
CORNELL UNIVERSITY LAW LIBRARY

The Moak Collection

PURCHASED FOR

The School of Law of Cornell University

And Presented February 14, 1893

IN MEMORY OF

JUDGE DOUGLASS BOARDMAN

FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

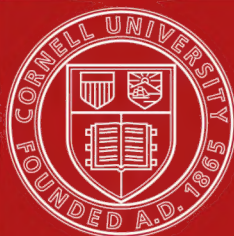
A. M. BOARDMAN and ELLEN D. WILLIAMS

Cornell University Library
KD 296.M42

A digest of all the reported decisions o



3 1924 017 601 489



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

A DIGEST

OF ALL THE

REPORTED DECISIONS.

OF THE SUPERIOR COURTS,

From 1884 to 1888 inclusive.

TOGETHER WITH A

SELECTION FROM THOSE OF THE IRISH COURTS.

BY

JOHN MEWS,

BARRISTER-AT-LAW.

LONDON:

SWEET AND MAXWELL, LIMITED,

3, CHANCERY LANE;

STEVENS AND SONS, LIMITED,

119 AND 120, CHANCERY LANE;

Law Publishers.

1889.

THE REPORTS COMPRISED IN THIS DIGEST.

REPORTS.	ABBREVIATIONS.	COURTS.
Aspinall's Maritime Cases ...	Asp. M. C. ...	All.
Cababé & Ellis ...	C. & E. ...	Nisi Prius.
Coltman ...	Colt. ...	Registration Cases.
Cox's Criminal Cases ...	Cox, C. C. ...	Central Criminal and Crown.
Fox ...	Fox ...	Registration Cases.
Irish Reports ...	L. R., Ir. ...	All.
Justice of the Peace ...	J. P. ...	—
Law Journal ...	L. J. ...	—
Law Reports ...	L. R. ...	—
Law Times (N. S.) ...	L. T. ...	—
Megone ...	Meg. ...	Cases under Companies Acts.
Morrell ...	M. B. R. ...	Bankruptcy Cases.
Neville & Macnamara ...	Nev. & Mac. ...	Railway Commission.
O'Malley & Hardcastle ...	O'M. & H. ...	Election Petitions.
Weekly Reporter ...	W. R. ...	All.

ABBREVIATIONS.

H. L., *House of Lords.*
 P. C., *Privy Council.*
 L.JJ. and L.J., *Lords Justices, Lord Justice.*
 L. C., *Lord Chancellor.*
 JJ. and J., *Justices, Justice.*
 M.R., *Master of the Rolls.*
 Ch. D., *Chancery Division.*
 Q. B. D., *Queen's Bench Division.*
 C. P. D., *Common Pleas Division.*
 Ex. D., *Exchequer Division.*
 D., *Divisional Court.*
 P. D., *Probate, Divorce and Admiralty Division.*
 Mat., *Matrimonial.*
 Prob. or P., *Probate.*
 Ch., *Chancery.*
 V.-C. B., *Vice-Chancellor Bacon.*

C.J.B., *Chief Judge in Bankruptcy.*
 Q. B., *Queen's Bench.*
 Bk., *Bankruptcy.*
 C. C. R., *Crown Cases Reserved.*
 C. A., *Court of Appeal.*
 App. Cas., *Appeal Cases (Law Reports).*
 M. C., *Magistrates' Cases.*
 S. C., *Same Case.*
 S. P., *Same Point or Principle.*
 E., *England.*
 Sc., *Scotland.*
 Ir., *Ireland.*
 W. N., *Weekly Notes (Law Reports).*
 L. R., *Law Reports.*
 S. J., *Solicitor's Journal.*
 L. T. Journ., *Law Times' Journal.*

A Digest

OF ALL THE

CASES REPORTED

FROM 1884 TO 1888 INCLUSIVE.

ABATEMENT.

Divorce—Death of Petitioner before Decree Absolute.—A husband who had obtained a decree nisi for dissolution of his marriage died before the time for making it absolute had arrived:—Held, that the legal personal representative of the husband could not revive the suit for the purpose of applying to make the decree absolute. *Stanhope v. Stanhope*, 11 P. D. 103; 55 L. J., P. 36; 54 L. T. 906; 34 W. R. 446; 50 J. P. 276—C. A.

Death of Parties in Actions.—See PRACTICE (PARTIES).

ABDUCTION.

See CRIMINAL LAW.

ABSTRACT OF TITLE.

See VENDOR AND PURCHASER.

ACCIDENT.

See NEGLIGENCE.

ACCORD AND SATISFACTION.

Contract by Creditor to take less than Sum due.—An agreement between judgment debtor and creditor that, in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor or his nominee the residue by instalments, the creditor will not take any proceedings on the judgment, is nudum pactum, being without consideration, and does not prevent the creditor, after payment of the whole debt and costs, from proceeding to enforce payment of the interest upon the judgment. *Pinel's case* (5 Rep. 117 a), and *Cumber v. Wane* (1 Str. 426) followed. *Foakes v. Beer*, 9 App. Cas. 605; 54 L. J., Q. B. 130; 51 L. T. 833; 33 W. R. 233—H. L. (E.).

Cheque sent "to Balance Account"—Cheque retained "on account" and cashed.—A. sent B. a "cheque to balance account, as per inclosed statement." The inclosed statement debited B. with a sum claimed on account of defects in work done. B. replied acknowledging the receipt of the cheque "on account," and shortly afterwards sent A. a statement of account, omitting the sum claimed by A. for defective work, and debiting A. with a small sum for discount not allowed in his account, and in the accompanying memorandum said: "We would thank you for a remittance of the balance, or we shall be obliged to take proceedings to recover same." A. replied, sending a cheque for the discount claimed. B. kept and cashed the cheques. In an action for the balance B. was nonsuited on the ground that, having taken and cashed the first cheque, he was bound to apply it according to A.'s intention:—Held, that the nonsuit was wrong. *Ackroyd v. Smithies*, 54 L. T. 130; 50 J. P. 358—D.

Cheque by Third Party for a smaller Sum—Payment of Costs without Interest by Mistake.]
—An action having been dismissed with costs, the defendant's solicitor got the costs taxed, and took the taxing-master's certificate to the plaintiff's solicitor, who gave him a cheque for the amount of the costs, and received the certificate with a receipt indorsed. After the cheque had been paid, the defendant's solicitor discovered that the defendant was entitled to interest on the amount of taxed costs, and applied to the plaintiff to pay it. The plaintiff having refused to pay the interest, the defendant moved for an order directing the plaintiff to attend before the proper officer and produce the certificate in order that a writ of execution might be issued for the interest :—Held, that the defendant acting by his solicitor must be taken to have accepted the cheque of the plaintiff's solicitor in full accord and satisfaction of the whole debt due from the plaintiff, and the motion was accordingly refused. *Foakes v. Beer* (9 App. Cas. 605) distinguished. *Bidder v. Bridges*, 37 Ch. D. 406; 57 L. J., Ch. 300; 58 L. T. 656—C. A.

Forgiveness of Amount of Promissory Note.]
Where a promissory note was payable a month after demand, forgiveness of the amount of the note is no defence unless the forgiveness be before the note has become payable. *Smith v. Gordon*, 1 C. & E. 105—Day, J.

ACCOUNTS.

See PRACTICE.

Accounts stated.]—See MONEY COUNTS.

ACKNOWLEDGMENT.

I. OF DEBTS AND DEMANDS TO BAR STATUTE OF LIMITATIONS.—See LIMITATION (STATUTES OF).

II. TO BAR WIFE'S INTEREST IN PROPERTY.
—See HUSBAND AND WIFE.

ACQUIESCENCE.

See WAIVER.

ACT OF PARLIAMENT.

See STATUTE.

ACTION.

I. PARTIES.

II. CAUSES OF ACTION.

III. NOTICE OF ACTION.

IV. CHOSES IN ACTION.

V. WHEN ACTION ABATES BY DEATH OF PARTIES.—See PRACTICE (PARTIES).

VI. WHETHER ARBITRATION A CONDITION PRECEDENT.—See ARBITRATION.

I. PARTIES.

By some Members of Committee (on behalf of all) against former Member.]—An action by certain members of a church building committee, on behalf of themselves "and all others the subscribers" to the building fund, against a former member of the committee for an account, cannot be maintained. *Strickland v. Weldon*, 28 Ch. D. 426; 54 L. J., Ch. 452; 52 L. T. 247; 33 W. R. 545—Pearson, J.

On Contract—Third Party.]—To entitle a third person, not named as a party to the contract, to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of cestui que trust under the contract. *Gandy v. Gandy*, 30 Ch. D. 57; 54 L. J., Ch. 1154; 53 L. T. 306; 33 W. R. 803—C. A.

Felony—Effect of, on acquiring Property.]—A testatrix, by her will, dated in July, 1869, devised and bequeathed all her real and personal estate to T. K. in trust for her sister M. C. for life, and after her decease upon trust to pay to or permit H. C. D. to receive the interest for his life, but if he should become bankrupt or publicly insolvent, or should compound with his creditors, or should assign or incur his interest under the trust, or any part thereof, or should otherwise by his own act, or by operation of law, be deprived of the absolute personal enjoyment of the same interest, or any part thereof, then, and in either of such cases, the trust in favour of H. C. D. should be void, and T. K. should thenceforth apply the interest for the maintenance, education, and support of the children of H. C. D. The testatrix died in 1871, and M. C. died in 1881. In July, 1878, H. C. D. was convicted of felony, and sentenced to ten years' penal servitude. Before the expiration of his sentence he obtained a ticket-of-leave, and commenced this action for the administration of the estate of the testatrix, and claimed the arrears of interest :—Held, that, under s. 30 of the Act 33 & 34 Vict. c. 23, he could commence the action. Held, also, that he had not been deprived of the actual enjoyment of the life interest by any operation of law; and that he was entitled to all arrears of interest. *Dash, In re, Darley v. King*, 57 L. T. 219—Chitty, J.

Statutory Rights—Provision for special benefit of Individual.]—Where an act of parliament contains a provision for the special protection or benefit of an individual, he may enforce his

rights thereunder by an action without either joining the attorney-general as a party or showing that he has sustained any particular damage. *Devonport (Mayor) v. Plymouth Tramways Company*, 52 L. T. 161; 49 J. P. 405—C. A.

II. CAUSES OF ACTION.

"Cause of Action."—A cause of action includes every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to sustain his action. *Read v. Brown*, 22 Q. B. D. 128; 58 L. J., Q. B. 120; 60 L. T. 250; 37 W. R. 131—C. A.

Felony disclosed — Action whether maintainable.—In an action for the seduction of the plaintiff's daughter a paragraph of the statement of claim alleged that the defendant administered noxious drugs to the daughter for the purpose of procuring abortion:—Held, that the paragraph could not be struck out as disclosing a felony for which the defendant ought to have been prosecuted, inasmuch as the plaintiff was not the person upon whom the felonious act was committed, and had no duty to prosecute. *Appleby v. Franklin*, 17 Q. B. D. 93; 55 L. J., Q. B. 129; 54 L. T. 135; 34 W. R. 231; 50 J. P. 359—D.

Waiver of Tort—Action on Contract.—After the death of a sheriff and before the appointment of his successor, the under-sheriff sold goods under a writ delivered to him before the death of the sheriff. He did not pay over all the proceeds to the execution creditor, who more than six months after the death of the under-sheriff and also more than six months after they had undertaken administration, sued his executors for money had and received and also for the tort:—Held, that the action for money had and received would lie; and that as that action did not require the same evidence to support it as the action for tort, it was not necessary to waive the tort. *Gloucestershire Banking Co. v. Edwards*, 19 Q. B. D. 575; 56 L. J., Q. B. 514; 35 W. R. 842—D.

Remedy for Breach of Statutory Duty.—There are three classes of cases in which a liability may be established by statute:—(1) Where a liability existed at common law and was only re-enacted by the statute with a special form of remedy, in such cases the plaintiff had his election unless the statute contained words necessarily excluding the common law remedy; (2) where a statute has created a liability but given no remedy, then the party may adopt an action of debt or other remedy at common law to enforce it; (3) where the statute creates a liability not existing at common law and gives a particular remedy, here the party must adopt the form of remedy given by the statute. *Valance v. Falle*, 13 Q. B. D. 109; 35 L. J., Q. B. 459; 51 L. T. 158; 32 W. R. 770; 48 J. P. 519; 5 Asp. M. C. 280—Per Mathew, J.

Damnum absque Injuria—Assuming Business Name.—The short address "Street, London," was used for many years in sending telegrams from abroad to Street & Co., of Cornhill. A

bank adopted by arrangement with the Post-office the phrase "Street, London," as a cypher address for telegrams from abroad to themselves:—Held, that the court had no jurisdiction to grant an injunction restraining the bank from using such address, as there was no attempt to interfere with trade, no legal injury done, but simply a matter of inconvenience. *Street v. Union Bank of Spain and England*, 30 Ch. D. 156; 55 L. J., Ch. 31; 53 L. T. 262; 33 W. R. 901—Pearson, J.

Real Action—Action for Debt.—The defendant was the owner and occupier of certain lands in the parish of P., which by a private act were charged with the payment to the vicar of 270*l.* in lieu of all tithes. The act provided that if the annual rents were in arrear, the vicar was to have such and the same powers and remedies for recovering the same as by the laws and statutes of the realm are provided for the recovery of rent in arrear; and also that if no sufficient distress was found on the premises, the vicar might enter and take possession of the same until the arrears were satisfied. Four years' arrears of the annual rent accrued in respect of the whole of the lands charged, during the whole of which period the defendant was the owner and occupier of a portion only of such lands:—Held, that the vicar might maintain an action of debt against the defendant for the whole amount in arrear, the remedy by real action, which was a higher remedy than the action by debt, having been abolished by 3 & 4 Will. 4, c. 27, s. 36. *Christie v. Barker*, 53 L. J., Q. B. 537—C. A.

Balance Order.—By a balance order made in the winding-up of a company, the defendant, who was a shareholder and director of the company, was ordered to pay a sum of 252*l.* due in respect of calls to the official liquidator of the company. The liquidator brought an action against the defendant for the sum due under the balance order and the defendant claimed to set off a sum due to him from the company:—Held, that no action can be brought upon a balance order. *Chalk & Co. v. Tennent*, 57 L. T. 598; 36 W. R. 263—North, J. See *Machay, Ex parte, Shirley, In re*, 58 L. T. 237—D.

Action for Costs—Appeal to Quarter Sessions.—An action lies to recover costs which have been taxed by the clerk of the peace, and which arise out of an order made by justices in the case of a pauper lunatic under 16 & 17 Vict. c. 97, s. 97, and subsequently abandoned after notice of appeal to sessions has been given. *Dewsbury Union v. West Ham Union*, 56 L. J., M. C. 89; 52 J. P. 151—D.

High Court—Not below £10.—An action in the High Court claiming relief which, before the Judicature Act, could have been given only in the Court of Chancery, cannot now be maintained if the subject-matter is below 10*l.* in value. The old rule of the Court of Chancery in this respect still remains in force. *Westbury-on-Severn Rural Sanitary Authority v. Meredith*, 30 Ch. D. 387; 55 L. J., Ch. 744; 52 L. T. 839; 34 W. R. 217—C. A. [By Rules of Supreme Court, 1883, the Chancery Consolidated General Orders of 1860 are repealed.]

III. NOTICE OF ACTION.

Constable—Contagious Diseases (Animals).]—Section 19 of 1 & 2 Will. 4, c. 41, by which, in all actions for anything done in pursuance of that act, the venue is to be local, and the defendant to receive notice of action, applies only to such acts as a constable might at the date of the statute have been called upon to perform; therefore the section does not apply in the case of a constable acting under the Contagious Diseases (Animals) Act, 1878. *Bryson v. Russell*, 14 Q. B. D. 720; 54 L. J., Q. B. 144; 52 L. T. 208; 33 W. R. 34; 49 J. P. 293—C. A.

Highways Act—Injunction.]—The provision of section 109 of the Highways Act, 1835, as to notice of action, does not apply where the principal object of the action is an injunction. *Phelps v. Hadham District Board*, 1 C. & E. 67—Coleridge, C. J.

Public Health Act—Act "done under the provisions of this Act."]—The effect of the Public Health Act, 1875, which makes improvement commissioners under local acts urban sanitary authorities, is to reconstitute them as new bodies under the act, vesting in them as such new bodies the powers given by the local acts as well as those given by the Public Health Act; and such commissioners in subsequently doing any act in the exercise of the powers originally conferred by their local acts are acting under the Public Health Act, 1875, and consequently are entitled in respect of such act to any protection or privilege given by that act to members of local authorities acting under its provisions. *Lea v. Facey*, 19 Q. B. D. 352; 56 L. J., Q. B. 536; 58 L. T. 32; 35 W. R. 721; 51 J. P. 756—C. A.

A local board, assuming to act under the authority of s. 39 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), erected a public urinal partly upon a highway and partly upon a strip of land belonging to the plaintiff, and so near to other adjoining land of the plaintiff as to be a nuisance to her and her tenants, and to depreciate the value of her property:—Held, that the plaintiff was entitled to a mandatory injunction to restrain the board from continuing the urinal upon her land or so near thereto as to cause injury or annoyance to her or her tenants, and that in such a case notice of action under s. 264 is not required. *Sellers v. Matlock Bath Local Board*, 14 Q. B. D. 928; 52 L. T. 762—Denman, J.

— **Person Acting when Disqualified.]**—A person who is in fact disqualified from being a member of a local authority but who acts in the bona fide belief that he is a member is entitled to notice of action under s. 264 of the Public Health Act, 1875. *Lea v. Facey*, supra.

Justices — Negligence in building Police Station.]—The building of a police station is an act done by justices in the execution of their office; and the justices, if sued for negligence in the building or maintaining thereof, and for damage arising therefrom, are entitled to the protection afforded by 11 & 12 Vict. c. 44. *Hardy v. North Riding Justices*, 50 J. P. 663—Huddleston, B.

Metropolis Management—Actions in Equity—Injunction.]—Section 106 of the Metropolis Local Management Acts Amendment Act, 1862, which requires that before any proceeding is instituted against a district board a month's notice shall be served on them by the person intending to take the proceeding, does not apply to actions in equity—per North, J. That section does not apply to an action for an injunction to restrain a nuisance—per Lopes, L.J. (Cotton and Lindley, L.JJ., not dissenting). *Bateman v. Poplar Board of Works*, 33 Ch. D. 360; 56 L. J., Ch. 149; 55 L. T. 374—C. A.

General Requirements.]—An action against the Melbourne Harbour Trust Commissioners is an action brought against a "person" within the meaning of s. 46 of the Melbourne Harbour Trust Act; and notice in writing thereof complying in form or in substance with the requirements of the section is necessary. *Union Steamship Company of New Zealand v. Melbourne Harbour Commissioners*, 9 App. Cas. 365; 53 L. J., P. C. 59; 50 L. T. 337; 5 Asp. M. C. 222—P. C.

IV.—CHOSSES IN ACTION.

What are.]—Choses in action include all personal chattels not in possession. Shares in a railway company are choses in action. *Colonial Bank v. Whinney*, 11 App. Cas. 426; 56 L. J., Ch. 43; 55 L. T. 362; 34 W. R. 705; 3 M. B. R. 207—H. L. (E.).

Voluntary Assignment — Incomplete Gift — Intention of Donor.]—A. held certain bank shares in trust for his father B., under a written acknowledgment of the trust. B. indorsed on the acknowledgment: "I transfer these shares to my daughter C. for her sole use and benefit." —B. also held two I O U's, one from A., the second from another person indebted to him. Upon each of these B. indorsed: "I transfer the debt of £ to my daughter C., for her sole use and benefit." B. signed these indorsements, and handed the acknowledgment and I O U's to C. There was no consideration for the transfer. B. did not give any notice of it to A. or the debtor upon the second I O U, and continued till his death, five years later, to receive the dividends on the shares and the interest on A.'s I O U:—Held, that, although the indorsements, accompanied by the delivery of the acknowledgment and I O U's were capable, if followed by notice to the trustees and debtors, of operating as equitable assignments, yet as it appeared, having regard to the evidence and especially to B.'s receipt of the subsequent dividends and interest, that he did not intend at the time of the indorsement to divest himself absolutely of his property in the shares or debts, but attempted at most to effect a disposition to become operative only at his death, and in the meanwhile to be ambulatory and revocable, they did not constitute a complete gift enforceable in equity. *Gason v. Rich*, 19 L. R., Ir. 391—C. A.

Marriage—Severance of Wife's Joint Tenancy.—Marriage does not operate as a severance of the wife's joint tenancy in a chose in action (Bank stock) which has not been reduced into possession by the husband. *Baillie v. Treharne*,

(17 Ch. D. 388) disapproved. *Butler's Trusts, In re, Hughes v. Anderson*, 38 Ch. D. 286; 57 L. J., Ch. 643; 59 L. T. 386; 36 W. R. 817—C. A.

ADEMPTION.

Of Legacies.]—See WILL.

ADJUDICATION.

Of Bankrupts.]—See BANKRUPTCY.

ADMINISTRATION.

Of Assets.]—See EXECUTOR AND ADMINISTRATOR—WILL (PAYMENT OF LEGACIES).

Action.]—See EXECUTOR AND ADMINISTRATOR.

Letters of.]—See WILL.

ADMIRALTY.

See SHIPPING.

ADMISSIONS.

In Pleadings.]—See PRACTICE.

As Evidence.]—See EVIDENCE.

ADULTERATION.

See HEALTH.

Mixing Beers of different Strengths.]—See REVENUE (EXCISE).

ADULTERY.

See HUSBAND AND WIFE

ADVANCEMENT.

What is.]—Advancement is a payment to persons who are presumably entitled to, or have a vested or contingent interest in, an estate or a legacy before the time fixed by the trust instrument for their obtaining the absolute interest in a portion or a whole of that to which they would be entitled. (Per Cotton, L. J.) *Aldridge, In re, Abram v. Aldridge*, 55 L. T. 554—C. A. Reversing 50 J. P. 723—Kay, J.

Absence of express Words—Power whether inferred.]—In the absence of express words authorising the payment, by way of advancement, of part of the corpus of an estate to a person who, under the trust instrument, can never become absolutely entitled to a share of the corpus, the court will not infer a power to the trustees to advance a sum out of the corpus from the mere fact that the instrument contains a power of advancement simpliciter. *Id.*

In favour of Children—Gift of Income to Children and Corpus to Grandchildren.]—A testator directed his trustees to invest the proceeds of sale of his residuary estate, and to pay the income to his eight sons and daughters in equal shares. The will then contained the following clause: "And I give a power of advancement to my trustees." After the death of the survivor of the children, the corpus of the estate was directed to be paid to the testator's grandchildren. The will contained a special power of advancement out of corpus in the case of grandchildren and a clause of forfeiture in case a child or other object of the trusts should attempt to anticipate his share:—Held, that the trustees had no power to make advances out of the corpus to the children. *Id.*

Power of, exercisable with Consent of Life Tenant—Bankruptcy.]—A testatrix, who died in 1884, gave a moiety of a trust fund to trustees upon trust to pay the income to J. C., during his life, and after his death in trust for W. J. (an infant), empowering the trustees to raise any part not exceeding one-half of W. J.'s share for his advancement, subject to the consent in writing of J. C. during his life. The trustees were desirous of exercising the power, but J. C. had become a bankrupt, and was still undischarged:—Held, that J. C.'s power of consenting to the advancement was not extinguished by his bankruptcy, but could not be exercised without the sanction of his trustee in bankruptcy acting under the direction of the Court of Bankruptcy. *Cooper, In re, Cooper v. Slight*, 27 Ch. D. 565; 51 L. T. 113; 32 W. R. 1015—Kay, J.

Father and Child—"Advancement by portion."]—A gift was made by a father to a son to enable the son to pay a debt:—Held, on the death of the father intestate, to be an "advancement by portion" of the son, within sect. 5 of the Statute of Distributions. The opinion expressed by Jessel, M.R., in *Taylor v. Taylor*, (20 L. R., Eq., 155) dissented from. *Blockley, In re, Blockley v. Blockley*, 29 Ch. D. 250; 54 L. J., Ch. 722; 33 W. R. 777—Pearson, J.

— Set-off—Debt due to Father from Son.]—

A father borrowed and advanced to his son 200*l.*, to enable him to stock a farm. The father subsequently paid off the lender without taking any acknowledgment of any kind from the son, except that he received interest from him for some years:—Held, that there was a debt due from the son to the father which could be set-off against a share of the father's residuary personal estate coming to the son as one of the next of kin. *Milnes v. Sherwin*, 33 W. R. 927—North, J.

— **Evidence of Intention.**—After a testator had made his will, giving his son a share in his residuary estate, he purchased for such son certain farming stock, and placed him in a farm. Shortly afterwards the testator died, and the trustees of the will debited the son with a sum of money equal to the value of the farming stock, as having been advanced to him by the testator by way of loan, and as a debt due from him to the estate:—Held, that although *Grave v. Earl of Salisbury* (3 Bro. C. C. 425) laid down that where there had been a gift of farming stock there was no presumption that it was intended as an advance to be set-off as against a legacy receivable under a will, yet *Kirk v. Addowes* (3 Hare, 509), was an authority that evidence was admissible to show that at the time of the gift, the testator expressed his intention that such gift was an advance to be set off; that in this case the court was of opinion that such an intention had been proved, and that, therefore, the value of the farming stock must be deducted from the share of the son. *Turner, In re, Turner v. Turner*, 53 L. T. 379—Kay, J.

— **Contract by Son—Payment by joint and several Notes of Father and Son.**—In March, 1885, W. entered into an agreement with C. to purchase a business for 1,500*l.*, 300*l.* to be paid in cash and the balance to be secured by joint and several promissory notes of W. and his father payable at various times. By his will dated in October, 1885, the father divided his residuary estate into fifths, to be held upon trust for his five children, but W.'s share was settled, and the testator declared that before any of his sons should participate under the trusts of the will they should repay all sums advanced by him in his lifetime; but if they should be unable to repay such advances, they should be treated as part of their shares. W. had no means of his own. The 300*l.* and the amount due on the first promissory note were paid by the father in his lifetime. After the father's death W. entered into a deed of arrangement whereby he assigned all his property for the benefit of his creditors, who released him from his debts saving their rights against sureties. C. proved under the deed for the balance of the purchase-money, but did not obtain complete satisfaction, and he recovered the residue from the father's estate:—Held, first, that all the sums paid by the father or his executors were debts due from W. to the father's estate. Secondly, that the sums recovered from the father's estate after his death (including sums in payment of notes which fell due in his lifetime) were not within the clause in the will relating to advances, but that the sums paid by the father in his lifetime were, and that the latter ought to be set off against the corpus of W.'s share. Thirdly, that as to the former sums, the executors might elect whether they would

recover against W. upon the agreement for indemnity arising out of the contract of suretyship, in which case they might retain W.'s life interest in his share in satisfaction, or whether they would stand in the place of C.; but that in the latter event the release given by C. to W. would be effective as between the executors and W. *Whitehouse, In re, Whitehouse v. Edwards*, 37 Ch. D. 683; 57 L. J., Ch. 161; 57 L. T. 761; 36 W. R. 181—Stirling, J.

— **Right of Father to charge on Contingent Interest of Infant Son.**—The Court refused to declare that sums advanced by a father for the benefit of his infant son were a charge on property to which the son would become entitled only in the event of his attaining twenty-one. Semble, the court has no jurisdiction to make such a charge, and the only proper form of order in such a case is that in *Arbuckle, In re* (14 W. R. 435). *Tanner, In re*, 53 L. J., Ch. 1108; 51 L. T. 507—Kay, J.

Widowed Mother—Person in loco parentis—Presumption.—An action was brought by creditors for the administration of the estate of an intestate, a widow, against the administrator, who was her eldest son, and who was acting under letters of administration granted to him previously. The defendant had joined as surety with the intestate in giving a security for certain loans which had been procured by her for her own purposes, and he claimed to retain out of the assets of the intestate, in or coming to his hands as administrator, a sum sufficient to repay these loans with interest. He had not, in fact, repaid them, although he was personally liable to do so. The defendant was at one period engaged in farming, and the intestate from time to time made him small advances when he was in want of money to assist him in carrying on his business, or for his maintenance. The intestate never attempted to recover these moneys and she took no acknowledgment for them. The plaintiffs sought to charge the defendant with the moneys so received by him. By the chief clerk's certificate it was certified that the defendant had made the claim above mentioned, which the chief clerk had allowed, and that the plaintiffs had brought in the set-off above referred to, but which the chief clerk had disallowed. The plaintiffs took out a summons to vary the chief clerk's certificate:—Held, that the moneys advanced to the defendant by the intestate (who was in loco parentis at the time) to provide for his necessities, were presumably gifts to him, and accordingly the plaintiff's set-off could not be allowed. *Orme, In re, Evans v. Maxwell*, 50 L. T. 51—Kay, J.

Godmother—Transfer of Stock into Joint Names—Intention to Benefit.—The plaintiff, a widow, in the year 1880, caused 6,000*l.* Consols to be transferred into the joint names of herself and the defendant, who was her godson. She did so with the express intention that the defendant, in the event of his surviving her, should have the Consols for his own benefit, but that she should have the dividends during her life; and she had previously been warned that if she made the transfer she could not revoke it. The first notice the defendant had of the transaction was a letter from the plaintiff's solicitors about the end of 1882, claiming to have the fund re-transferred to the plaintiff:—Held, that the legal title of the

defendant as a joint tenant of the stock was complete, although he had not assented to the transfer until he was requested to join in re-transferring the stock, for that the legal title of a transferee of stock is complete without acceptance. A transfer of property to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of the transfer. *Standing v. Bowring*, 31 Ch. D. 282; 55 L. J., Ch. 218; 54 L. T. 191; 34 W. R. 204—C. A.

Held, further, that the plaintiff could not claim a re-transfer on equitable grounds, the evidence clearly showing that she did not, when she made the transfer, intend to make the defendant a mere trustee for her except as to the dividends. *Id.*

ADVERTISEMENT.

For Evidence—Contempt of Court.]—A correspondent in a suit for divorce, immediately after the service of the citation, caused advertisements to be published denying the charges made in the petition, and offering a reward for information which would lead to the discovery and conviction of the authors of them :—Held, that these advertisements constituted a contempt of court. *Brodrick v. Brodrick*, 11 P. D. 66; 55 L. J., P. 47; 56 L. T. 672; 34 W. R. 580; 60 J. P. 407—Hannen, P.

In a suit for divorce on the wife's petition on the grounds of adultery and cruelty, the husband caused to be printed and published about the district in which the wife and her family resided a notice purporting to be signed by him, offering a reward of 25*l.* for evidence of the confinement of a young married woman of a female child, "probably not registered" :—Held, that this was a contempt of court as tending to prejudice the petitioner, and discrediting her in the assertion of her rights, and a writ of attachment ordered to issue. *Pool v. Sacheverel* (1 P. Wm. 675) questioned. *Butler v. Butler*, 13 P. D. 73; 57 L. J., P. 42; 58 L. T. 563—Butt, J.

ADVOWSON.

See ECCLESIASTICAL LAW.

AFFIDAVIT.

Evidence by.]—*See* EVIDENCE.

Accompanying Bill of Sale.]—*See* BILL OF SALE (REGISTRATION).

AFFILIATION.

See BASTARDY.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

Of Guarantee.]—*See* PRINCIPAL AND SURETY.

For Leases.]—*See* LANDLORD AND TENANT.

For Sale of Goods.]—*See* SALE.

For Sale of Land.]—*See* VENDOR AND PURCHASER.

AIR.

See EASEMENT.

ALDERMAN.

See CORPORATION.

ALE AND BEER HOUSE.

See INTOXICATING LIQUORS.

ALIMONY.

See HUSBAND AND WIFE.

ALLOTMENT.

See COMMONS.

Of Shares.]—*See* COMPANY.

AMENDMENT.

See PRACTICE.

ANCIENT LIGHTS.

See EASEMENT.

ANIMALS.

I. CRUELTY TO.

II. CONTAGIOUS DISEASES.

III. RIGHTS AND LIABILITIES OF OWNER.

I. CRUELTY TO.

Domestic Animals—Decoy Bird.]—Linnets caught, kept in captivity, and trained to act as decoy birds, for the purpose of catching other birds, were treated with cruelty:—Held, that they were “domestic animals” under the protection of 12 & 13 Vict. c. 92, ss. 2 and 29, as amended by 17 & 18 Vict. c. 60, s. 3. *Colam v. Pagett*, 12 Q. B. D. 66; 53 L. J., M. C. 64; 32 W. R. 289; 48 J. P. 263—D.

Operation for Purpose of Improving Animal.]

—A person who, with reasonable care and skill, performs on an animal a painful operation, which is customary, and is performed *bonâ fide* for the purpose of benefiting the owner by increasing the value of the animal, is not guilty of the offence of cruelly ill-treating, abusing, or torturing the animal, within the meaning of 12 & 13 Vict. c. 92, s. 2, even though the operation is in fact unnecessary and useless. *Lewis v. Fernor*, 18 Q. B. D. 532; 56 L. J., M. C. 45; 56 L. T. 236; 35 W. R. 378; 51 J. P. 371; 16 Cox, C. C. 176—D.

—**Dishorning Cattle.]**—Upon a summons against the respondent, under 12 & 13 Vict. c. 92, s. 2, for dishorning cattle, evidence was given that the operation caused very great pain and suffering, and was inflicted for greater convenience in yard feeding, and because dishorned cattle would sell for about 2*l.* a head more than those with horns. The magistrate having referred to this court the question whether the case was one of the class contemplated by the statute:—Held, that the respondent did “cruelly ill-treat, abuse, and torture” animals, within the meaning of 12 & 13 Vict. c. 92, s. 2; and that the act could not be justified as being either necessary or reasonable for the purposes of general convenience, and that the respondent ought to have been convicted. *Brady v. McArgle*, 14 L. R., Ir. 174; 15 Cox, C. C. 516—Ex. D.

The practice of dishorning cattle, if performed with due care and skill, and for the purpose of rendering them more profitable to farmers in the course of their trade, is not cruelty to the animals within the 12 & 13 Vict. c. 92, s. 2. *Brady v. McArgle* (14 L. R., Ir. 174) not followed. *Callaghan v. Society for Prevention of Cruelty to Animals*, 16 Cox, C. C. 101; 16 L. R., Ir. 325—C. P. D.

Evidence.]—F. was charged with causing a sheep to be tortured. The only evidence was that he conveyed nine sheep in a waggon, and one of them broke its leg on getting out of the waggon; the drover, on driving them to a pen at the market for sale, put the sheep with the broken leg along with the others, and they trampled on it:—Held, though the facts showed carelessness, there was no evidence of causing the sheep to be tortured. *Westbrook v. Field*, 51 J. P. 726—D.

II. CONTAGIOUS DISEASES.

Movement of Animals in Infected District—Railway Company.]—By an Order in Council of the 23rd February, 1883, made in exercise of the powers given under the Contagious Diseases (Animals) Act, 1878, 41 & 42 Vict. c. 74, it was ordered that any local authority in England or Wales might, with the view of preventing the introduction of foot and mouth disease into their district, make regulations for prohibiting or regulating the movement by land or water of animals into their district from the district of any other local authority, provided that any regulation made by a local authority under the Order shall not restrict movement of animals by railway through the district of that local authority; and that if an animal is moved in contravention of the Order, or of a regulation of a local authority thereunder, the owner of the animal, and the person for the time being in charge of the animal, and the person causing, directing, or permitting the movement, and the person or company moving or conveying the animal, shall be deemed guilty of an offence against the Act of 1878. The local authority of the county of Glamorgan made a regulation that “no animal may be moved into the district of the local authority,” except that fat animals, for immediate slaughter, might be moved in from districts free from disease, subject to the following regulation: “Before any movement into the county district, or removal from the railway truck in the county district, takes place, the owner, consignee, or person in charge shall deliver to the inspector of the local authority a declaration under the act.” W. tendered fat animals to the Great Western Railway Company, in a district free from disease, for carriage into the Glamorganshire district, but the Great Western Railway Company refused to carry the said cattle unless furnished by W. with a “declaration under the act.” In an action by W. against the Great Western Railway Company to recover damages and expenses incurred by him through breach of duty on the part of the defendant company:—Held, that, notwithstanding the words of the regulation “or before removal from the railway truck in the county district takes place,” the defendant company were entitled to refuse to carry the said cattle with-

out a declaration, and committed no breach of duty in refusing so to do. *Williams v. Great Western Railway*, 52 L. T. 250; 49 J. P. 439—D.

By an Order of Council made under the Contagious Diseases (Animals) Act, 1878, if an animal is moved in contravention of the regulations of any local authority, the person "causing, directing, or permitting" the movement shall be deemed guilty of an offence against the act. The local authority of the county of Dorset having by regulations prohibited the movement of animals into their district except under specified conditions, animals were consigned to a place within the district, with through bills from Cork via Bristol and a specified route. The appellants were no parties to the contract with the consignor, but in furtherance of the scheme of carriage carried the animals on their railway over a portion of the route to a point outside the county of Dorset, whence they were subsequently carried into that county by another company:—Held, that the appellants were liable to be convicted of an offence against the act as persons "causing, directing, or permitting" the movement of the animals within the meaning of the Order of Council; and that the justices of the county of Dorset had jurisdiction to convict. *Midland Railway v. Freeman*, 12 Q. B. D. 629; 53 L. J., M. C. 79; 32 W. R. 830; 48 J. P. 660—D.

Notice of Action to Constable—Local Venue.—Section 19 of 1 & 2 Will. 4, c. 41, by which, in all actions for anything done in pursuance of that act, the venue is to be local, and the defendant is to receive notice of action, applies only to such acts as a constable might at the date of the statute have been called upon to perform; therefore the section does not apply in the case of a constable acting under the Contagious Diseases (Animals) Act, 1878. *Bryson v. Russell*, 14 Q. B. D. 720; 54 L. J., Q. B. 144; 52 L. T. 208; 33 W. R. 34; 49 J. P. 293—C. A.

Slaughtering diseased Animals—Compensation.—By the 42nd section of the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), it is provided that every local authority shall, from time to time, appoint so many inspectors and other officers as they think necessary for the execution and enforcement of this act, and shall assign to those inspectors and officers such duties and salaries or allowances, and may delegate to any of them such authorities and discretion as to the local authority may seem fit, and may at any time revoke any appointment so made. "The local authority failed to appoint an inspector, and disease having broken out amongst the plaintiff's cattle, some of them died. The local authority did not slaughter any of the plaintiff's cattle, nor did they pay him any compensation:—Held, that the plaintiff could not maintain an action for damages nor for a peremptory mandamus. *Mulcahy v. KilmacThomas Guardians*, 13 L. R., Ir. 200—Q. B. D.

III. RIGHTS AND LIABILITIES OF OWNER.

Detention of Dog—Order for Delivery—Metropolitan Police Magistrate.—Section 40 of 2 & 3

Vict. c. 71, confers upon a magistrate power to order delivery of goods, under the value of 15*l.*, unlawfully detained within the limits of the Metropolitan Police District, to the owner:—Held, that the term "goods" includes a dog, and that a magistrate can entertain an application for delivery up of a dog alleged to be unlawfully detained. *Reg. v. Slade*, 21 Q. B. D. 433; 57 L. J., M. C. 120; 59 L. T. 640; 37 W. R. 141; 52 J. P. 599; 16 Cox, C. C. 496—D.

Liability of Owner for Injuries.—The plaintiff was engaged in digging a hole in a garden of a house adjoining that of the defendant T. The gardens were separated from one another and the adjacent gardens by low walls. A dog belonging to the defendant T., which had been taken out by the other defendant S., in returning sprang over the wall, under which the plaintiff was working, and falling into the hole injured the plaintiff:—Held, that as the dog was not shewn to be mischievous to the knowledge of the owner, the plaintiff had no cause of action against either of the defendants, either for trespass or breach of duty. *Sanders v. Teape*, 51 L. T. 263; 48 J. P. 757—D.

Evidence—Dog Worrying Sheep.—L.'s dog was seen with another dog on a Welsh mountain worrying two lambs. The same day the shepherd found near the place four lambs dead, and next day ten more. L. being summoned for damage under 28 & 29 Vict. c. 60:—Held, that the evidence was sufficient to justify the justices in ordering L. to pay part of the value of the whole loss. *Lewis v. Jones*, 49 J. P. 198—D.

ANNUITY.

Under Rent-charges.—See RENT-CHARGE.

Under Wills.—See WILL.

Valuation—Insufficient Funds—Arrears.—By a separation deed provision was made for the payment of an annuity by the husband to trustees for the wife. Upon the husband's death children of the marriage claimed to be entitled under the same deed to a large amount in the funds held by the trustees; such funds were, however, insufficient to satisfy their claims and also to answer the annuity, besides paying off arrears. Upon an originating summons, taken out to decide (inter alia) the mode in which the available funds should be apportioned between the widow and the children:—Held, that, for the purpose of such apportionment, the amount of the arrears of the annuity to the date of the hearing of the summons must be added to the value of the annuity at the same date ascertained according to the table of values of Government annuities, and that the fund must be divided in the proportion borne by the total so arrived at to the full amount claimed by the children. *Delves v. Newington*, 52 L. T. 512—Pearson, J.

APPEAL.

- I. TO THE HOUSE OF LORDS.
- II. TO THE COURT OF APPEAL.
- III. TO THE DIVISIONAL COURT.
- IV. FROM THE JUDGE IN CHAMBERS.
- V. FROM MASTER TO THE JUDGE.
- VI. FOR COSTS.—*See* COSTS.
- VII. BANKRUPTCY APPEALS.—*See* BANKRUPTCY.
- VIII. ADMIRALTY APPEALS.—*See* SHIPPING.
- IX. DIVORCE APPEALS.—*See* HUSBAND AND WIFE.
- X. TO PRIVY COUNCIL.—*See* COLONY.
- XI. FROM COUNTY COURTS.—*See* COUNTY COURT.
- XII. BILL OF REVIEW.—*See* PRACTICE (JURISDICTION).
- XIII. SEPARATION ORDER OF JUSTICES.—*See* HUSBAND AND WIFE.
- XIV. LOCAL GOVERNMENT BOARD.—*See* HEALTH.

I. TO THE HOUSE OF LORDS.

Time for—Matrimonial Cause.—Since the Judicature Act of 1881, an appeal to the House of Lords in a matrimonial cause (where an appeal lies) can only be from a decision of the Court of Appeal; and such an appeal must be brought within one month after the decision appealed against is pronounced by the Court of Appeal, if the House of Lords is then sitting, or if not, within fourteen days after the House of Lords next sits. *Cleaver v. Cleaver*, 9 App. Cas. 631—H. L. (E.)

Petition not Lodged within a Year.—The House of Lords refused to enlarge the time for presenting an appeal provided by Standing Order No. 1, which is to the effect that no petition of appeal shall be received unless the same be lodged within one year from the date of the last decree, order, judgment or interlocutor appealed from. *Phillips v. Homfray*, 11 App. Cas. 466—H. L. (E.).

Stay of Proceedings pending Appeal—Special Grounds.—Execution for costs pending an appeal from the Court of Appeal to the House of Lords will not be stayed, unless evidence be adduced to show that the respondent to the appeal will be unable to repay the amount levied by execution, if the appellant be successful before the House of Lords. *Barker v. Lavery*, 14 Q. B. D. 769; 54 L. J., Q. B. 241; 33 W. R. 770—C. A.

The defendants in an action had been ordered by the Court of Appeal to produce certain documents: an application was thereupon made

by the defendants for a stay of the order pending their appeal to the House of Lords; the application was granted on their undertaking to present the appeal within a week and to duly prosecute it, and that the deeds should be deposited in court upon oath, on the ground that if the defendants produced their deeds, the appeal would be useless. *Emmerson v. Ind*, 55 L. J. Ch. 903; 55 L. T. 422; 34 W. R. 778—C. A.

The practice as to staying execution pending an appeal from the Court of Appeal to the House of Lords in actions in the Queen's Bench Division of the High Court applies to Admiralty actions. The fact that bail has been given in an Admiralty action in rem is not a special ground for staying execution pending an appeal from the Court of Appeal to the House of Lords. *The Annot Lyle*, 11 P. D. 114; 55 L. J., P. 62; 55 L. T. 576; 34 W. R. 647; 6 Asp. M. C. 50—C. A.

— Application, where to be made.—An application for a stay of execution pending an appeal to the House of Lords from the Court of Appeal ought in all cases to be made to the Court of Appeal. *Hamill v. Lilley*, 19 Q. B. D. 83; 56 L. J., Q. B. 337; 56 L. T. 620; 35 W. R. 437—C. A.

— Security for Costs of Foreign Respondent.—The amount paid into court by a foreign plaintiff as security for costs will not, after he has succeeded in his action, be ordered to remain in court pending an appeal by the defendant. *Hamill v. Lilley*, 56 L. T. 620—C. A.

Bankruptcy of Appellant—Effect of.—Where an appeal involves a question of the appellant's status, the House of Lords will allow it to be proceeded with notwithstanding the bankruptcy of the appellant. *G. v. M.*, 10 App. Cas. 171—H. L. (Sc.).

Appeal in Formâ Pauperis—Public Right—Subscriptions.—Upon a petition for leave to prosecute an appeal in formâ pauperis, it appeared that the petitioner sought as one of the public to establish a right of fishing in a tidal river adjoining land belonging to the defender, and that subscriptions had been collected to assist the petitioner in the litigation:—Held, that in the circumstances the application could not be granted. *Bowie v. Ailsa (Marquis)*, 13 App. Cas. 371; 58 L. J., P. C. 7; 60 L. T. 162—H. L. (Sc.).

Findings of Court of Session—How far conclusive.—The House of Lords is bound by the facts found by the Court of Session, and cannot look at the evidence adduced by either party in that court. *McLean v. Clydesdale Banking Co.*, 9 App. Cas. 95—H. L. (Sc.).

Judicial Notice of Law of any part of the United Kingdom.—It is not competent for the House of Lords to divest themselves of their judicial knowledge of the law of any part of the United Kingdom, though the point may arise in an appeal from another part of the United Kingdom, and may not have been argued in the court below. The appellant, a domiciled Irishwoman, being an infant without legal guardian, married in Ireland, before the passing of the Infants'

Settlement Act (18 & 19 Vict. c. 43), a domiciled Scotchman. An ante-nuptial settlement was executed. After the death of her husband she commenced the present action in the Scotch courts to set aside the settlement. No evidence was given as to the capacity of an infant to execute a binding contract by the law of Ireland:—Held, that the point being raised in the pleadings, the House must take judicial notice that by the law of Ireland the settlement was not binding on the appellant, without regard to whether any, or what, evidence of the law of Ireland, as a matter of fact, had been given in the court below; and further, that the validity of the settlement was not affected by the fact that at the time of its execution both parties contemplated a Scottish domicile during their married life. *Cooper v. Cooper*, 13 App. Cas. 88; 59 L. T. 1—H. L. (Sc.).

Costs—Point not raised below.—Where an appeal succeeds upon a point not raised in the court below, the appellant will not get costs. *Ib.*

II. TO THE COURT OF APPEAL.

1. *Jurisdiction.*
2. *In what Cases Appeal lies.*
 - a. Criminal Cause or Matter.
 - b. In Interpleader Proceedings.
 - c. On Cases Stated.
 - d. In other Matters.
3. *Parties to Appeal.*
4. *Time within which Appeal must be brought.*
 - a. In what cases.
 - b. From what Period Time runs.
 - c. Extension of Time.
5. *Notice of Appeal.*
6. *Security for Costs.*
7. *Staying Proceedings pending Appeal.*
8. *Evidence on Appeal.*
9. *Hearing of the Appeal.*
10. *Costs of the Appeal.*

1. JURISDICTION.

To Strike Solicitor off Rolls not by way of Appeal.—On the hearing of an appeal from a decision in the County Palatine Court, the attention of the Court of Appeal was called to the evidence given by a solicitor in the court below, from which it appeared that he had been guilty of gross misconduct in his character of solicitor with regard to a mortgage on which a question arose in the action. The Court of Appeal directed the official solicitor to take proceedings against him. The official solicitor moved the court for an order calling on the solicitor to explain his conduct or that he should be struck off the roll. The solicitor took no notice of the application:—Held, that the court had jurisdiction to entertain the application; but, having regard to the circumstances of the case, and that the solicitor had not taken out a certificate for several years, the court did not order him to be struck off the roll, or suspend him, but granted an injunction restraining him from renewing his certificate without the leave of the court. *Whitehead, In re*, 28 Ch. D. 614; 54 L. J., Ch. 796; 52 L. T. 703; 33 W. R. 601—C. A.

To order Solicitors of successful Party below

to repay Costs on Reversal of Judgment.—An action being dismissed at the hearing with costs, a sum of money which had been paid into court as security for the defendants' costs was ordered to be paid out to the solicitors for the defendants in part payment of the defendants' costs. The judgment was reversed by the Court of Appeal, and the costs ordered to be paid by the defendants. The plaintiffs asked for an order against the defendants' solicitors for repayment by them:—Held, that the court had no jurisdiction on the appeal to order the defendants' solicitors to refund the money, the solicitors not being present. Nor, *semble*, could such an order have been made if they had been served with notice of the application. *Lydney and Wigpool Iron Ore Co. v. Bird*, 33 Ch. D. 85; 55 L. T. 558; 34 W. R. 749—C. A.

To enter Judgment instead of ordering New Trial.—On the appeal from the order of a divisional court, upon an application for a new trial, the Court of Appeal has power, under Ord. LVIII. r. 4, if all the facts are before the court, to give judgment for the party in whose favour the verdict ought to have been given, instead of directing a new trial. *Millar v. Toulmin*, 17 Q. B. D. 603; 55 L. J., Q. B. 445; 34 W. R. 695—C. A.

Quære, whether on appeal from an order of a divisional court upon an application for a new trial on the ground of the verdict being against the weight of evidence, the Court of Appeal has power to give judgment for the appellants instead of directing a new trial. *Millar v. Toulmin* (17 Q. B. D. 603) doubted. *Toulmin v. Millar*, 12 App. Cas. 746; 57 L. J., Q. B. 301; 58 L. T. 96.—H. L. (E.).

Patent—Certificate—Particulars of Objection.—In an action for infringement of a patent, the defendant disputed its validity, delivered particulars of objections, stating the grounds, and adduced evidence in support thereof. At the trial judgment was given in favour of the plaintiff, and the validity of the patent was upheld. On appeal this judgment was reversed and the patent was declared invalid. The defendant, the successful appellant, applied to the Court of Appeal for a certificate under s. 29, sub-s. (6) of the Patents Act, 1883, that the particulars of objection delivered by him were reasonable and proper:—Held, that the Court of Appeal, having power to make such order as ought to have been made in the first instance, had power to grant—and under the circumstances of the case, would grant—such certificate. *Cole v. Saqui*, 40 Ch. D. 132; 58 L. J. Ch. 237; 59 L. T. 877; 37 W. R. 109—C. A.

2. IN WHAT CASES APPEAL LIES.

a. Criminal Cause or Matter.

Property obtained by False Pretences—Power to order Restitution.—By 24 & 25 Vict. c. 96, s. 100, if any person guilty (inter alia) of obtaining any property by false pretences is convicted thereof, in such case the property shall be restored to the owner or his representative, and in every such case the court before whom any such person shall be tried shall have power to order the restitution thereof in a summary manner.

The Queen's Bench Division having discharged a rule for a certiorari to remove an order for restitution made under the above section:—Held, that the order of the Queen's Bench Division was a judgment "in a criminal cause or matter" within s. 47 of the Judicature Act, 1873, and that there was no appeal to the Court of Appeal. *Reg. v. Central Criminal Court Justices*, 18 Q. B. D. 314; 56 L. J., M. C. 25; 56 L. T. 352; 35 W. R. 243; 51 J. P. 229; 16 Cox, C. C. 196—C. A.

Habeas Corpus.—[An order of the Queen's Bench Division, refusing to grant a writ of habeas corpus ad subjiciendum was not a judgment in a criminal cause or matter, and therefore an appeal from the order was competent. *Keller, In re*, 22 L. R., Ir. 158—C. A.]

—**Extradition Proceedings.**—[The Queen's Bench Division having refused an application for a writ of habeas corpus made on behalf of a person who had been committed to prison under s. 10 of the Extradition Act, 1870, as a fugitive criminal accused of an extradition crime:—Held, that the decision of the Queen's Bench Division was given in a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873, and therefore that no appeal would lie to the Court of Appeal. *Woodhall, Ex parte, or Woodall, In re*, 20 Q. B. D. 832; 57 L. J., M. C. 71; 59 L. T. 841; 36 W. R. 655; 52 J. P. 581—C. A.]

Whether the Court of Appeal has any jurisdiction to entertain an appeal from the refusal of a divisional court to issue a writ of habeas corpus, on the application of a person who has been arrested for an alleged extradition crime, *quare*. *Reg. v. Weil*, 9 Q. B. D. 701; 53 L. J., M. C. 74; 47 L. T. 630; 31 W. R. 60; 15 Cox, C. C. 189—C. A.

Order striking Solicitor off the Rolls.—[When the High Court makes an order ordering a solicitor to be struck off the rolls for misconduct, it does so in exercise of a disciplinary jurisdiction over its own officers, and not of a jurisdiction in any criminal cause or matter within the meaning of s. 47 of the Judicature Act, 1873, and therefore an appeal lies from such order to the Court of Appeal. *Hardwick, In re*, 12 Q. B. D. 148; 53 L. J., Q. B. 64; 49 L. T. 584; 32 W. R. 191—C. A.]

Refusal of Justices to state Case.—[Under the Judicature Act, 1877, there is no appeal to the Court of Appeal in a criminal case, except for error on the record. B. was convicted at Petty Sessions before a court of summary jurisdiction, and sentenced to one month's imprisonment. He applied to the magistrates to state a case for the opinion of the court. Upon their refusal to do so he applied for a rule, calling upon the justices to show cause why such case should not be stated. The court refused to make the order, and B. appealed to the Court of Appeal:—Held, that the refusal of the Queen's Bench Division to make the order applied for was a judgment in a criminal cause or matter within the meaning of section 50 of the Act; and that the Court of Appeal had no jurisdiction to entertain an appeal from

such refusal. *Brosnan, Ex parte*, 22 L. R., Ir. 334—C. A.]

Certiorari—Indictment.—[No appeal lies to the Court of Appeal from the refusal of the Queen's Bench Division to grant a certiorari to remove an indictment to the Central Criminal Court under 19 & 20 Vict. c. 16. *Reg. v. Rudge*, 16 Q. B. D. 459; 55 L. J., M. C. 112; 53 L. T. 851; 34 W. R. 207; 50 J. P. 755—C. A.]

Bail.—[A prisoner applied for bail to a divisional court of the Queen's Bench Division but was refused; he then appealed to the Court of Appeal:—Held, that the decision of the divisional court was a judgment of the High Court in a criminal matter, and therefore that the Court of Appeal had no jurisdiction to entertain the appeal. *Reg. v. Foote*, 10 Q. B. D. 378; 52 L. J., Q. B. 528; 48 L. T. 394; 31 W. R. 490; 48 J. P. 36; 15 Cox, C. C. 240—C. A.]

Special Case—Non-repair of Highway.—[See *Loughborough Highway Board v. Curzon*, post, col. 26.]

Information by Attorney-General—Parliamentary Oaths Act, 1866.—[Upon the trial of an information at the suit of the Attorney-General against a member of the House of Commons for voting without having taken the oath of allegiance within the meaning of the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Act, 1868, judgment was given for the Crown, and the Divisional Court refused to grant a rule for a new trial, on the ground of misdirection and misreception of evidence. On application by the defendant to the Court of Appeal:—Held, that the Court of Appeal had power to hear the application and to grant a new trial in such a case.—By Brett, M.R., and Lindley, L.J., Cotton, L.J., doubting, an information at the suit of the Attorney-General to recover penalties under s. 5 of the Parliamentary Oaths Act, 1866, from a member of Parliament for voting without having taken the oath of allegiance required by that statute, as amended by the Promissory Oaths Act, 1868, is not a "criminal cause or matter" within the meaning of the Supreme Court of Judicature Act, s. 47, and an appeal may be brought from any order or judgment therein of the High Court to the Court of Appeal:—By Brett, M.R., on the ground that the information is in its nature a civil proceeding, and, therefore, that an appeal lies under the Supreme Court of Judicature Act, 1873, s. 19:—By Lindley, L.J., on the ground that even although the information may be to some extent of a criminal nature, nevertheless before the passing of the Supreme Court of Judicature Acts, 1873, 1875, an appeal would have lain under the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), ss. 31, 34, 35, from a decision of the Court of Exchequer to the Court of Exchequer Chamber, and that the Supreme Court of Judicature Acts, 1873, 1875, do not take away any right of appeal existing before the passing of those statutes.—Semble, by Brett, M.R., that even if the information could be regarded as a criminal proceeding, nevertheless an appeal would lie, for by the Supreme Court of Judicature Act, 1873, s. 47, the right of appeal is taken away only in the case of indictments, of criminal informations for indictable misdemeanors filed in the Queen's Bench Division, and

of criminal proceedings before justices. *Attorney-General v. Bradlaugh*, 14 Q. B. D. 667; 54 L. J., Q. B. 205; 52 L. T. 589; 33 W. R. 673—C. A.

b. In Interpleader Proceedings.

Appeal from Judgment and Motion for New Trial.]—After the trial of an interpleader issue the judge before whom the issue was tried gave judgment for the plaintiff on the finding of the jury, and gave the defendant leave to appeal:—Held, that the defendant, having obtained leave, was entitled, under Ord. LVII. r. 11, to appeal against the judgment, and that, by Ord. XI. r. 5, the appeal ought to be to the divisional court, and therefore that both the application for a new trial and the appeal from the judgment ought to be entertained on the merits by the Court of Appeal on appeal from the divisional court. *Robinson v. Tucker*, 14 Q. B. D. 371; 53 L. J., Q. B. 317; 50 L. T. 380; 32 W. R. 697—C. A.

Appeal from Judgment of Judge at Trial.]—Where it is sought to impeach the judgment of a judge on the trial of an interpleader issue with respect only to the finding of the facts or the ruling of the law, and not with respect to the final disposal of the whole matter of the interpleader proceedings, an appeal will lie from such judgment under s. 19 of the Judicature Act, 1873, as it will from any other judgment or order of a judge. *Dawson v. Fox*, or *Fox v. Smith*, 14 Q. B. D. 377; 54 L. J., Q. B. 299; 33 W. R. 514—C. A.

Summary Decision.]—By the combined operation of the Common Law Procedure Act, 1860, s. 17, and of the Appellate Jurisdiction Act, 1876, s. 20, no appeal lies to the Court of Appeal from a decision of the Queen's Bench Division upon an appeal from the summary decision at chambers of an interpleader summons, and Ord. LVII. r. 11, does not confer any power to give leave to appeal. *Waterhouse v. Gilbert*, 15 Q. B. D. 569; 54 L. J., Q. B. 440; 52 L. T. 784—C. A.

Under Ord. LVII. r. 11, no appeal lies, unless by special leave, from the divisional court to the Court of Appeal, in respect of the decision of an interpleader summons in a summary way under Ord. LVII. r. 8. *Waterhouse v. Gilbert* (15 Q. B. D. 569), followed. *Bryant v. Reading*, 17 Q. B. D. 128; 55 L. J., Q. B. 253; 54 L. T. 524; 34 W. R. 496—C. A.

—Appeal by Sheriff.]—When the court or a judge decides summarily, under ss. 14 and 17 of the Common Law Procedure Act, 1860, the sheriff is not a party so as to be concluded by the decision, but may appeal therefrom. *Smith v. Darlow*, 26 Ch. D. 605; 53 L. J., Ch. 696; 50 L. T. 571; 32 W. R. 665—C. A.

Proceedings transferred to County Court.]—Interpleader proceedings were transferred under the Judicature Act, 1884, s. 17, from the Queen's Bench Division to a county court. On appeal from the judgment of the county court the Queen's Bench Division affirmed that judgment, but gave leave to appeal to the Court of Appeal:—Held, that the Court of Appeal had jurisdiction under the Judicature Act, 1873, s. 45, to hear the appeal, that jurisdiction not having

been taken away by the Appellate Jurisdiction Act, 1876, s. 20. *Crush v. Turner* (3 Ex. D. 803) approved. *Thomas v. Kelly*, 13 App. Cas. 506; 58 L. J., Q. B. 66; 60 L. T. 114; 37 W. R. 353—H. L. (E.)

c. On Cases Stated.

Under Highway Act—Quarter Sessions.]—An appeal lies without leave from a judgment of the Queen's Bench Division on a special case stated by quarter sessions pursuant to the Highway Act, 1835, s. 108, as the Queen's Bench Division, in giving judgment on such a case, exercises its own original common law jurisdiction, and not any new statutory appellate jurisdiction. *Illingworth v. Bulmer East Highway Board*, 53 L. J., M. C. 60; 32 W. R. 450—C. A.

Agreement—Judge's Order—Poor-rate.]—An appeal will lie to the Court of Appeal from the decision of the Queen's Bench Division upon a case stated under 12 & 13 Vict. c. 45, s. 11, in an appeal against a poor-rate; for the decision of the Queen's Bench Division is an "order" within the meaning of the Supreme Court of Judicature Act, 1873, s. 19. *Peterborough Corporation v. Wiltshorpe Overseers*, 12 Q. B. D. 1; 53 L. J., M. C. 33; 50 L. T. 189; 32 W. R. 458; 48 J. P. 373—C. A.

Under 12 & 13 Vict. c. 45, s. 11.]—An appeal lies to the Court of Appeal from the decision of the divisional court upon a case stated under 12 & 13 Vict. c. 45, s. 11, on an appeal from an order of justices to the quarter sessions, it not being a decision of the divisional court on an appeal from petty or quarter sessions within the meaning of s. 45 of the Judicature Act, 1873, and it being an "order" within s. 19 of that act. *Holborn Union v. Chertsey Union*, 15 Q. B. D. 76; 54 L. J., M. C. 137; 53 L. T. 656; 33 W. R. 698; 50 J. P. 36—C. A.

Bankruptcy—County Court Judge.]—An appeal will lie to the Court of Appeal from a decision of the High Court on special case stated by a county court judge under s. 97, sub-s. 3 of the Bankruptcy Act, 1883. *Dawes, Ex parte, Moon, In re*, 17 Q. B. D. 275; 55 L. T. 114; 34 W. R. 752; 3 M. B. R. 105—C. A.

Under Summary Jurisdiction Act, 1879, s. 33—Highway.]—An appeal lies to the Court of Appeal from the judgment of the Queen's Bench Division upon a special case stated under s. 33 of the Summary Jurisdiction Act, 1879, in proceedings before justices for the non-repair of a highway, the judgment not being "a judgment in any criminal cause or matter" within s. 47 of the Judicature Act, 1873. *Loughborough Highway Board v. Curzon*, 17 Q. B. D. 344; 55 L. T. 50; 50 J. P. 788—C. A.

By Railway Commissioners.]—There is no appeal to the Court of Appeal from the decision of a divisional court upon a case stated by the Railway Commissioners under s. 26 of the Regulation of Railways Act, 1873, even though leave to appeal has been given. Sect. 45 of the Judicature Act, 1873, does not apply to appeals from the Railway Commissioners. *Hall v. London, Brighton, and South Coast Railway*, 17 Q. B. D. 230; 55 L. J., Q. B. 328; 54 L. T. 713; 34 W. R. 558; 5 Nev. & Mac. 28—C. A.

d. In other Matters.

Trial at Bar.—An appeal lies to the Court of Appeal from any order or judgment made or given by the Queen's Bench Division either during or afterwards with respect to a trial at bar of a civil proceeding, and whether or not the appeal is brought from a decision upon a motion for a new trial on the ground of misdirection or wrongful reception of evidence; but the appeal must be brought on by notice of motion, an *ex parte* application for a rule nisi to the Court of Appeal being irregular. *Attorney-General v. Bradlaugh*, ante, col. 25.

Judgment by Default.—The Court of Appeal has jurisdiction to entertain an appeal from a judgment given on default; but the proper course to be taken by the party against whom such judgment has been given is for him to apply in the first instance to the judge who gave the judgment to restore the action. *Vint v. Hudspeth*, 29 Ch. D. 322; 54 L. J., Ch. 844; 52 L. T. 741; 33 W. R. 738—C. A.

Municipal Election Petition—Leave Given.—Notwithstanding s. 93, sub-s. 7, of the Municipal Corporations Act, 1882, which enacts that the decision of the High Court upon a petition questioning municipal election shall be final; nevertheless an appeal, if leave be given, lies from a judgment of the Queen's Bench Division upon a petition of that nature to the Court of Appeal, owing to s. 242 of the statute above mentioned, which in effect incorporates the Supreme Court of Judicature Act, 1881, s. 14, whereby in certain cases an appeal is allowed from the High Court of Justice to the Court of Appeal, if special leave be given. *Line v. Warren*, 14 Q. B. D. 548; 54 L. J., Q. B. 291; 53 L. T. 446—C. A.

Habeas Corpus.—Section 19 of the Judicature Act, 1873, gives an appeal from orders made by the High Court of Justice on application for habeas corpus, whether the order grants or refuses the writ. *Cox, Ex parte*, 20 Q. B. D. 1; 57 L. J., Q. B. 98; 53 L. T. 323; 36 W. R. 209—C. A.

Patent—Certificate of Validity.—By s. 31 of the Patents, Designs, and Trades Marks Act, 1883, in an action for infringement of a patent, the court or a judge may certify that the validity of the patent came in question.—Held, that such a certificate is not a judgment or order against which an appeal lies to the Court of Appeal under s. 19 of the Judicature Act, 1873. *Haslam Engineering Company v. Hall*, 20 Q. B. D. 491; 57 L. J., Q. B. 352; 59 L. T. 102; 36 W. R. 407—C. A.

Under Debtors Act.—The jurisdiction of the High Court under s. 5 of the Debtors Act, 1869, has been, by virtue of s. 103 of the Bankruptcy Act, 1883, and orders under it assigned to the judge in bankruptcy, and the exercise of it delegated to the bankruptcy registrars. An appeal from an order of a registrar, approved by the judge in bankruptcy, will therefore not lie to the divisional court, but will be regulated by s. 104 of the Bankruptcy Act. *Genese, Ex parte, Lascellas, In re*, 53 L. J., Q. B. 578; 32 W. R. 794; 1 M. B. R. 183—D.

Where party has conformed to Order of Court below.—A plaintiff signed judgment for default of delivery of defence which a divisional court set aside upon the defendant paying a certain sum into court; the defendant appealed after paying into the court the money:—Held, that by paying the money into court the defendant had not so availed himself of the order of the divisional court as to be precluded from appealing. *Anlaby v. Prætorius*, 20 Q. B. D. 764; 57 L. J., Q. B. 287; 58 L. T. 671; 36 W. R. 487—C. A.

From Discretion of Court below.—Although an appeal lies from the exercise of discretion by the judge in the court below, yet the Court of Appeal will only interfere (1) when the judge has decided on a matter not within his discretion; (2) when his assumed discretion has been exercised on wrong principles; (3) when some great loss will be occasioned by a clearly erroneous exercise of discretion. *Oriental Bank Corporation, In re*, 56 L. T. 868—C. A.

When a winding-up order is made on two petitions, there is no rule which absolutely binds the judge making the order to give the carriage of it to the petitioner who presented the first petition. He has a discretion as to which of the petitioners shall have it. An order made in exercise of that discretion is an appealable one, but the Court of Appeal will not encourage such appeals. *Cunningham & Co., In re*, 53 L. J., Ch. 246; 50 L. T. 246—C. A.

Winding up of Building Society.—See BUILDING SOCIETY.

3. PARTIES TO APPEAL.

In formâ pauperis.—Where a party who has not sued or defended as a pauper in the court below, applies for leave to appeal in formâ pauperis, the court will follow by analogy Ord. XVI. rr. 22, 23, and 24, and not the old practice as to such appeals. A married woman suing without a next friend, her husband not being a party, applied for leave to appeal in formâ pauperis:—Held, that her husband as well as herself must make the affidavit required by rule 22. *Roberts, In re, Kiff v. Roberts* (No. 2), 33 Ch. D. 265; 35 W. R. 176—C. A.

Liquidator—Removal of.—A liquidator who has been removed by a judge may appeal against his removal. *Charlesworth, Ex parte, Adam Eytton, In re*, 36 Ch. D. 299; 57 L. J., Ch. 127; 57 L. T. 899; 36 W. R. 275—C. A.

Executor—Residuary Legatee.—A bill had been filed against executors asking for certain inquiries and directions, and the court ultimately ordered that the conduct of the cause should be transferred from the surviving executor to the residuary legatee, that service of all notices or proceedings upon the executor should be dispensed with, and directed certain inquiries, certain other inquiries dependent upon them being directed to stand over. Upon answers being returned to the first-mentioned inquiries a further inquiry was ordered. Against this order the residuary legatee appealed. Upon this appeal the court refused to allow counsel for the executor to be heard. *De Mora v. Concha*, 29 Ch. D. 268; 33 W. R. 846—C. A.

—**Creditor's Administration Action—Appeal by Person not a Party.**—D., the residuary legatee of Mrs. Y., brought her action for administration of Mrs. Y.'s estate against R., the surviving executor. Mrs. Y. had been the surviving executrix of her husband. V., one of the residuary legatees of the husband, shortly afterwards brought her action against R. as sole defendant, for administration of the husband's estate, alleging breaches of trust by Mrs. Y., and asking administration of her estate if R., as her representative, did not admit assets to pay what should be found due from her estate to the husband's estate. On the 28th February, 1885, V. moved for judgment. There was no evidence before the court that Mrs. Y. was indebted to her husband's estate, or that she had been guilty of wilful neglect and default. R., by his counsel, admitted that she was so indebted, and he submitted to a judgment directing an account of personal estate of the husband which she had received, or but for her wilful neglect or default might have received, with an inquiry as to balances in her hands, and directing administration of her estate. It appeared that, from information R. had received, he felt sure that Mrs. Y. would be found a debtor to her husband's estate, and that wilful default would be established against her, and that it was not advisable to incur the expense of contesting these points at the hearing. D., on the 26th of June, 1885, moved before Pearson, J., under Ord. XVI., r. 40, to discharge or vary the judgment of February, 1885. This motion was refused on the ground that D. had not been served with the judgment. D. appealed from this refusal, and also applied for leave to appeal from the judgment.—Held, that leave cannot be given to a residuary legatee to appeal from a decree made against the executor at the suit of a creditor, as the executor completely represents the estate for the purposes of such a suit, and the residuary legatee could not be made a party to the suit, and the case is quite different from one where leave to appeal is applied for by a person who, though not according to the present practice a necessary party to the suit, would have been a proper party to it. Held, further, that the application of June, 1885, to vary the judgment was not supported by Ord. XVI., r. 40, the case not falling within that rule, which only applies to cases where service of an order is necessary in order to make it binding, whereas here the order was binding without service, and D. was not a proper person to be served. *Youngs, In re, Doggett v. Revett, Vollum v. Revett*, 30 Ch. D. 421; 53 L. T. 682; 33 W. R. 880—C. A.

4. TIME WITHIN WHICH APPEAL MUST BE BROUGHT.

a. In what Cases.

Final or Interlocutory—Case stated.—A judgment given by the Queen's Bench Division on a case stated by quarter sessions under 12 & 13 Vict. c. 45, s. 11, is an interlocutory and not a final order. *Peterborough Corporation v. Wilsyth Overseers*, 12 Q. B. D. 1; 53 L. J., M. C. 33; 50 L. T. 189; 32 W. R. 458; 48 J. P. 373—C. A.

—**Order in Administration Action.**—Although an order made on a summons by a cre-

ditor in an administration action is considered as interlocutory for the purpose of determining the time within which an appeal must be brought, for other purposes it is a final order, and therefore fresh evidence cannot be given on the appeal without the special leave of the court. *Compton, In re, Norton v. Compton*, 27 Ch. D. 392; 51 L. T. 277; 33 W. R. 160—C. A.

—**Interpleader Issue.**—The judgment of the divisional court, affirming the judgment of a county court judge in an interpleader issue transferred to the county court under s. 17 of the Judicature Act, 1884, is a "final order" within Ord. LVIII. r. 3. *Hughes v. Little*, 18 Q. B. D. 32; 56 L. J., Q. B. 96; 55 L. T. 476; 35 W. R. 36—C. A.

—**Review of Taxation.**—An appeal from an order directing a review of taxation must be brought within twenty-one days. *Phillips, Ex parte, Watson, In re*, 19 Q. B. D. 234; 56 L. J., Q. B. 619; 57 L. T. 215—C. A.

—**Foreclosure Judgment.**—Under Ord. LVIII. r. 15, an order in the ordinary form of a foreclosure judgment, made under Ord. XV., is, for the purpose of an appeal from it, to be treated as a final order, and it can be appealed from at any time within a year, and the appeal can be heard though, since the notice was served, the foreclosure has been made absolute. *Smith v. Davies*, 31 Ch. D. 595; 55 L. J., Ch. 496; 54 L. T. 478—C. A.

Originating Summons.—An originating summons taken out under Ord. XV. r. 3, is a civil proceeding commenced otherwise than by writ in manner prescribed by a rule of court, and is consequently an action within the definition of that word in s. 100 of the Judicature Act, 1873. Therefore an order made upon such a summons is appealable at any time within one year from its date. *Fawcett, In re, Galland v. Burton*, 30 Ch. D. 231; 54 L. J., Ch. 1131; 55 L. J., Ch. 568; 53 L. T. 271; 34 W. R. 26—C. A.

An originating summons under Ord. LV. r. 3, is an action within the meaning of the Judicature Act, 1873, s. 100, and therefore it is not a "matter not being an action" within Ord. LVIII. r. 15. An appeal, therefore, can be brought from an order made on such a summons within a year from the date of the order. *Varadon's Trusts, In re*, 55 L. J., Ch. 259—C. A.

Order on Further Consideration and on Summons to Vary Certificate.—Where an order was made on further consideration and another order separate in form was made the same day dismissing a summons to vary the certificate on which the order on further consideration was made, and the two orders were separately drawn up on consecutive days.—Held, that there was in substance only one order, and consequently that Ord. LVIII. r. 15 (a), applied, and that the time for appealing would be the same as the time for appealing against the order on further consideration. The object of that rule was to get rid of the anomaly of having two different periods of time for appealing where a summons to vary and further consideration were heard together. *Marsland v. Hole*, 40 Ch. D. 110; 59 L. T. 593; 37 W. R. 81—C. A.

Application Partly Refused and Partly Granted.—[On appeal by the plaintiff from an order made upon an application to unseal certain books and documents which was partly refused and partly granted, the defendants objected that, though the appeal was brought within twenty-one days of the drawing up of the order embodying the decision appealed from, it was not within twenty-one days from the date of the decision itself, and therefore the appeal was out of time:—Held, that, as the matters decided were not clearly severable, the objection failed. *Jones v. Andrews*, 58 L. T. 601—C. A.]

b. From what Period Time runs.

Two different Periods.—[See two preceding cases.]

Refusal of Application—Special Direction as to Costs.—[Where an application to a judge is refused, and the judge adds special directions as to the payment of the costs, that is a refusal of the application within the meaning of Ord. LVIII. r. 15, and the time for appeal runs from the date of the refusal, not from the drawing-up of the order. *Smith, In re, Hooper v. Smith*, 26 Ch. D. 614; 53 L. J., Ch. 1149; 33 W. R. 18—C. A.]

Appeal when "Brought."—[At the trial of an action on the 23rd of June, 1884, judgment of nonsuit was given. The judgment was entered on the 2nd of July, 1884. The plaintiffs served a notice of appeal on the 22nd of June, 1885; the appeal was not entered till the 4th of July, 1885:—Held, that the appeal was "brought" when the notice of appeal was served on the defendant, and that, as this was done within a year from the pronouncing of the judgment, the appeal was in time. *Christopher v. Croll*, 16 Q. B. D. 66; 55 L. J., Q. B. 78; 53 L. T. 655; 34 W. R. 134—C. A.]

c. Extension of Time.

Where some Parties have Appealed.—[Three of six directors sold their shares to the company and received the price out of the funds of the company. In the winding-up of the company an order was made upon the six directors jointly and severally to replace these sums, with liberty to the three who had not received them to apply as to the liability of those who had. On the last day for appealing the three who had received the sums appealed from the order, without the knowledge of the other three:—Held, that leave to appeal after time ought to be given to the other three. *Clayton Mills Manufacturing Company, In re*, 37 Ch. D. 28; 57 L. J., Ch. 325; 58 L. T. 317—C. A.]

Doubts as to Practice—Interlocutory Order.—[On an appeal from the refusal by the registrar of the application of the debtor for leave to summon a fresh first meeting of his creditors, the objection was taken that the appeal was out of time. The appellant's solicitor deposed that he had mistaken the effect of the rules, and was of opinion that the time for appealing ran from the date of the perfecting of the order, instead of the date when it was pronounced:—Held, that the order appealed from was in the nature of an interlocutory order, and as no harm could

be done to anyone, the time would now be extended. *Tippett, Ex parte, Tippett, In re*, 2 M. B. R. 229—C. A.]

Where an interlocutory report or certificate from chambers has been made up, and confirmed by the judge, an appeal lies, and is to be regulated by the general order dealing with interlocutory appeals; and it makes no difference that the confirmation takes the form of a refusal of a motion to vary the report or certificate, and that such refusal is made part of an order of the court or judge, which also contains a final decree upon further consideration. Leave was given to appeal after the proper time, where there was a reasonable doubt as to the practice applicable. *O'Donnell v. O'Donnell*, 13 L. R., Ir. 226—C. A.]

Special Grounds—Company—Order on Winding-up Petition.—[The shareholders in a company passed an extraordinary resolution to wind up the company voluntarily, but the resolution was void, the majority of members who voted not being entitled to vote. A creditor filed a petition in the Chancery Court of the Duchy of Lancaster for a supervision order, or for a compulsory winding-up order, and as the court and the petitioner were ignorant of the fact that the resolution was invalid, a supervision order was made. Five months afterwards the petitioner discovered the invalidity of the resolution, and then moved before the Vice-Chancellor that the supervision order might be discharged, and a compulsory winding-up order made. This motion having been refused by the Vice-Chancellor on the ground of want of jurisdiction to rehear the petition, the petitioner appealed from the refusal of the motion, and also applied to the Court of Appeal for leave to appeal against the original order notwithstanding the lapse of time. The application for leave to appeal was opposed by the executors of a previous member, who had transferred their testator's shares to escape liability less than twelve months before the presenting of the original petition, but more than twelve months before the case came before the Court of Appeal, on the ground that if an order were now made on the original petition they would be made liable under the 38th section of the Companies Act, 1862:—Held, that leave to appeal, notwithstanding the lapse of time, ought to be given, the mistake as to the validity of the resolution forming a special ground for the application, and the respondents having no equity to resist it. Observations on the principle on which the court grants extension of time for appeal. *New Callao, In re* (22 Ch. D. 484), approved. *Manchester Economic Building Society, In re*, 24 Ch. D. 488; 53 L. J., Ch. 115; 49 L. T. 793; 32 W. R. 325—C. A.]

Informal Notice given within Time.—[Within twenty-one days from the date of an order allowing a creditor's claim in an administration action the defendant gave a four days' notice of appeal. After the time for appealing had expired the respondent wrote to say that the notice was bad, as it ought to have been a fourteen days' notice. The appellant thereupon gave notice of motion for leave to amend his notice of appeal by substituting the fourteen days' period for that of four. At this time more than fourteen days from the service of the notice of appeal had passed:—Held, that the notice of appeal was bad, for that it ought to have been a

fourteen days' notice, and that leave to amend it in the way proposed ought not to be given after the fourteen days, but as the applicant had given a distinct notice of appeal in proper time, the time for appealing ought to be extended. *Crosley or Crosby, In re, Munns v. Burn*, 34 Ch. D. 664; 56 L. J., Ch. 509; 56 L. T. 103; 35 W. R. 294—C. A.

5. NOTICE OF APPEAL.

Length of Notice—Waiver.—Where a summons in an administration action was heard and determined on the 9th June, and the notice of appeal served on 20th June:—Held, upon a preliminary objection, that as the respondent had appeared he had waived the irregularity of the notice. *McRae, In re, Forster v. Davis*, 25 Ch. D. 19; 32 W. R. 304—C. A.

Service—On former Solicitor.—By order on further consideration the defendant was ordered to pay money into court, which was then to be carried to the credit of an action for administering the estate of a testator whose executrix was the plaintiff in the present action. The defendant went abroad without complying with the order. On appeal the order was varied by ordering the defendant to pay the money to the plaintiff, who was then to pay it into court in the administration action, such an order being capable of being better enforced against the defendant's property than the order as originally framed. The notice of appeal was served on the defendant's solicitors, who stated that they had ceased to act for him, but they were still his solicitor on the record:—Held, that as the order on further consideration had not been worked out, they still represented him, and that service of the notice on them was good service. Whether the solicitors on the record do not continue to represent their client until the expiration of the time allowed for appealing, *quære*. *De la Pole v. Dick*, 29 Ch. D. 351; 54 L. J., Ch. 940; 52 L. T. 457; 33 W. R. 585—C. A.

Notice of Motion—Day in Vacation.—See PRACTICE (MOTIONS).

6. SECURITY FOR COSTS.

Time when Application should be Made.—Notice of appeal from dismissal of an action was served by the plaintiff on the 1st of March. On the 5th of June a defendant gave notice of motion for security for costs, supporting it by an affidavit that on the 1st of June writs of *fi. fa.* for costs payable to him by the appellant had been issued to which the sheriff returned *nulla bona*; but the affidavit did not state that the applicant had not up to that time any reasonable evidence of the appellant's insolvency. The appellant's briefs had been delivered and the fees paid on the 22nd of May, and on the 10th of June, when the application was heard, the appeal was only two out of the paper:—Held, that although there was such evidence of insolvency that an order for security would have been made if applied for in due time, the application must be refused as having been made too late, when the appellant had incurred all the costs of the appeal, though it might even then

have been granted if the applicant had shown that until the return of *nulla bona* he had no reasonable evidence of the appellant's insolvency. *Pooley's Trustee v. Whetham* (No. 2), 33 Ch. D. 76; 56 L. J., Ch. 41; 55 L. T. 462—C. A.

— **Motion and Appeal in Paper on same Day.**—Notice of appeal from an interlocutory order was served on 8th of February. On the 10th of February the respondent gave notice of motion for security for costs. The appeal motion and the motion for security came into the paper on the 16th. Poverty was sufficiently established, and it was also sworn to and not denied that the person really promoting the appeal was a person of substance:—Held, that security ought to be given. *Pooley's Trustee v. Whetham* (33 Ch. D. 76) distinguished. *Clough, In re, Bradford Commercial Banking Company v. Cure*, 35 Ch. D. 7; 56 L. J., Ch. 338; 56 L. T. 104; 35 W. R. 353—C. A.

Order for security for costs made although the appeal was in that day's paper for hearing, there having been no delay in making the application except a slight delay which was attributable to the appellant. *Ellis v. Stewart*, 35 Ch. D. 459; 57 L. T. 30—C. A.

In what Cases—Order striking Solicitor off Roll.—Whether the court will require a solicitor who is insolvent to give security for the costs of an appeal against an order striking him off the roll, *quære*. But where such an order is not the whole order, but comprises other directions, and the solicitor appeals against the whole order, then the general rule applies, and if insolvent he will be required to give security. *Strong, In re* (No. 2), 31 Ch. D. 273; 55 L. J., Ch. 506; 54 L. T. 219; 34 W. R. 420—C. A.

— **Executor—Set-off.**—In an administration action P. was found to be heir-at-law. K., who claimed to be heir, appealed against this decision. P. then died, and K. revived against H., his executor and devisee in trust. H. applied for security for the costs of the appeal on the ground of K.'s proved insolvency. K. resisted on the ground that P. had been ordered to pay to him the costs of a previous appeal, which were of sufficient amount to be a security:—Held, that if P. had been the respondent this would have been a sufficient answer, but that H. being only a representative was entitled to be indemnified, and that security must be given. *Knight, In re, Knight v. Gardner*, 38 Ch. D. 108; 58 L. T. 699—C. A.

— **Special Circumstances.**—An appellant may be ordered to give security for the costs of an appeal where a *prima facie* case of abuse of the process of the court has been made out. *Weldon v. Maples*, 20 Q. B. D. 331; 57 L. J., Q. B. 224; 57 L. T. 672; 36 W. R. 154—C. A.

— **Inference of Insolvency.**—Where a plaintiff in an action had been served with a bankruptcy notice by the defendant, with the terms of which he had not complied, the court inferred, in absence of evidence to the contrary, that he was insolvent, and directed him to give security for the costs of an appeal. *Nixon v. Sheldon*, 50 L. J., Ch. 624; 50 L. T. 245—C. A.

— **Bankruptcy of Appellants—Bankrupts personally interested in Action.**—[An injunction was granted restraining the defendants from making instruments infringing the plaintiffs' patent and ordering delivery up of all instruments so constructed. The defendants appealed from this decision and set down the appeal for hearing, but before the appeal came on they became bankrupt. No trustee was appointed, but there was an official receiver. The plaintiffs moved to have the appeal dismissed for want of prosecution. The learned judge who had granted the injunction had not given the reasons for his judgment:—Held, that the bankrupts were still interested, as the injunction restrained them from selling a particular class of machines, and they might be sent to prison for a breach of the injunction; and it was ordered that, unless within fourteen days from the learned judge giving his reasons the bankrupts gave security for costs or the official receiver made himself a party to the proceedings, the appeal should without further order be dismissed. *United Telephone Company v. Bassano*, 31 Ch. D. 630; 55 L. J., Ch. 625; 54 L. T. 479; 34 W. R. 537—C. A.]

— **New Point of Law raised.**—[There is no general rule that an insolvent appellant will be exempted from giving security for the costs of the appeal because the case involves a question of law which has not been previously considered by a Court of Error. *Rourke v. White Moss Colliery Company* (1 C. P. D. 556) explained. *Farmer v. Lucy*, 28 Ch. D. 482; 54 L. J., Ch. 808; 52 L. T. 38; 33 W. R. 265—C. A.]

Order not complied with—Dismissal of Appeal—Time.—[Where an order has been made for the appellant to give security for the costs of an appeal, if he does not give it within a reasonable time, the court will dismiss the appeal without giving further time, unless there are extenuating circumstances. As a general rule a period of three months is more than a reasonable time. *Washburn and Moen Manufacturing Company v. Patterson*, 29 Ch. D. 48; 54 L. J., Ch. 643; 52 L. T. 705; 33 W. R. 403—C. A.]

Increase of Deposit—Special circumstances.—[Protracted litigation in regard to the same matter held a ground for increasing the deposit to secure costs on appeal. *McHenry, In re*, 17 Q. B. D. 351; 55 L. J., Q. B. 496; 35 W. R. 20—C. A.]

7. STAYING PROCEEDINGS PENDING APPEAL.

Jurisdiction of Master.—[A master has jurisdiction under Ord. LVIII. r. 16, to stay execution on a judgment pending an appeal to the Court of Appeal. *Oppert v. Beaumont*, 18 Q. B. D. 435; 56 L. J., Q. B. 216; 35 W. R. 266—C. A.]

Refusal by Court below—Time for Application to Court of Appeal.—[In an action by patentees judgment was given referring it to the official referee to assess the damages occasioned to the plaintiffs by the defendants' infringement, and ordering payment within twenty-one days after service of the report. The defendants appealed, and set down their appeal on the 18th

of April, and then moved to stay proceedings under the judgment pending the appeal. This was refused by Chitty, J. On the 25th of June, the official referee made his report, and on the 14th of July, more than twenty-one days after the above refusal, the defendants gave notice of motion before the Court of Appeal that the time for payment of the damages might be extended till after the hearing of the appeal. The plaintiffs took the objection that the application could not be made as an original motion, and as an appeal motion was out of time:—Held, that Ord. LVIII. r. 16, gives concurrent jurisdiction to the court below and to the Court of Appeal as to staying proceedings pending an appeal; that rule 17 does not take away any of the jurisdiction thus given to the Court of Appeal, but only requires that it shall not be exercised till an application has first been made to the court below, and that the application to the Court of Appeal to stay proceedings when an order for that purpose has been refused by the court below, is not properly an appeal motion, and need not be brought within twenty-one days from the refusal. *Attorney-General v. Swansea Improvements and Tramways Company* (9 Ch. D. 46) considered. *Cropper v. Smith*, 24 Ch. D. 305; 53 L. J., Ch. 170; 49 L. T. 548; 32 W. R. 212—C. A.]

Payment out of Fund in Court—Terms.—[In the absence of special circumstances it is not the practice of the court to retain in court pending an appeal a fund which has been ordered to be paid out, because there is an appeal from the order. An order directing the payment of a fund out of court to the plaintiff having been made just before the commencement of the Long Vacation, and an appeal having been presented, a suspension of the payment out was granted over the Long Vacation, in order to enable the appellant to apply to the Court of Appeal. On appeal, it being shown that the plaintiff had been abroad for two years, and that the applicant could not discover his address, it was held that payment out ought to be stayed if the applicant would give security to pay to the plaintiff interest at 4 per cent. on the present value of the funds in court, and to make good to the plaintiff, if the appeal was unsuccessful, the difference between the highest market price of the investments at any time before the hearing of the appeal and their market price on the day of the hearing of the appeal. *Bradford v. Young, Falconar's Trusts, In re*, 28 Ch. D. 18; 54 L. J., Ch. 368; 51 L. T. 550; 33 W. R. 169—C. A.]

Grounds of Application—Affidavit.—[The power to stay execution pending an appeal is purely discretionary, and may be exercised in a proper case though the application is not made upon affidavit. Execution was stayed pending an appeal by a railway company, defendants, from an order refusing a new trial, on the terms of their lodging in court the amount of the verdict and a sum to cover costs, although the application was not grounded upon affidavit stating special circumstances. *Barker v. Lavery* (14 Q. B. D. 769) distinguished. *McCarthy v. Cork Steam Packet Company*, 16 L. R., Ir. 164—Ex. D.]

Costs of Summons—Power of Court below to order Sum to be paid out of Court.—[Where a

contributory of a company was ordered to pay a certain sum of money to the liquidator, the contributory took out a summons to stay execution pending an appeal, and stay of execution was ordered upon the terms of his paying the money and 50*l.* for costs into court, no order being made as to the costs of the summons to stay. The appeal was dismissed with costs, but no reference was made as to the costs of the summons to stay, and the taxing master disallowed the costs of that summons. On summons to review the taxation:—Held, that the contributory was ordered to pay the 50*l.* into court to satisfy such costs as the court should think he ought to pay, and that the costs of the summons to stay, being caused by the appeal, must be paid out of the 50*l.* in court, and that the court had jurisdiction at any time to make such order. *Brighton Livery Stables Company, In re*, 52 L. T. 745—V.-C. B.

8. EVIDENCE ON APPEAL.

Copy of Judge's Notes of Evidence.—When oral evidence taken in the court below has to be considered on appeal, it is the duty of the appellant to apply to one of the judges of the Court of Appeal through his clerk to ask the judge before whom the evidence was taken to send to the Court of Appeal a copy of the judge's notes, and if this is not done the appeal will be ordered to stand over at the expense of the appellant. *Ellington v. Clark*, 38 Ch. D. 332; 57 L. J., Ch. 958; 58 L. T. 818; 36 W. R. 873—C. A.

Shorthand Notes of Evidence.—The Court of Appeal will not allow a shorthand note of evidence taken by a clerk of one of the solicitors in the action to be referred to. *Id.*

Fresh Evidence.—An appellant applied to the court for leave to adduce further evidence, the court granted the application, considering it a very special case, but not in any way departing from the rule that parties ought not to be allowed to bolster up their case by adducing fresh evidence before the Court of Appeal. The costs of the motion to be paid by the appellant. *Evans v. Benyon*, 37 Ch. D. p. 345; 58 L. T. p. 704—C. A.

— **Leave of Court—Interlocutory Order—Cross-examination.**—The plaintiff appealed from the refusal of a judge to issue a writ of sequestration against the defendant company for an alleged breach of an injunction to restrain the infringement of the plaintiff's patent. On the appeal coming on for hearing it was proposed to read certain further affidavits which had been filed on behalf of the appellant since the order was made in the court below. The defendant company had been duly furnished with copies of such affidavits. The defendant company objected to the reception of the fresh evidence, as leave had not been obtained for that purpose from the court, and no special grounds had been shown under Order LVIII. r. 4, the order refusing the writ being, they contended, a final order as to the matter in dispute, and not an interlocutory order;—Held, that the order appealed from was an interlocutory order within the rule referred to; and that, therefore, the appellant had a right to adduce

fresh evidence, but that the appeal must stand over to enable the respondents to answer the further affidavits; and that, after the affidavits on both sides had been filed, either party might cross-examine the deponents. *Spencer v. Ancoats Vale Rubber Company*, 58 L. T. 363—C. A.

— Order in Administration Action.]—

Although an order made on a summons by a creditor in an administration action is considered as interlocutory for the purpose of determining the time within which an appeal must be brought, for other purposes it is a final order, and therefore fresh evidence cannot be given on the appeal without the special leave of the court. *Compton, In re, Norton v. Compton*, 27 Ch. D. 392; 51 L. T. 277; 33 W. R. 160—C. A.

9. HEARING OF THE APPEAL.

In Camera—Jurisdiction.—When the public hearing of a case will defeat the object of the plaintiff in commencing proceedings, the court has jurisdiction to hear the case in private, notwithstanding the opposition of the defendant. *Mellor v. Thompson*, 31 Ch. D. 55; 55 L. J., Ch. 942; 54 L. T. 219—C. A.

Postponement of Hearing.—An application to postpone the hearing of an appeal which is in the general list, though made with the consent of all parties, will not be granted as a matter of course. The court requires some sufficient reason for the postponement to be shown. The fact that negotiations with a view to settlement of an appeal are pending is a sufficient reason. *Bird v. Andrew*, 36 W. R. 1—C. A.

Re-argument, when allowed.—The court declined to allow a case to be re-argued on the ground that an enactment in the Conveyancing and Law of Property Act, 1881, had been overlooked. *Birmingham Land Company v. London and North-Western Railway*, 34 Ch. D. 261; 56 L. J., Ch. 956; 55 L. T. 699; 35 W. R. 173—C. A.

Dismissal—Ex parte.—The Court of Appeal will not make an order dismissing an appeal with costs on the ex parte application of the appellant. *Ormerod v. Bleasdale*, 54 L. T. 343—C. A.

Withdrawal of Appeal.—Where an appeal has once been set down it cannot be withdrawn by the appellant on merely procuring the written consent thereto of the respondent, but the leave of the court to withdraw the appeal must be obtained. *West Devon Great Consols Mine, In re*, 38 Ch. D. 51; 57 L. J., Ch. 850; 58 L. T. 61; 36 W. R. 342—C. A.

— **Right of Respondent to continue Cross-Appeal—Right of Original Appellant.**—When a respondent under Ord. LVIII. r. 6, has given notice that he will on the hearing of an appeal contend that the decision of the court below should be varied, and the appellant subsequently withdraws his appeal, such notice entitles the respondent to elect whether to continue or withdraw his cross-appeal. If he continues his cross-appeal the appellant has the right to give a cross-notice that he will bring forward his ori-

ginal contention on the hearing of the respondent's appeal. *The Beeswing*, 10 P. D. 18; 54 L. J., P. 7; 51 L. T. 883; 33 W. R. 319; 5 Asp. M. C. 335—C. A.

Power to Amend Order.]—See PRACTICE (ORDER).

Amendment of Notice of Motion.]—A defence delivered after the expiration of the time limited by the rules cannot be treated as a nullity. Where, therefore, the court, treating such a defence as a nullity, had, upon a motion for judgment in default of delivering a defence (Ord. XXIX. r. 10, Rules of 1875), given a judgment for foreclosure, the Court of Appeal held the judgment improperly given. But as the defence substantially admitted the plaintiff's claim, the Court of Appeal, under Ord. LVIII. r. 4 (Rules of 1883), ordered the notice of motion to be amended, and the notice being treated as amended, gave judgment for the plaintiff upon admissions in the defence. *Gill v. Woodfin*, 25 Ch. D. 707; 53 L. J., Ch. 617; 50 L. T. 490; 32 W. R. 393—C. A.

Effect of equally divided Judgment.]—The Court of Appeal is not bound by a decision of its own where that decision was come to by reason of the judges who heard the case being equally divided in opinion. *The Vera Cruz*, 9 P. D. 96; 53 L. J., P. 33; 51 L. T. 104; 32 W. R. 783; 5 Asp. M. C. 270—C. A.

Reviewing Findings of Fact by Judge below.]

—Where the testimony of a witness as to a material fact was not shaken at the trial on cross-examination, and was believed by the judge who saw and heard the witness, the Court of Appeal will not differ from the conclusion at which the judge arrived at as to the nature of that evidence, although if it had been on affidavit, the court might not have treated it as satisfactory. *Smith v. Land and House Property Corporation*, 28 Ch. D. 7—C. A.

S. P. Cleather v. Twisden, 28 Ch. D. 353; 52 L. T. 330—C. A.

On the evidence before the Court of Appeal, one of the judges would have come to the contrary conclusion, but that the finding of the president, who had seen and heard the witnesses, ought not to be reversed. *Wright v. Sanderson*, *Sanderson, In re*, 9 P. D. 149; 53 L. J., P. 49; 50 L. T. 769; 32 W. R. 560; 48 J. P. 180—C. A. Per Cotton, L. J.

Entering Judgment instead of Ordering New Trial.]—See ante, col. 22.

10. COSTS OF THE APPEAL.

No Note of Judgment of Court below.]—A decision on the construction of a will was reversed on appeal, but the court, on the ground that it was not furnished with any information as to the reasons given by the judge for his decision, refused to make any order as to the costs of the appeal. *McConnell, In re, Saunders v. McConnell*, 29 Ch. D. 76; 52 L. T. 80; 33 W. R. 359—C. A.

Judgment below varied.]—Where the Court of Appeal varies an order of the court below

upon a point not argued in that court, that is not enough to entitle the appellant to the costs of the appeal. *Games v. Bonnor*, 54 L. J., Ch. 517; 33 W. R. 64—C. A.

Where the Court of Appeal vary a judgment of the Admiralty Division that one of two vessels only is to blame for a collision by finding both to blame, no order will be made as to costs either in the Court of Appeal or in the court below, but each party will pay his own costs of the whole litigation. *The Hector* (No. 1), 52 L. J., P. 47; 48 L. T. 890; 5 Asp. M. C. 101—C. A.

Payment of, out of Fund in Court.]—Where a fund is the subject of an action, the costs of an unsuccessful appeal ought not, except on rare occasions, to come out of the fund, but ought to be borne by the unsuccessful appellant. *Barlow, In re, Barton v. Spencer*, 56 L. J., Ch. 795; 57 L. T. 95; 35 W. R. 737—C. A.

Several Parties Appearing Separately.]—Where a number of parties, having similar interests, have appeared by counsel in the court below, and an appeal is brought by one of them, all parties having similar interests as against the appellant should join, or be represented by one party alone, as but one set of costs will be allowed them against the appellant if the appeal is dismissed. *Cernwall v. Saurin*, 17 L. R., Ir. 595—C. A.

Copies of Documents for use of Court.]—The three judges in the Court of Appeal should each be provided with a copy of material documents (such as a copy of a will, the construction of which is in question) and the costs of the three copies should be allowed by the taxing-masters. *Randell, In re, Hood v. Randell*, 56 L. T. 8—C. A.

Shorthand Notes—Judgment.]—In future, the costs of appeal will include the costs of the shorthand writer's notes of the judgment appealed from, unless otherwise specially ordered. *Humphery v. Sumner*, 55 L. T. 649—C. A.

It is unnecessary for a successful appellant to make special application for allowance of the costs of the shorthand writer's note of the judgment of the court below. *Morgan, In re, Owen v. Morgan*, 35 Ch. D. 492—C. A.

—Evidence—Trustees.]—An action was brought by a beneficiary under a will against trustees, and was dismissed with costs, the defendants being allowed their "costs, charges, and expenses." The taxing-master then disallowed the costs of the shorthand-writer's notes of the evidence. The plaintiff appealed, and at the hearing of the appeal used and referred to the shorthand-writer's notes. The trustees also had a copy of the notes, but were not called on. Counsel for the trustees asked for the costs of the notes, but the lords justices refused to allow them as party and party costs against the appellant, but added: "It may be these costs are included in costs, charges, and expenses. On that we give no opinion." The taxing-master allowed the costs of the notes:—Held that the disallowance of the costs of the notes by the taxing-master, when taxing the costs of the trial of the action in the court below, did not affect the question as to their allowance in taxing the costs of the appeal:—Held further, that the use of the notes by the

appellant at the hearing of the appeal was conclusive that the notes were required on the appeal, and that the taxing-master was right in allowing them. *Nation, In re, Nation v. Hamilton*, 57 L. T. 648—Kay, J.

Against Solicitor personally—Appellant in formâ pauperis.]—A former solicitor of the plaintiff in an action, who was suing in formâ pauperis, served notice of appeal on all the defendants who had been successful in the court below. These respondents appeared by counsel on the hearing of the appeal, but no relief was then asked as against one of them. He had not been previously informed that the appeal would not be pressed against him, and had incurred expense in preparing to resist the appeal:—Held, that it was a proper case for giving leave to the respondent to serve the solicitor with a notice of motion for an order to show cause why he should not pay the costs incurred by serving notice of appeal without good cause. *Martinson v. Clowes*, 52 L. T. 706; 33 W. R. 555—C. A.

III. TO THE DIVISIONAL COURT.

Leave to appeal to Court of Appeal.]—That the divisional court is satisfied that its own judgment is right, is not a valid reason for not giving leave to appeal to the Court of Appeal. *Gilchrist, Ex parte, Armstrong, In re*, 17 Q. B. D. 521; 55 L. J., Q. B. 578; 55 L. T. 538—Per Esher, Ld., M.R.

School Board Election Petition—Appeal from Commissioner.]—The High Court has no jurisdiction to entertain an appeal against the decision of a commissioner appointed to inquire into alleged corrupt or illegal practices at a school board election, except on points of law reserved for its decision by way of a case stated by the commissioner. *Finsbury School Board Election, In re, Ayres, Ex parte*, 54 L. T. 296—D.

From Quarter Sessions.]—See JUSTICE OF THE PEACE.

From County Court.]—See COUNTY COURT.

In Interpleader.]—See INTERPLEADER.

From Mayor's Court.]—See MAYOR'S COURT.

IV. FROM THE JUDGE IN CHAMBERS.

To Divisional Court—Time for—Vacation.]—An order was made by the vacation judge in chambers on 11th Sept. and on 1st Oct. the plaintiff gave notice of appeal for the 24th Oct.:—Held, that Order LIV. rule 24. and Order LII. rule 5, applied, and that the plaintiff should have given notice of appeal within five days from the decision appealed against, and that therefore the notice of appeal was out of time. *Steedman v. Hakin*, 59 L. T. 607.—D. Affirmed, 22 Q. B. D. 16; 58 L. J., Q. B. 57; 37 W. R. 208—C. A.

Motion to Discharge—Judge in Court—Counsel—Appeal.]—When an order has been made by a judge in chambers, the court has no power to alter that order unless upon motion, under sect. 50 of the Judicature Act, 1873, to discharge the order. Where all parties concerned have been

represented by counsel in chambers, the practice is for the chief clerk to give a certificate, and upon that the parties may go direct to the Court of Appeal. *Attorney-General v. Llewellyn*, 58 L. T. 367.—Kay, J.

Where an order had been made in chambers by way of final judgment against an executor, on motion ex parte, on behalf of the executor, for leave to appeal direct to the Court of Appeal from such order:—Held, that the court would not give such leave unless all the parties were represented by counsel in chambers: the proper course is to move to discharge the order. *Somerville, In re, Downes v. Somerville*, 56 L. T. 424—Kay, J.

—Time.]—In an administration action by next of kin against administratrix, the conduct of which had been given to a creditor, an order was made, on the application of the administratrix, by the judge in chambers, directing the taxation of the costs of the plaintiff, the defendant, and the creditor, and the application of the funds in court in payment of a debt and then pro tanto of the costs when taxed, priority being given to the costs of the defendant. Liberty was also given to any of the parties to apply in chambers as to the getting in of an outstanding asset, and generally:—Held, that this was an interlocutory order, and that a notice of motion in court to vary it, given after the expiration of twenty-one days, was too late. *Lewis, In re, Lewis v. Williams*, 31 Ch. D. 623; 54 L. T. 198; 34 W. R. 410—C. A.

Where a motion was made to discharge an order made in chambers more than twenty-one days after such order had been pronounced, the court held that the motion was made too late, and refused it with costs. *Hardwidge, In re*, 52 L. T. 40—Kay, J.

Where a summons, taken out on the 25th March, was heard on the 30th June, when the chief clerk made no order, and on the 23rd Oct. the chief clerk refused an application to adjourn it into court on the ground of lapse of time; on summons on the 29th Oct. for the opinion of the judge upon the chief clerk's refusal to make an order upon the summons of the 25th March:—Held, that though no time was limited for an adjournment into court by sect. 50 of the Judicature Act, 1873, the court would not hesitate to act by analogy, and the application being in the nature of an appeal from the summons of the 25th March, should have been made within twenty-one days from the hearing of that summons. *Norwich Equitable Fire Assurance Company, In re, Brasnett's Case*, 51 L. T. 620; 33 W. R. 270—V.-C. B.

—Fresh Evidence.]—After a summons has been heard by the judge specially in chambers, and he has given his decision upon it, further evidence, which was not before him in chambers, will not be received upon motion in court to discharge the order made in chambers. *Munns and Longden, In re*, 50 L. T. 536—Kay, J.

Probate Division—Special Leave.]—The practice with reference to appealing from orders in chambers in the Probate Division is the same as that which is followed in the Chancery Division—namely, that special leave must be obtained from the judge, which leave is signified by a certificate from the judge that he does not re-

quire to hear any further argument in the case. *Smith, In re, Rigg v. Hughes*, 9 P. D. 68; 53 L. J., p. 62; 50 L. T. 293; 32 W. R. 355—C. A.

V. FROM MASTER TO THE JUDGE.

Interpleader—Summary Decision—Leave.]—An appeal lies to a judge at chambers from the summary decision by a master disposing of the merits of the claims in an interpleader where special leave to appeal has been given by such master. *Webb v. Shaw*, 16 Q. B. D. 658; 55 L. J., Q. B. 249; 54 L. T. 216; 34 W. R. 415—D.

Quere whether an appeal does not lie without leave to a judge at chambers, under Ord. LIV. r. 21, from every order or decision of a master at chambers, including a decision in an interpleader proceeding by a master in a summary way under Ord. LVII. r. 8. *Bryant v. Reading*, 17 Q. B. D. 128; 55 L. J., Q. B. 253; 54 L. T. 524; 34 W. R. 496—C. A.

Upon the true construction of Ord. LIV. rr. 12 and 21, and Ord. LVII. rr. 8 and 11, an appeal lies from a summary decision of a master in an interpleader proceeding to a judge at chambers. *Clench v. Dooley*, 56 L. T. 122—D.

APPOINTMENT, POWER OF.

Exercise by Will.]—See WILL.

Under Marriage Settlements.]—See HUSBAND AND WIFE.

In other Cases.]—See SETTLEMENT.

APPORTIONMENT.

Will coming into Operation before, Death of Tenant for Life after, Apportionment Act, 1870.]—A testator who died before the Apportionment Act, 1870, came into operation, gave the income of his residuary estate, which included railway, preference, and ordinary stock, to his wife for life, with remainder to his nephews. The widow claimed under the old law and received the entire dividends upon the railway stock which were declared and became receivable after the testator's death. On the death of the widow the residuary legatees claimed the whole of the railway dividends becoming payable after the death of the widow:—Held, that the executors of the widow were entitled, under the new law, to an apportioned part of the dividends up to her death. *Lawrence v. Lawrence*, 26 Ch. D. 795; 53 L. J., Ch. 982; 50 L. T. 715; 32 W. R. 791—Pearson, J.

Dividends on Consols.]—A testator, who died in 1878, bequeathed all his "moneys due on mortgage, securities for money, and ready money," to trustees upon trust for his children.

Part of the testator's property consisted of the proportion of dividend on Consols to the date of the testator's death:—Held, that the proportion of dividend on the Consols did not pass, as the Apportionment Act, 1870, applied, and the dividend must therefore be apportioned as at the date of the testator's death. *Beaven, In re, Beaven v. Beaven*, 53 L. T. 245—Kay, J.

Rent.]—Rent as between landlord and tenant is apportionable under the Apportionment Act, 1870. *Hartcup v. Bell*, 1 C. & E. 19—Manisty, J.

— Eviction between Quarter Days.]—A landlord who has wrongfully evicted his tenant between two quarter days is not entitled to the apportioned rent up to the day of eviction under the Apportionment Act, 1870. *Clapham v. Draper*, 1 C. & E. 484—Mathew, J.

— Will excusing Rent due at time of Death.]—A testator directed his executors "to forgive to my tenant all rent or arrears of rent which may be due and owing from him at the time of my decease." The rent was due at Lady-day and Michaelmas. The testator died in February:—Held (*dissentiente* Fry, L.J.), that the effect of the clause in the will was to forgive to the tenant the rent due at the quarter-day preceding the testator's death, and that the Apportionment Act, 1870, did not affect the bequest so as to entitle the tenant to be forgiven the rent down to the day of the testator's death. *Lucas, In re, Parish v. Hudson*, 55 L. J., Ch. 101; 54 L. T. 30—C. A.

APPRENTICE.

Infant—Validity of Indenture.]—By an apprenticeship deed the master covenanted to find the apprentice fair and reasonable work during the term, and pay him wages at a certain rate during the term. The apprentice (an infant) and his father covenanted that the master should not be liable to pay any wages to the apprentice so long as his business should be interrupted by any turn out, and the apprentice was expressly authorized by the deed, during any such turn out, to employ himself in any other manner or with any other person for his own benefit. The apprentice absented himself from work, and the master applied, under 38 & 39 Vict. c. 90, for an order to compel him to return. The magistrate refused the application:—Held, that the magistrate was right, as the deed was invalid and incapable of being enforced against the infant, by reason of the clause providing for the cessation of wages, which was a stipulation necessarily to the prejudice of the infant. The proviso entitling the infant to earn money elsewhere did not alter the character of the preceding clause so as to make the whole deed equitable or capable of being upheld. *Leslie v. FitzPatrick* (3 Q. B. D. 229), questioned. *Meakin v. Morris*, 12 Q. B. D. 352; 53 L. J., M. C. 72; 32 W. R. 661; 48 J. P. 344—D.

APPROPRIATION.

Of Payments.]—See PAYMENT.

Of Goods to meet Bills of Exchange.]—See post, col. 127.

Of Specific Goods to Contract.]—See SALE.

ARBITRATION, REFERENCE, AND AWARD.

I. IN ORDINARY CASES.

1. *Parties.*
2. *The Submission.*
 - a. What Included in.
 - b. Making Submission a Rule of Court.
 - c. Staying Proceedings.
 - d. Revocation.
 - e. Breach of Agreement to Refer.
 - f. Condition Precedent to Action.
 - g. Powers of High Court.
3. *The Arbitrator.*
4. *The Umpire.*
5. *The Award.*
6. *Costs.*

II. COMPULSORY REFERENCES.

1. *Common Law Procedure Act.*
2. *Judicature Act, 1873, ss. 56, 57.*

III. REFERENCE TO A MASTER.

IV. IN PARTICULAR CASES.

1. *Architect's or Surveyor's Certificates.* See BUILDING CONTRACTS.
2. *In case of Building Societies.* See BUILDING SOCIETY.
3. *Under Agricultural Holdings Act.* See LANDLORD AND TENANT.
4. *As to Damages in Shipping Cases.* See SHIPPING.
5. *Under Lands Clauses Act.* See LANDS CLAUSES ACT.
6. *As to Regulation of Mines.* See MINES AND MINERALS.
7. *Under Public Health Act.* See HEALTH.
8. *Between Railway Companies.* See RAILWAY.
9. *Under Waterworks Clauses Act.* See WATER.

I. IN ORDINARY CASES.

1. PARTIES

Death of Plaintiff before Award—Damage to Realty.]—Where an action of tort dying with the person is referred to arbitration by an order made by consent, and with a stipulation that the award shall bind the representatives in the case of the death of either party, and the plaintiff dies before the award, the action abates, and the plaintiff's executors cannot be substituted. *Bowker v. Evans*, 15 Q. B. D. 565; 54 L. J., Q. B. 421; 53 L. T. 801; 33 W. R. 695—C. A.

2. THE SUBMISSION.

a. What Included In.

Inferior Quality.]—A contract for the sale of wheat to arrive, contained a clause that any dispute arising thereout should be referred to arbitration, as therein provided. On its arrival, the buyer claimed the right to reject it, on account of inferiority in quality. The sellers at once called for an arbitration. The arbitrators made an award that the purchasers should take the wheat with an allowance:—Held, that the award was invalid, inasmuch as the only question submitted to the arbitrators was the buyer's right to reject. *Sinidino v. Kitchen*, 1 C. & E. 217—Hawkins, J.

—“**Dispute arising on this Contract.**”—By a contract in writing the defendants “sold to” the plaintiff a cargo of cotton seed cake of a specified quality. The contract contained a clause that “should any of the above goods turn out not equal to quality specified, they are to be taken at an allowance, which allowance, together with any dispute arising on this contract, is to be settled by arbitration.” The defendants signed the contract, with the addition of the word “brokers,” and were acting as agents. Sometime after the contract was signed, the defendants named their principals. The cargo proved to be of inferior quality, and an arbitration (which the plaintiff did not attend) to determine the liability of the defendants was held; the arbitrators decided by their award that the defendants were not liable; inasmuch as a custom existed that a broker, upon naming his principals, ceased to be liable on the contract. After trial of the action, the jury found that the alleged custom did not exist:—Held (Fry, L.J., diss.) that the defendants were not relieved from their liability by the award, inasmuch as the arbitrators had exceeded their jurisdiction. *Hutcheson v. Eaton*, 13 Q. B. D. 861; 51 L. T. 846—C. A.

Payment on Certificate of Engineer—Refusal to certify—“All Disputes.”—A contract for the sale of locomotives provided for payment of the price upon the certificate of the engineer that the locomotives were in perfect working order at Croydon, and, by a subsequent clause, that “all disputes are to be settled by” arbitration. The locomotives were delivered at Croydon, but the engineer refused to certify, or to give his reasons for not certifying. The vendors thereupon proceeded under the arbitration clause, the purchasers taking part under protest. An award was given in favour of the vendors:—Held, that a dispute had arisen within the arbitration clause, and that, whether the arbitrator was right or wrong, as he had not exceeded his jurisdiction, the court would enforce the award. *Hohenzollern Actien Gesellschaft and the Contract Corporation, In re*, 54 L. T. 596—C. A.

Building Contract.—A building contract between the plaintiff and the defendants (Commissioners of Public Works), contained the following arbitration clause:—“It is hereby agreed that in case of any difference between the Commissioners and the contractor in relation to any of the works, matters, and things herein contracted for, or to the meaning of these presents or to the

plans, sections, specifications, descriptions, or particulars, or to any money to be paid or retained, or to any act, matter or thing done, or omitted to be done, by either of the parties hereto, under or by virtue of any of the provisions, covenants or stipulations of these presents, and whether such difference shall relate to any act done by the Commissioners for the purpose of determining this contract . . . then, and in any such case, the same shall be referred to such arbitrator as the Commissioners shall appoint, whose decision shall be based upon the provisions of these articles, and shall be final, binding and conclusive upon the parties hereto." The plaintiff alleged that, whilst the works were in progress the Commissioners directed some of them to be suspended, and that they directed additional works, not provided for by the contract, to be executed; and in the present action, he claimed; (1) 1112*l.* 10*s.* damages for the suspension; (2) 3658*l.* 8*s.* 6*d.* for materials and labour in the additional works; (3) 570*l.* 10*s.* 2*d.* for furniture supplied to the Commissioners at their request; and (4) 66*l.* 15*s.* 4*d.* interest on these sums. After notice of action, the Commissioners, by deed-poll, also signed by the plaintiff (and with his assent so testified), referred the plaintiff's claim for 5408*l.* (being the total of the said sums) to the arbitration of K. The plaintiff, before any award was made, and before the submissions in the original contract or the last mentioned deed-poll were made rules of court, revoked the authority of K. as arbitrator and commenced the present action for the moneys claimed, in which the Commissioners undertook to appear without prejudice to any of their rights, and before appearance entered, they applied to the court to stay the action, and for a compulsory order of reference to K. as arbitrator:—Held, (1), that the plaintiff was entitled to revoke the appointment of K. and had effectively done so; (2) that item No. 1 of the claim was clearly outside the submission in the building contract; and the remaining items not being satisfactorily shown to be within the submission, and all the items being so far connected as to make it doubtful whether complete justice would be done to the parties, unless all were disposed of by the same tribunal, the court, in the exercise of its discretion, refused the application. *Moyers v. Soady*, 18 L. R., Ir. 499—*Ex. D.*

Partnership Articles—Continuance after Expiration of Term.—A partnership was continued after the expiration of the term specified in the articles of partnership. The articles contained an arbitration clause, providing, in effect, that all disputes or questions respecting the partnership affairs, or the construction of the articles, should be referred to arbitration. There were also clauses providing for the purchasing by the continuing partners of the share of a deceased partner. An action was brought by the executors of a deceased partner against the surviving partner for the winding-up of the partnership. The defendant moved for a stay of proceedings and a reference of the matters in difference between the parties to arbitration. One of the questions was, whether it was for the court or for the arbitrators to determine which of the clauses in the articles, and in particular whether the purchasing clauses, applied to the partnership so carried on after the expiration of the

term:—Held, that it was for the arbitrators, and not for the court, to determine which of the articles applied; and that a stay of proceedings must be directed, and a reference of all matters in difference to arbitration. *Cope v. Cope*, 52 L. T. 607—*Kay, J.*

b. Making Submission a Rule of Court.

Agreement to appoint Valuers.—An agreement between landlord and tenant for the letting of a farm provided, that the tenant should be paid at the expiration of the tenancy the usual and customary valuation, as between outgoing and incoming tenant, in the same manner as he paid on entering the premises. And it was thereby mutually agreed by and between the parties thereto, that, when any valuation of the covenants should be made between the tenant and the landlord, or his incoming tenant, the persons making such valuation should take into consideration the state, condition, and usage of the farm, and, if not left in a proper and creditable state, should determine what sum of money should be paid to the landlord as compensation therefor, and should deduct such sum from the amount of the valuation. On the expiration of the tenancy, there being no incoming tenant, the landlord and tenant respectively appointed a valuer. The valuers could not agree upon the amount of the valuation, and they appointed an umpire, who held a sitting and heard witnesses, and then made and published an award in writing. The tenant, with the view of obtaining an order remitting the matters in dispute to the umpire for reconsideration, applied for an order to make the submission to arbitration contained in the agreement, together with the appointment of arbitrators and umpire, a rule of court, under s. 17 of the Common Law Procedure Act, 1854:—Held, that the agreement did not contain any submission to arbitration, but that it provided only for the appointment of valuers, and that it could not, therefore, be made a rule of court. *Hopper, In re* (2 L. R., Q. B. 367), explained and distinguished. *Dawdy, In re*, 15 Q. B. D. 426; 54 L. J., Q. B. 574; 53 L. T. 800—*C. A.*

c. Staying Proceedings.

In what Cases.—See *Cope v. Cope*, *supra*.

General Agreement to refer future Disputes—Submission to particular Arbitrators.—An arbitration clause in an agreement between the plaintiffs and the defendant provided that, if any dispute should arise between the parties touching that agreement, the dispute should be referred to two named arbitrators, or their umpire, the provisions of the Common Law Procedure Act, 1854, to apply to the reference. A dispute having arisen in respect of moneys alleged to have become due and payable from the defendant to the plaintiffs under the agreement, the defendant gave notice to proceed to arbitration. The plaintiffs thereupon brought an action for the moneys and revoked their submission to the arbitrators:—Held, that the defendant was not entitled to have the proceedings in the action stayed under s. 11 of the Common Law Procedure Act, 1854, because after the plaintiffs' revocation of the submission, there was, in respect of the particular dispute which had arisen,

no subsisting agreement to refer capable of being carried into effect. *Deutsche Springstoff Actien Gesellschaft v. Briscoe*, 20 Q. B. D. 177; 57 L. J., Q. B. 4; 36 W. R. 557—D. See *Moyers v. Soady*, supra, and cf. *Mitchell and Governor of Ceylon*, *In re*, infra.

d. Revocation.

Bankruptcy.—Bankruptcy of one of the parties to an arbitration, during the course of the arbitration, and before the making of the award, does not operate as a revocation of the submission. *Edwards, Ex parte, Smith, In re*, 3 M. B. R. 179—D.

Appointment of Arbitrator by one Party.]—

Where there is an agreement to refer a dispute to two arbitrators, one to be appointed by each party, but no agreement to make the submission a rule of court, and one of the parties having failed to appoint an arbitrator, the other party, by virtue of s. 13 of the Common Law Procedure Act, 1854, appoints his arbitrator to act as sole arbitrator, the authority of such arbitrator may be revoked by either party before an award is made. *Fraser v. Ehrensperger*, or *Fraser, In re*, 12 Q. B. D. 310; 33 L. J., Q. B. 73; 49 L. T. 646; 32 W. R. 240—C. A.

Incorporation of Common Law Procedure Act, 1854.]—By a contract in writing it was provided that disputes between the contracting parties should be referred to arbitration. The contract did not contain an express stipulation that the submission should be made a rule of court, but by one of its clauses it was agreed that the provisions of the Common Law Procedure Act, 1854, with regard to arbitration, as far as they were applicable, should apply to the arbitration therein agreed to. A dispute arising out of the contract having been referred, one of the parties revoked the submission. The arbitrator proceeded ex parte, and made his award:—Held, that the submission was not duly revoked; that the incorporation in the submission of the Common Law Procedure Act, 1854, was equivalent to an agreement that the submission should be made a rule of court; and that the case was, therefore, within the provisions of 3 & 4 Will. 4, c. 42, s. 39, and the submission was not revocable without the leave of the court. *Mitchell and Governor of Ceylon, In re*, 21 Q. B. D. 408; 57 L. J., Q. B. 524; 59 L. T. 812; 36 W. R. 873—C. A. Cf., *Deutsche, etc. v. Briscoe*, supra.

Mistake of Arbitrator in Law.]—The court has power to give leave to revoke a submission to arbitration where it appears that the arbitrator is going wrong in point of law, even in a matter within his jurisdiction. *East and West India Dock Company v. Kirk*, 12 App. Cas. 738; 57 L. J., Q. B. 295; 58 L. T. 158—H. L. (E.)

e. Breach of Agreement to Refer.

Damages.]—In an action for damages for breach of an agreement to refer disputes to arbitration, the plaintiff can recover only nominal damages if he would not have been entitled to succeed in the arbitration. *Brunsdon v. Staines Local Board*, 1 C. & E. 272—Mathew, J.

f. Condition Precedent to Action.

Fire Insurance—Proviso against suing before Arbitration.]—In an action on a fire policy the defendant pleaded that the policy was made subject to a condition that, if any difference should arise in the adjustment of a loss, the amount to be paid should be submitted to arbitration, and the insured should not be entitled to commence or maintain any action upon the policy until the amount of the loss should have been referred and determined as therein provided, and then only for the amount so determined, that a difference had arisen, and the amount had not been referred or determined:—Held, that the determination of the amount by arbitration was a condition precedent to the right to recover on the policy, and the defence was an answer to the action. *Collins v. Locke* (4 App. Cas. 674) distinguished. *Viney v. Big-nold or Norwich Union*, 20 Q. B. D. 172; 57 L. J., Q. B. 82; 58 L. T. 26; 36 W. R. 479—D.

Burden of Proof that Reference required.]—The Railway Passengers' Assurance Company's Act, 1864, provides by s. 3 that any question arising on any contract of insurance shall, if either party require it, be referred to arbitration, and by s. 16 that if there be any question or difference as to the liability of the company, it shall, if either the company or the persons claiming require it, and as a condition precedent to the enforcing of any claim to which the question or difference relates, be referred to arbitration. S. 33 provides that if any policy-holder or his representatives begin any action against the company in respect of the matters to be referred to arbitration under the provisions of the act, the court or a judge, on application by the company after appearance, "upon being satisfied that no sufficient reason exists why the matters cannot be or ought not to be referred to arbitration, and that the company were, at the time of the bringing of the action or suit, and still are, ready and willing to concur in all acts necessary and proper for causing the matters to be decided by arbitration," may make an order staying all proceedings in the action or suit. The representatives of a policy-holder in the company made a claim against the company. The company disputed it, but did not give notice that they required the question to be referred to arbitration. The claimants then brought an action, whereupon the company took out a summons to stay proceedings in the action:—Held, that the provisions of ss. 3 and 16 apply to cases in which a reference to arbitration is required before an action is begun; that s. 33 applies to cases in which an action has been begun before a reference is asked for, and that in such cases the party claiming has a right to bring an action, and that it must then be a question of discretion in each case whether the action ought or ought not to be stayed. *Hodgson v. Railway Passengers' Assurance Company* (9 Q. B. D. 188) explained. *Fox v. Railway Passengers' Assurance Company*, 54 L. J., Q. B. 505; 52 L. T. 672—C. A.

g. Powers of High Court.

To appoint Receiver, and stay all further Proceedings.]—Where there is an agreement to

refer all matters in dispute under a contract to arbitration, and an action is subsequently brought under the contract, in which it is found to be desirable, for the protection of the property which is the subject of the contract, that a receiver should be appointed or an injunction granted, it is competent for the court to appoint a receiver or grant an injunction, and by the same order to stay all further proceedings in the action, except for the purpose of carrying out the order for a receiver or an injunction, with a view to a reference to arbitration. The form of order to be made in such a case considered. *Compagnie du Senegal v. Woods or Smith*, 53 L. J., Ch. 166; 49 L. T. 527; 32 W. R. 111—Kay, J.

Injunction to restrain Proceedings.]—The lessee of a ferry served a notice on a railway company on behalf of himself and his lessors claiming compensation for injury to the ferry, and requiring the dispute to be submitted to arbitration under the Lands Clauses Act. The lessors had not given authority to use their names; the act of the railway company provided for compensating the lessors of the ferry, but did not mention their lessee; and the notice claimed one lump sum without distinguishing the interests of the lessors and the lessee. The railway company brought an action for an injunction to restrain the lessee from proceeding to arbitration under the notice:—Held, that a proceeding in the name of a person who had given no authority ought to be stayed, and that an injunction ought to be granted, the unauthorised use of the name of the lessors distinguishing the case from *North London Railway v. Great Northern Railway* (11 Q. B. D. 30):—But held, on appeal, that though the court in which an action is brought has jurisdiction to stay proceedings in it if it has been brought without authority, the court has no general jurisdiction to restrain persons from acting without authority, and that an injunction could not be granted to restrain a person from taking proceedings out of court in the name of a person who had given no authority to use it. *London and Blackwall Railway v. Cross*, 31 Ch. D. 354; 55 L. J., Ch. 313; 54 L. T. 309; 34 W. R. 201—C. A.

To stay Proceedings.]—See *supra*.

3. THE ARBITRATOR.

Power to strike out and add Claims.]—Where an arbitrator was appointed having all the powers of a judge at nisi prius, and of a judge at chambers:—Held, that such arbitrator had no power to strike out or add claims, but must make a final end and determination of all the matters before him. *Wilson v. Condé D'Eu Railway*, 51 J. P. 230—D.

Enforcing Attendance of Witnesses.]—A reference of a cause and of "all matters in difference between the parties" to a referee empowered to enter judgment on the award, is not a "trial" within the meaning of 17 & 18 Vict. c. 34, s. 1, so as to enable a party to enforce by subpoena the attendance before the referee of a witness not within the jurisdiction. *Hall v. Brand*, 12 Q. B. D. 39; 53 L. J., Q. B. 19; 49 L. T. 492; 32 W. R. 133—C. A.

Mercantile Reference—Implied Contract to Pay Remuneration.]—The parties in a mercantile dispute agreed to refer their differences to arbitrators (who were not in the legal profession), or in case of disagreement to their umpire. The arbitrators disagreed and appointed an umpire who made his award:—Semble, that there was an implied contract by the parties jointly to pay the arbitrators and umpire reasonable remuneration for their services. *Crampton v. Ridley*, 20 Q. B. D. 48; 57 L. T. 809; 36 W. R. 554—A. L. Smith, J.

4. THE UMPIRE.

Election of—Validity.]—Where in an action for dissolution of partnership the matters in difference were referred to arbitration, and two arbitrators were appointed, and the two arbitrators met at an hotel to appoint an umpire, and each man nominated a man unknown to the other, and put the two names into a hat, and directed the waiter to draw one out, and the lot fell upon Brown, the person nominated by the plaintiff's umpire, on motion on behalf of the defendant:—Held, that the arbitrators not knowing whether the persons respectively nominated by each other were fit to act as umpire, the appointment was bad. An arbitrator intrusted with the duty of appointing an umpire has no right to evade his judicial duty by leaving the appointment to chance. *Pescod v. Pescod*, 58 L. T. 76—Kay, J.

Remuneration.] See *Crampton v. Ridley*, *supra*.

5. THE AWARD.

Time for making Award—Enlargement by Court.]—By a submission in writing the time within which the award was to be made was fixed at one month. The submission contained no power to enlarge the time. The award was in fact made after the expiration of the month:—Held, that the court had power subsequently to the making of the award to enlarge the time under s. 15 of the Common Law Procedure Act, 1854. *May v. Harcourt*, 13 Q. B. D. 688—D.

The court cannot enlarge the time for making an award under the Public Health Act, 1875 (38 & 39 Vict. c. 55), beyond the period limited in s. 180. *Mackenzie and Ascot Gas Company, In re*, 17 Q. B. D. 114; 55 L. J., Q. B. 309; 34 W. R. 487—D.

Application to Set aside—Valuation.]—On the sale of land one of the conditions of sale was that the purchaser should pay for the timber on the land at a valuation, and it was provided for the purpose of such valuation that each party should appoint a valuer, and the valuers thus appointed should, before they proceeded to act, appoint by writing an umpire, and that the two valuers, or, if they disagreed, their umpire, should make the valuation. The two valuers appointed being unable to agree, the umpire made the valuation:—Held, that such valuation was not in the nature of an award on an arbitration, and therefore an application to set it aside must be refused. *Carus-Wilson, In re, or Wilson and Green, In re*, 18 Q. B. D. 7; 56 L. J., Q. B. 530; 55 L. T. 864; 35 W. R. 43—C. A.

— **Evidence of Witness contrary to his previous Testimony.**—The court will refuse to set aside an award of an arbitrator on the ground that the evidence of a material witness differed from and was contrary to evidence he had previously given in another arbitration, which fact the party against whom the evidence was given only discovered subsequently to the award. *Smith v. Sainsbury* (8 Bing. 31) followed. *Glasgow and South Western Railway and London and North Western Railway, In re*, 52 J. P. 215—D.

— **Affidavits not served with Notice of Motion.**—A party to an arbitration gave notice of motion to set aside the award, and intended to rely upon affidavits in support of the motion; the affidavits were not served with the notice of motion, and not until the day after. At the hearing it was contended, by way of preliminary objection, that the affidavits could not be used because of non-compliance with the provision of Ord. LII. r. 4. On the other hand, it was submitted that such non-compliance was an irregularity which might be amended by the court under Ord. LXX. r. 1:—Held, that the court had power under Ord. LXX. r. 1, to give relief, and cure the irregularity of non-compliance with the provision of Ord. LII. r. 4, and that the affidavits might be read. *Wyggeston Hospital and Stephenson, In re*, 54 L. J., Q. B. 248; 52 L. T. 101; 33 W. R. 551—D.

6. COSTS.

— **Reference of all Matters in Difference—Costs in the Cause.**—Where after writ in an action "all matters in difference between the parties" are referred to an arbitrator, and the order of reference contains a clause that "the costs of the said cause, and the costs of the reference and award, shall be costs in the cause," the arbitrator has power to deal with all the costs, and may order the successful plaintiff to pay the defendant's costs. *Hayward v. Moss*, 49 J. P. 248—D.

— **To abide "Event"—All matters in Difference.**—An action and all matters in difference were referred, the costs of the cause, reference, and award to abide the event:—Held, on the authority of *Ellis v. Desilva* (6 Q. B. D. 521), that the word "event" must be construed distributively; and that, consequently, upon an award by which the arbitrator decided in the plaintiff's favour upon the claim in the action, but in the defendant's favour upon a matter in difference not raised in the action, the plaintiff was entitled to the costs of the action and the defendant to the costs of the matter on which he had succeeded. *Gribble v. Buchanan* (18 C. B. 691) not followed. *Hawke v. Brear*, 14 Q. B. D. 841; 54 L. J., Q. B. 315; 52 L. T. 432; 33 W. R. 613—D.

— **Cause referred.**—In an action the defendants denied all the allegations of the statement of claim, and, as an alternative defence, paid a sum of money into court in satisfaction of the plaintiffs' claim. This sum the plaintiffs did not accept. The cause was referred, the costs of the cause, reference and award to abide the event. The arbitrator found all the issues, except one as to special damage, in favour of the plaintiffs; and he also found that the money paid into court

was enough to satisfy the plaintiffs' claim in respect of the subject-matters of the action:—Held, that the defendants were entitled to the general costs of the action and award, and to the costs of the issues found in their favour; but that the plaintiffs were entitled to the costs of the issues on which they had succeeded, for that the costs ought in such a case to be taxed in the same manner as though the action had been tried out in the ordinary course of law. *Goutard v. Carr*, 53 L. J., Q. B. 55; 32 W. R. 242—C. A.

— **Counter-Claim.**—Where an action is referred to an arbitrator, "the costs of the said cause, of the reference, and of the award to abide the event," and the plaintiff is successful on his claim, and the defendant on his counter-claim, the amount recovered by the plaintiff exceeding the amount recovered by the defendant on his counter-claim, the defendant is entitled to the costs of the issues on which he is successful, notwithstanding that the subject-matter of the claim and counter-claim is the same. *Pearson v. Ripley*, 50 L. T. 629; 32 W. R. 463—D.

On a reference to arbitration the costs to "abide the event," the word "event" means the event of the whole action, and where the plaintiff is substantially successful in the action he is entitled to the general costs of the action, and the defendant only to the costs of those issues on which he has been successful, notwithstanding that on the reference the defendant has recovered more upon his counter-claim than the plaintiff on his claim, and that the success of the plaintiff on the whole action is due to the defendant having paid money into court prior to the reference. In an action to recover 417*l.* for work and labour done, the defendant paid into court 178*l.*, and as to the residue pleaded negligence and disobedience to orders as a defence, and also counter-claimed for 500*l.* damages in respect thereof. The action being referred, "the costs of the cause to abide the event," the arbitrator awarded the plaintiff 7*l.* beyond the amount paid into court and awarded the defendant 18*l.* on his counter-claim:—Held, that as the plaintiff had been substantially successful in the action, the proper order was that the plaintiff should tax the general costs of the action and the defendant the costs of those issues raised by his counter-claim on which he had been successful. *Waring v. Pearman*, 50 L. T. 633; 32 W. R. 429—D.

Where in an action which was referred to arbitration—costs of the cause and of the reference and award to follow the event—the amount found to be due on a counter-claim arising out of the contract exceeded the amount found to be due on a claim also arising out of the contract, and the arbitrator awarded that the plaintiff should pay the balance due to the defendant:—Held, that the defendant was entitled to the costs of the cause and of the reference and award, but that the plaintiff was entitled to the costs of those issues upon which he had succeeded; and that judgment should be entered accordingly. *Lund v. Campbell*, 14 Q. B. D. 821; 54 L. J., Q. B. 281; 53 L. T. 900; 33 W. R. 510—C. A.

— **Less than £50 recovered—Counterclaim.**—The plaintiffs having claimed from the defen-

dant, in respect of a contract, a sum greater than 50%, and having been awarded upon certain issues a sum less than 20%, and the defendant having been awarded 63% upon his counterclaim, upon an application by the plaintiffs to be allowed the costs of the issues found in their favour:—Held, that the plaintiffs, having recovered a sum less than 20%, were, by virtue of the operation of s. 5 of the County Courts Act, 1867, not entitled to the costs of the issues upon which they had succeeded. *Ahrbecker, or Ahrbecket v. Frost*, 17 Q. B. D. 606; 55 L. J., Q. B. 477; 55 L. T. 264; 34 W. R. 789—D.

— **On High Court Scale—Jurisdiction.**—An action of contract was referred by consent, the costs to abide the event of the award, and judgment on the award to be entered in the High Court. The arbitrator found for the plaintiff for a sum less than 50%, and judgment was entered accordingly:—Held, that a judge at chambers had jurisdiction under Ord. XLV. r. 12, to order the plaintiffs' costs to be taxed on the High Court scale. *Hyde v. Beardesley*, 18 Q. B. D. 244; 56 L. J., Q. B. 81; 57 L. T. 802; 35 W. R. 140—D.

Taxation—Negotiating and settling Terms of Submission—"Costs of Reference."—Where upon a reference by consent, but not in a cause, the costs of the reference are left in the discretion of the arbitrator, the costs of negotiating and settling the terms of the submission may be allowed on taxation as "costs of the reference." *Autothreptic Steam Boiler Company, In re*, 21 Q. B. D. 182; 57 L. J., Q. B. 488; 59 L. T. 632; 37 W. R. 15—D.

— **Special Case.**—The costs of a special case stated by the arbitrator are costs incidental to the arbitration within the meaning of s. 34 of the Lands Clauses Consolidation Act, 1845, and are therefore costs over which the Court of Appeal has no jurisdiction. *Holliday and Wakefield (Mayor), In re* 20 Q. B. D. 699; 57 L. J., Q. B. 620; 59 L. T. 248; 52 J. P. 644—C. A.

— **Shorthand Writer's Notes.**—Before an arbitration an arrangement was made between the parties that a shorthand writer should, on behalf of both parties, take notes of the arbitration, and that the costs of the notes and transcripts should be costs in the arbitration. After four days this arrangement was rescinded. On taxation the master disallowed the costs of these notes except those taken during the time the arrangement lasted:—Held, that these costs were rightly disallowed as on a reference the costs of shorthand notes ought not, as a general rule, to be allowed. *Autothreptic Steam Boiler Company, In re*, 59 L. T. 632—D.

— **Number of Counsel.**—There is no universal rule that in an arbitration the fees of one counsel only can be allowed. *Orient Steam Navigation Company v. Ocean Marine Insurance Company*, 35 W. R. 771—D.

— **Public Health Act.**—Two local authorities, whose districts were adjacent, agreed to carry out a joint sewage scheme by an agreement, in which it was stipulated that all disputes as to the matters comprised therein should be settled

by arbitration in the manner provided by sections 179 and 180 of the Public Health Act, 1875. An award was made which provided that one of the authorities should pay to the other the costs of the reference and award, without stating the amount of such costs. Upon motion for an order directing the taxation of the costs:—Held, that as the submission to arbitration had been made a rule of court, the taxing-master was bound to tax the costs upon the application of the successful party, and that it was not obligatory to bring an action upon the award in order to enable him to do so. *Chesterfield Corporation and Brompton Local Board, In re*, 50 J. P. 824—D.

II. COMPULSORY REFERENCES.

1. COMMON LAW PROCEDURE ACT.

What may be referred.—An action may be referred under s. 3 of the Common Law Procedure Act, 1854, although the question in dispute does not consist entirely of matters of mere account. *Martin v. Fyfe*, 49 L. T. 107; 31 W. R. 840—D. But in C. A. though not reversed, the matter was referred to an official referee. 50 L. T. 72—C. A.

Under s. 3 of the Common Law Procedure Act, 1854, the court or a judge has jurisdiction to refer compulsorily the whole matter in dispute in an action, if any part of the matter in dispute consists of matter of mere account which cannot conveniently be tried in the ordinary way. *Knight v. Coales*, 19 Q. B. D. 296; 56 L. J., Q. B. 486; 35 W. R. 679—C. A. Fry and Lopes, L.JJ.

2. JUDICATURE ACT, 1873, ss. 56, 57.

What may be referred.—If any part of the matter in dispute can be brought within s. 3 of the Common Law Procedure Act, 1854, as being matter of mere account which cannot conveniently be tried in the ordinary way, then s. 57 of the Judicature Act, 1873, applies, and the court or a judge has jurisdiction to refer compulsorily, under that section, all the issues in the cause. *Knight v. Coales*, supra.—By Lord Esher, M.R.

Upon what Terms—Special Referee.—The court or a judge has no power to refer any cause or matter to a special referee without the consent of the parties thereto. Where one of the parties to a cause objected to a reference to a special referee, the judge, in ordering the cause to be tried by an official referee, ordered that "the extra costs occasioned by a trial before an official referee instead of a special referee be reserved":—Held, that the judge had jurisdiction to insert these terms in the order. *London and Lancashire Fire Insurance Company v. British American Association*, 54 L. J., Q. B. 302; 52 L. T. 385—D.

Peremptory Appointment for proceeding with Reference.—A referee, whether official or special, and whether he has to try a matter or report thereon, has power, subject to the control of the

court, to peremptorily appoint a day for the hearing of the reference, and, in the absence of either party, to proceed with the same. *Wenlock (Baroness) v. River Dee Co.*, 53 L. J., Q. B. 208; 49 L. T. 617; 32 W. R. 220—C. A.

Mode of Conducting Inquiry.—The Judicature Act, 1873, s. 56, contemplates an inquiry by the examination of witnesses, and not only an inquiry by personal observation of the referee. *Wenlock (Baroness) v. River Dee Company*, 19 Q. B. D. 155; 56 L. J., Q. B. 589; 57 L. T. 320; 35 W. R. 822—C. A.

It was not intended by the Judicature Act that an official referee should decide the issue in an action; he is only to ascertain the facts so as to enable the court to decide the issue. *Cardinall v. Cardinall*, 25 Ch. D. 772; 53 L. J., Ch. 636; 32 W. R. 411—Pearson, J.

Application to set aside Report—Time.—Where there has been a reference under s. 57 of the Judicature Act, 1873, and one of the parties is dissatisfied with the findings of the referee, he may move to set the report aside at any time before judgment has been given upon it. The practice as laid down in *Dyke v. Cannell* (11 Q. B. D. 180), is not altered by the rules of the Supreme Court, 1883. *Bedborough v. Army and Navy Hotel Co.*, 53 L. J., Ch. 658; 50 L. T. 173—Kay, J.

III. REFERENCE TO A MASTER.

Power of Court to inquire into Report.—Where a receiver has been appointed and certain questions have been referred to a master of the Queen's Bench Division to report, the report of the master, by analogy to the practice in the Chancery Division in respect to the certificate of a chief clerk, is not final and conclusive; the court therefore has power to inquire into the accuracy of such report. *Walmsley v. Mundy, Ex parte Goodenough*, 13 Q. B. D. 807; 53 L. J., Q. B. 304; 50 L. T. 317; 32 W. R. 602—C. A.

The court will, as a rule, accept the findings of a master upon the evidence brought before him, and this rule is hardly ever departed from. Still there is no rule to prevent the court entering into such matters; and if something in the findings appeared to be manifestly wrong, or if some fresh evidence had since been adduced, the court would not be bound to accept the master's report, which would otherwise acquire the semblance of a judgment. *Simmons, In re*, 33 W. R. 706—D.

sation cases on the compulsory purchase of property are entitled to be remunerated on a percentage of the sum awarded, according to Ryde's scale. *Debenham v. King's College, Cambridge*, 1 C. & E. 438—Wills, J.

ARMY AND NAVY.

Person subject to Military Law—Canteen Steward.—A canteen steward appointed by the commanding officer of the district, acting under a committee consisting of three officers, and having no interest in the profits of the canteen, but receiving such pay or allowance as the committee may think fit to award him, and being liable to dismissal at the pleasure of the committee, though performing no military duty, wearing no uniform, bearing no arms, and having free ingress and egress at his pleasure to and from the barracks, is still a person subject to military law within s. 176, sub-s. 4, of the Army Act, 1881. *Flint, Ex parte*, 15 Q. B. D. 488; 33 W. R. 936; 50 J. P. 454—D.

Officer in Navy—Right to resign Commission.—A commissioned officer in the Royal Navy who has accepted an appointment to serve on board one of her Majesty's ships in commission, and who is entered on the ship's books is not entitled without permission from the Admiralty to resign his commission and to leave his ship. Such an officer does not by resigning his commission without the permission of the Admiralty cease to be "a person belonging to her Majesty's navy" within s. 87 of the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109). Section 50 of the Naval Discipline Act, 1866, which provides that every officer in command of one of her Majesty's ships, or the senior officer present at a port, may by warrant under his hand authorise any person to arrest any offender subject to this act for any offence against the act mentioned in such warrant, does not prevent a naval officer, being "a person subject to the act" within the meaning of s. 51, from arresting such offender without a warrant. *Reg. v. Cuming, Hall, Ex parte*, 19 Q. B. D. 13; 56 L. J., Q. B. 287; 57 L. T. 477; 36 W. R. 9; 51 J. P. 326; 6 Asp. M. C. 189; 16 Cox, C. C. 315—D.

Pay of Surgeon in Navy—Attachment.—The pay of a surgeon in her Majesty's navy who is in active service cannot be assigned, and therefore cannot be attached for costs. *Apthorpe v. Apthorpe*, 12 P. D. 192; 57 L. T. 518; 35 W. R. 728—C. A.

Indian Officer's Pension—Execution.—The pension of an officer of her Majesty's forces, being by s. 141 of the Army Act, 1881, made inalienable by the voluntary act of the person entitled to it, cannot be taken in execution, even though such pension be given solely in respect of past services, and the officer cannot again be called upon to serve:—Held, that an order appointing a receiver of such pension was bad. *Birch v. Birch* (8 P. D. 163) approved;

ARCHITECT.

Certificate of.—See BUILDING CONTRACTS.

Duties and Powers as to Buildings under Metropolis Management Acts.—See METROPOLIS.

Remuneration—Ryde's Scale.—No custom exists by which surveyors engaged in compen-

Dent v. Dent (1 L. R., P. 366) distinguished. *Lucas v. Harris*, 18 Q. B. D. 127; 56 L. J., Q. B. 15; 55 L. T. 658; 35 W. R. 112; 51 J. P. 261—C. A.

Domicil of Choice—Military Service of Crown.]

—The rule that a British subject does not, by entering into and remaining in the military service of the Crown, abandon the domicil which he had when he entered into the service, applies to an acquired domicil as well as to a domicil of origin. An infant, whose father was then living in Jersey, where he had acquired a domicil in place of his English domicil of origin, obtained a commission in the British army in 1854 and joined his regiment in England. He served with the regiment in different parts of the world, and ultimately, in 1863, he died in Canada, where he then was with the regiment. He had in the meantime paid occasional visits to Jersey while on leave:—Held, that he retained his Jersey domicil at the time of his death. *Macreight, In re, Paxton v. Macreight*, 30 Ch. D. 165; 55 L. J., Ch. 18; 53 L. T. 146; 33 W. R. 838—Pearson, J.

Right of Soldiers to Vote.]—See ELECTION LAW.

ARREST.

See DEBTORS ACT.

ARTIZANS.

Dwellings—"Owner"—Time when Ownership to be ascertained.]—By various sections of the Artizans' and Labourers' Dwellings Act, 1875, notice of all proceedings, &c., under the act are directed to be served upon the "owner" of the premises which are being dealt with by the local authority; by s. 3 "owner" is to include "all lessees or mortgagees of any premises required to be dealt with under this act, except persons holding or entitled to the rents and profits of such premises for a term of years, of which twenty-one years do not remain unexpired."—In July, 1886, the tenant of premises was possessed of them as assignee of a lease expiring at Michaelmas, 1886, and was also the assignee of another lease of the same premises for twenty-one years, commencing on the expiration of the first lease. In the same month the vestry, in the exercise of their powers under the act, caused copies of the reports of their officer of health and their surveyor, with a notice of the time and place appointed for their consideration, to be served upon the tenant, as being the "owner" under s. 7 of the act. In the following October an order was made by the vestry for the demolition of the premises. The work required was done by the tenant, who upon

its completion applied to and obtained from the vestry a charging order upon the premises:—Held, that although the interest of the tenant in the new lease was in law only an interesse termini, he had such an interest in the premises at the time when the proceedings were initiated by service of the notices upon him as to make him the "owner" within the meaning of the section, and, that the point of time to be looked at in order to determine the ownership for the purposes of the act was the date of the service of the notices and not of the making of the order for demolition. *Reg. v. St. Marylebone Vestry*, 20 Q. B. D. 415; 57 L. J., M. C. 9; 58 L. T. 180; 36 W. R. 271; 52 J. P. 534—D.

Compensation—Duty of Arbitrator.]—

When an arbitrator has been appointed under the Artizans' and Labourers' Dwellings Improvement Act, 1875, to assess compensation for lands proposed to be taken compulsorily under that act, it is his duty to assess the compensation for such lands upon the footing that the interest in respect of which a claim is made is an existing interest, and it is not his duty to decide whether the interest does or does not exist. *Wilkins v. Birmingham (Mayor)*, 25 Ch. D. 78; 53 L. J., Ch. 93; 49 L. T. 468; 32 W. R. 118; 48 J. P. 231—Mathew, J.

From the date when the local authority shall have published once in three successive weeks the particulars mentioned in s. 6 of the schedule to the Artizans' Dwellings Act, the relation of vendor and purchaser is created for the purpose of fixing the subject-matter of compensation, and the effect of the publication of such particulars is analogous to the effect of a notice to treat under the Lands Clauses Consolidation Act, 1845. Section 121 of the Lands Clauses Consolidation Act, 1845, is incorporated in the Artizans' Dwellings Act, *Id.*

Appeal—Verdict of Jury—Interest payable.]—

Where a corporation had lodged in court the sum awarded by an arbitrator as compensation in respect of land taken compulsorily under the Artizans' and Labourers' Dwellings Act, 1875, and entered into possession, and such sum was afterwards increased by the verdict of a jury:—Held, that interest at the rate of 4 per cent. upon the difference was payable from the time when the corporation entered into possession until payment thereof into court: that in the case of an appeal under the act from the arbitrator's award to a jury, the function of the jury is to assess the compensation to be paid as at the date of the final award, and the jury's verdict expresses the sum which ought to have been certified by the award. *Shaw and the Birmingham Corporation, In re*, 27 Ch. D. 614; 54 L. J., Ch. 51; 51 L. T. 684; 33 W. R. 74—Chitty, J.

Power to Enter into Possession.]—The Artizans' and Labourers' Dwellings Act, 1875 schedule, ss. 18 and 20, empower a local authority to enter into possession after payment to the party entitled, or after payment into court of the sum awarded by the arbitrator. *Id.*

ASSIGNMENT.

1. *Equitable Assignment.*
2. *Right of Assignee to Sue in his own Name.*
3. *Other Points.*

1. EQUITABLE ASSIGNMENT.

Fund must be Mentioned.]—An order by a creditor to his debtor to pay a sum of money to a third person is not an equitable assignment unless it specifies the fund or debt out of which the payment is to be made. Thus, where A., a builder, being a debtor to the plaintiff, P., but a creditor of the defendant, handed to P. the following order signed by A. and addressed to the defendant, who received due notice thereof: "Please pay P. the amount of his account, 42*l.* 1*s.* 6*d.* for goods supplied."—Held, that the order did not operate as an equitable assignment, and that the document was merely a polite note by one person asking another person to pay his debt, and imposed no kind of obligation upon that other person to do so. *Percival v. Dunn*, 29 Ch. D. 128; 54 L. J., Ch. 570; 52 L. T. 320—V.-C. B.

Insurance Money—Cash.]—A., having made his will in 1880, by which he gave the income of his property to his wife B., fell ill in 1887, and, being in anticipation of death, signed the following document:—"1887, March 1,—I give all my insurance money that is coming to me to my wife B. for her own use, as well as 200*l.* in the bank. This is my wish.—A., witness, C." This document was, at A.'s request, placed with his will, and remained there till his death in April, 1887. Evidence having been admitted as to the circumstances attending the execution of the document:—Held, that effect could not be given to the document as an immediate assignment of the property therein mentioned. *Hughes, In re*, 59 L. T. 586; 36 W. R. 821—C. A.

Notice.]—In 1885 a limited company made an equitable assignment to H. & Co. in the following terms:—"We hold at your disposal the sum of 425*l.* due from Messrs. Cayzer, Irvine & Co., for goods delivered by us to them up to the 31st December, 1884, until the balance of our acceptance of 660*l.* has been paid." No notice of this assignment to the debtor was given by H. & Co. until after a petition for winding-up the company had been presented:—Held, on the true construction of the letter, that H. & Co. were entitled to the whole debt up to the amount of 425*l.*; and that no notice of the assignment was necessary to perfect the assignment as between the assignor and the assignees, and that the assignment was therefore complete before the winding-up. *Gorringe v. Irwell India Rubber Works*, 34 Ch. D. 128; 56 L. J., Ch. 85; 55 L. T. 572; 35 W. R. 86—C. A.

The defendants were auctioneers, and had sold for a customer a brewery, and part of the proceeds of the sale was in their hands subject to their claim for charges incurred in connexion with the sale; they had also in their hands the balance of the price of some furniture sold by them for the same customer. The plaintiff was a creditor of the defendants' customer, and the customer by letter charged the proceeds of the

sale of the brewery in favour of the plaintiff. The defendants wrote to the plaintiff acknowledging the receipt of the letter of charge:—Held, that the letter of charge and the defendants' acknowledgment thereof amounted to a good equitable assignment in favour of the plaintiff. *Webb v. Smith*, 30 Ch. D. 192; 53 L. T. 737—C. A.

See also *Gason v. Rich*, ante, col. 8.

2. RIGHT OF ASSIGNEE TO SUE IN HIS OWN NAME.

"Absolute Assignment"—Judicature Act, 1873, s. 25, sub-s. 6.]—A deed by which debts were assigned to the plaintiff upon trust that he should receive them and out of them pay himself a sum due to him from the assignor, and pay the surplus to the assignor:—Held, an "absolute assignment (not purporting to be by way of charge only)" within the Judicature Act, 1873, in his own name for the debts. *Burlinson v. Hall*, 12 Q. B. D. 347; 53 L. J., Q. B. 222; 50 L. T. 723; 32 W. R. 492; 48 J. P. 216—D.

A landlord borrowed money of the plaintiff and gave him a letter addressed to his tenant (of which the tenant had notice) directing him to pay to the plaintiff the rent until the order should be countermanded by the plaintiff:—Held, that this was an absolute assignment under s. 25, sub-s. 6, of the Judicature Act, 1873, and that the plaintiff could sue the tenant for the rent. *Knill v. Prowse*, 33 W. R. 163—D.

The defendants, who were executors and trustees under a will, sent to G., one of the residuary legatees, a statement of account showing a balance to be due to him on account of his share of the residuary estate. G., who lived in Australia, sent this account to his daughter, the plaintiff, with the following direction on it in his handwriting: "I hereby instruct the trustees in power to pay to my daughter, Laura Harding, the balance shown in the above statement. . . ." Notice in writing of this document was given by the plaintiff to the defendants, but they refused to be bound by it:—Held, that the document was a valid assignment of the balance in the hands of the defendants, and that the plaintiff was entitled to recover the amount. *Harding v. Harding*, 17 Q. B. D. 442; 55 L. J., Q. B. 462; 34 W. R. 775—D.

— Notice of Assignment after Assignor's Death.]—By a deed of assignment all moneys then or hereafter to be standing to the credit of the assignor at a bank were assigned to a trustee, on trust for the assignor for his life, and after his death on other trusts. At the date of the assignment the assignor's balance at the bank was 48*l.*, at his death it was 217*l.* Notice of the assignment was not given to the bank until after the assignor's death. In an action by the trustee against the bank to recover the balance of 217*l.*:—Held, that the bank, being a stranger to the assignment, could not set up the defence that it was voluntary and therefore invalid in equity; that the balance at the time of the assignor's death was a debt or legal chose in action within the meaning of s. 25, sub-s. 6, of the Judicature Act, 1873; that notice after the death of the assignor was sufficient; and that the plaintiff was entitled to recover. *Walker v. Bradford Old Bank*, 12

Q. B. D. 511; 53 L. J., Q. B. 280; 32 W. R. 645—D.

—Chose in Action.]—Sub-s. 6 of s. 25 of the Judicature Act, 1873, does not prevent the ultimate assignee of a debt from suing in respect of it in the name of the original creditor, free from any equities which would have been available against an intermediate assignee, but not against the original creditor. *Milan Tramways Company, In re, Theys, Ex parte*, 25 Ch. D. 587; 50 L. T. 545; 32 W. R. 601—C. A.

Action for Specific Performance.]—A local authority, having compulsory powers of purchase, gave notice to a landowner to treat, and the amount of compensation was assessed by a jury. Before completion the landowner conveyed the land to the plaintiffs, subject to the claim of the local authority:—Held, that the plaintiffs could maintain an action against the local authority for the specific performance of the contract arising out of the notice to treat and subsequent assessment of value, without joining as plaintiff the landowner to whom the notice was given. *Burr v. Wimbledon Local Board*, 56 L. T. 329; 35 W. R. 404—Keke-wich, J.

Restraint of Trade—Action to enforce Covenant.]—See CONTRACT.

Solicitor's Bill of Costs.]—A solicitor assigned his bill of costs and the right to recover on it, and the assignee gave notice of the assignment, and delivered the bill to the party to be charged, inclosed in a letter signed by himself. After the expiration of a month he brought an action in his own name on the bill of costs:—Held, that the plaintiff was an assignee within s. 37 of the Solicitors' Act, 1843, and was entitled to maintain the action. *Ingle v. McCutchan*, 12 Q. B. D. 518; 53 L. J., Q. B. 311—D.

3. OTHER POINTS.

Stamping Document.]—O'C. & Co. contracted with the defendants to supply them with timber, and the defendants thereupon became indebted to O'C. & Co. in the sum of 460*l*. O'C. & Co., when the defendants were so indebted to them, addressed a letter to the defendants as follows:—"We do hereby authorise and request you to pay to A. the sum of 395*l*. 10*s*., due from you to us for goods sold and delivered by us to you, and the receipt of A. will be a good discharge." This instrument was duly stamped as an assignment but was not stamped with an impressed stamp as a bill of exchange. In an action on the instrument, the defence denied its validity, on the ground that it was a bill of exchange within the Stamp Act, 1870 (33 & 34 Vict. c. 97), and had not been stamped as such before its execution. On demurrer by the plaintiff:—Held, that the defence was bad. *Adams v. Morgan*, 14 L. R., Ir. 140—C. A.

Moneys due under Building Contract—Contractor bankrupt—Validity.]—A building contract provided that payments should be made, as the work proceeded, of such sums on account of the price of the work as should be stated in the certificates of an architect, such certificates

to be given at the architect's discretion at the rate of 80 per cent. upon the contract value of the work done at the dates of such certificates, and that the remaining 20 per cent. should be retained till the completion of the work. The contract empowered the building owners, in the event of the contractors committing an act of bankruptcy, to discharge them from the further execution of the work, and employ some other person to complete it, and to deduct the amount paid to such other person for completing the same from the contract price. The contractors assigned a portion of the retention moneys, *i.e.*, the price of work done under the contract retained under the before-mentioned provision, by way of mortgage to secure a debt, and notice of the assignment was given to the building owners. After making such assignment the contractors filed a petition for liquidation, the works then remaining incomplete. A trustee in liquidation and a committee of inspection were appointed. The trustee, in pursuance of a resolution of the committee, completed the work, himself advancing money for that purpose, of which an amount exceeding that of the retention moneys assigned as aforesaid was still unpaid, there being no other assets from which he could be recouped in respect thereof. The trustee and the mortgagee both claimed the amount of the retention moneys assigned as aforesaid from the building owners. On an interpleader issue to try the title to such moneys:—Held, that, in the absence of anything to show that the building owners had exercised the power of taking the work out of the contractors' hands, the trustee must be taken to have completed the work under the original contract as trustee of the contractors' estate, and not as a person employed to complete the work in substitution for the contractors; that the assignment of the retention moneys held good as against the trustee; and that the mortgagees were therefore entitled to succeed. *Tooth v. Hallett* (4 L. R., Ch. 242) distinguished. *Drew v. Josolyne*, 18 Q. B. D. 590; 56 L. J., Q. B. 490; 57 L. T. 5; 35 W. R. 570—C. A.

Divisibility of Contract.]—A colonial statute embodied a contract by which a company agreed to construct and complete a railway in the colony, on behalf of the Colonial Government, in a certain time, in consideration of an annual subsidy, to be paid for a certain period, "such annual subsidy to attach in proportionate parts and form part of the assets of the company as and when each section is completed," and of a grant of land "upon completion of each section." The company, under the powers of their charter, afterwards assigned a portion of the undertaking and "all their interest in the subsidy" to trustees to secure the payment of certain bonds. The company failed to complete the railway:—Held, first, that on completion of each section of the railway a proportionate part of the subsidy became payable for the whole period; secondly, that the claim of the company to the grant of land became complete as each section of the railway was completed; thirdly, that if the Colonial Government had claims against the company, such Government might relieve itself pro tanto from payment of the subsidy by counter-claim; fourthly, that as the claims of the trustees arose out of the same contract, such claims were subject to a similar counter-claim.

Newfoundland Government v. Newfoundland Railway, 13 App. Cas. 199; 57 L. J., P. C. 35; 58 L. T. 285—P. C.

Allowance out of Lunatic's Estate not Assignable.]—On a decree for judicial separation an order was made for payment of 60*l.* a year to the wife as permanent alimony. The husband was afterwards found lunatic by inquisition, and by an order in lunacy and chancery the dividends of a sum of stock to which he was entitled in a chancery suit were ordered to be carried to his account in the lunacy, and 60*l.* a year to be paid out of them to his wife in respect of her alimony till further order. The wife assigned the annuity to a purchaser, who presented a petition in lunacy, and in the suit to have the annuity paid to her:—Held, that the petition must be refused, on the ground that whether the annuity was considered as alimony or as an allowance made to the wife by the court in lunacy, it was not assignable. *Robinson, In re*, 27 Ch. D. 160; 53 L. J., Ch. 986; 33 W. R. 17—C. A.

Of Trust Fund — Duty of Assignee as to Notice.]—When an assignment is made of an interest in trust funds, part of which is in court and part in the hands of trustees, the assignee in order to complete his title must, as regards the funds in the hands of the trustees, give notice to the trustees. Notice to the trustees will be ineffectual as regards the fund in court, and as to that fund the priorities of different assignees will be determined by the dates at which they have obtained stop-orders. An assignee who has obtained a stop-order is entitled (as regards the fund in court) to priority over a prior assignee (of whose assignment he had no notice) who had given notice to the trustees before the date of the stop-order, but who had not himself obtained a stop-order. *Mutual Life Assurance Society v. Langley*, 26 Ch. D. 686; 51 L. T. 284; 32 W. R. 792—Pearson, J.

Life and Accident Policies.]—See INSURANCE.

Of Leases.]—See LANDLORD AND TENANT.

Of Bill of Sale—Whether Registration Required.]—See BILLS OF SALE.

When an Act of Bankruptcy.]—See BANKRUPTCY.

Right of Assignee of Judgment to Garnishee Order.]—See ATTACHMENT OF DEBTS.

Of Debt — Specially Indorsed Writ — Sufficiency.]—See PRACTICE (WRIT).

writ of attachment. *Salm Kyrburg v. Posnanski*, 12 Q. B. D. 218; 53 L. J., Q. B. 428; 32 W. R. 752—D.

Application in Chancery Division, how made.]—An application in the Chancery Division for leave to issue a writ of attachment is not properly made by summons in Chambers, but should be made in open Court by motion. *Davis v. Galmoye*, 39 Ch. D. 322; 58 L. J., Ch. 120; 60 L. T. 130; 37 W. R. 227—C. A.

Breach of Injunction—Non-service of Order—Notice.]—In order to justify the committal of a defendant for breach of an injunction it is not necessary that the order granting the injunction should have been served upon him, if it is proved that he had notice of the order aliunde, and knew that the plaintiff intended to enforce it. This rule is not limited to cases in which a breach is committed before there has been time for the plaintiff to get the order drawn up and entered. *James v. Downes* (18 Ves. 522), and *Vansandau v. Rose* (2 Jac. & W. 264), discussed and explained. *United Telephone Company v. Dale*, 25 Ch. D. 778; 53 L. J., Ch. 295; 50 L. T. 85; 32 W. R. 428—Pearson, J.

Writ not Issued.]—An attachment may be issued for breach of an injunction, although no writ of injunction has been actually issued, when the defendant, after being served with the decree or order for injunction, has disobeyed it. *Mining Company of Ireland v. Delany*, 21 L. R., Ir. 8—V. C.

For Non-payment of Debt and of Costs.]—See DEBTORS ACT.

For Non-compliance with Decree in Restitution Suit.]—See HUSBAND AND WIFE.

Contempt of Court.]—See CONTEMPT OF COURT.

Of Solicitors—Summary Jurisdiction.]—See SOLICITOR.

Committal or Attachment — Amendment of Notice of Motion.]—A motion having been made by the plaintiff to attach the defendant for disobedience to an order, it was objected by the defendant that the plaintiff's remedy, if any, was by committal:—Held, that the distinction between committal and attachment still existed, and that, although permission would be given to the plaintiff to amend his notice of motion, yet the motion must stand over for service of the notice as amended. *Callow v. Young*, 56 L. J., Ch. 690; 56 L. T. 147—Chitty, J.

Personal Service—Waiver.]—A motion was made for the attachment of a solicitor for non-compliance with an order of the court upon him, to deliver a bill of costs within a fortnight. It appeared that the order had not been personally served upon him, but had been left with his clerk at his office. The solicitor had written giving reasons for his delay, and promising the bill of costs during the then ensuing week:—Held, that personal service of the order was necessary, and that the necessity for such personal service had not been waived by the letter, and that therefore the motion for attach-

ATTACHMENT.

I. OF PERSONS.

II. OF DEBTS.

I. OF PERSONS.

Jurisdiction of Judge at Chambers.]—A judge at chambers has power to give leave to issue a

ment must be dismissed. *Cunningham, In re*, 55 L. T. 766—North, J.

Service on Solicitor—Indorsement on Order—Waiver.—Ord. XLI. r. 5, which requires any order to bear an indorsement warning the party bound by it of the consequences of disobedience, applies to an order for discovery of documents of which service on the solicitor is permitted. And a writ of attachment cannot be issued against a person who disobeys such an order unless the copy served on his solicitor bore the required indorsement. A party whose solicitor was served with such an order without the required indorsement, took out a summons for further time:—Held, that he did not thereby waive the irregularity of the service. *Hampden v. Wallis*, 26 Ch. D. 746; 54 L. J., Ch. 83; 50 L. T. 515; 32 W. R. 808—C. A.

Breach of Undertaking.—There is no distinction in regard to the service of a notice of motion for leave to issue a writ of attachment between contempt in breach of an undertaking, and contempt in breach of an injunction. Where, therefore, the defendant, in an action, had committed a breach of his undertaking contained in an order of the court, made on motion for an injunction, and personal service of a motion for leave to issue an attachment against him could not be effected, the order was made upon affidavit of service upon the solicitor who had acted for the defendant in the action, notwithstanding that he had ceased so to act shortly after the date of the undertaking. *Callow v. Young*, 55 L. T. 543—Chitty, J.

Indorsement of Order—Tender of Expenses.—An order for attachment of the defendant was made by a district registrar in respect of default in attendance on a future appointment; it also appeared that there was no tender of conduct money in respect of her expenses and that the order was not properly endorsed under Ord. XLI. r. 5:—Held, that any one of these points was fatal to the validity of the order for attachment. *Shurrock v. Lillie*, 52 J. P. 263—D.

Form of Notice of Motion for Attachment—Sufficiency of Affidavit.—By order of the 28th of February, 1884, the defendant was directed to pay a sum into court by the 13th of March. This order not having been served before the 13th of March, an order was made on the 3rd of April, enlarging the time until four days after service of the two orders. The plaintiff served the two orders, indorsing on the former the notice given in Ord. I. of the 7th of January, 1870, but putting no indorsement on the latter. The money not having been paid in, the plaintiff moved for an attachment "for your default in obeying the orders made herein on the 28th of February last and the 3rd of April last," supporting it by an affidavit that the defendant had not borrowed the order for the purpose of paying in the money, nor given notice of having paid in the money:—Held, that as the second order did not require the defendant to do any act, but only extended the time for doing the act mentioned in the first order, it was sufficient to endorse the first order only. *Treherne v. Dale*, 27 Ch. D. 66; 51 L. T. 553; 33 W. R. 96—C. A.

Held, also, that the indorsement was sufficient in form, for that although not in the words of

the indorsement given in the rules of 1883, Ord. XLI., r. 5, it was to the same effect. *Ib.*

Held, also, that having regard to the nature of the orders, a notice of motion to attach "for default in obeying" them sufficiently stated the grounds of the application within the meaning of Ord. LII., r. 4. *Ib.*

Held, also, that though the affidavit in support of the application would probably have been held insufficient to support an attachment, if the motion had been heard on affidavit of service, the defect was cured by the defendant's appearing and resisting the application on other grounds. *Ib.*

Service of Copy of Affidavit with Motion.—On giving a notice of motion to commit a defendant for contempt in disobeying an order for discovery, the plaintiffs omitted to serve with the notice of motion a copy of an affidavit which they stated in the notice that they should read in support of the motion:—Held, that Ord. LII., r. 4, applied to such a notice of motion, and not only to a case in which a writ of attachment would have issued under the old common law practice, and that the notice of motion was therefore irregular. *Litchfield v. Jones*, 25 Ch. D. 64; 32 W. R. 288—North, J.

But held, that the motion should not be at once dismissed, but should be ordered to stand over until after the hearing of a summons by the defendant for further time to make the discovery. *Ib.*

Irregularity.—The affidavit in support of a motion for attachment was not served with the notice of motion as it ought to have been under Ord. LII., r. 4, but was served two clear days before the day named in the notice of motion for moving the court:—Held, that this was not such an irregularity as made the notice invalid. *Hampden v. Wallis*, supra, per Chitty, J.

It is irregular under Rules of Supreme Court, 1883, Ord. LII., r. 4, not to serve with a notice of motion for attachment copies of the affidavits intended to be used on the motion; the copy affidavits, and the notice should be served together, and, if not served personally, at the address for service. (See Ord. IV., r. 1; XII., r. 10; LXVII., r. 2.) *Petty v. Daniel*, 34 Ch. D. 172; 56 L. J., Ch. 192; 55 L. T. 745; 35 W. R. 151—Kay, J.

An irregularity committed in the course of any proceedings under the Rules of the court does not necessarily render the proceedings void; under Ord. LXX., r. 1, the court has power to condone the irregularity. Therefore, where an order for attachment for contempt of court had been made against a defendant on a motion the affidavits in support of which had not been served with the notice of motion, as required by Ord. LII., r. 4, the court, being satisfied that a contempt had been committed, refused, in the exercise of the discretion conferred on it by Ord. LXX., r. 1, to set it aside; but under the circumstances the defendant, who was in prison under the attachment, was ordered to be released. *Hampden v. Wallis* (26 Ch. D. 746), and *Wyggeston Arbitration, In re* (33 W. R. 551), considered. *Ib.*

A summons or notice of motion to set aside proceedings for irregularity should state the

several objections on which the applicant intends to insist. (See Ord. LXX., r. 3.) *Ib.*

Sheriff—Execution of Writ—Breaking open Outer Door.]—Where a writ of attachment has issued against a party to an action for contempt of court in non-compliance with an order for the delivery over of deeds and documents, the officer charged with the execution of the writ may break open the outer door of the house in order to execute it. *Burdett v. Abbott* (14 East, 1), and *Freeston, In re* (11 Q. B. D. 545), discussed, *Harvey v. Harvey*, 26 Ch. D. 644; 33 W. R. 76; 48 J. P. 468—Chitty, J.

II. OF DEBTS.

Who entitled to—Assignee of Judgment.]—The assignee of a judgment debt is a person who has "obtained" a judgment within the meaning of Ord. XLV., r. 1, and is entitled to a garnishee order attaching debts due to the judgment debtor. *Goodman v. Robinson*, 18 Q. B. D. 332; 56 L. J., Q. B. 392; 55 L. T. 811; 35 W. R. 274—D.

What Attachable—"Debt, Legal or Equitable."]—In July, 1882, the plaintiff obtained a judgment against W. for 574*l.* in an action for breach of promise of marriage commenced in August, 1881. In May, 1881, W. became entitled to a legacy of 500*l.* under a will of which the defendant was executor. This legacy was in hand and ready to be paid over in October, 1881. On the 31st of May, 1881, and before the legacy became actually payable to W., he married; and on the 17th October, 1881, he, by deed between himself of the one part and the defendant of the other part, assigned the 500*l.* to the defendant upon trust to invest the money and pay the annual income to his wife for her separate use for life, and afterwards upon other trusts. On the 4th of January, 1883, the plaintiff obtained an order under s. 61 of the Common Law Procedure Act, 1854, attaching any sum or sums of money then in or which might come to the hands of the defendant, to answer the judgment recovered by her against W. Upon an issue directed to try whether on the 4th of January, 1883, there was a sum of money which the plaintiff was entitled, under Ord. XLV. (1883), and under the Common Law Procedure Act, 1854, to attach in the hands of the defendant, to satisfy the plaintiff's judgment debt against W.:—Held, that, even assuming the settlement of October, 1881, to be impeachable, there was nothing in the nature of a debt, either legal or equitable, due or accruing due from the defendant to W. (the judgment debtor) which could be attached to satisfy the judgment debt. *Vyse v. Brown*, 13 Q. B. D. 199; 33 W. R. 168; 48 J. P. 151; 1 C. & E. 223—Williams, J.

—Moneys accruing due—Sale of Lands.]—

A. mortgaged leaseholds by underlease to B., to secure 800*l.* A. subsequently agreed to sell the leaseholds to C. for 900*l.* C. paid a deposit of 30*l.*, and agreed to pay the balance of the purchase-money payable on a given day. By the agreement 800*l.* of the purchase-money was to be left on mortgage of the property sold. The same solicitors acted for A., B., and C. throughout the matter. A. executed an assign-

ment of the leaseholds to C., and C. entered into possession thereof:—Held, that A. was entitled to the 70*l.* balance of purchase-money from C., although no surrender had been obtained of B.'s underlease, and that therefore the sum of 70*l.* could be attached by the judgment creditor of A. *Owens v. Shield*, 1 C. & E. 356—Denman, J.

—Debt due to Judgment Debtor and Another jointly.]—The debt, legal or equitable, owing by a garnishee to a judgment debtor, which can be attached to answer the judgment debt, must be a debt due to such judgment debtor alone, and where it is only due to him jointly with another person it cannot be so attached. *Macdonald v. Tacquah Gold Mines Company*, 13 Q. B. D. 535; 53 L. J., Q. B. 376; 51 L. T. 210; 32 W. R. 760—C. A.

—Pension—Quarterly Instalment due and to become due.]—A quarterly instalment of a police constable's pension which is actually due to him may be attached under Ord. XLV., being "a debt owing" to him. Otherwise as to further instalments to become due in the future. *Booth v. Trail, Hayson, In re*, 12 Q. B. D. 8; 53 L. J., Q. B. 24; 49 L. T. 471; 32 W. R. 122—D.

—Pay of Surgeon in Navy.]—The pay of a surgeon in her Majesty's navy who is in active service, cannot be assigned, and therefore cannot be attached for costs. *Apthorpe v. Apthorpe*, 12 P. D. 192; 57 L. T. 518; 35 W. R. 728—C. A.

—Money found on Prisoner and retained by Police.]—Money in the possession of a prisoner which is taken by the police upon his apprehension, and retained by them after his conviction, does not render the police debtors to the prisoner, and is not a debt due from them to the prisoner which can be attached by a judgment creditor of the prisoner by garnishee proceedings under Ord. XLV. r. 1. *Bice v. Jarvis*, 49 J. P. 264—D.

Priorities—Equitable Charge—Notice.]—A garnishee order under Rules of Supreme Court, 1883, Ord. XLV., binds only so much of the debt owing to the debtor from a third party as the debtor can honestly deal with at the time the garnishee order nisi was obtained and served, consequently it is postponed to a prior equitable assignment of the debt, even in the absence of notice. *General Horticultural Company, In re, Whitehouse, Ex parte*, 32 Ch. D. 512; 55 L. J., Ch. 608; 54 L. T. 898; 34 W. R. 681—Chitty, J.

A creditor can only attach by a garnishee order such property of his debtor as the debtor could deal with properly and without violation of the rights of other persons. Therefore an equitable charge, obtained before a garnishee order, takes priority of the order, even where no notice of the charge was given. *Badeley v. Consolidated Bank*, 38 Ch. D. 238; 57 L. J., Ch. 468; 59 L. T. 419; 36 W. R. 745—C. A.

—Solicitor's Lien.]—Costs awarded upon an interlocutory application are subject to the lien of the solicitor for the party to whom they are given and cannot be attached by a judgment

creditor of the party to the prejudice of the lien. *Cormick v. Ronayne*, 22 L. R., Ir. 140—Ex. D.

—**Solicitor's Charging Order.**]—The amount of the debt and costs recovered by a plaintiff in an action had been levied, and were in the hands of the sheriff, when a judgment creditor of the plaintiff took out a garnishee summons to attach this money. After the summons was taken out, but before any order was made thereon, the solicitor who had acted for the plaintiff in the action, the proceeds of the judgment in which it was sought to attach, obtained under 23 & 24 Vict. c. 127, s. 28, from a judge at chambers, an order charging in his favour the money in the hands of the sheriff. The judgment creditor applied to set this order aside:—Held, that the charging order had priority and ought not to be set aside, that the judgment creditor who had taken out the garnishee summons was not a bonâ fide purchaser for value within 23 & 24 Vict. c. 127, s. 28, and that the word "property" in that section included both the debt and the costs recovered in the action. *Dallow v. Garrold*, 14 Q. B. D. 543; 54 L. J., Q. B. 76; 33 W. R. 219—C. A.

Bankruptcy—When Payment Protected.]—A judge's order made by consent was given by the defendant in a personal action to the plaintiffs authorising them to sign judgment for a certain amount, and judgment was accordingly signed. The consent order was not filed within twenty-one days after the making of the order, as required by section 27 of the Debtors Act, 1869. The judgment creditors subsequently obtained payment under a garnishee order of certain money owed by one Y. to the judgment debtor, and after such payment had been made the debtor was adjudged bankrupt:—Held, that as the consent order had not been filed within twenty-one days, and the bankruptcy of the debtor had intervened, both the order and the judgment upon which the garnishee order was based were void under s. 27; and that the trustee in bankruptcy was entitled to recover from the judgment creditors the money received by them under the garnishee order as money paid to the use of the trustee. *Brown, Ex parte, Smith, In re*, 20 Q. B. D. 321; 57 L. J., Q. B. 212; 36 W. R. 403—C. A.

—**Payment into Court to abide further Order—"Receipt of Debt."**]—A creditor having obtained a garnishee order in respect of a debt due to the judgment debtor, a third person intervened claiming that the debt was due to her; and the garnishee, under an order of the court, paid the amount into court to abide further order. A receiving order having been subsequently made against the judgment debtor, the third person withdrew her claim:—Held, that there had been no "receipt of the debt" by the creditor within the meaning of s. 45 of the Bankruptcy Act, 1883, so as to entitle him to retain it against the judgment debtor's trustee in bankruptcy. *Butler v. Wearing*, 17 Q. B. D. 182; 3 M. B. R. 5—Manisty, J.

Right of Garnishee to set off.]—A garnishee cannot set off against a judgment creditor a debt due to him (the garnishee) from the judgment debtor, if the garnishee was aware, from the commencement of the transaction which resulted

in his becoming indebted to the judgment debtor, that the judgment debtor's right to such debt could only be as trustee for the judgment creditor. *Fitt v. Bryant*, 1 C. & E. 194—Denman, J.

A garnishee can set off against a judgment creditor costs incurred by him but not paid at the time the issue is directed, against which the judgment debtor is bound to indemnify the garnishee. *Rymill v. Wandsworth District Board*, 1 C. & E. 92—Day, J.

Lapse of Six Years from Date of Judgment.]—A garnishee against whom proceedings under Ord. XLV. have been duly taken, may be ordered to pay to a judgment creditor a debt due from such garnishee to the judgment debtor, although more than six years have elapsed since the judgment. *Fellows v. Thornton*, 14 Q. B. D. 335; 54 L. J., Q. B. 279; 52 L. T. 389; 33 W. R. 258—D.

Effect of Order Nisi.]—By a decree of the Master of the Rolls, it was ordered that the plaintiff F. do pay to the defendant W. his costs of the action. By the decree of the Court of Appeal in the same case, the action was dismissed with costs to be paid by F. to the defendant S., when taxed. W.'s costs were taxed; S. was indebted to F. in a sum for rent, and W. obtained an order that the debt be attached for W.'s costs, unless within ten days cause be shewn to the contrary. When this order was obtained, S.'s costs had not been taxed, but they were taxed and certified before it was made absolute:—Held, that the order nisi had attached the debt, and it was ordered to be paid to W.'s administrators. *Fitzpatrick v. Waring*, 13 L. R., Ir. 2—M. R.

—**Duty to Stop Payment of Cheque.**]—Where a debtor draws a cheque in payment of a debt, which cheque is duly honoured and paid, there is no debt owing or accruing from the debtor to the creditor between the giving of the cheque and payment thereof. There is no duty upon the debtor who is served with a garnishee order nisi between such dates to stop payment of the cheque. *Elwell v. Jackson*, 1 C. & E. 362—Denman, J. Affirmed in C. A.

Conditional Order to Pay—Appearance by Defendant.]—Though a defendant cannot shew cause against a conditional order made on a garnishee to pay money alleged to be due to the defendant, yet, if served with the order, he is entitled to appear on the motion to make it absolute, and to inform the court by affidavit of such facts as may be material. And where a conditional order was made on occupying tenants to pay to the plaintiff rents alleged to be then due to the defendant, and the defendant made an affidavit shewing that the rents were not due to her, inasmuch as the lands had been sold some years previously to a third party:—Held, that the defendant was entitled to appear on the motion, and the conditional order was discharged. *Lovely v. White*, 12 L. R., Ir. 384—Q. B. D.

Order for Examination of Garnishee.]—A garnishee against whom an order absolute has been made and execution issued under Ord. XLV. rr. 3, 4, is a debtor within Ord. XLII. r. 32, and the judgment creditor is entitled under

that rule to an order for the garnishee's examination as to his means. *Cowan v. Carlill*, 52 L. T. 431; 33 W. R. 583—D.

Garnishee Order absolute on Default of Appearance—Effect of Debt not attachable.]—A claim on a fire policy having been made against an insurance company for unliquidated damages, the plaintiff, a judgment creditor of the assured for 127*l.*, duly served an *ex parte* garnishee order, under Ord. XLV., r. 1, on the company, attaching all debts owing or accruing from them to the assured. The company did not appear to shew cause against it, and the order was made absolute. An award on the claim was afterwards made of 248*l.* due to the assured, who assigned it to trustees for his creditors. The plaintiff demanded payment under his garnishee order of 127*l.* out of the sum payable by the company, and threatened them with execution, and the trustees claiming the 248*l.*, the company took out an interpleader summons on which an order was made directing the sum of 127*l.* to be paid into court, and an issue to be tried as to whether that sum was the property of the plaintiff or the trustees. On appeal:—Held, that although no attachable debt was in existence at the date of the garnishee order, yet it, not having been set aside, entitled the plaintiff to issue execution for 127*l.*, and that the interpleader order was wrong. *Randall v. Lithgow*, 12 Q. B. D. 525; 53 L. J., Q. B. 518; 50 L. T. 587; 32 W. R. 794—D.

ATTORNEY.

See SOLICITOR.

Power of.]—See POWER OF ATTORNEY.

ATTORNEY-GENERAL.

See CROWN.

AUCTIONEER.

See SALE.

AUDITOR.

See COMPANY.

AUSTRALIA.

See COLONY.

AVERAGE.

See INSURANCE—SHIPPING.

AWARD.

See ARBITRATION.

BAIL.

In Shipping Matters.]—See SHIPPING.

Contract to Indemnify.]—See CRIMINAL LAW.

BAILMENT.

Power of Sale in case of Pledge.]—See *France v. Clark*, 26 Ch. D. 257; 53 L. J., Ch. 585; 50 L. T. 1; 32 W. R. 466—C. A.

To Innkeeper.]—See INNKEEPER.

Of Goods and Animals for Carriage.]—See CARRIER.

Involuntary Bailees—Duty of.]—There is no duty cast upon the recipient with respect to goods sent to him voluntarily by another, and unsolicited by the recipient. *Howard v. Harris*, 1 C. & E. 253—Williams, J.

BAKER.

Sale of Bread—Delivery by Cart without Beam and Scales.]—The appellant, a baker, having received through his traveller an order from a customer for a quarter loaf, the manager of the baker's shop selected, weighed, and appropriated to the customer a loaf, which was then carried out in a cart and delivered to the customer, on credit, by a servant of the baker, without being provided with any beam and scales with proper weights:—Held, that the appellant was rightly convicted under 6 & 7 Will. 4, c. 37, s. 7, which enacts that every baker beyond certain metropolitan limits who shall "carry out bread for sale in and from any cart" shall be provided with a correct beam and scales with proper weights, in order that all bread sold by him may be weighed in the presence of the purchaser; and in case any such baker shall "carry out or deliver any bread" without being provided with such beam and scales with proper weights, he shall be liable to a penalty. *Ridgway v. Ward*, 14 Q. B. D. 110; 54 L. J., M. C. 20; 51 L. T.

704; 33 W. R. 166; 49 J. P. 150; 15 Cox, C. C. 603—D.

Sect. 7 of 6 & 7 Will. 4, c. 37, provides that every baker or seller of bread, and every servant employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart, shall be provided with a beam and scales with proper weights, in order that all bread sold by any such baker or seller of bread, or his servant, may be weighed in the presence of the purchaser thereof: and in case any "such baker or seller of bread" or his servant shall carry out or deliver any bread without being provided with such beam and scales, every such baker or seller of bread shall be liable to a penalty. A customer bought three loaves in a baker's shop. The baker weighed the loaves in her presence, and subsequently, at her request and to oblige her, his servant carried them out in a cart and delivered them at her house, without being provided with any beam and scales:—Held, that the baker had not carried out or delivered the loaves as "such baker or seller of bread," and therefore could not be convicted of an offence under s. 7. *Daniel v. Whitfield*, 15 Q. B. D. 408; 54 L. J., M. C. 134; 53 L. T. 471; 33 W. R. 905; 49 J. P. 694; 15 Cox, C. C. 762—D.

BANKER.

1. *Liability in General.*
2. *Lien.*
3. *Customers' Accounts.*
4. *Bank Notes.*
5. *Savings Banks.*
6. *Bank Books as Evidence.*—See EVIDENCE (DOCUMENTS).

1. LIABILITY IN GENERAL.

Estoppel—Negligence—Custody of Seal—Loss by unauthorised use of Seal—Proximate Cause of Loss.—The plaintiffs, a corporate body, left their seal in the custody of their clerk, who, without authority, affixed it to powers of attorney, under which certain stock in the public funds, the property of the plaintiffs, was sold. The clerk appropriated the proceeds. In an action in which the plaintiffs claimed that they were entitled to the stock on the ground that it had been transferred without their authority by the defendants:—Held, on the authority of *Bank of Ireland v. Trustees of Evans' Charities* (5 H. L. C. 389), that assuming the plaintiffs had been negligent their negligence was not the proximate cause of the loss, and did not disentitle them from recovering in the action. *Merchants of Staple of England v. Bank of England*, 21 Q. B. D. 160; 57 L. J., Q. B. 418; 36 W. R. 880; 52 J. P. 580—C. A.

Deposit by Money-dealer of Customer's Securities—Custom—Negotiable Securities—Holder for Value without Notice.—The appellant, who was associated with E. in a financial speculation, gave him, for the purpose of raising a loan, certificates of stock in a foreign railway, of which he executed transfers in blank, and some bonds of foreign companies. Some of the

bonds were payable to bearer, and in others the name of the obligee was left blank, and they were transferable, after the name had been filled in, by entry in the company's books. There was evidence that both classes of bonds were treated as negotiable securities transferable by delivery. E., with the consent of the appellant, gave these securities to M., a money-dealer, for the purpose of raising money. M. obtained advances from the respondent banks by depositing these securities, together with others, having first filled up the blank transfers of railway stock. M. became bankrupt, and the banks claimed a right to hold the stock and bonds as security for the whole debt due from him to them. There was evidence that it was the custom of banks dealing with money-dealers to make advances to them on deposit of securities en bloc, without regard to particular interests:—Held, that, under the circumstances, the banks could not be considered as holders for value without notice, and, as against the appellant, could not hold the certificates and bonds as security for the whole debt due from M., but only for the specific advances made on them. *Sheffield (Earl) v. London Joint Stock Bank*, 13 App. Cas. 333; 57 L. J., Ch. 986; 58 L. T. 735; 37 W. R. 33—H. L. (E.).

Duty as to Inquiry—Securities.—The English executors of a deceased English owner of shares in an American company desired to be entered in the New York registry in respect of them to enable them to receive the dividends, and if necessary to sell. On the instructions of their broker they signed in blank a form of transfer and power of attorney, which was indorsed on the share certificates, and sent them to the broker in London to be forwarded to New York for registration. The broker fraudulently deposited the certificates with the defendant bankers as security for advances, and afterwards became bankrupt. A question then arose as to whether the executors or the banks were entitled to the certificates:—Held, that as the question depended on transactions in England, it must be decided by English and not by American law:—that the state of the certificates put the defendant banks on inquiry, and that the executors were entitled to the shares, and were not estopped from denying the title of the banks to them. *Williams v. Colonial Bank*, 38 Ch. D. 388; 57 L. J., Ch. 826; 59 L. T. 643; 36 W. R. 625—C. A.

A holder of shares "in trust" is not a mandataire prête-nom and holds subject to a prior title on the part of some person undisclosed. Such holding not being forbidden by the law of the colony, a transferee from such holder is bound to inquire whether the transfer is authorised by the nature of the trust. *Bank of Montreal v. Sweeting*, 12 App. Cas. 617; 56 L. J., P. C. 79; 56 L. T. 897—P. C.

Loan to Customer—Transfer by Three Persons to secure Loan—Authority to Sell—Transfer to Nominees of Customer.—G., a stock-broker, who was one of three trustees and acted as broker to the trust, proposed to his co-trustees to sell B. stock belonging to the trust and re-invest in N. E. stock. The three trustees then, on the 27th of January, 1882, executed a transfer of the B. stock for a nominal consideration to two persons who were officers of a bank of which G. was a customer. G. gave the transfer to the

bank as security for a loan by them to him, and the transfer was registered. *G.*, in February, 1882, paid off the loan, and on the 15th of February the bank transferred the stock to purchasers from *G.*, and, without giving any notice to *G.*'s co-trustees, allowed him to receive the purchase-money. He invested it in *N. E.* stock in his own name. In 1883 he sold the *N. E.* stock and misappropriated the proceeds. Shortly after the sale of the *B.* stock *G.* had given an account to his co-trustees shewing the sale of *B.* stock and a re-investment in *N. E.* stock, and in 1884 he rendered another account in which he represented the *N. E.* stock as still forming part of the trust funds. In 1885 he absconded. The co-trustees remembered hardly anything about the transaction, but admitted the genuineness of their signatures to the deed of transfer:—Held, that the bank had occasioned the loss to the trust estate by allowing the purchase-money to come to the hands of *G.* who had no authority to receive it, and whom they had no sufficient reason for believing to have authority to receive it, and that the bank must therefore make it good at the suit of the co-trustees, although the co-trustees had been negligent in not seeing that the *N. E.* stock was registered in the joint names of the trustees. *Magnus v. Queensland National Bank*, 37 Ch. D. 466; 57 L. J., Ch. 413; 58 L. T. 248; 36 W. R. 577—*C. A.* Affirming 52 J. P. 246—*Kay, J.*

Post Office Order cashed—Negotiable Instrument.—The plaintiffs banked with the defendants. It was the duty of the plaintiffs' secretary to pay all moneys received by him on behalf of the plaintiffs into the defendants' bank to the credit of the plaintiffs. The secretary without the knowledge of the plaintiffs kept an account at the defendants' bank. He paid into the defendants' bank to his own credit certain post-office orders belonging to the plaintiffs which the defendants subsequently cashed. The post-office regulations with regard to post-office orders provide that, when presented for payment by a banker, they shall be payable without the signature by the payee of the receipt contained in the order, provided the name of the banker presenting the order is written or stamped upon it:—Held, that there had been a wrongful conversion of the post-office orders above mentioned by the defendants; and that the regulations of the post-office with regard to the payments of post-office orders presented through bankers did not give to those instruments in the hands of bankers the character of instruments transferable to bearer by delivery so as to bring the case within the doctrine of *Goodwin v. Roberts* (1 App. Cas. 476), and thus give the defendants a good title to the post-office orders independently of the authority given to the plaintiffs' secretary. *Fine Art Society v. Union Bank*, 17 Q. B. D. 705; 56 L. J., Q. B. 70; 55 L. T. 536; 35 W. R. 114; 51 J. P. 69—*C. A.*

2. LIEN.

General—Memorandum of Deposit.—A customer deposited a policy of life assurance with his bankers, accompanied by a memorandum of charge to secure overdrafts, not exceeding a specified amount. In an action to administer the customer's estate:—Held, that the banker's

general lien was displaced, and the charge was limited to the amount specified. *Bowes, In re, Strathmore (Earl) v. Vane*, 33 Ch. D. 586; 56 L. J., Ch. 143; 55 L. T. 260; 35 W. R. 166—*North, J.*

—Deposit of Security by partner—Claim to apply to Firm's general Account.—A partnership firm had an account with certain bankers, and *A.*, the senior partner of the firm, had also a private account with the same bankers. The two accounts were treated as separate accounts by the bankers. Both the accounts had been considerably overdrawn, and certain deeds had been deposited with the bankers by *A.* as security for the two accounts. An extension of credit to the amount of 500*l.* being required by the partnership firm for a short period, *A.*, in the name of his firm, deposited the lease of his house as security for the temporary accommodation. Some time later the firm's account being above the limit agreed upon, it was closed. The lease of the house was then sold, and the proceeds were handed to the bankers. Subsequently *A.* was adjudicated bankrupt, and his trustees in bankruptcy brought an action against the bankers to recover the surplus of the proceeds of the sale after settlement of the overdraft on *A.*'s private account. The bankers alleged that the lease was deposited with them by *A.* in order to secure advances made to him upon the two banking accounts; and they claimed, therefore, to retain the proceeds of the sale of the lease for the purpose of repaying both such advances:—Held, that the lease was deposited by *A.* with the bankers merely for the purpose of securing to them repayment of the particular overdraft of 500*l.*; that the bankers had no such general lien on the proceeds of sale so as to entitle them to retain the surplus of such proceeds in respect of the firm's overdrawn amount; and that the same must accordingly be refunded. *Wolstenholme v. Sheffield Union Banking Company*, 54 L. T. 746—*C. A.*

Building Society—Overdrawing Account.—*See BUILDING SOCIETY (BORROWING POWERS).*

3. CUSTOMERS' ACCOUNTS.

Right to apply Proceeds to reduce Overdraft—Auctioneer.—An auctioneer received moneys from a sale of live stock and paid them into his private account at the defendant's bank. His account was overdrawn to an amount not exceeding 2,500*l.*, but under an arrangement which was then subsisting he was permitted to overdraw up to 2,500*l.*, and he had no suspicion at the time when he paid in such moneys of any intention on the part of the bank to close his account. The bank shortly afterwards closed the account, and applied the proceeds of the sale in reduction of the overdraft. The bank had notice that the moneys so paid in were substantially the produce of the sale of stock. An action was brought by the plaintiff on behalf of all the vendors at the sale, against the bank, to recover their respective purchase-moneys, less the auctioneer's commission:—Held, that the auctioneer paid the proceeds of the sale to his private account in the ordinary course of business, and was not guilty of a breach of trust in so doing, and that therefore

the plaintiff had no remedy against the bank. *Marten v. Roche*, 53 L. T. 946; 34 W. R. 253—North, J.

Deposit for Special Purpose—Payment into another Account.—Where a company's bank received a money deposit from an applicant for shares in the company, and placed it to a separate account kept for such deposits; the bank having at the request of the company, and on receiving notice of allotment to the applicant of the shares in respect of which the deposit had been paid (which allotment was in fact invalid), transferred the deposit to the overdrawn general account of the company, with knowledge that a meeting had been held with the object of winding up the company, and that its reconstruction was contemplated, and in spite of notice from the applicant not to part with the deposit without his authority:—Held, that the bank was liable to repay the amount of the deposit to the applicant. *Greenwell v. National and Provincial Bank*, 1 C. & E. 56—Denman, J.

Cheques—Course of Business.—Where a bank has, as a matter of fact, always treated cheques paid in by a particular customer as cash before clearance, it cannot, as against such customer, set up a usage entitling it to exercise a discretion as to whether each particular cheque should be so treated. *Armfield v. London and Westminster Bank*, 1 C. & E. 170—Cave, J.

— Dishonouring — Damages.—Where bankers, owing to a mistake, dishonoured a cheque of a customer, given in course of business, which mistake was subsequently satisfactorily explained to the payee, but still the payee declined to deal further with the customer:—Held, in an action for damages against the bank, that the customer could not recover damages for the loss of the payee's custom. *Morris v. London and Westminster Bank*, 1 C. & E. 498—Day, J.

Cashing Crossed Cheque with unauthorized Signature per pro.—See **BILLS OF EXCHANGE (CHEQUES)**.

Guarantee—Current Account—Death of Surety—Appropriation of Payments.—S. guaranteed the account of T. at a bank by two guarantees, one for 150*l.*, the other for 400*l.* By the terms of the guarantees the surety guaranteed to the bank "the repayment of all moneys which shall at any time be due from" the customer "to you on the general balance of his account with you;" the guarantee was moreover to be "a continuing guarantee to the extent at any one time of" the sums respectively named, and was not to be considered as wholly or partially satisfied by the payment at any time of any sums due on such general balance; and any indulgence granted by the bank was not to prejudice the guarantee. S. died, leaving T. and another executors. The bank on receiving notice of his death, without any communication with the executors beyond what would appear in T.'s pass-book, closed T.'s account, which was overdrawn, and opened a new account with him, in which they did not debit him with the amount of the overdraft, but debited him with interest on the same, and continued the account until he went into liquidation, when it also was overdrawn:—

Held, that there was no contract, express or implied, which obliged the debtor and creditor to appropriate to the old overdraft the payments made by the debtor after the determination of the guarantee, and that the bank was entitled to prove against the estate of S. for the amount of the old overdraft, less the amount of the dividend which they had received on it in the liquidation. *Sherry, In re, London and County Banking Company v. Terry*, 25 Ch. D. 692; 53 L. J., Ch. 404; 50 L. T. 227; 32 W. R. 394—C. A.

— Advances—Construction—Parol Evidence—Discounting Bills and Notes—Surety, Rights of—Giving Time.—G., knowing that his son C., who was a stock-broker in London, required advances for the purpose of his business, gave to a bank a letter of guarantee, undertaking to guarantee any advances made to C. to the extent of 1,000*l.* After the death of G., the bank sought to prove on his estate in respect of four items:—1, a promissory note of C. to the bank for 440*l.*, dated the 30th August, 1880, at six months; 2, a sum of 32*l.*, balance due on a bill of exchange drawn by D., and accepted by E., dated the 6th October, 1880, at six months; 3, a promissory note for 490*l.*, of B. to the bank, dated the 18th October, 1880, at six months, and 4, 7*l.* 6*s.* 6*d.*, the overdraft of C.'s current account. The promissory note for 440*l.* had been renewed more than once, and this note, and the renewals, and the bill of exchange had been placed to the credit of C.'s account with the bank while current, and transferred to the debit side of his account when due, discount being charged in cases of renewal to C.'s account. C. drew upon the bank to the full amount for which he was thus credited. C.'s name was not on the bill of exchange, but the bank cashed it on his guarantee, and the proceeds were placed to C.'s credit. The promissory note for 490*l.* represented a note given to the bank by B. some years previously to the date of G.'s guarantee, the amount of which had been then advanced to C. No entry of this note or its renewals appeared in C.'s current account, although the amount of the discounts on it were charged:—Held, (1), that to aid in the construction of the guarantee, parol evidence was admissible of the circumstances under which it was given; (2), that under the circumstances, the guarantee was a continuing guarantee, extending to advances made after its date; (3), that "advances" was not confined to cash advances or overdrafts, but included the proceeds of bills or notes discounted by the bank, and placed to C.'s credit; (4), that the right of the bank to sue on bills and notes being suspended during their currency was not a giving of time within the rule which discharges a surety; but that, whether each renewal was equivalent to a fresh and independent advance or not, the amount advanced by the bank to C. was within the guarantee; (5), that the bank could not sustain against G.'s estate a claim upon the note for 490*l.* *Grahame v. Grahame*, 19 L. R., Ir. 249—V. C.

4. BANK NOTES.

Issue of—Penalties.—By s. 11 of the Bank Charter Act, 1844, it shall not be lawful for any banker to "issue" any note payable on

demand, except that any banker carrying on business as such on the 6th of May, 1844, and then lawfully issuing his own notes, may continue to issue them under specified conditions; and by s. 12, if any banker, entitled after the passing of the act to issue bank notes, "shall cease to carry on the business of a banker," it shall not be lawful for him to issue such notes at any time thereafter. In 1880 a firm of bankers entitled to issue their own notes under the exception in s. 11, sold their business to a limited liability company upon the following terms:—The company took over the whole of the business as a going concern, and the goodwill, except and reserving to the firm the right to issue their own notes, but including in the sale and purchase such benefit of the issue as was thereby agreed to be given to the company; the firm were to issue their notes in the same form as theretofore, but through the company's officers only, and might nominate those officers and make the returns required by statute through them: the company were to allow and pay the firm 2l. per cent. interest on the amount of all notes from time to time in circulation: for the purposes of the issue only the firm might continue to use their accustomed name, but they were not to assign their rights, nor to take new partners for the purpose of continuing the issue without the consent of the company, nor to carry on the business of banking within a defined district without the like consent, except so far as related to the issue of their notes under the agreement: if the right of issue should at any time be taken away from the firm they were to pay any compensation they might receive to the company, unless the company should get an equal right of issue, in which case the firm might retain the compensation: if the company acquired a right to issue their own notes, the firm's right of issue was to cease. When the business was taken over by the company, a large number of the firm's notes being in circulation, the amount of them was deducted from the purchase-money, and the notes, when presented for payment, were cashed by the company, and reissued by them. Notes in hand when the business was taken over were treated as cash lent by the firm to the company. Daily returns were made by the company shewing the number of the firm's notes in circulation, and twice a year the company paid 2l. per cent. interest to the firm on the amount so ascertained. On an information against the firm and the company for penalties in respect of their having issued the notes contrary to the provisions of the act:—Held, that the company had "issued" the notes within the meaning of s. 11 of the Bank Charter Act, 1844; that the firm, in issuing the notes, were not protected by the exception in s. 11, because after the making of the agreement they had "ceased to carry on the business of bankers" within the meaning of s. 12; and therefore that all the defendants were liable. *Attorney-General v. Birkbeck*, 12 Q. B. D. 605; 53 L. J., Q. B. 378; 51 L. T. 199; 32 W. R. 905—D.

5. SAVINGS BANKS.

Officer of Bank—Right of preference—Bankruptcy Act—Administration of Estate in Chancery Division.—The provision of s. 14 of the Savings Bank Act, 1863, by which a savings bank is enabled to obtain payment of a debt

due to it from an officer of the bank in preference to the other creditors of the officer, is repealed by s. 40 of the Bankruptcy Act, 1883, so far as regards administration in bankruptcy, but not as regards the administration of an estate in the Chancery Division; and s. 10 of the Judicature Act, 1875, does not incorporate the provisions of s. 40 of the Bankruptcy Act, 1883, into the rules of administration of an estate in the Chancery Division so as to take away such right of preference of a savings bank. *Williams, In re, Jones v. Williams*, 36 Ch. D. 573; 57 L. J., Ch. 264; 57 L. T. 756; 36 W. R. 34—North, J.

In the administration of the insolvent estate of an officer of a savings bank in the Chancery Division, the bank is therefore entitled to payment of a debt due to it in preference to the other creditors. But the court may, under the 125th section of the Bankruptcy Act, 1883, on the application of a creditor, order a transfer of the proceedings to the Court of Bankruptcy. *Id.*

BANKRUPTCY.

I. JURISDICTION, 84.

II. OFFICERS OF THE COURT.

1. *Registrars*, 87.
2. *Official Receiver*, 88.
3. *Trustees*, 91.
 - a. Appointment, 91.
 - b. Removal, 91.
 - c. Order to Account and Pay Money, 92.
 - d. Actions by, 93.
 - e. Liability for costs, 94.
 - f. Other Points relating to, 94.

III. WHO MAY BE BANKRUPT, 95.

IV. ACT OF BANKRUPTCY, 96.

V. DEBTOR'S SUMMONS, 101.

VI. BANKRUPTCY NOTICE, PETITION AND RECEIVING ORDER.

1. *Parties to*, 102.
2. *Amount and Nature of Debt*, 105.
3. *Powers of the Court*, 109.
4. *Practice*.
 - a. In General, 111.
 - b. Staying Proceedings, 113.
 - c. Application to Rescind Order, 114.

VII. ADJUDICATION, 117.

VIII. PROPERTY.

1. *What passes to Trustee*.
 - a. Leaseholds—Disclaimer, 119.
 - b. Order and Disposition, 124.
 - c. Property appropriated to meet Bills of Exchange, 127.
 - d. Property held by Bankrupt as Trustee, 131.

- e. Salary and Income*, 132.
- f. Materials being used by Bankrupt in Execution of Contracts*, 133.
- g. Of Married Women*, 134.
- h. In other Cases*, 135.
- 2. *Proceedings for Discovery and Protection of Property*, 136.

IX. PROOF OF DEBTS.

- 1. *Debts entitled to Priority*, 139.
- 2. *In respect of what Debts*, 141.
- 3. *By and against Particular Persons*, 143.
- 4. *Practice on Proof*, 148.
- 5. *Expunging Proof*, 150.
- 6. *Rejection of Proof*, 151.

X. MUTUAL DEALINGS—SET-OFF, 152.

XI. INVALID AND PROTECTED TRANSACTIONS.

- 1. *Executions*, 154.
- 2. *Distresses*, 159.
- 3. *Fraudulent Conveyances*, 159.
- 4. *Fraudulent Preferences*, 161.
- 5. *Assignments of Property*, 164.
- 6. *Other Dealings by Bankrupt*, 166.
- 7. *Dealings with Property by Agent*, 168.

XII. COMPOSITION, LIQUIDATION AND SCHEMES OF ARRANGEMENT.

- 1. *Under the Bankruptcy Act*, 1883, 169.
- 2. *Under Prior Statutes*, 174.
 - a. Liquidation*, 174.
 - b. Composition*, 176.

XIII. COMPOSITION DEEDS, 178.

XIV. THE DISCHARGE AND RE-OPENING BANKRUPTCY.

- 1. *Discharge under the Bankruptcy Act*, 1883, 180.
- 2. *Discharge under Prior Statutes*, 184.
- 3. *Re-opening Bankruptcy*, 185.
- 4. *Effect of Discharge*, 185.

XV. OFFENCES, 187.

XVI. THE BANKRUPT, 187.

XVII. EFFECT OF BANKRUPTCY, 190.

XVIII. PRACTICE.

- 1. *Generally*, 193.
- 2. *Staying Proceedings*, 194.
- 3. *Transfer of Proceedings*, 196.
- 4. *Evidence*, 197.
- 5. *Costs*, 198.

XIX. APPEAL.

- 1. *Jurisdiction*, 201.
- 2. *Parties*, 201.
- 3. *In what Cases*, 202.
- 4. *Notice of—Time for*, 204.
- 5. *The Deposit—Security for Costs*, 205.

6. *Leave to Appeal*, 206.7. *Costs*, 207.8. *Other Points*, 208.

XX. ADMINISTRATION OF INSOLVENT ESTATES IN BANKRUPTCY, 209.

I. JURISDICTION.

Claims arising out of the Bankruptcy—Strangers.]—The jurisdiction conferred on the Court of Bankruptcy by sub-s. 1 of s. 102 of the Bankruptcy Act, 1883, is identical with that conferred on that court by s. 72 of the Bankruptcy Act, 1869. Where, therefore, there are conflicting claims to any part of a bankrupt's property, between parties who are strangers to the bankruptcy, and in which the trustee in bankruptcy has no interest, the Court of Bankruptcy will decline to adjudicate upon the questions at issue. *Beesty, Ex parte, Lowenthal, In re*, 13 Q. B. D. 238; 53 L. J., Q. B. 524; 51 L. T. 431; 33 W. R. 138; 1 M. B. R. 117—Cave, J.

The bankrupt carried on business as a corn-merchant at Southampton, where his stores were under the charge of a manager. On the 8th of June the appellants, to whom the bankrupt was largely indebted for wheat then in his stores, were informed that the bankrupt was in difficulties, and thereupon arranged with the manager to repurchase the wheat on credit at a price exceeding 200*l.* The wheat was accordingly delivered to them on the following day. This sale was unknown to the bankrupt, who on the 8th of June sent out by post notices of suspension, which were delivered to the manager at Southampton and to the appellants on the following morning:—Held, that under s. 102 of the Bankruptcy Act, 1883, it was competent for the county court acting in bankruptcy to adjudicate upon a claim by the bankrupt's trustee for the return of the wheat by the appellants or payment of its value, for it must be taken to be "a claim arising out of the bankruptcy." *Scott, Ex parte, Hawke, In re*, 16 Q. B. D. 503; 55 L. J., Q. B. 302; 54 L. T. 54; 34 W. R. 167; 3 M. B. R. 1—D. See, also, *Ellis, Ex parte, Crouther, In re*, 20 Q. B. D. 38; 57 L. J., Q. B. 57; 58 L. T. 115; 36 W. R. 189; 4 M. B. R. 305—D.

Death of Debtor—Effect of.]—A debtor having died two days after filing his petition:—Held, that the bankruptcy proceedings might continue as though the debtor were alive. Semble, that if under the above circumstances the debtor's representatives make arrangements with the creditors, the court will use the discretion given to it by s. 108 of the Bankruptcy Act, 1883. *Sharp, Ex parte, Walker, In re*, 54 L. T. 682; 54 W. R. 550; 3 M. B. R. 69—D.

Where a debtor against whom a creditors' petition in bankruptcy has been presented dies before service of the petition upon him, there is no power under s. 108 of the Bankruptcy Act, 1883, or the Bankruptcy Rules, to dispense with service or to order substituted service of the petition, and the bankruptcy proceedings must necessarily be stayed. *Hill, Ex parte, Easy, In re*, 19 Q. B. D. 538; 56 L. J., Q. B. 624; 35 W. R. 819; 4 M. B. R. 281—C. A.

High Court—Judgment Summons.]—The High Court has authority to issue a judgment summons on a judgment of the High Court where the debtor does not reside within its bankruptcy jurisdiction. *Nicholson, Ex parte, Stone, In re, 1 M. B. R. 177—Cave, J.*

Court ordering Prosecution of Bankrupt—Debtor's Petition.]—Where a bankrupt presents his own petition, a court exercising jurisdiction in bankruptcy has no power since the coming into operation of the Bankruptcy Act, 1883, to order the trustee to prosecute him for any of the statutable misdemeanours created by s. 11, sub-ss. 13, 14, and 15, of the Debtors Act, 1869. *Wood, Ex parte, Burden, In re, 21 Q. B. D. 24; 57 L. J., Q. B. 570; 59 L. T. 149; 36 W. R. 896; 5 M. B. R. 166—D.*

Charging Order whether made under Bankruptcy or Ordinary Jurisdiction—Power to Review.]—In an action in the Chancery Division, by one partner against another, for a dissolution of the partnership, judgment was given for a dissolution, and the appointment of a receiver of the assets of the partnership. Both the partners were afterwards adjudged bankrupt; the action was transferred to the Queen's Bench Division in bankruptcy, and the judge having jurisdiction in bankruptcy made an order under 23 & 24 Vict. c. 127, s. 28, charging the costs of the plaintiff's solicitor on the funds in the hands of the receiver. Before this order was made, the landlord of the premises in which the bankrupts had carried on their business had given notice to the receiver of a claim for rent due to him, but had not attempted to distrain. The judge was not informed of this claim before he made the order, and he subsequently made a further order by which he directed the receiver to pay the rent due to the landlord, and to pay the balance in his hands to the solicitor.—Held, that the charging order was not made by the judge in the exercise of his bankruptcy jurisdiction, and that he had consequently no power to rescind or vary it under s. 104 of the Bankruptcy Act, 1883. *Brown, Ex parte, Suffield and Watts, In re, 20 Q. B. D. 693; 58 L. T. 911; 36 W. R. 584; 5 M. B. R. 83—C. A.*

Debtor must have English Domicil.]—See post, col. 96.

County Court—Order of High Court to Pay Costs—Payment by Instalments.]—Where the High Court has simply made an order for the payment of costs, or given judgment for the payment of a sum of money, a county court can, by virtue of the Debtors Act, 1869, s. 5, and the Bankruptcy Act, 1883, s. 103, sub-s. 4, enforce that order or judgment by directing payment of the amount thereof by instalments. A county court cannot, however, rescind or vary an order of the High Court for the payment of a judgment debt by instalments since in such a case the High Court has considered and adjudicated upon the question of the debtor's ability to pay forthwith. *Washer v. Elliot (1 C. P. D. 169)* explained. *Addington, Ex parte, Ives, In re, 16 Q. B. D. 665; 55 L. J., Q. B. 246; 34 W. R. 593; 3 M. B. R. 83—Cave, J.*

—Alleged Fraudulent Deed—Question of Character—Large Amount Involved.]—Section

102 of the Bankruptcy Act, 1883, defines the general powers of the courts in bankruptcy, and goes on to enact, "provided that the jurisdiction hereby given shall not be exercised by the county court for the purpose of adjudicating upon any claim not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceedings consent thereto, or the money, money's worth, or right in dispute, does not, in the opinion of the judge, exceed in value two hundred pounds." A. was tenant under a lease to H., who was also his mortgagee. In May, 1885, certain transactions were entered into between H. and A. with a view of assisting A., who was then in money difficulties. A. became bankrupt, and a motion was made in the county court by his trustee in bankruptcy to have these transactions declared fraudulent and void as against the trustee. The amount at stake was 13,700*l.* On the hearing objection was taken that the county court had no jurisdiction as the amount at stake was very large, and a question of character was involved. The county court judge decided that he had jurisdiction, but adjourned the hearing to enable this appeal to be brought:—Held, on appeal, that assuming the county court judge had jurisdiction, yet that he ought not to exercise it unless there were special circumstances showing him he ought to do so, and that here there were no such special circumstances. *Hazlehurst, Ex parte, Beswick, In re, 58 L. T. 591; 5 M. B. R. 105—D.*

—Consent to Jurisdiction—Mistake.]—By a proviso to s. 102 of the Bankruptcy Act, 1883, it is provided that "the jurisdiction hereby given shall not be exercised by the county court for the purpose of adjudicating on any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceedings consent thereto," &c. Consent to the jurisdiction was given in ignorance of the fact that an order for summary administration had been made:—Held, that the consent to the jurisdiction was vitiated by the fact that it had been given under a mistaken impression of facts not easily to be ascertained. *Sergeant, Ex parte, Sanders, In re, 52 L. T. 516—D.*

—Power to Restrain Proceedings in High Court.]—Under the Bankruptcy Act, 1883, a county court sitting in bankruptcy has no power to restrain proceedings in an action in the High Court. *Reynolds, Ex parte, Barnett, In re, 15 Q. B. D. 169; 54 L. J., Q. B. 354; 53 L. T. 448; 33 W. R. 715; 2 M. B. R. 147—C. A.*

Question whether to be determined in Bankruptcy or High Court.]—See *infra*, PRACTICE (TRANSFER OF PROCEEDINGS).

Jurisdiction of Judge to review Order of Registrar.]—The power given to the court by s. 104 of the Bankruptcy Act, 1883, "to review, rescind, or vary any order made by it," is only given to the court by which the order is in fact made. Where, therefore, an order dismissing a bankruptcy petition was made by the registrar of a county court:—Held, that the county court judge had no jurisdiction to review, rescind, or vary the registrar's order. *Maugham, Ex parte,*

Maugham, In re, 21 Q. B. D. 21; 57 L. J., Q. B. 487; 59 L. T. 253; 36 W. R. 846; 5 M. B. R. 152—D.

Where, on the refusal of an application by the registrar, application was subsequently made to the judge sitting in bankruptcy to review the decision:—Held, that there was no power to accede to the request, and that in the event of the registrar declining to review his own decision, the proper course was by way of appeal to the Court of Appeal. *Moore, In re*, 2 M. B. R. 78—Cave, J.

Power of Court to go behind Judgment.]—See post, cols. 110, 111.

II. OFFICERS OF THE COURT.

1. *Registrars.*
2. *Official Receiver.*
3. *Trustees.*

1. REGISTRARS.

Jurisdiction—Pending Proceedings.]—The jurisdiction which registrars in bankruptcy had by delegation or otherwise under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), is preserved by 46 & 47 Vict. c. 52, s. 169, sub-s. 3, in respect of proceedings pending when the latter act came into operation on the 1st of January, 1884; and rule 264 of the Bankruptcy Rules, 1883, which provides for the exercise of their jurisdiction, is a valid rule, and is properly made pursuant to s. 127 of the Bankruptcy Act, 1883. *Edwards, Ex parte, Home, In re*, 54 L. J., Q. B. 447; 2 M. B. R. 203—C. A.

—Delegation of Judge's Authority.]—H. J. died in 1871, and application for letters of administration was made by C. and E. J. Large sums of money were required for the purposes of administration, which were paid to B. by C. and E. J., and B. paid 3,160*l.* to the Inland Revenue Office for probate purposes. E. J. was adjudicated a bankrupt in 1875, and, in 1878, B. applied for a return of the surplus. Upon an application to the registrar by the trustee in bankruptcy that the said moneys should be paid to him, it was objected that under the terms of the Bankruptcy Act, 1883, the registrars had no jurisdiction in pending business. The question was referred to the judge for decision:—Held, that the registrar had jurisdiction, and that the application had been rightly made to him and must be remitted to him. *Jones v. Chievertton*, 49 L. T. 745; 1 M. B. R. 17—Mathew, J.

Duty of Registrar.]—It is the duty of the registrar to hear and decide those cases brought before him, and which he is not prevented from so deciding by any order of the judge or by the rules or statute. The registrar ought not to adjourn any such case for the purpose of its being heard before the judge unless there is good cause or the case presents points of novelty or difficulty. *Foster, Ex parte, Webster, In re*, 3 M. B. R. 132—Cave, J.

It is the duty of the registrar to hear and determine an application made *ex parte* for an injunction, even though at the time of such application the judge in bankruptcy may be sitting. *Brooks, In re*, 3 M. B. R. 62—Cave, J.

—Request from Foreign Court in aid—Order to hand over Books.]—An application for an order to hand over books and papers under s. 118 of the Bankruptcy Act, 1883, which provides that every British court having jurisdiction in bankruptcy, or insolvency, shall be auxiliary to each other, ought to be made to the registrar and not to the judge in court. Although the registrar may in a case of difficulty refer a matter to the judge in bankruptcy for his decision, yet there is no authority for him without reason to delegate his work to the judge, and unless a matter is especially reserved to the judge, or some difficulty arises, the registrar ought to deal with it. *Knight, Ex parte, Firbank, In re*, 4 M. B. R. 50—Cave, J.

—Apprenticeship Premium—Application for return of.]—An application under s. 41 of the Bankruptcy Act, 1883, for the return of an apprenticeship premium paid to the bankrupt as a fee, ought to be made to the registrar and not to the judge in court. *Gould, Ex parte, Richardson, In re*, 35 W. R. 381; 4 M. B. R. 47—Cave, J.

Jurisdiction of Judge over Order of Registrar.]—See ante, cols. 86, 87.

Refusal to carry out Order of Court of Appeal—Procedure to compel Obedience.]—Upon appeal from a county court in a bankruptcy proceeding, the divisional court allowed the appeal, and ordered money, which had been paid into the county court to abide the result of the appeal, to be paid out to the appellant. The divisional court also gave leave to appeal to the Court of Appeal, but made no order for a stay of proceedings. The registrar of the county court having refused to pay out the money until the time for appealing to the Court of Appeal had elapsed:—Held, that the refusal was unjustifiable, but that, the registrar being an officer of the county court, the divisional court had no jurisdiction over him personally to enforce compliance with the order. *Croydon County Court (Registrar), Ex parte, or Brown, Ex parte, Wise, In re*, 17 Q. B. D. 389; 55 L. J., Q. B. 362; 54 L. T. 722; 34 W. R. 711; 3 M. B. R. 174—C. A.

Fees—County Court—Discharge of Bankrupt—Consent Judgment for over £50.]—Where a county court grants a bankrupt his discharge subject to his consenting to judgment being entered up against him by the trustee for the balance of debts provable under the bankruptcy, the county court has jurisdiction under r. 240 of the Bankruptcy Rules, 1886, to enter up such judgment, although the amount exceeds 50*l.*; but, the rule being silent as to fees, the registrar is not entitled to any fee in respect of such judgment. *Howe, In re*, 18 Q. B. D. 573; 56 L. J., Q. B. 257; 35 W. R. 380; 4 M. B. R. 57—Cave, J.

2. OFFICIAL RECEIVER.

Acting as Trustee—Power to sell Bankrupt's Property.]—Under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), the official receiver, when acting as trustee in a bankruptcy in the interval between the adjudication and the appointment

of a trustee by the creditors, has power to sell the bankrupt's property, though it be not of a perishable nature. *Turquand v. Board of Trade*, 11 App. Cas. 286; 55 L. J., Q. B. 417; 55 L. T. 30—H. L. (E.). Affirming *S. C.*, sub nom. *Turquand, Ex parte, Parkers, In re*, 2 M. B. R. 158—C. A.

Power to Compromise.]—A debtor on 6th May, presented his own petition upon which a receiving order was made, and on 7th May the official receiver took possession of the debtor's property. On 30th June a compromise was entered into between the official receiver and two holders of bills of sale over the property of the debtor. On 9th July the debtor was adjudicated bankrupt, and on 23rd July the certificate of approval of the trustee in the bankruptcy was granted by the Board of Trade. The trustee subsequently applied to the court to set aside the compromise:—Held, that on its appearing that the official receiver had the permission of the Board of Trade to make this compromise, the application of the trustee must be refused. *Singleton, Ex parte, Johnstone, In re*, 2 M. B. R. 206—D.

Business carried on—Repayment by Trustee of Expenses.]—Where the business of a debtor is carried on by the official receiver, who makes payments out of his own pocket for the purpose, and a composition is then sanctioned, the right order for the county court judge to make is, that the official receiver shall forthwith deliver up possession of the debtor's estate to the trustee under the composition, and that the trustee shall reimburse the official receiver out of the first monies which come to his hand from the realisation of the assets. *Board of Trade, Ex parte, Taylor, In re*, 51 L. T. 711; 1 M. B. R. 264—D.

Application to Court—In what cases.]—The court does not sit to assist the official receiver or the trustee in simple matters relating to the management of the estate, but it sits for a judicial purpose; and where there is no question of law arising, there is no justification for coming to the court. *Honygar, Ex parte, Mahler, In re*, 1 M. B. R. 272—Cave, J.

The official receiver must be prepared to undertake the proper responsibility of his position, and he has no right in a simple case to come to the court merely for information. *Ib.*

Cannot act as Solicitor in his own behalf.]—The effect of s. 116, sub-s. 2, of the Bankruptcy Act, 1883, which provides that no official receiver shall, during his continuance in office, either directly or indirectly, by himself, his clerk or partner, act as solicitor in any proceeding in bankruptcy, is not limited to cases of the official receiver acting as solicitor by himself, his clerk, or partner, for another person, or on an application for the benefit of the estate, but extends also to cases where the official receiver is acting as solicitor for himself and conducting a case on his own behalf. *Official Receiver, Ex parte, Taylor, In re*, 2 M. B. R. 127—D.

Small Bankruptcy—Personal Liability for Costs.]—The official receiver, acting as trustee of an estate being administered in a summary manner under s. 121 of the Bankruptcy Act,

1883, on an unsuccessful motion by him was ordered personally to pay the costs of the respondent, with liberty to take the costs out of the estate, if any. *Jenkins, Ex parte, Glanville, In re*, 33 W. R. 523; 2 M. B. R. 71—Cave, J.

—Application—Evidence.]—The official receiver, having reported to the registrar of a county court sitting in bankruptcy that the property of the bankrupt was not likely to exceed 300% in value, asked for an order for summary administration of the estate under s. 121 of the Bankruptcy Act, 1883; but the registrar refused to make the order required unless the official receiver would support his report by affidavit, assigning no other reason for refusal:—Held, on appeal, that the registrar was not entitled to require an affidavit in support of the official receiver's report, and that such reports were intended to be received by the court as *prima facie* evidence, and to be acted upon as such. *Semble*, that s. 121 gives a certain discretion to the court, and that a refusal must be based upon reasonable grounds. *Official Receiver, Ex parte, Hornblow, In re*, 53 L. T. 155; 2 M. B. R. 124—D.

Appointment of Receiver and Manager—Mortgage.]—A receiver and manager had been appointed on an *ex parte* application by the plaintiff in a foreclosure action under a mortgage of brewery premises. The mortgagor, the defendant, afterwards became bankrupt on his own petition. The official receiver opposed a motion by the plaintiff for the continuance of the original receiver and manager, contending that he ought to be substituted:—Held, that an order must be made confirming the previous appointment, and continuing the person then appointed as receiver of the rents and profits of the premises comprised in the mortgage, and as manager of the business, he to be at liberty to use any of the vats, fixed motive machinery, and other property comprised in the mortgage, but nothing else. *Deacon v. Arden*, 50 L. T. 584—Pearson, J.

Special Manager—Appointment of.]—By s. 12 of the Bankruptcy Act, 1883, sub-s. 1, it is provided that the "official receiver of a debtor's estate may, on the application of any creditor or creditors, and if satisfied that the nature of the debtor's estate or business or the interests of the creditors generally require the appointment of a special manager of the estate or business other than the official receiver, appoint a manager thereof accordingly to act until the trustee is appointed, and with such powers (including any of the powers of a receiver) as may be intrusted to him by the official receiver." By s. 66 it is provided (*inter alia*), that the official receivers, besides acting under the general authority and directions of the Board of Trade, shall also be officers of the courts to which they are respectively attached. Upon an appeal from a decision of the chief official receiver, refusing to sanction the appointment of a manager named by the creditors:—Held, that the court had no jurisdiction to interfere with the discretion of the official receiver in this matter. *Whittaker, In re*, 50 L. T. 510; 1 M. B. R. 36—Cave, J.

Appearing to oppose Discharge of Receiving Order.]—*See post*, col. 116.

Liability for Costs.—*See Jenkins, Ex parte*, supra.

— **On Appeals.**—*See infra*, APPEAL, XIX.

3. TRUSTEES.

- a. Appointment.
- b. Removal.
- c. Order to Account and Pay Money.
- d. Actions by.
- e. Liability for costs.
- f. Other Points relating to.

a. Appointment.

Liquidation Petition.—A trustee can be appointed by the creditors under a liquidation petition, though more than six months have elapsed since the filing of the petition. *Fenning, Ex parte* (3 Ch. D. 455), discussed. *Credit Company, Ex parte, McHenry, In re*, 24 Ch. D. 353; 53 L. J., Ch. 161; 49 L. T. 385; 32 W. R. 47—C. A.

The last clause of sub-s. 7 of s. 125, relates only to the effect of the appointment of a trustee under a liquidation after he has been appointed, and does not impose on the making of the appointment any limitation similar to that which by s. 6 is imposed on the making of an adjudication of bankruptcy, viz., that the act of bankruptcy on which the adjudication is founded must have occurred within six months before the presentation of the petition for adjudication. *Id.*

Objection to, by Board of Trade—Grounds for.]

—The fact that a trustee has been proposed by the brother of a bankrupt, that such trustee has previously voted in favour of a composition and scheme of arrangement of the debtor's affairs, and that no committee of inspection is appointed, will not justify the Board of Trade in objecting to the appointment of such trustee under s. 21, sub-s. 2, of the Bankruptcy Act, 1883, even though the majority in number of the creditors are desirous that such objection shall be made. *Board of Trade, Ex parte, Games, In re*, 1 M. B. R. 216—Cave, J.

When creditors acting under s. 21 of the Bankruptcy Act, 1883, have appointed a trustee of the property of the bankrupt, and it appears that the person so appointed is an accounting party to the estate, and that questions will arise between him and the estate which will render it difficult for him to act with impartiality by reason of the conflict between his own interests and his duty to the creditors, these circumstances will, as a general rule, justify the Board of Trade in objecting to the appointment under the powers conferred on them by sub-s. 2 of s. 21. *Board of Trade, Ex parte, Martin, In re*, 21 Q. B. D. 29; 57 L. J., Q. B. 384; 58 L. T. 889; 36 W. R. 698; 5 M. B. R. 129—Cave, J.

b. Removal.

Discretion of Registrar—"Cause shown."—The power given to the court by sub-s. 4 of s. 83 of the Bankruptcy Act, 1869, to "remove any trustee upon cause shown," authorises the removal of one of several co-trustees without the

removal of all. "Cause shown" does not mean only conduct amounting to fraud or dishonesty on the part of the trustee; it is enough to prove conduct—such as vexatious obstruction of the realization of the estate in the interest of the debtor—which shows that it is no longer fit that the trustee should remain a trustee. Though the making of an order to remove a trustee is not a matter of pure discretion, and the Court of Appeal is bound to see that cause was shown in order to found the jurisdiction of the registrar, yet, if the facts are capable of two reasonable interpretations, the Court of Appeal will trust to the discretion of the registrar in determining which is the more reasonable interpretation of the two, and will not disturb his order for the removal of a trustee, he, from his acquaintance with the proceedings throughout, having far better means of judging than the Court of Appeal has. *Newitt, Ex parte, Mansel, In re*, 14 Q. B. D. 177; 54 L. J., Q. B. 245; 52 L. T. 202; 33 W. R. 142—C. A.

Court Restraining Creditors' Meeting for Purpose of.]

—There is jurisdiction in bankruptcy to restrain creditors from holding a meeting for the purpose of removing a trustee by resolution. Such a meeting was restrained when notice of it was given by creditors interested in a large debt, which the trustee had obtained an appointment for moving to expunge. *Sayer, Ex parte, Mansel, In re*, 19 Q. B. D. 679; 56 L. J., Q. B. 605—C. A.

c. Order to Account and Pay Money.

After Discharge of Trustee.—A trustee under the Bankruptcy Act, 1869, who has obtained his statutory release and discharge under that Act, after the 25th of August, 1883 (the date of the passing of the Bankruptcy Act, 1883), is not thereby relieved from rendering an account to the Board of Trade of his receipts and payments as such trustee, if, on that date, he had in his hands any undistributed funds, although such funds may have been disposed of by a subsequent resolution of the creditors. *Board of Trade, Ex parte, Chudley, In re*, 14 Q. B. D. 402; 33 W. R. 708; 2 M. B. R. 8—Cave, J.

After Removal—Scheme of Arrangement.]

The Board of Trade has power to require a trustee appointed under a scheme of arrangement to transmit a verified account of all his receipts and payments, even though such trustee may have been removed from office; and, in case of refusal, the court will make an order against such trustee to enforce compliance with the requirements of the Board of Trade. *Board of Trade, Ex parte, Rogers, In re*, 35 W. R. 457; 4 M. B. R. 67—Cave, J.

Order to pay over Funds.—Upon an application on behalf of the Board of Trade, an order was made under s. 162 of the Bankruptcy Act, 1883, directing the trustees of an estate to pay over certain undistributed funds and dividends into the Bank of England. *Board of Trade, Ex parte, Pearce, In re*, 1 M. B. R. 56—Cave, J.

Order for Account—Non-compliance.—When the Board of Trade applies to the court under s. 102, sub-s. 5, of the Bankruptcy Act, 1883, to

enforce an order made by the Board under s. 162, sub-s. 2, against a trustee to submit to them an account of receipts and expenditure, the court will in the first instance make an order that the trustee obey the order of the Board of Trade, but will not add to that order a conditional order for the committal of such trustee. *Board of Trade, Ex parte, Margetts, In re*, 32 W. R. 1002; 1 M. B. R. 211—Cave, J.

Enforcing Payment of Money—Application to what Court.—An order having been made by a county court judge against a trustee in liquidation to credit the estate of the debtor with certain moneys, the trustee appealed to the bankruptcy judge, by whom the decision was substantially affirmed, and a special order was made as to costs, and as to the payments to be made by the trustee. The trustee having failed to comply with the order, an application was made to the bankruptcy judge to enforce the order:—Held, that the application should have been made to the county court judge. *Comptroller, Ex parte, Thomas, In re*, 3 M. B. R. 49—Cave, J.

d. Actions by.

New Trustee appointed.—When a trustee in bankruptcy suing in his official name is removed, and a new trustee appointed, the new trustee must obtain an order to continue the action, and give notice thereof to the other parties, under Ord. XVII. rr. 4, 5. *Pooley's Trustee v. Whet- ham*, 28 Ch. D. 38; 54 L. J., Ch. 182; 51 L. T. 608; 33 W. R. 423—C. A.

Security for Costs—Suing in Official Name—Insolvency.—A trustee of the property of a bankrupt brought an action in his official name, his own name not being mentioned. The defendants moved for security for costs on the ground of his insolvency, and of his suing solely in his official name. Evidence was given that he had been bankrupt ten years previously, and had also compounded with his creditors four years before the action was brought:—Held, that the evidence of the insolvency of the plaintiff was insufficient; and that the fact of his suing solely in his official name was not a ground for ordering him to give security for costs. Whether a trustee in bankruptcy suing in his official name would, if insolvent, be ordered to give security for costs, *quære*. *Id.*

The court will not require security for costs to be given by a plaintiff who sues as the trustee in liquidation for the benefit of the estate, even though he be insolvent. *Denston v. Ashton* (4 L. R., Q. B. 590) approved. *Cowell v. Taylor*, 31 Ch. D. 34; 55 L. J., Ch. 92; 53 L. T. 433; 34 W. R. 24—C. A.

Discovery and Particulars.—The court ordered that the defendant in an action brought by a trustee in bankruptcy of a firm which had been adjudicated bankrupt before the passing of the Bankruptcy Act, 1883, should be allowed to obtain particulars from and deliver interrogatories to the trustee, and that the action should be tried by a jury. *Carvill, In re*, 1 M. B. R. 150—Cave, J.

e. Liability for Costs.

Costs of Appeals.—Where, in a case of legal difficulty, a trustee in a bankruptcy has obtained the decision of the court, and he appeals from such decision unsuccessfully, the order for costs will be made against him personally. *James, Ex parte, Malden, In re*, 55 L. T. 708; 3 M. B. R. 185—D.

Where the county court had refused to approve of resolutions for a scheme of settlement under s. 28 of the Bankruptcy Act, 1869, and the trustee appealed to the chief judge, who reversed the order, and the Court of Appeal finally restored the order of the county court judge, the trustee was allowed the costs of his application to the county court judge out of the assets, if any, but was ordered to pay the costs of the appeals to the chief judge and to the Court of Appeal. *Strawbridge, Ex parte, Hickman, In re*, 25 Ch. D. 266; 53 L. J., Ch. 323; 49 L. T. 638; 32 W. R. 173—C. A.

Rejection of Proof.—The court, in reversing the decision of the trustee in a bankruptcy rejecting a proof, ordered him to pay the costs personally, being of opinion that he had acted unreasonably and improperly in rejecting it. *Brown, Ex parte, Smith, In re*, 17 Q. B. D. 488; 3 M. B. R. 202—C. A. See *Edmunds, Ex parte, Green, In re*, 53 L. T. 967—D.

Adoption of Bankrupt's Defence.—An interlocutory order for an injunction and receiver having been made against the defendants in an action, they gave notice of appeal, and shortly afterwards became bankrupt. An order was made for carrying on the proceedings against their trustee. The trustee gave notice to the plaintiff that he should not proceed with the appeal. Shortly after this the trustee entered an appearance and demanded a statement of claim. He declined to undertake to pay the costs of the appeal incurred by the plaintiff before the notice that the appeal would not be proceeded with, and the appeal came on that the question as to the costs might be decided:—Held, that the appeal must be dismissed with costs to be paid by the trustee, for that having adopted the defence of the bankrupts he had placed himself in their position as to the whole of the action, and could not reject part of the proceedings in it. *Borneman v. Wilson*, 28 Ch. D. 53; 54 L. J., Ch. 631; 51 L. T. 723; 33 W. R. 141—C. A.

f. Other points relating to.

Affidavit of no Receipts—Duty as to Stamp- ing Affidavit.—Where no money on account of the debtor's estate has come into the hands of a trustee, he must, at his own expense, provide the stamp for the affidavit of no receipts or payments which is required to be forwarded to the Board of Trade in such case. *Board of Trade, Ex parte, Rowlands, In re*, 35 W. R. 457; 4 M. B. R. 70—Cave, J.

Duty where Official Receiver's Account Unsatisfactory.—When the trustee in bankruptcy is dissatisfied with the accounts rendered to him by the official receiver, he should make a report thereon to the Board of Trade pursuant to the

249th rule of the Bankruptcy rules, 1883; and if the Board neglect or refuse to act in the matter, he should then apply to the court for directions under s. 101 of the Act. *Foa, Ex parte, Smith, In re*, 17 Q. B. D. 4; 55 L. J., Q. B. 288; 54 L. T. 307; 34 W. R. 535; 3 M. B. R. 63—Cave; J.

Duty as to Appealing.—A trustee, to protect himself, should, before appealing, obtain the consent of the creditors to do so, and also obtain a guarantee from such creditors for his own protection. *James, Ex parte, Malden, In re*, 55 L. T. 708; 3 M. B. R. 185—D.

Payment of Money to Trustee under Mistake of Law—Right to recover.—The ordinary rule, as between litigant parties, that money paid under a mistake of law cannot be recovered, does not apply to a payment made under such a mistake to the trustee in a bankruptcy. The trustee being an officer of the court, the court, when the mistake is discovered, will direct him to refund the money, if it is still in his hands; and, if it has been applied in the payment of dividends to the creditors under the bankruptcy, the court will direct the trustee to repay it out of other moneys coming to his hands, and applicable to the payment of dividends to the creditors. *James, Ex parte* (9 L. R. Ch. 609), followed and extended. *Simmonds, Ex parte, Carnac, In re*, 16 Q. B. D. 308; 55 L. J., Q. B. 74; 54 L. T. 439; 34 W. R. 421—C. A.

Relation back of Title—Adjudication after Liquidation Petition.—See *Sharp v. McHenry*, post, col. 175.

Title to Property.—See post, PROPERTY, VIII.

What Transactions are protected.—See post, PROTECTED TRANSACTIONS, XI.

III. WHO MAY BE BANKRUPT.

Lunatic—Leave to Committee.—The court gave leave to the committee of a lunatic to file a petition in bankruptcy under s. 4 (f) of the Bankruptcy Act, 1883, on behalf of the lunatic upon evidence that it would be for the benefit of the lunatic that he should be made a bankrupt, and that the creditors were willing to make him an allowance. *James, In re*, 12 Q. B. D. 332; 53 L. J., Q. B. 575; 50 L. T. 471—C. A.

Married Woman—Separate Estate—Non-Trader.—A married woman, possessed of separate estate, but not carrying on a trade separately from her husband, is not subjected to the operation of the bankruptcy laws, and cannot commit an act of bankruptcy under s. 4 of the Bankruptcy Act, 1883. *Coulson, Ex parte, Gardiner, In re*, 20 Q. B. D. 249; 57 L. J., Q. B. 149; 58 L. T. 119; 36 W. R. 142; 5 M. B. R. 1—D.

Medical Practitioner—"Trader."—A medical man practising as a general practitioner dispensed medicines to his patients but charged by the visit irrespectively of the medicine supplied, which was covered by the charge for the visit:—Held, that he was not a trader in drugs within the meaning of the Bankruptcy Act, 1869. *Hance v. Harding*, 20 Q. B. D. 732; 57

L. J., Q. B. 403; 59 L. T. 659; 36 W. R. 629—C. A.

Domicil of Debtor.—Sub-s. 1 (d) of s. 6 of the Bankruptcy Act, 1883, enacts that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless (inter alia) "the debtor is domiciled in England:—Held, that this must be taken to mean domiciled in England, as distinguished from Scotland or Ireland. *Cunningham, Ex parte, Mitchell, In re*, 13 Q. B. D. 418; 53 L. J., Ch. 1067; 51 L. T. 447; 33 W. R. 22; 1 M. B. R. 137—C. A.

Onus of Proof.—The onus is, in the first instance, on the petitioning creditor to prove the domicile, though he may adduce such *prima facie* evidence as will throw the burden of disproving the domicile on the debtor. But the mere fact that the debtor bears an English name, and is an officer in the British army, does not raise any presumption that his domicile is English as distinguished from Scotch or Irish, inasmuch as his domicile of origin might have been Scotch or Irish, and in either of those cases he would not by entering into the British army have lost his domicile of origin. *Yelverton v. Yelverton* (1 Sw. & Tr. 574), and *Brown v. Smith* (15 Beav. 444), approved and followed. *Id.*

The onus is on the petitioning creditor to prove that the debtor's domicile is English, as required by s. 6, sub-s. 1 (d), of the Bankruptcy Act, 1883, and that his residence has been such as to give the High Court jurisdiction under s. 95. But, if there is no reason to suppose that the debtor will dispute that his domicile is English, or that the petition is presented in the right court, the petitioning creditor need not in the first instance adduce evidence of either of those facts. *Cunningham, Ex parte* (13 Q. B. D. 418), explained. *Barne, Ex parte, Barne, In re*, 16 Q. B. D. 522; 54 L. T. 662; 3 M. B. R. 33—C. A.

Debtor ordinarily residing in England.—Where a debtor who was not domiciled in nor had a dwelling-house or place of business in England, had for eighteen months previous to the presentation of a bankruptcy petition against him, a room at an hotel in London, which he paid for continuously during that time, and was treated as an ordinary resident there:—Held, that the debtor had "ordinarily resided in England," within the meaning of s. 6, sub-s. 1 (d), of the Bankruptcy Act, 1883, and that the creditor was entitled to present a bankruptcy petition against him. *Reynolds, Ex parte, Norris, In re*, 5 M. B. R. 111—C. A.

IV. ACT OF BANKRUPTCY.

"Remaining out of England"—Domiciled Englishman residing Abroad.—A domiciled Englishman went, in 1876, with his family, to reside in France, where he took a house. He was not then being pressed by any creditors in England. For a period of fourteen months in 1877 and 1878 he was in England, carrying on the business of a newspaper which he had purchased, and he then had a furnished lodging in London. During that period he retained his house in France, and his wife and family lived

in it. During the same period he contracted a debt for costs to a solicitor in London. At the end of the fourteen months he discontinued the business, and went back to his residence in France. In 1880 he, with his family, occupied for nine months a furnished house in England, his house in France being let furnished; at the end of the nine months he returned to that house. He then continued to reside there, paying occasional visits to England. During one of these visits he accidentally met the solicitor, who asked him why he had not paid his debt, and he answered that his newspaper speculation had left him with a number of claims, and he thought if he kept abroad he should be able to settle them more easily. The solicitor presented a bankruptcy petition against the debtor, alleging as an act of bankruptcy that he had remained out of England with intent to defeat or delay his creditors:—Held, that as the debtor was remaining out of England at his own permanent residence abroad, no intent to defeat or delay his creditors could be imputed to him from that circumstance alone, and that the conversation with the petitioning creditor was not sufficient to prove such an intent. *Brandon, Ex parte, Trench, In re*, 25 Ch. D. 500; 53 L. J., Ch. 576; 50 L. T. 41; 32 W. R. 601—C. A.

—Intent to Defeat or Delay Creditors.]—

In January, 1886, the debtor, whose business was connected with Central America, called on his bankers and informed them that he was about to visit that country and obtained from them an advance of 2,000*l*. The money was not repaid, and in July, 1886, a circular was sent to the creditors by the debtor's solicitors stating that he was in difficulties and calling a meeting of creditors. The creditors resolved that the debtor should be requested to stay in America to realise his assets there, and a telegram was thereupon sent to him by his solicitors to that effect. No communications having arrived from the debtor, and his solicitors having declined to accept service of a writ, it was ascertained that the debtor's London office had been closed, and in September, 1886, the bank presented a petition:—Held, that the object for which the creditors accorded permission to the debtor to remain in America was in order that he might realise his assets; that the conduct of the debtor in not communicating with the creditors, and also in respect of the non-acceptance of service of the writ, afforded ample evidence of an intention to stay abroad for the purpose of defeating his creditors within the meaning of s. 4, sub-s. 1 (d), of the Bankruptcy Act, 1883; and that the court was right in making a receiving order. *Campbell, Ex parte, Campbell, In re*, 4 M. B. R. 198—D. And see preceding case.

“**Keeping House.**”]—Where a debtor keeps house and denies himself to a creditor, though not with the intention of defeating him, but rather with the view of gaining time for the purpose of paying his creditors, he delays him and commits an act of bankruptcy within the meaning of the provisions of the Bankruptcy Act. *Richardson v. Pratt*, 52 L. T. 614—D.

“**Departing from Dwelling-house**”—**Intent to Delay and Defeat Creditors.**]—On March 8th the debtor, who was a farmer, instructed an

auctioneer to sell off all the stock, furniture, and effects on his farms, and the sale was advertised to take place on March 16th and 18th, the advertisements stating that the debtor was leaving the neighbourhood. On March 15th a creditor, having heard of the sale, wrote to the debtor, and on the same day another creditor served the debtor with a writ. On March 16th the debtor departed from his house but left his brother at the farm, who superintended the conduct of the sale, and informed the auctioneer that letters addressed to him would reach the debtor. On March 17th the debtor wrote to the first-mentioned creditor stating that he would call and explain matters, but did not do so. A petition was subsequently presented, the act of bankruptcy alleged being that the debtor had departed from his dwelling-house with intent to delay and defeat creditors; but the county court judge refused to make a receiving order:—Held, that the debtor was not bound to stay on the farm while his effects were being sold; that he left his brother as his representative, and no evidence had been given to show that if inquiries had been made as to the debtor they would not have been answered; and that as the county court judge had come to the conclusion that there was no intention to defeat creditors, the court would not interfere with his decision. *Foster, Ex parte, Woolstenholme, In re*, 4 M. B. R. 258—D.

—**Onus of Proof.**]—A petitioning creditor, who alleges that his debtor has committed an act of bankruptcy, by departing from his dwelling-house with intent to defeat and delay his creditors, is bound to show that the debtor is alive and in some other place. *Geisel, Ex parte, Stanger, In re*, 22 Ch. D. 436; 53 L. J., Ch. 349; 48 L. T. 405; 31 W. R. 264—C. A.

“**Notice of Suspension of Payment**”—**Verbal Notice.**]—A notice by a debtor that he has suspended, or that he is about to suspend, payment of his debts need not, in order that it may constitute an act of bankruptcy, be in writing. It is sufficient if a verbal statement to that effect be made by the debtor to one of his creditors. *Nicholl, Ex parte, Walker, In re*, 13 Q. B. D. 469; 1 M. B. R. 188—D. Compromised on appeal, W. N. 1884, 222.

An oral statement made by a debtor to a creditor that he is unable to pay his debts in full, is not a notice that he has suspended, or is about to suspend, payment of his debts, so as to constitute an act of bankruptcy within sub-s. 1 (h) of s. 4 of the Bankruptcy Act, 1883. Such a notice may be given orally, but it must be given formally and deliberately, and with the intention of giving notice. *Oastler, Ex parte, Friedlander, In re*, 13 Q. B. D. 471; 54 L. J., Q. B. 23; 51 L. T. 309; 33 W. R. 126; 1 M. B. R. 207—C. A.

By s. 4, sub-s. 1 (h), of the Bankruptcy Act, 1883, it is provided that a debtor commits an act of bankruptcy if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts. A debtor having called his creditors together, and having made to them an offer of a certain amount in the pound:—Held, that this did not amount to a declaration of intention to suspend payment, and did not, therefore, constitute an

act of bankruptcy. *Trustee, Ex parte, Walsh, In re*, 52 L. T. 694; 2 M. B. R. 112—D.

—**What Constitutes.**—By s. 4, sub-s. 1 (h) of the Bankruptcy Act, 1883, it is provided that a debtor commits an act of bankruptcy if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts. A debtor through his agents issued a circular to his creditors, setting out a statement of his affairs and offering them a certain amount in the pound, adding that he had no other property, that he was going out of business and into some situation. The agents after the issue of the circular paid some debts by the debtor's direction:—Held, that this circular issued by the agents amounted to a declaration by the debtor that he was about to suspend payment, and as such was an act of bankruptcy. *Gibson, Ex parte, Lamb, In re*, 55 L. T. 817—D. Affirmed 4 M. B. R. 25—C. A.

Where two circulars were sent out by the solicitors of the debtor to the creditors, calling a meeting of the creditors, and laying before them the position of the debtor, and further stating that by the kindness of friends, and by raising money upon his furniture, such debtor might be enabled to pay 10s. in the pound, provided all the creditors would accept it to save bankruptcy proceedings, but that if all the creditors would not agree, there was no alternative but to seek the protection of the court:—Held, that such statements amounted to a notice by the debtor "that he has suspended, or that he is about to suspend, payment of his debts," so as to constitute an act of bankruptcy under s. 4, sub-s. 1 (h), of the Bankruptcy Act, 1883. *Wolstenholme, Ex parte, Wolstenholme, In re*, 2 M. B. R. 213—D.

Assignment of Proceeds of Sale of Property.]

—G., a farmer, whose lease was about to expire in September, 1884, placed all his live and dead stock in the hands of an auctioneer to realize, and in order to prevent H., who held a judgment for 130*l.* against him, and also a promissory note for 38*l.*, from stopping the sale, G. signed and gave the following letter addressed to the auctioneer:—"I authorize and request you to pay to H. out of the first proceeds of the sale of my farming live and dead stock (after satisfying the landlord's claim for rent) the sum of 168*l.*, being the amount due from me to him, and I hereby appropriate the sum of 168*l.* out of the proceeds of such sale for the purpose of such payment accordingly.—Dated, August 18, 1884." G. then owed other debts of about 150*l.* The goods were sold by the auctioneer on August 21, and realized 276*l.* gross. The net proceeds after payment of rent amounted to 142*l.* A receiving order was made on October 22. The crops on the farm sold or paid for by the incoming tenant realized 148*l.*, and G.'s furniture 12*l.* G. had no other property. The trustee in bankruptcy claimed the 142*l.*:—Held, that H. was entitled to the 142*l.*, and the transaction in question was not an act of bankruptcy. *Jenkins, Ex parte, Glanville, In re*, 33 W. R. 523; 2 M. B. R. 71—Cave, J.

Fraudulent Conveyance—Assignment of all Debtor's Property—Intent to defeat or delay Creditors.]—A trader in embarrassed circumstances in July, 1882, assigned substantially the

whole of his property (including his stock in trade, book debts, and the goodwill of his business) to a single creditor, in consideration (as expressed in the deed) of the release by that creditor of a debt of 3,271*l.* then owing to him by the debtor. In fact, at the date of the assignment, only 1,370*l.* was due by the assignor to the assignee, and the real consideration was the release by the assignee of that debt, and a secret verbal agreement between him and the assignor that he should undertake the payment of the assignor's debts (either the whole of his debts, or, at any rate, his trade debts). On the same day the assignor entered into a written agreement to manage the business as the servant of the assignee at a weekly salary. The assignee, a few days before the execution of the deed, but after the arrangement between the parties had been come to, paid out some executions for the assignor, and shortly after the execution of the deed he paid an arrear of rent which the assignor owed to his landlord. The business was, after the execution of the deed, carried on by the assignor in his own name, just as it was before, there being nothing to show that he was not the real as well as the apparent owner of it, though he was in fact acting under the directions of the assignee. None of the other creditors knew of the assignment. In March, 1883, the assignor was adjudged a bankrupt. At the date of the bankruptcy nearly all the trade debts due by the assignor at the date of the deed had been paid in the course of the carrying on of the business:—Held, by Cotton and Bowen, L.JJ., that the deed was void as against the trustee in the bankruptcy as an act of bankruptcy, its necessary effect being to defeat and delay the assignor's creditors in enforcing their ordinary remedies for the recovery of their debts, and there being no means by which they could compel the fulfilment by the assignee of his agreement to pay their debts. *Chaplin, Ex parte, Sinclair, In re*, 26 Ch. D. 319; 53 L. J., Ch. 732; 51 L. T. 345—C. A.

Held, by Fry, L. J., that the deed was void as against the assignor's creditors under the statute, 13 Eliz. c. 5. *Id.*

Assignment of whole Property to secure existing Debt and further Advance.]—When a bill of sale of the whole of a trader's property is executed as security for an existing debt and a fresh advance, the true test whether the execution of the deed is an act of bankruptcy, is, was the fresh advance made by the lender with the intention of enabling the borrower to continue his business, and had he reasonable grounds for believing that the advance would enable the borrower to do so? If these questions can be answered in the affirmative, the execution of the deed is not an act of bankruptcy. *Johnson, Ex parte, Chapman, In re*, 26 Ch. D. 338; 53 L. J., Ch. 763; 50 L. T. 214; 32 W. R. 693—C. A.

The court ought not to look at the uncommunicated intention of the borrower, nor at the actual result of the loan. *Id.*

Fraudulent Transfer of Property—Payment by Agent.]—An agent, who, in obedience to the previous direction of his principal, pays away money of the principal which is in his hands, knowing before he makes the payment (though he did not know when he received the money) that the payment will when completed consti-

tute, an act of bankruptcy on the part of the principal, is not liable to the trustee in the subsequent bankruptcy of the principal for the money so paid away. The trustee could recover the money from the agent only on the ground that he had paid away the money of the trustee, and in such a case the money would become the trustee's money only on the completion of the act of bankruptcy to which his title would relate back, i.e., not until after the money had left the agent's hands. *Helder, Ex parte, Lewis, In re*, 24 Ch. D. 339; 53 L. J., Ch. 106; 49 L. T. 612—C. A.

Fraudulent Preference.—A fraudulent preference is not per se an act of bankruptcy. *Luck, Ex parte, Kemp, In re*, 49 L. T. 809; 32 W. R. 296—C. J. B.

Computation of Time — “Within Three Months.”—By s. 6, sub-s. 1 (c), Bankruptcy Act, 1883, “a creditor shall not be entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition.” A debtor committed an act of bankruptcy on the 13th August, and a petition was presented on the 13th November :—Held, that the petition was presented in time. *Foster, Ex parte, Hanson, In re*, 56 L. T. 573; 35 W. R. 456; 4 M. B. R. 98—D.

Act of Bankruptcy committed before the 1st of January, 1884.—A receiving order can be made on a bankruptcy petition presented under the Bankruptcy Act, 1883, founded on an act of bankruptcy committed before that act came into operation, but in respect of which no bankruptcy proceedings had been taken before that date. And the fact that liquidation proceedings under the Bankruptcy Act, 1869, were pending when the act of 1883 came into operation, and that those proceedings afterwards came to an end by reason of the creditors failing to pass any resolution, does not affect the power of the court to make the receiving order. *Pratt, Ex parte, Pratt, In re*, infra.

Waiver of Proof.—A debtor who has appeared on a bankruptcy petition and not taken the objection that the act of bankruptcy has not been strictly proved, will be deemed to have waived his right of proof. *Evans, Ex parte, Evans, In re*, 50 L. T. 158; 32 W. R. 281—C. A.

If, on the hearing of a bankruptcy petition, the act of bankruptcy alleged is not strictly proved, but the debtor appears and does not raise the objection, and a receiving order is made, he cannot on an appeal from that order raise the objection. *Pratt, Ex parte, Pratt, In re*, 12 Q. B. D. 334; 53 L. J., Ch. 613; 50 L. T. 294; 32 W. R. 420; 1 M. B. R. 27—C. A.

V. DEBTOR'S SUMMONS.

Service—Inaccurate Copy — “Formal Defect or Irregularity.”—On serving a debtor with a debtor's summons the sealed copy which was delivered to him stated the amount of the debt claimed by the creditor to be 24*l*. (instead of 74*l*., the real amount), but these words were added, “being the sum claimed of you by him according to the particulars hereunto annexed.”

The particulars thus referred to were set forth on the second half of a sheet of paper, the first half of which contained the summons. The particulars stated the amount of the debt, and the circumstances under which it arose, correctly :—Held, that the error in the summons was a merely “formal defect” within the meaning of s. 82 of the Bankruptcy Act, 1869, by which the debtor could not possibly have been misled, and that no substantial injustice had been caused to him by it, and, consequently, that the service of the summons was not invalidated by it, and an adjudication of bankruptcy founded on the summons could not be impeached. *Johnson, Ex parte, Johnson, In re*, 25 Ch. D. 112; 53 L. J., Ch. 309; 50 L. T. 157; 32 W. R. 175—C. A.

— **By Clerk of Creditor.**—The summoning creditor was a solicitor, and the service of the summons was effected by his clerk, instead of by himself or his attorney, or by an officer of the court, as required by r. 61 of the Bankruptcy Rules, 1870 :—Held, that this irregularity also was cured by s. 82. *Ib*.

— **Time—Substituted Service.**—R. 59 of the Bankruptcy Rules, 1870, does not apply to substituted service of a debtor's summons, but, if personal service cannot be effected, an order for substituted service may be made under r. 61 after the expiration of the time limited by r. 59 for effecting personal service, and the substituted service must be effected within such reasonable time as the court may fix. *Warburg, Ex parte, Whalley, In re*, 25 Ch. D. 336; 53 L. J., Ch. 336; 32 W. R. 542—C. A.

Security.—Where a debtor's summons had been served for non-payment of 250*l*., part of a larger debt of 1,400*l*., and after service of the summons the entire debt became payable, and was disputed by the debtor, the court held that the registrar had, under s. 9 of the Bankruptcy Act, 1869, upon a bankruptcy petition, founded on non-compliance with the summons, an absolute discretion to order security to be given for the larger amount. *Evans, Ex parte, Evans, In re*, 50 L. T. 158; 32 W. R. 281—C. A.

What included in Surety's Bond.—The prosecution of a counter-claim is a “proceeding continued,” within the meaning of the surety's bond given in pursuance of s. 7 of the Bankruptcy Act, 1869. *Norman v. Bolt*, 1 C. & E. 77—Field, J.

VI. BANKRUPTCY NOTICE, PETITION AND RECEIVING ORDER.

1. Parties to.
2. Amount and Nature of Debt.
3. Powers of the Court.
4. Practice.
 - a. In General.
 - b. Staying Proceedings.
 - c. Application to Rescind Order.

1. PARTIES TO.

Any Creditor — Notice served by another Creditor.—When an act of bankruptcy has been committed by the failure of a debtor to comply

with a bankruptcy summons, any creditor may avail himself of it for the purpose of presenting a bankruptcy petition against the debtor; the right to petition is not limited to the creditor who has served the bankruptcy notice. *Dearle, Ex parte, Hastings, In re, infra.*

Trustee for absolute Owner.]—Under the Bankruptcy Act, 1883, as under the Bankruptcy Act, 1869, a mere trustee of a debt for an absolute beneficial owner is not entitled to present a bankruptcy petition against the debtor unless the cestui que trust, if capable of dealing with the debt, joins as a co-petitioner. *Culley, Ex parte* (9 Ch. D. 307), followed. *Dearle, Ex parte, Hastings, In re*, 14 Q. B. D. 184; 54 L. J., Q. B. 74; 33 W. R. 440; 1 M. B. R. 281—C. A.

— Leave to Amend.]—A bankruptcy petition having been presented by a bare trustee of a debt, and dismissed on the ground that the cestui que trust ought to have been joined as a petitioner, leave was given by the Court of Appeal (though more than three months had elapsed since the presentation of the petition) to amend it by joining the cestui que trust, with her consent, but the appellant was ordered to pay the costs of the appeal, and the costs (if any) occasioned by the amendment. *Dearle, Ex parte, Hastings, In re, supra.*

At the hearing of a bankruptcy petition the objection was raised on behalf of the debtor that the petitioning creditor was a mere trustee for his father, and the registrar after hearing the evidence, having come to that conclusion, the petition was dismissed without leave to amend:—Held, that although the registrar was justified in so doing, as a matter of indulgence, leave to amend the petition by joining the father would be granted, but such leave must be subject to the condition that all costs thrown away should be paid by the father within one month, including the costs of the appeal. *Hinselwood, Ex parte, Ellis, In re*, 4 M. B. R. 283—C. A.

Substitution of Petitioning Creditors.]—A creditor's petition in bankruptcy founded on the execution by the debtor of a deed of assignment for the benefit of creditors, was dismissed on the ground that the petitioning creditors had assented to the deed. More than three months after the execution of the deed, two non-assenting creditors applied to rescind the order dismissing the petition, and asked that their names might, under s. 107 of the Bankruptcy Act, 1883, be substituted for those of the original petitioning creditors:—Held, that the court had no jurisdiction under s. 107 to entertain the application, the petition having been dismissed, and more than three months having elapsed since the act of bankruptcy upon which it was founded. *Maugham, Ex parte, Maugham, In re*, 21 Q. B. D. 21; 57 L. J., Q. B. 487; 59 L. T. 253; 36 W. R. 846; 5 M. B. R. 152—D.

Liquidator of Company.]—The liquidator appointed in the voluntary winding-up of a company may serve a bankruptcy notice, under the Bankruptcy Act, 1883, upon a judgment debtor of the company. *Winterbottom, Ex parte, Winterbottom, In re*, 18 Q. B. D. 446; 56 L. J., Q. B. 238; 56 L. T. 168; 4 M. B. R. 5—D.

— Not in his own Name.]—A balance

order was made against A. to pay to the official liquidator of the Land Development Association a certain sum for calls due from A. to the company. The official liquidator brought an action as official liquidator on that order, and obtained judgment against A., and thereupon issued a bankruptcy notice in his own name as official liquidator of the company. A petition was presented against A., founded on that notice, and came on for hearing before the registrar, who dismissed it, and from his dismissal this appeal was brought:—Held, that the petition was rightly dismissed by the registrar, as it was irregular. *Mackay, Ex parte, Shirley, In re*, 58 L. T. 237—D.

Purchase by Creditor of Debt—Absence of mala fides.]—A. was secretary to a death club, and as such received sums of money and paid all claims owing to members. Certain mistakes having occurred in A.'s accounts, A. agreed to refund all sums missing, and in addition A. paid by bills 45l. each to B. and C., members of the club, for claims which they were entitled to have paid by the club. A. absconded, and his whereabouts was unknown. B. purchased bona fide for 15l. C.'s debt of 45l., so as to enable him to take proceedings in bankruptcy against A. B. presented a petition, and a receiving order was obtained. Against that order A. appealed:—Held, that as B.'s purchase of C.'s debt was made perfectly bona fide, it was valid and not an abuse of the bankruptcy laws, and that the receiving order was therefore well founded. *Baker, Ex parte, Baker, in re*, 58 L. T. 233; 36 W. R. 558; 5 M. B. R. 5—D.

Joint Petition by Persons not Joint Traders.]—Where debtors who are neither partners nor joint traders join in presenting a bankruptcy petition, the petition is an abuse of the process of the court, and the court has jurisdiction, notwithstanding s. 8 of the Bankruptcy Act, 1883, to refuse to make a joint receiving order. *Official Receiver, Ex parte, Bond, In re*, 21 Q. B. D. 17; 57 L. J., Q. B. 501; 58 L. T. 887; 36 W. R. 700; 5 M. B. R. 146—Cave, J.

Notice in Name of Partners.—Bankruptcy of one Partner before Hearing of Petition.]—After the bankruptcy of a partner and the appointment of a trustee of his property his solvent partner has a right to receive, and can give a good discharge for, the partnership assets, and is entitled, for the purpose of collecting or recovering the assets, to use the name of the trustee, upon giving him an indemnity. After one of two partners had filed a liquidation petition and a receiver had been appointed, a judgment was recovered in an action previously commenced in the names of the two partners against O., a debtor of the firm. A bankruptcy notice in the names of the two partners was then served on O.; he failed to comply with it within the seven days limited for the purpose, and a bankruptcy petition was presented against him in the names of the two partners. Before this petition came on to be heard, the creditors of the partner who had filed the liquidation petition had resolved on a liquidation by arrangement, and had appointed a trustee of his property:—Held, that though there was a good act of bankruptcy, a receiving order could not properly be made against O., unless the trustee in the liquidation was joined as a co-

petitioner. *Owen, Ex parte, Owen, In re*, 13 Q. B. D. 113; 53 L. J., Ch. 863; 50 L. T. 514; 32 W. R. 811; 1 M. B. R. 93—C. A.

"Creditor who has obtained final Judgment."

—**Assignee of Judgment Debt.**—In the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (g)—which enables a creditor who has obtained a final judgment against a debtor to issue a bankruptcy notice requiring him to pay or secure the debt—the words "creditor who has obtained a final judgment" do not include an assignee of the judgment debt. *Ex parte Woodall* (13 Q. B. D. 479), explained. *Blanchett, Ex parte, Keeling, In re*, 17 Q. B. D. 303; 55 L. J., Q. B. 327; 34 W. R. 438; 3 M. B. R. 157—C. A.

—**"Judgment Creditor"—Alimony—Wife.**—By s. 103, sub-s. 5, Bankruptcy Act, 1883, "Where under s. 5 of the Debtors Act, 1869, application is made by a judgment creditor to a court having bankruptcy jurisdiction for the committal of a judgment debtor, the court may, if it think fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor . . . make a receiving order against the debtor." An order was made in the Divorce Court for payment of alimony. The payments having fallen into arrear, a judgment summons was issued by the wife against her husband, and, with the consent of the wife and in the absence of the husband, a receiving order was made in lieu of an order for committal. The case was ordered to be reheard:—Held, that the wife was not a judgment creditor within the meaning of sub-s. 5 of s. 103, and that a receiving order could not be made. *Otway, Ex parte, Otway, In re*, 53 L. T. 885; 36 W. R. 698; 5 M. B. R. 115—Cave, J.

—Damages in Divorce Suit—Payment to Husband.

—In a divorce suit by a husband a decree of dissolution of the marriage was made whereby F., the co-respondent, was ordered to pay into court the amount of damages assessed by the jury. A further order was made that F. should pay the money to the husband for the purposes of settlement upon the children of the marriage. F. failed to pay, whereupon the husband applied to the judge in bankruptcy for a committal order under s. 5 of the Debtors Act, 1869. F. had means sufficient to pay part only of the money. The judge, acting under s. 103, sub-s. 5, of the Bankruptcy Act, 1883, made a receiving order in lieu of an order for committal:—Held, that the judge had no jurisdiction to make the order, inasmuch as the husband, being a mere receiver or collector for the court of money not to be applied for his own benefit, was not a "judgment creditor" within the meaning of s. 103, sub-s. 5, of the Bankruptcy Act, 1883; but that an order should be made against F., under s. 5 of the Debtors Act, 1869, for payment of the money by instalments. *Fryer, Ex parte, Fryer, In re*, 17 Q. B. D. 718; 55 L. J., Q. B. 478; 55 L. T. 276; 34 W. R. 766; 3 M. B. R. 231—C. A.

2. AMOUNT AND NATURE OF DEBT.

Amount—Costs of issuing abortive Execution.—The costs of an abortive execution cannot be added to the judgment debt for the purpose of making up the amount of debt required by the Bankruptcy Act, 1883, s. 6, to

support a bankruptcy petition. *Long, Ex parte, Cuddeford, Ex parte, Long, In re*, 20 Q. B. D. 316; 57 L. J., Q. B. 360; 58 L. T. 664; 36 W. R. 346; 5 M. B. R. 29—C. A.

Valuation of Security by Secured Creditor.]—

When a secured creditor presents a bankruptcy petition against his debtor it is not necessary that the estimate given by the petitioner of the value of his security should be a true estimate; but, if an adjudication is made, the trustee in the bankruptcy will be entitled to redeem the security at the amount of the petitioner's estimate. *Taylor, Ex parte, Lacey, In re*, 13 Q. B. D. 128; 1 M. B. R. 113—D.

Judgment on which Execution stayed—Garnishee Order absolute against Debtor.]—

Where a creditor has obtained final judgment and a garnishee order absolute has been made against the judgment debtor as garnishee, execution on the judgment must be taken to be stayed so long as the garnishee order remains undischarged, and the creditor is not entitled to serve a bankruptcy notice on the garnishee in respect of the judgment debt, even though the debt in respect of which the garnishee order was made has been in fact paid. *Hyde, Ex parte, Connan, In re*, 20 Q. B. D. 690; 57 L. J., Q. B. 472; 59 L. T. 281; 5 M. B. R. 89—C. A.

—**Interpleader Order.**—Where goods taken in execution under a judgment are claimed by a third party, and an interpleader order is made, under which the sheriff withdraws from possession, execution on the judgment has been stayed, within the meaning of s. 4, sub-s. 1 (g), of the Bankruptcy Act, 1883, and therefore the judgment creditor cannot issue a bankruptcy notice. *Ford, Ex parte, Ford, In re*, 18 Q. B. D. 369; 56 L. J., Q. B. 188; 56 L. T. 166; 3 M. B. R. 283—D.

On 14th Jan., judgment was recovered against the debtor for 446*l.* and execution was issued under which the sheriff levied, but a third person having claimed the goods, an interpleader order was obtained, whereby upon payment of 20*l.* into court by the claimant, the sheriff was directed to withdraw. On 14th March, a bankruptcy notice under s. 4, sub-s. 1 (g), of the Bankruptcy Act, 1883, requiring payment of the debt, was served upon the debtor, but the notice was dismissed by the registrar of the county court on the ground that within the meaning of the section, execution had been stayed:—Held, that there had been no stay, and that the creditor was entitled to issue a bankruptcy notice. *Lindsey, Ex parte, Bates, In re*, 57 L. T. 417; 35 W. R. 668; 4 M. B. R. 192—D.

On July 8th judgment was recovered against the debtor, and execution was issued under which the sheriff levied on July 11th. On July 13th, a third person having claimed the goods, an interpleader summons was issued by the sheriff; on the same day a bankruptcy notice under s. 4, sub-s. 1 (g), of the Bankruptcy Act, 1883, was served by the judgment creditor upon the debtor, on which a receiving order was subsequently made against him:—Held, that at the time when the bankruptcy notice was issued the creditor was not in a position to issue execution, and that the receiving order must be set aside. *Phillips, Ex parte, Phillips, In re*, 5 M. B. R. 40—D.

— **Foreclosure Decree.**—A creditor who, as equitable mortgagee, has obtained a foreclosure decree and an order for sale of the property of the debtor is still, if no such sale is found to be possible, at liberty to serve a bankruptcy notice on the debtor and to take further proceedings; and the fact of such an order for sale not having been carried out is not sufficient ground for an adjournment by the registrar of further proceedings on the notice on the application of the debtor under r. 139 of the Bankruptcy Rules, 1886. *Meston, Ex parte, Kelday, In re*, 36 W. R. 585—C. A.

— **Agreement for Payment by Instalments—Right to issue Second Notice on Default.**—If execution may be issued on a judgment, a bankruptcy notice under s. 4, sub-s. 1 (g), of the Bankruptcy Act, 1883, may be issued; where, therefore, a bankruptcy notice had been issued in respect of a judgment debt and withdrawn, a second bankruptcy notice may be issued in respect of the same debt. *Feast, Ex parte, Feast, In re*, 4 M. B. R. 37—C. A.

Judgment for debt and costs having been recovered against a debtor, the costs were taxed and the creditor issued a bankruptcy notice in respect of the judgment debt and costs. An agreement was thereupon come to between the debtor and the creditor, by which the debt and costs were agreed at 500*l.*, and the debtor agreed to pay 100*l.* at once, and the balance by monthly instalments of 20*l.*; in case any instalment was not duly paid, the whole amount then unpaid was forthwith to become due and payable. The 100*l.* and some of the instalments were duly paid, but on default subsequently being made, a bankruptcy notice for the unpaid balance was issued by the creditor:—Held, that the agreement entered into was to the effect that, upon default of payment of any instalment, the unpaid balance was to become due under the judgment, and that the creditor was entitled to issue a bankruptcy notice in respect of the debt. *Id.*

— **Where Execution cannot be Issued without Leave.**—A judgment against a firm cannot be made the subject of a bankruptcy notice under s. 4, sub-s. 1 (g), of the Bankruptcy Act, 1883, against a partner against whom execution could not, under Ord. XLII. r. 10, have issued upon the judgment without leave. *Id.*, *Ex parte, Id.*, *In re*, 17 Q. B. D. 755; 55 L. J., Q. B. 484; 35 W. R. 20; 3 M. B. R. 239—C. A.

The executor of a creditor who has obtained a final judgment is not entitled to issue a bankruptcy notice against the judgment-debtor, unless he has obtained leave from the court, under rule 23 of Ord. XLII. of the rules of the Supreme Court of 1883, to issue execution on the judgment. Under sub-s. 1 (g) of s. 4 of the Bankruptcy Act, 1883, the creditor who issues a bankruptcy notice must be in a position to issue execution on the judgment. *Woodhall, Ex parte, Woodhall, In re*, 13 Q. B. D. 479; 53 L. J., Ch. 966; 50 L. T. 747; 32 W. R. 774; 1 M. B. R. 201—C. A.

— **Conditional Payment of Debt.**—Within seven days after the service of a bankruptcy notice the debtor gave to the creditor a promissory note, payable two months after date, for the amount of the debt, which note the creditor accepted:—Held, that, the note being a conditional payment

of the debt, the creditor could not, during the currency of the note, avail himself of the bankruptcy notice to obtain a receiving order against the debtor. *Matthew, Ex parte, Matthew, In re*, 12 Q. B. D. 506; 51 L. T. 179; 32 W. R. 813; 1 M. B. R. 47—C. A.

— **Payment prevented—Attachment of Shares by Judgment Creditor.**—A judgment creditor having served a bankruptcy notice on the debtor, within the seven days allowed for complying with the notice, obtained a charging order on certain shares belonging to the debtor:—Held, that the creditor had not, by attaching the shares, prevented the debtor from paying the judgment debt, and that the debtor was not entitled to have the bankruptcy notice set aside. *McMurdo, Ex parte, Sedgwick, In re*, 60 L. T. 9; 37 W. R. 72; 5 M. B. R. 262—C. A.

— **"Final Judgment"—Judgment for Costs.**—At the trial of an action in the Chancery Division, upon motion for judgment in default of pleading, judgment was given ordering and adjudging that the defendant should be perpetually restrained from practising as a solicitor at Liverpool or otherwise, in violation of his covenant with the plaintiff. And the court declared that the partnership between the plaintiff and the defendant ought to be dissolved as from the date of the plaintiff's notice, and ordered and decreed the same accordingly. And it was ordered that an inquiry should be made what was the amount of the damages which the plaintiff had sustained by reason of the defendant's breach of covenant, and that the defendant should within fourteen days from the date of the chief clerk's certificate, pay the amount of the damages, when certified, to the plaintiff. And it was ordered that the defendant should pay to the plaintiff his taxed costs of the action. The costs were taxed, and were partly paid by the defendant. The inquiry as to damages was not prosecuted:—Held, that the order for the payment of costs was a "final judgment" within the meaning of s. 4, sub-s. 1 (g), of the Bankruptcy Act, 1883, and that the plaintiff was entitled to serve the defendant with a bankruptcy notice for the unpaid balance of costs. *Chinery, Ex parte* (12 Q. B. D. 342), explained. *Moore, Ex parte, Faithfull, In re*, 14 Q. B. D. 627; 54 L. J., Q. B. 190; 52 L. T. 376; 33 W. R. 438; 2 M. B. R. 52—C. A.

The defendants to an action for the specific performance of a contract executed the deeds necessary to carry out the contract, and an order was then made by consent that, on the defendants paying the plaintiff's taxed costs of the action, all further proceedings in the action should be stayed. The costs were taxed, and an order was made that the defendants should, on or before a day named, pay the taxed amount. Payment was not made within the time appointed:—Held, that the order for payment was not a "final judgment," within the meaning of sub-s. 1 (g) of s. 4 of the Bankruptcy Act, 1883, and that a bankruptcy notice could not be founded on it. *Schmitz, Ex parte, Cohen, In re*, 12 Q. B. D. 509; 53 L. J., Ch. 1168; 50 L. T. 747; 32 W. R. 812; 1 M. B. R. 55—C. A.

In an action in the Chancery Division the defendant obtained under Ord. XXVII. r. 1, an order for the dismissal of the action for want of prosecution, and the payment of costs by the

plaintiff:—Held, that the order was not a “final judgment” within the meaning of sub-s. 1 (g) of s. 4 of the Bankruptcy Act, 1883, and that the defendant was not entitled to serve the plaintiff with a bankruptcy notice in respect of such order. *Strathmore (Earl), Ex parte, Riddell, In re*, 20 Q. B. D. 512; 57 L. J., Q. B. 259; 58 L. T. 838; 36 W. R. 532; 5 M. B. R. 59—C. A.

— **“Balance Order.”**]—A “balance order” in respect of calls made on a contributory in the winding-up of a company is not a “final judgment” within the meaning of sub-s. 1 (g) of s. 4 of the Bankruptcy Act, 1883, and a bankruptcy notice cannot be issued in respect of such an order. *Ex parte Whinney* (13 Q. B. D. 476), followed. *Grimwade, Ex parte Tennent, In re*, 17 Q. B. D. 357; 55 L. J., Q. B. 495; 3 M. B. R. 166—C. A.

A “balance order” made in the voluntary winding-up of a company on a contributory, for the payment of calls which had been made upon him before the commencement of the winding-up, is not a “final judgment” within the meaning of sub-s. 1 (g) of s. 4 of the Bankruptcy Act, 1883, and therefore a bankruptcy notice cannot be issued in respect of such an order. *Whinney, Ex parte, Sanders, In re*, 13 Q. B. D. 476; 1 M. B. R. 185—D.

— **Garnishee Order Absolute.**]—A garnishee order absolute is not a “final judgment” against the garnishee within sub-s. 1 (g) of s. 4 of the Bankruptcy Act, 1883, and the judgment creditor who has obtained the order cannot issue a bankruptcy notice against the garnishee in respect of it. *Chinery, Ex parte, Chinery, In re*, 12 Q. B. D. 342; 53 L. J., Ch. 662; 50 L. T. 342; 32 W. R. 469; 1 M. B. R. 31—C. A.

— **Order for Payment of Alimony, pendente lite.**]—An order for the payment of alimony pendente lite is not a “final judgment” against the husband within the meaning of sub-s. 1 (g) of s. 4 of the Bankruptcy Act, 1883, and a bankruptcy notice cannot be issued against the husband in respect of arrears due under such an order. *Moore, Ex parte* (14 Q. B. D. 627) distinguished. *Henderson, Ex parte, Henderson, In re*, 20 Q. B. D. 509; 57 L. J., Q. B. 258; 58 L. T. 835; 36 W. R. 567; 5 M. B. R. 52—C. A.

Judgment by Consent—Failure to file Judge's Order.]—Where a creditor in whose favour a judgment has been entered up by consent omits to file the judge's order in accordance with s. 27 of the Debtors Act, 1869, he is nevertheless entitled to serve the debtor with a bankruptcy notice founded on such judgment. *Guest, Ex parte, Russell, In re*, 37 W. R. 21; 5 M. B. R. 258—C. A.

3. POWERS OF THE COURT.

Power to Refuse—“Sufficient Cause.”]—The fact that shortly before the presentation of a bankruptcy petition against a debtor he has, with the assent of a large majority of his creditors, executed a deed assigning the whole of his property to trustees appointed by the creditors, to be administered by them as in bank-

ruptcy, is not, within the meaning of sub-s. 3 of s. 7 of the Bankruptcy Act, 1883, a “sufficient cause” for refusing to make a receiving order on the petition. *Dixon, Ex parte, Dixon, In re*, 13 Q. B. D. 118; 50 L. J., Ch. 769; 50 L. T. 414; 32 W. R. 837; 1 M. B. R. 98—C. A.

The fact that a debtor has, shortly before the presentation of a bankruptcy petition against him, entered into an arrangement with his creditors (to which the petitioner has not assented), is not, however beneficial to the creditors the terms of the arrangement may be, a “sufficient cause” within the meaning of s. 7 (3) of the Bankruptcy Act, 1883, for dismissing the petition. There is no jurisdiction under such circumstances to dismiss the petition, and there is no jurisdiction to adjourn the hearing of it with a view to its ultimate dismissal in case the arrangement shall be found to work well. *Oram, Ex parte, Watson, In re*, 15 Q. B. D. 399; 52 L. T. 785; 33 W. R. 890; 2 M. B. R. 199—C. A.

The decision in *Dixon, Ex parte* (13 Q. B. D. 118) did not depend upon the particular terms of the arrangement in that case, but on the fact that the arrangement was made at such a time and in such a manner as not to bind dissentient creditors. *Id.*

Power to make Receiving Order “in lieu of” Committal Order.]—A judgment creditor for a sum of 31*l.* applied in a county court for the committal of the judgment debtor on the ground that he had means to satisfy the debt, and had not done so. The judge, after hearing evidence, held that the debtor had no means of satisfying the debt, and consequently he refused to commit, but on the application of the creditor made a receiving order in lieu of a committal order under sub-s. (5) of s. 103 of the Bankruptcy Act, 1883. On a summons for a prohibition it was held that the learned judge had a discretion to make, and had properly made, the receiving order “in lieu of” a committal order, although he could not have made a committal order in consequence of the inability of the judgment debtor to satisfy the debt. *Reg. v. Sussex County Court Judge*, 59 L. T. 32—D.

— **Petition presented in wrong Court.**]—If a bankruptcy petition is by inadvertence presented in a wrong bankruptcy court, the court to which it is presented has jurisdiction to make a receiving order. If, however, the petition is wilfully presented in a wrong court, this is a ground for dismissing it. The divisional court made a receiving order, which it held that the court ought to have made, and to which the debtor had raised no other objection than want of jurisdiction, giving leave to the debtor to apply afterwards to the divisional court to discharge the order on any ground arising since the hearing in the county court. *May, Ex parte, Brightmore, In re*, 14 Q. B. D. 37; 51 L. T. 710; 33 W. R. 598; 1 M. B. R. 253—D.

Judgment Debt—Power of Court to inquire into.]—The court of bankruptcy has power to go behind a judgment and inquire into the consideration for the judgment debt, not only at the instance of the trustee in the bankruptcy of the debtor upon the question of the proof of the debt, but also at the instance of the judgment debtor him-

self upon the hearing of a petition by the judgment creditor for a receiving order, even though the debtor has consented to the judgment; and, if on the hearing of the petition facts are alleged by the debtor, of which evidence is tendered, and which, if proved, would show that, notwithstanding the judgment, there is, by reason of fraud or otherwise, no real debt, the court ought not to make a receiving order without first inquiring into the truth of the debtor's allegations. *Kibble, Ex parte* (10 L. R. Ch. 373), discussed and followed. *Lennox, Ex parte, Lennox, In re*, 16 Q. B. D. 315; 55 L. J., Q. B. 45; 54 L. T. 452; 34 W. R. 51—C. A.

Although upon a petition by a judgment creditor for a receiving order, the court has power at the instance of the judgment debtor to go behind the judgment, yet, if the facts alleged by the debtor as a reason for so doing, are in the opinion of the registrar immaterial and insufficient, he is right in refusing to hear evidence in support of such facts and in making a receiving order as prayed. *Lipcombe, Ex parte, Lipcombe, In re*, 4 M. B. R. 43—C. A.

The Court of Bankruptcy has power to go behind a judgment at the instance of the debtor, upon the hearing of a petition presented by the judgment creditor for a receiving order; but the court will not do so on the mere suggestion by the debtor that the judgment debt is bad, if it considers that the objections raised are frivolous. *Beyfus, Ex parte, or Saville, Ex parte, Saville, In re*, 35 W. R. 791; 4 M. B. R. 277—C. A.

A judgment debtor having been served with a bankruptcy notice, without alleging fraud or that there had been a miscarriage of justice at the trial, proposed to give evidence before the registrar to show that the issues in the action, which had been tried before a judge and jury, had been wrongly decided:—Held, that the registrar rightly refused to admit such evidence. *Scotch Whiskey Distillers, Ex parte, Flatau, In re*, 22 Q. B. D. 83; 37 W. R. 42—C. A.

4. PRACTICE.

a. In General.

Form of Notice—Liquidator.—By the Companies Act, 1862, ss. 95 and 133, a liquidator appointed in the voluntary winding-up of a company is empowered "to bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company." A liquidator appointed in the voluntary winding-up of a company served upon the judgment debtor of the company a bankruptcy notice headed "*Ex parte N*, liquidator of the M. Bank, Limited." In the body of the notice the debtor was required to pay to N., "the liquidator of the bank," the sum "claimed by him" as the amount due on the judgment, or to secure or compound for the same sum "to his satisfaction," &c. The debtor was not in any way misled by the terms of the notice:—Held, that the form of the notice must comply strictly with the provisions of s. 95, a substantial compliance not being sufficient, and therefore, that the notice, not being in the name of the company, was bad. *Winterbottom, Ex parte, Winterbottom, In re*, 18 Q. B. D. 446; 56 L. J., Q. B. 238; 56 L. T. 168; 4 M. B. R. 5—D.

— Omission of Name—Amount of Debt.]—

On 14th Jan., judgment was recovered against the debtor for 446l. and execution was issued under which the sheriff levied, but a third person having claimed the goods, an interpleader order was obtained, whereby upon payment of 20l. into court by the claimant, the sheriff was directed to withdraw:—Held, that the fact that the creditor had omitted to insert his name in the heading of the bankruptcy notice, such heading being left "*Ex parte*—"—the notice being sued out by him in person and giving complete information on the face of it who the creditor was—did not render the notice invalid; that the fact of the notice claiming the whole debt of 446l. without considering the 20l. which might be stayed, only amounted to a formal error which the court would rectify. *Lindsey, Ex parte, Bates, In re*, 57 L. T. 417; 35 W. R. 668; 4 M. B. R. 192—D.

Signature of Petition by Attorney.—A bankruptcy petition by a creditor may be signed on his behalf by his duly constituted attorney. A power of attorney authorised the attorney (inter alia) "to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings touching anything in which I, or my ships or other personal estate may be in anywise concerned":—Held, that this power authorised the attorney to sign on behalf of his principal a bankruptcy petition against a debtor of the principal. *Richards, Ex parte, or Wallace, Ex parte, Wallace, In re*, 14 Q. B. D. 22; 54 L. J., Q. B. 293; 51 L. T. 551; 33 W. R. 66; 1 M. B. R. 246—C. A.

Substituted Service—Death of Debtor before

Service.—Where a debtor against whom a creditors' petition in bankruptcy has been presented dies before service of the petition upon him, there is no power under s. 108 of the Bankruptcy Act, 1883, or the Bankruptcy Rules, to dispense with service or to order substituted service of the petition, and the bankruptcy proceedings must necessarily be stayed. *Hill, Ex parte, Easby, In re*, 19 Q. B. D. 538; 56 L. J., Q. B. 624; 35 W. R. 819; 4 M. B. R. 281—C. A.

— Advertisement in Newspaper—Discretion.]—

On appeal from an order directing that publication of a notice in the *London Gazette* and in the *Times* newspaper should be deemed to be good service of a bankruptcy petition upon the debtor:—Held, that under Rule 154 and Form 16 of the Bankruptcy Rules, 1886, the registrar, on being satisfied that the debtor was avoiding personal service, had jurisdiction to make the order in question and that upon the facts of the case there was no ground for the appeal. *Collinson, Ex parte, Collinson, In re*, 4 M. B. R. 161—C. A.

Affidavit—Committee of Lunatic.—When the petitioning creditor is a lunatic so found by inquisition, the affidavit verifying the petition may be sworn by the committee of the lunatic. *Brady, In re*, 19 L. R., Ir. 71—Bk.

Petition by Company.—Where a bankruptcy petition presented by a company under s. 148 of the Bankruptcy Act, 1883, was not accompanied by the affidavit required by rule

258 of the Bankruptcy Rules, 1886, stating that the person presenting the petition was the authorized public officer or agent of such company:—Held, that the petition was rightly refused. *Ross, Ex parte, Cripps, In re*, 5 M. B. R. 226—Cave, J.

Evidence in Support of Petition—Adjournment.]—Where, upon the hearing of a bankruptcy petition against a debtor, the evidence requisite under s. 7, sub-s. 2, of the Bankruptcy Act, 1883, is adduced, it is not necessary, in the event of the hearing being adjourned, to give at such adjourned hearing similar evidence under the above sub-section. *Winby, Ex parte, Winby, In re*, 3 M. B. R. 108—C. A.

Transfer to Bankruptcy Court—Notice to Judgment Debtor.]—When a judgment summons for a committal comes before the judge of a county court, not having jurisdiction in bankruptcy, and he, being of opinion that a receiving order should be made in lieu of a committal, makes an order transferring the matter to the Bankruptcy Court, notice of the subsequent proceedings under the order of transfer must be served on the judgment debtor. In such a case the Court of Bankruptcy is not bound to act on the opinion of the county court judge, and to make a receiving order as of course, but must exercise its judicial discretion on hearing the case on its merits. *Andrews, Ex parte, Andrews, In re*, 15 Q. B. D. 335; 54 L. J., Q. B. 572; 2 M. B. R. 244—Cave, J.

Receiving Order, Effect of—Order for Payment of Money.]—An order was made upon W. to pay a sum of money, due from him, as solicitor, to the trustee of a will. W. made default in payment of the money; and, on the 25th April, 1887, a receiving order was made against him upon a creditor's petition. Two days afterwards, W. was served with a notice of motion (dated the 22nd of April) for leave to issue an attachment against him for non-compliance with the order:—Held, that, as the attachment applied for was not mere civil process, but process of a punitive or disciplinary nature, the existence of the receiving order was no bar to the application. But application refused, as, looking at all the circumstances, no benefit was likely to accrue to the applicant from making the order. *Wray, In re*, 36 Ch. D. 138; 56 L. J., Ch. 1106; 57 L. T. 605; 36 W. R. 67—C. A.

b. Staying Proceedings.

Pending Appeal—Discretion.]—A judgment debtor, after having been served with a bankruptcy notice, gave notice of appeal from the judgment on which the bankruptcy notice was founded:—Held, that it was a matter of discretion of the registrar whether he should stay the petition pending the appeal. *Scotch Whiskey Distillers, Ex parte, Plateau, In re*, 22 Q. B. D. 83; 37 W. R. 42—C. A.

The Court of Appeal will not interfere with the exercise of discretion by the registrar, under sub-s. 4 of s. 7 of the Bankruptcy Act, 1883, in adjourning the hearing of, or dismissing, a bankruptcy petition founded on non-compliance with a bankruptcy notice in respect of a judgment debt, when an appeal is pending from the judgment, unless it is clear that the registrar

could not have been right. If the appeal appears to be a bona fide one, the hearing of the bankruptcy petition ought to be adjourned. If the appeal is evidently frivolous, a receiving order ought to be made, notwithstanding its pendency. *Heyworth, Ex parte, Rhodes, In re*, 14 Q. B. D. 49; 54 L. J., Q. B. 198; 52 L. T. 201; 1 M. B. R. 269—C. A.

Evidence of Reasonable Ground.]—A debtor, after the service of a bankruptcy notice upon him under s. 4, sub-s. 1 (g), of the Bankruptcy Act, 1883, commenced an action against his creditor to set aside the judgment on which such notice was founded, and prayed that an account might be taken, and made other claims in the nature of a counterclaim. The debtor delivered the statement of claim in the action, and applied to the court to dismiss the bankruptcy notice. The registrar, after reading the statement of claim, adjourned the application sine die, with liberty to apply:—Held, that the statement of claim was not evidence, and that the registrar, before interfering with the operation of the bankruptcy notice, ought to have been satisfied by evidence that the debtor had at any rate some reasonable ground for bringing the action. *Basan, Ex parte, Foster, In re*, 2 M. B. R. 29—C. A. See also *Meston, Ex parte, Kilday, In re, ante*, col. 107.

Two Petitions.]—On 19th Feb., 1885, a petition was presented in the London Bankruptcy Court, but the hearing of the petition was adjourned from time to time with the consent of the petitioning creditor. On 5th Jan., 1886, a receiving order was made on this petition in the High Court at 11.30 o'clock, and on the same day at 1 o'clock a receiving order was also made against the debtor in the Swansea County Court at the instance of another creditor. On an appeal by the creditor presenting the petition in London to set aside such order of the county court:—Held, that from the evidence it was clear that the legitimate business of the debtor was carried on at Swansea, which was *prima facie* the place where his business transactions ought to be investigated, and that the petitioning creditor in London, having for his own purpose delayed for several months to proceed with his petition, the proper course was not to interfere with the order of the county court, and that an application should be made to the London Court to stay the proceedings in London. *Martin, Ex parte, Strick, In re*, 3 M. B. R. 78—D.

c. Application to Rescind Order.

Payment of Creditors in full—Jurisdiction.]—A debtor presented a bankruptcy petition and a receiving order was made. The debtor's father, who was a partly secured creditor, immediately afterwards paid all the unsecured creditors in full. The only other creditor was fully secured. The debtor then applied to the court to rescind the receiving order and to allow him to withdraw his petition. The application was assented to by the fully secured creditor and by the father. The judge held that he had no jurisdiction to rescind the order, but he made an order staying all further proceedings under the order:—Held, that there was jurisdiction to grant the application. *Wemyss, Ex parte, Wemyss, In re*, 13 Q. B. D.

244; 53 L. J., Q. B. 496; 32 W. R. 1002; 1 M. B. R. 157—D.

Consent of Creditors—Proof.—The registrar, before rescinding the appointment of a receiver, or granting a stay of proceedings, is not bound to be satisfied that the consent of all the creditors has been obtained; but he must exercise his discretion as to the sufficiency of the consent obtained in each case. Pending such rescission or stay of proceedings the debtor should not, even with the consent of all the petitioning creditors, be left in unfettered control of the estate; but a stay of the advertisement by the receiver may properly be granted. *Carr, Ex parte, Carr, In re*, 35 W. R. 150—C. A.

Substitution of Scheme.—After a receiving order had been made against the debtor on his own petition, a scheme was put forward by him which the creditors were willing to accept, and the debtor thereupon, with the assent of the creditors, applied to the county court to rescind the receiving order.—Held, that the registrar was right in refusing to rescind the receiving order under the circumstances, and that if the debtor was desirous of substituting a scheme, he must proceed in the manner provided by s. 18 of the Bankruptcy Act, 1883. *Dixon, Ex parte, Dixon, In re*, 37 W. R. 161; 5 M. B. R. 291—C. A. Affirming 59 L. T. 776—D.

Judgment Debt paid.—On 30th Dec., 1886, judgment for 33l. was recovered against the debtor, and in January, 1887, a judgment summons was issued; on 11th Feb. 1887, a receiving order in lieu of a committal, was made against the debtor under s. 103, sub-s. 5, of the Bankruptcy Act, 1883. The debtor thereupon paid the debt and the judgment creditor consented to the receiving order being rescinded, but on application being made for that purpose, the county court judge held that the debtor had not shown that the consent of the creditors to such rescission had been obtained and he declined to make any order.—Held, that the debtor was entitled to have the matter referred to the registrar to report whether a majority of the creditors did assent or not. Whether where a receiving order in lieu of a committal is made under s. 103, sub-s. 5, of the Bankruptcy Act, 1883, it is necessary that the consent of the creditors should be shown, if the debtor pays the judgment creditor and applies to rescind, *quære*. *Hughes, Ex parte, Hughes, In re*, 4 M. B. R. 236—D.

To what Court made.—A receiving order having been made in the county court against a debtor, a compromise was subsequently agreed upon between the petitioning creditor and the debtor, and an application was made by the debtor with the consent of the petitioning creditor to the Divisional Court in Bankruptcy, to rescind the receiving order on the terms of such compromise.—Held, that the court had no jurisdiction to entertain such an application. *Shurly, Ex parte, Shurly, In re*, 5 M. B. R. 158—D.

Transfer of Proceedings.—On the hearing of a judgment summons in the county court, a receiving order was made against the debtor

under s. 103, sub-s. 5, of the Bankruptcy Act, 1883, and the proceedings were thereupon transferred under Rule 360 (1) of the Bankruptcy Rules, 1886, to the London Bankruptcy Court, as being the court to which a bankruptcy petition against the debtor would properly be presented. The debtor paid the debt and appealed to the Divisional Court in Bankruptcy to rescind the receiving order.—Held, that the proper course for the debtor to pursue was to apply to the county court judge for a rehearing. *Hughes, Ex parte, Hughes, In re*, 4 M. B. R. 73—D.

Official Receiver—Appearance at Hearing.—A receiving order having been made against a debtor upon his own petition, his public examination was adjourned; and ultimately, the creditors accepted a scheme of arrangement under which they received less than the full amount of their debts. In an application to have the receiving order discharged, made by the debtor with the concurrence of all the creditors, the official receiver appeared and objected to the discharge of the order until after the public examination had been held, on the ground that he was not satisfied with the debtor's conduct.—Held, that the official receiver was entitled, under the Bankruptcy Act, 1883, to appear in the application and oppose the discharge of the receiving order; and that the county court judge had a discretion to refuse the discharge. *Leslie, Ex parte, Leslie, In re*, 18 Q. B. D. 619; 56 L. T. 569; 35 W. R. 395; 4 M. B. R. 75—D.

Notice to, of Application.—Where after a receiving order has been made against a debtor on a bankruptcy notice, the petitioning creditor is settled with, and with his assent the debtor appeals for the purpose of having the receiving order set aside, it would appear that notice should be given to the official receiver, and where this was not done, the court discharged the receiving order as prayed, but directed that the order should not be drawn up for four days and notice given to the official receiver so as to enable him to come forward if he thought fit. *Fletcher, Ex parte, Fletcher, In re*, 4 M. B. R. 113—D.

Appeal—Delay in Proceedings.—After a bankruptcy petition had been presented, but before the day appointed for the hearing, the debtor obtained the consent of the petitioning creditor to an adjournment with a view to a settlement, and a form of consent to an extension of time was sent to the County Court Registrar by post, but on the day appointed for the hearing the Registrar dismissed the petition for non-appearance. Notice of appeal having been given by the creditor the debtor filed his own petition, on which a receiving order was made. When the appeal came on for hearing an adjournment was taken by consent, in order that a scheme of arrangement proposed by the debtor might be considered, but this subsequently fell through, and the petitioning creditor now proceeded with the appeal a year after the notice thereof had been given.—Held, that the delay which had occurred was fatal to the appeal, and that no sufficient reason having been adduced to justify the court in hearing it, notwithstanding such delay, the appeal must be

dismissed. *Ward, Ex parte, Gamlen, In re, 4 M. B. R. 301—D.*

VII. ADJUDICATION.

Jurisdiction—Act of Bankruptcy committed before commencement of Bankruptcy Act, 1869.]

—A debtor filed a liquidation petition in December, 1883, and a receiver of his property was appointed. On the 15th of January, 1884, the adjourned first meeting of the creditors was held, when the creditors separated without passing any resolutions, and without again adjourning the meeting. On the 21st of January one of the creditors presented a bankruptcy petition against the debtor under the Act of 1869, alleging the filing of the liquidation petition as an act of bankruptcy. On the 1st of February, the registrar adjudicated the debtor bankrupt on the petition. The debtor was present, and raised no objection to the jurisdiction of the court to make the order. The receiver had not been discharged. On the 14th of March (*Pratt, Ex parte, 12 Q. B. D. 334*, having meanwhile been decided), the debtor applied to the registrar for a rehearing of the petition, and a reversal of the order of adjudication, on the ground that there was no jurisdiction to make it. The registrar refused the application :—Held, that the court had no jurisdiction to make the adjudication under the Act of 1869 on the ground that an act of bankruptcy had been committed, but that it would have had jurisdiction to make it under the power given by sub-s. 12 of s. 125 of that act. Held, therefore, that, as the objection had not been raised before the registrar, a rehearing ought not to be allowed. *May, Ex parte, May, In re, 12 Q. B. D. 497; 53 L. J., Q. B. 571; 50 L. T. 744; 32 W. R. 839; 1 M. B. R. 50—C. A.*

Application for, after Abortive Liquidation Petition—Payment of Applicant's Debt.]

—A debtor filed a liquidation petition in August, 1879. A receiver of his property was at once appointed, and injunctions were granted to restrain some of the creditors from proceeding against him for their debts. The first meeting of the creditors was held on the 20th of October, 1879, when it was resolved to adjourn to the 15th of December, 1879. Similar resolutions for adjournment were passed again and again, the meeting being ultimately, on the 15th of November, 1882, adjourned to the 28th of March, 1883. No resolutions for liquidation by arrangement or composition were passed. In January, 1883, two of the creditors applied to the Court of Bankruptcy by motion, under sub-s. 12 of s. 125 of the Bankruptcy Act, 1869, for an adjudication of bankruptcy against the debtor. At the adjourned meeting on the 28th of March, 1883, the creditors resolved that it was inexpedient in the interests of the creditors that any further proceeding should be taken under the petition, and that application should be made to the court to discharge the receiver, and dismiss the petition, or stay all further proceedings under it. The registrar, on the 3rd of May, made an adjudication. The debtor appealed, and on the hearing of the appeal an offer was made by a friend of his to pay the debts of the two creditors in full and to provide for their costs of the application, the payment to be made by the friend out of his own moneys, and an undertaking being given by him that neither directly nor indirectly should the

payment be made out of the debtor's assets :—Held, that, notwithstanding the resolution of the 28th of March, and having regard to the fact that the receiver had not been discharged, the liquidation proceedings were still pending, and that if the adjudication order was discharged, no other creditor would be injured, for that the court would have jurisdiction to adjudicate the debtor bankrupt on the application of any other creditor. The adjudication was accordingly discharged on the terms of payment proposed, and on the undertaking of the debtor to apply to the Court of Bankruptcy for leave to summon a fresh first meeting of the creditors. *M'Henry, Ex parte, M'Henry, In re, 24 Ch. D. 35; 53 L. J., Ch. 27; 48 L. T. 921; 31 W. R. 873—C. A.*

Held, by Baggeall and Cotton, L.J.J., and semble, per Bowen, L.J., that the court had jurisdiction to order a fresh first meeting of the creditors under the petition. *Id.*

Annulling of Adjudication—Jurisdiction.]

The discharge of a bankrupt having been granted on payment of a dividend of 7s. 6d. in the pound to the creditors, the county court judge, on application made to him, subsequently annulled the bankruptcy :—Held, that there was no power to annul a bankruptcy outside the provisions of the Bankruptcy Act, and that in any event, the county court judge was wrong in making the order under the circumstances of the present case. *Board of Trade, Ex parte, Gyll, In re, 58 L. J., Q. B. 8; 59 L. T. 778; 37 W. R. 164; 5 M. B. R. 272—D.*

— **Limit of Time.]**—In a proper case an adjudication of bankruptcy may be annulled upon an application made after the expiration of the time limited for appealing from it. Sect. 10 of the Bankruptcy Act, 1869, has no application to an appeal from an adjudication, or to an application to annul it. *Brown, Ex parte (9 L. R., Ch. 304)*, explained; *Johnson, Ex parte (12 Ch. D. 905)*, distinguished. *Geisel, Ex parte, Stanger, In re, 22 Ch. D. 436; 53 L. J., Ch. 349; 48 L. T. 405; 31 W. R. 264—C. A.*

— **Costs.]**—An order was made by the Court of Appeal to annul an adjudication of bankruptcy, on the ground that the debtor must be presumed to have been dead when it was made. Probate had been granted of a will executed by the debtor :—Held, that the costs and charges of the trustee properly incurred, and the costs of all parties of the application to annul and of the appeal, must be paid out of the estate, and that the executors must confirm all acts properly done by the trustee in the bankruptcy. *Id.*

VIII. PROPERTY.

1. What passes to Trustee.

- a. Leaseholds—Disclaimer.
- b. Order and Disposition.
- c. Property appropriated to meet Bills of Exchange.
- d. Property held by Bankrupt as Trustee.
- e. Salary and Income.
- f. Materials being used by Bankrupt in Execution of Contract.
- g. Of Married Women.
- h. In other Cases.

2. Proceedings for Discovery and Protection of Property.

1. WHAT PASSES TO TRUSTEE.

a. Leaseholds—Disclaimer.

Agreement for a Lease.—The right of disclaimer conferred on trustees by s. 55 of the Bankruptcy Act, 1883, is not limited to property of the bankrupt divisible amongst his creditors as defined by s. 44, but extends to any property as defined by s. 168, from which no benefit can accrue to the bankrupt's estate. A debtor held his business premises for a term of years under an agreement for a lease, and entered into a binding contract for the sale and assignment of his business and his business premises to a company, but became bankrupt before the completion of the contract:—Held, that the debtor's interest in the agreement for a lease was in the nature of land burdened with onerous covenants which his trustee in bankruptcy could under the circumstances disclaim. *Monkhouse, Ex parte, Maughan, In re*, 14 Q. B. D. 956; 54 L. J., Q. B. 128; 33 W. R. 308; 2 M. B. R. 25—Field, J.

Disclaimer binding on Crown.—The provisions of s. 55 of the Bankruptcy Act, 1883, as to the disclaimer of onerous property, are "provisions relating to the remedies against the property of a debtor" within the meaning of s. 150 of that Act, and are therefore binding upon the Crown. *Commissioners of Woods and Forests, Ex parte, Thomas, In re, or Thomas, Ex parte, Trotter, In re*, 21 Q. B. D. 380; 57 L. J., Q. B. 574; 59 L. T. 447; 36 W. R. 375; 5 M. B. R. 209—D.

Application for leave to Disclaim—Extension of Time.—Although the three months given to a trustee by s. 55, sub-s. 1, within which to disclaim onerous property, may have expired, the court has power under s. 105, sub-s. 4, to grant the trustee an extension of time. When a trustee applies for an extension of time, he should give some good reason for the indulgence he asks, and if the rights of other parties will be prejudiced by the time being extended, the court will, as a general rule, put the trustee upon terms. *Foreman, Ex parte, Price, In re*, 13 Q. B. D. 466; 33 W. R. 139; 1 M. B. R. 153—Cave, J.

— **Service of Notice out of the Jurisdiction.**—Notice of motion by the trustee for leave to disclaim may be served out of the jurisdiction upon persons whose interests may be affected. *Paterson, Ex parte, Rathbone, In re*, 56 L. J., Q. B. 504; 57 L. T. 420; 35 W. R. 735; 4 M. B. R. 270—Cave, J.

— **Joinder of Respondents.**—A trustee when applying to the court under the Bankruptcy Act, 1883, s. 55, sub-s. 3, for leave to disclaim property may include in one application several distinct premises so long as there is one landlord or chief respondent who is affected by the whole application, although there may be other respondents who are only affected by part of it. *Trustee, Ex parte, Whitaker, In re*, 21 Q. B. D. 261; 57 L. J., Q. B. 527; 59 L. T. 255; 36 W. R. 736; 5 M. B. R. 178—Cave, J.

Terms on which Leave granted.—In determining whether, on giving leave to the trustee in a bankruptcy to disclaim a lease of the bank-

rupt, the trustee should be ordered to pay compensation to the landlord in respect of his occupation of the leasehold premises, the court will have regard not merely to the question whether the occupation has actually produced a profit to the bankrupt's estate, but also to the question whether the possession was retained by the trustee with a view to obtaining such a profit. *Arnall, Ex parte, Whittin, In re*, 24 Ch. D. 26; 53 L. J., Ch. 134; 49 L. T. 221—C. A.

The rule as laid down by Cotton, L. J., in *Isherwood, Ex parte* (22 Ch. D. 384), adopted in preference to that expressed by Jessel, M. R., in *Izard, Ex parte* (23 Ch. D. 115). *Ib.*

The court ordered compensation to be paid by the trustee in a bankruptcy as a condition of giving him leave to disclaim the lease of the bankrupt's place of business, although during part of the time during which the trustee had been in occupation a bailiff had been in possession of the bankrupt's goods under a distress for rent, and the landlord had been allowed to place bills on the premises stating that they were to be let, and that application for that purpose was to be made to him. *Ib.*

Where a trustee in bankruptcy seeks to disclaim, the landlord is entitled to be paid if any advantage has accrued to the creditors from the use of the landlord's property subsequent to the adjudication. *Brooke, In re*, 1 M. B. R. 82—Cave, J.

Where an application for leave to disclaim is made by a trustee in bankruptcy, a demand of the landlord for rent in respect of the premises sought to be disclaimed, will not be entertained by the court unless the landlord has been kept out of the property for the benefit of the creditors, and the creditors have obtained some advantage therefrom. *Zappert, In re*, 1 M. B. R. 72—Cave, J.

A lease was granted to T. and S., co-partners. Upon dissolution of the partnership T. covenanted to hold his share of the lease upon trust for S., who continued the business. S. afterwards went into liquidation, and the trustee in liquidation remained in possession of the leasehold premises. During the occupation of the trustee, T. was obliged to pay rent to the landlord. Upon an application by the trustee for leave to disclaim the lease:—Held, that leave to disclaim ought only to be given upon condition of the trustee repaying to T. the rent paid during the trustee's occupation. *Good, Ex parte, Salkeld, In re*, 13 Q. B. D. 731; 54 L. J., Q. B. 96; 51 L. T. 876; 33 W. R. 22—C. A.

Where a trustee seeks to disclaim a lease under s. 55 of the Bankruptcy Act, 1883, the court may, under sub-s. 3, permit him to remove the fixtures. *Painter, Ex parte, Moser, In re*, 13 Q. B. D. 738; 33 W. R. 16; 1 M. B. R. 244—Wills, J.

— **Conduct of Trustee—Delay.**—On 4th August, 1886, the agent on behalf of a banking company took possession of a quarry under a sub-lease previously granted by the debtor, the original lessee, as security for a loan. On 11th August, the debtor was adjudged bankrupt, and such agent was appointed trustee in the bankruptcy, but he nevertheless continued in possession of the said quarry on the part of the bank, which was worked for the bank's benefit. On 6th Nov. the agent, as trustee in the bankruptcy, applied to the county court for un-

conditional leave to disclaim the lease; this application was opposed by the landlord and refused by the judge without prejudice to the trustee's applying for leave to disclaim upon terms:—Held, that the county court judge was right in refusing unconditional leave to disclaim; that the trustee had taken upon himself two irreconcilable duties, and that having regard to his conduct and to the fact that no evidence was before the county court judge to enable him to come to a proper conclusion as to terms, the order made by him was right. *Duff, Ex parte, Crowther, In re*, 4 M. B. R. 100—D.

— **Whether Discretion the subject of Appeal.**—The imposing of conditions on the trustee is a matter of judicial discretion, and the Court of Appeal will not readily interfere with the exercise of discretion by the judge of first instance. *Arnall, Ex parte, Witton, In re*, 24 Ch. D. 26; 53 L. J., Ch. 134; 49 L. T. 221—C. A.

Jurisdiction—Small Bankruptcy—Landlord's Compensation.—Where an order is made under s. 121 of the Bankruptcy Act, 1883, for the summary administration of a bankrupt's estate, and the trustee, in pursuance of the power conferred on him by r. 232 of the Bankruptcy Rules, 1883, disclaims, without any application to the court, the leasehold premises of the bankrupt, the court has no jurisdiction to give any compensation to the landlord out of the bankrupt's estate for the use and occupation by the trustee of the leasehold premises for the purposes of the bankruptcy, even although a benefit has thereby resulted to the estate. *Zerfass, Ex parte, Sandwell, In re*, 14 Q. B. D. 960; 54 L. J., Q. B. 323; 52 L. T. 692; 33 W. R. 522; 2 M. B. R. 95—Cave, J.

Mortgage by Sub-demise—Vesting Order—Exclusion—Application by Lessor.—A lessee mortgaged the leasehold property by sub-demise, and was subsequently adjudicated a bankrupt. The trustee obtained leave to disclaim, and thereupon the lessor applied for and obtained an order, under s. 55, sub-s. 6, of the Bankruptcy Act, 1883, that the mortgagee should be excluded from all interest in and security upon the property, unless within seven days he elected to accept an order vesting in him the disclaimed property, subject to the same liabilities and obligations as the bankrupt was subject to under the lease:—Held, that the order excluding the mortgagee's interest, unless he accepted the terms proposed, could be made upon the application of the lessor. *Shilson, Ex parte, Cook, In re*, 20 Q. B. D. 343; 57 L. J., Q. B. 169; 58 L. T. 586; 36 W. R. 187; 5 M. B. R. 14—D.

If the mortgagee refused to accept a vesting order on the terms offered by the order of the court, it was competent for the court to order that the property be vested in or delivered to the lessor. *Turquand, Ex parte* (14 Q. B. D. 405), discussed. *Id.*

Where a trustee in bankruptcy disclaims leasehold property of the bankrupt which the bankrupt has mortgaged by sub-demise, the court has power under s. 55 of the Bankruptcy Act, 1883, to make an order on the application of the original lessor, excluding the sub-lessee from all interest in and security upon the property unless he elects

to take a vesting order vesting the property in him subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of such property at the date of the filing of the bankruptcy petition. *Shilson, Ex parte* (20 Q. B. D. 343), followed. *Cloth-workers' Company, Ex parte, or Hambury, Ex parte, Finley, In re*, 21 Q. B. D. 475; 57 L. J., Q. B. 626; 60 L. T. 134; 37 W. R. 6; 5 M. B. R. 248—C. A.

On a disclaimer of leaseholds by a trustee in bankruptcy under sub-s. 6, s. 55, of the Bankruptcy Act, 1883, the landlord has not such an interest in the "disclaimed property" as to be entitled to a vesting order under the sub-section. The right to a vesting order is only conferred on a person claiming an interest in the property through or under the bankrupt.—Where in such a case a mortgagee does not appear on the trustee's application to disclaim, the proper course is to order that the mortgagee be excluded from all interest in and security upon the property unless he shall by a short date declare his option to take a vesting order in the terms of the sub-section. *Turquand, Ex parte, Parkers, In re* (1), 14 Q. B. D. 405; 51 L. T. 667; 33 W. R. 752; 1 M. B. R. 275—Cave, J.

Liability of Trustee—Relation back to Adjudication.—W., who occupied premises as a yearly tenant, was adjudicated bankrupt on the 7th of September, 1883. The defendant, as trustee, entered into possession of the premises and held them until the 29th of January, 1884 (when he tendered the keys to the plaintiff, the landlord), for the purpose of winding up the bankrupt's business and realizing his assets for the benefit of the estate,—paying rent down to the 25th of December, 1883. On the 26th of February, 1884, the trustee with the leave of the court, and after notice to the landlord, disclaimed all interest in the term:—Held, that the disclaimer relating back by force of s. 23 of the Bankruptcy Act, 1869, to the date of the adjudication, the trustee was not liable to an action in respect of his subsequent occupation of the premises (either as assignee or as a trespasser), the landlord's only remedy being by application to the Court of Bankruptcy under r. 8 of the Bankruptcy Rules, 1871. *Gabriel v. Blankenstein*, 13 Q. B. D. 684; 33 W. R. 151—D.

— **Covenant not to sell Hay, Straw, &c.**—The enactment in statute 56 Geo. 3, c. 50, s. 11, that the assignee of any bankrupt shall not take or use any hay, straw, &c., on any farm of the bankrupt in any other way than the bankrupt ought to have done, is still in force, and applies to a trustee in bankruptcy or liquidation under the Bankruptcy Act, 1869. A lessee was bound by the covenants in his lease not to sell the hay, straw, &c., grown on his farm without the consent of the landlord. The lessee became a liquidating debtor under the Bankruptcy Act, 1869, s. 125, and the trustee in the liquidation disclaimed the lease:—Held, that the trustee was bound by 56 Geo. 3, c. 50, s. 11, notwithstanding the disclaimer, and an injunction was granted to restrain him from selling the hay, straw, &c., grown on the farm. *Lybbe v. Hart*, 29 Ch. D. 8; 54 L. J., Ch. 860; 52 L. T. 634—C. A.

A tenant of a farm, restrained by agreement from selling the hay and straw grown on the farm, became bankrupt. The trustee in bank-

ruptcy removed and sold a quantity of the hay in breach of the agreement and then disclaimed the lease. The landlord sued the trustee for the removal of the hay, and the trustee counter-claimed for unexhausted improvements:—Held, that the trustee was personally liable for his wrongful act in selling the hay; that he was not protected by s. 55, sub-s. 2, of the Bankruptcy Act, 1883; and also, that the counter-claim could not be sustained, as by the Agricultural Holdings Act, 1883, s. 8, arbitration is rendered compulsory in cases of dispute between landlord and tenant. *Schofield v. Hincks*, 58 L. J., Q. B. 147; 60 L. T. 573; 37 W. R. 157—D.

— **Landlord's Notice—Trustee's Neglect—Costs.**—When a landlord gives a trustee notice under sub-s. 4 of the 55th section of the Bankruptcy Act, 1883, requiring him to decide whether he will disclaim or not the bankrupt's leaseholds, and the trustee declines or neglects within the twenty-eight days limited by the sub-section to give notice whether he disclaims or not, and subsequently applies to the court for leave to disclaim, he may render himself personally liable to the payment of rent and costs. *Mackay, Ex parte, Page, In re*, 14 Q. B. D. 404; 33 W. R. 825; 1 M. B. R. 287—Cave, J.

Liability of Lessee—Disclaimer by Trustee of Assignee of Lease.—The assignee of a lease for a term of years became bankrupt, and his trustee by leave of the court disclaimed under s. 23 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), all the bankrupt's property and interest in the premises. The lessor having brought an action against the original lessee upon his covenant to pay rent for the rent accrued due since the appointment of the trustee:—Held (Lord Bramwell dissenting), that notwithstanding the disclaimer the lessee remained liable upon his covenant. *Hill v. East and West India Dock Company*, 9 App. Cas. 448; 53 L. J., Ch. 842; 51 L. T. 163; 32 W. R. 925; 48 J. P. 788—H. L. (E.)

Right to Fixtures—Removal on Termination of Lease.—A lease of a mill and warehouse for twenty-one years contained a covenant by the lessors with the lessees (inter alia): (4) that certain articles mentioned in a schedule should be the property of the lessees, and should be removable by them, they making good all damage done by such removal. The articles mentioned in the schedule were iron columns, beams, floors, brick piers, and things ejusdem generis. There was a proviso (2) that the lessees might by notice determine the term at the end of seven or fourteen years, (1) that on the tenant's bankruptcy the term should cease, and (3) that on the determination or cesser of the term all the machinery and also all the buildings erected by the lessees should be their property, and should be removed by them previously to the determination or cesser of the term unless it should then be mutually agreed that the lessors should purchase them, the lessees in cases of removal to make good all damages which might be caused by such removal. The tenants failed and the lease determined:—Held, that the official receiver was nevertheless entitled to the articles mentioned in clause (4) of this covenant and clause (3) of the proviso as being the property of the lessees. *Gould or Gould, Ex parte, Walker, In*

re, 13 Q. B. D. 454; 51 L. T. 368; 1 M. B. R. 168—D.

b. Order and Disposition.

"Trade or Business"—Sale of Surplus Produce of Farm.—A person who occupies a residential property and engages in farming and market gardening for his pleasure, and carries on the same at a profit, is not carrying on a "trade or business" within the meaning of s. 44 of the Bankruptcy Act, 1883, even although he sells his surplus produce after supplying his household. But if the primary intention is abandoned, and the business is carried on with a view to profit as a means of livelihood, he will come within the mischief of the section. *Sully, Ex parte, Wallis, In re*, 14 Q. B. D. 950; 52 L. T. 625; 33 W. R. 733; 2 M. B. R. 79—Cave, J.

Articles not connected with Business—Onus of Proof.—When a trader is in possession at his place of business of articles not in their nature connected with his business, and the trustee in his bankruptcy claims the articles on the ground that the bankrupt was the reputed owner of them, much stronger evidence will be required to prove the reputed ownership than in the case of articles connected with the business, the inference from the nature of the articles being that they are not connected with the business. *Lovering, Ex parte, Murrell, In re*, 24 Ch. D. 31; 52 L. J., Ch. 951; 49 L. T. 242; 32 W. R. 217—C. A.

Artist's Pictures.—Where a picture was lent by the owner of it to the artist who had painted it for the purpose of being exhibited by him in a public gallery amongst other pictures painted by him, and exhibited there for sale, such picture does not pass to the trustee in bankruptcy on the artist becoming bankrupt, as being in his order and disposition within s. 44, sub-s. 3, of the Bankruptcy Act, 1883. *Dudgeon, Ex parte, Cook, In re*, 1 M. B. R. 108—Mathew, J.

Shares in Company—Chose in Action.—Shares in a railway company are "chooses in action" such as to be excepted from the doctrine of reputed ownership by s. 44, sub-s. 3, of the Bankruptcy Act, 1883. "Chose in action" includes all personal chattels not in possession. *Colonial Bank v. Whinney*, 11 App. Cas. 426; 56 L. J., Ch. 43; 55 L. T. 362; 34 W. R. 705; 3 M. B. R. 207—H. L. (E.).

B. and I. were in partnership as stockbrokers. Some shares in a railway company were bought with partnership money, and equitably mortgaged by B. by deposit with the appellant bank to secure the firm's banking account. Before notice of deposit had been given to the company, B. and I., separately, and as members of the firm, were made bankrupts:—Held, that the circumstances were such as to prove that the bankrupts were not reputed owners of the interest of the appellant bank in the shares. *Id.*

— **"In possession of Bankrupt in his Trade or Business."**—J., who carried on business as a stockbroker, silversmith, and watchmaker, deposited with his bankers the certificates of thirty shares in a joint stock company as security for the balance of his overdrawn account. There was no formal transfer of the shares. The

company had notice of the deposit on the 31st of January, 1884. On the 2nd of February a petition in bankruptcy was filed against J., and a receiving order made, and he was subsequently adjudged bankrupt:—Held, that the shares were not at the commencement of the bankruptcy "in the possession, order, or disposition of the bankrupt in his trade or business," within s. 44 of the Bankruptcy Act, 1883. *Nottingham Bank, Ex parte, Jenkinson, In re*, 15 Q. B. D. 441; 54 L. J., Q. B. 601; 2 M. B. R. 131—D.

Bills of Sale Acts, 1878 and 1882.—On the 18th of September, 1882, a debtor executed a bill of sale of his furniture, &c. The deed was registered under the Bills of Sale Act, 1878. The debtor remained in possession of the goods until the 2nd of November, 1882, when he filed a liquidation petition. By s. 15 of the Bills of Sale Act, 1882, s. 20 of the Act of 1878, by virtue of which the registration of a bill of sale takes the goods out of the order and disposition of the grantor, is repealed; but s. 3 of the Act of 1882 provides that that act shall not, "unless the context otherwise requires," apply to any bill of sale duly registered before the commencement of the act (1st of November, 1882), and of which the registration is subsisting:—Held, that the effect of s. 3 was to continue the protection afforded by s. 20, and that the bill of sale holder was entitled to the goods as against the trustee in the liquidation. *Izard, Ex parte, Chapple, In re*, 23 Ch. D. 409; 52 L. J., Ch. 802; 49 L. T. 230; 32 W. R. 218—C. A.

The repeal of s. 20 of the Bills of Sale Act, 1878, by s. 15 of the Bills of Sale Act, 1882, is limited by the effect of s. 3 of the latter act to bills of sale given by way of security for the payment of money, and does not operate to affect bills of sale given by way of absolute transfer. *Swift v. Pannell*, 24 Ch. D. 210; 53 L. J., Ch. 341; 48 L. T. 351; 31 W. R. 543—Fry, J.

Custom of Trade—Van let to Grocer on Conditional Sale and Hire.—A county court judge decided that no custom existed for a grocer and provision merchant to hire vans in the business, so as to prevent the operation of the reputed ownership clause, s. 44, sub-s. (iii.), of the Bankruptcy Act, 1883:—Held, on appeal, that upon the evidence on affidavit before the county court judge it was open to him to come to the conclusion to which he did, and that being so, his decision would not be set aside; but held further that where the fact of a custom existing in a particular trade has to be decided, the case is one proper to be tried with the assistance of a jury and with witnesses, and not upon affidavit evidence only. *Callow, Ex parte, Jensen, In re*, 4 M. B. R. 1—D.

Hiring of Furniture—Hotel-Keeper.—The custom for hotel-keepers to hire the furniture of their hotels is so notorious, and has been so often proved, that it need not now be proved, but the court will take judicial notice of it. And the custom extends, not only to furniture in the strictest sense of the word, but to all the articles which are necessary for the furnishing of an hotel for the purpose of using it as an hotel. The effect of the custom is absolutely to exclude the reputation of ownership by the hotel-keeper of all those articles in the hotel, at the

time of his bankruptcy, which are within the scope of the custom, without regard to the question whether the particular articles are or are not in fact hired by him. Consequently, articles which are his property subject to a mortgage by bill of sale, will be excluded from the operation of the reputed ownership clause. *Turquand, Ex parte, Parkers, In re* (No. 3), 14 Q. B. D. 636; 54 L. J., Q. B. 242; 53 L. T. 579; 33 W. R. 437—C. A.

Upholsterer—Patterns.—There is a custom in the upholstering trade for an upholsterer to have in his possession patterns belonging to the wholesale manufacturer, and, consequently, such patterns are not in the reputed ownership of the trader so as to pass to his trustee on bankruptcy. *Woodward, Ex parte, Lay, In re*, 54 L. T. 683—D.

Goods sent to Person in Furniture Trade "on Sale or Return."—There is no custom in the furniture trade to deliver goods to dealers upon "sale or return," so as to prevent the operation of the reputed ownership clause (s. 44, sub-s. 3) of the Bankruptcy Act, 1883. *Nasam, Ex parte, Horne, In re*, 3 M. B. R. 51—Cave, J.

The applicants deposited with the debtor certain goods upon the terms of "sale or return," which were in the possession of the debtor at the time of the bankruptcy, and were retained by the trustee:—Held, that where a custom is sought to be established, it lies on the persons who affirm the existence of a custom to prove it, and that although a practice was undoubtedly creeping into the furniture trade of sending goods on sale or return, the evidence given was not sufficient to justify the court in saying that the custom is an established one, and so common and notorious that a person making inquiry of those cognisant of the trade would be told there was no doubt of such custom. *Id.*

Hop Trade.—There is a custom in the hop trade that when hops are purchased from a merchant and not immediately delivered to the customer, they remain in the merchant's warehouse to the customer's order. On the bankruptcy of the merchant, hops in his warehouse, purchased and so left to a customer's order, are not in the order and disposition of the bankrupt, but must be delivered up to the customer. *Dyer, Ex parte, Taylor, In re*, 53 L. T. 768; 34 W. R. 108—Cave, J.

Agistment.—H. placed certain stock upon the lands of W. upon an agreement, whereby the stock remained the property of H., who, at the end of a fixed period, was to sell the stock; and, after deducting the original price and a percentage for profit, to hand over the balance to W. During the continuance of the agreement, W. became bankrupt, and the trustee claimed the stock in question as being within the reputed ownership of the bankrupt:—Held, on appeal, that the custom of agistment was notorious, and, that being the case, that no reputation of ownership could arise in the case of stock upon the lands of a farmer. *Huggins, Ex parte, Woodward, In re*, 54 L. T. 683; 3 M. B. R. 75—D.

The custom of agistment is notorious, and therefore no reputation of ownership can arise

in the case of stock upon the lands of a farmer. *Burke, In re*, 19 L. R., Ir. 564—Bk.

— **Hiring of Printing Machinery and Type.**]

—A custom exists in the printing trade to let printing machinery on hire so as to exclude the doctrine of reputed ownership in the event of the bankruptcy of the hirer; but such custom does not extend so as to include the hiring of type. *Hughes, Ex parte, Thackrah, In re*, 5 M. B. R. 235—Cave, J.

Debts growing due to Bankrupt in course of Trade—Deposit of Hiring Agreement.]—The debtors deposited with a creditor as security for his debt a hire-purchase agreement by which they had agreed to let certain furniture on the hire-purchase system, to be paid for by half-yearly instalments, with the usual conditions in case of default, etc. No notice of the assignment was given to the hirer, and, before the second instalment became due, the debtors were adjudicated bankrupt:—Held, that the amount payable under the agreement was a debt growing due to the bankrupts in the course of their trade, and, no notice of the assignment having been given, the trustee in bankruptcy was entitled to the benefit of the agreement under the order and disposition clause of the Bankruptcy Act, 1883. *Rawlings, Ex parte, Davis, In re*, 60 L. T. 156; 37 W. R. 141—Cave, J.

c. Property appropriated to meet Bills of Exchange.

Appropriation of Remittances.]—A liquidating debtor was in the habit of accepting bills for a trader abroad, receiving from him remittances sufficient to meet the bills. The proceeds of the remittances were carried by the debtor to the credit of the trader in a general account between them, and he was allowed interest thereon until the time when the bills fell due. On a claim by the trader that a draft remitted by him was specifically appropriated to meet a bill to the same amount, falling due a few days after the remittance:—Held, that as the draft was no longer in specie at the time the debtor failed, there was no appropriation, and that he was not entitled to the proceeds of the bill. *Broad, Ex parte, Neck, In re*, 13 Q. B. D. 740; 54 L. J., Q. B. 79; 21 L. T. 388; 32 W. R. 912—C. A.

Insolvency of Drawer and Acceptor—Application of Remittances remaining in Specie.]—

Bankers in London granted to merchants in Ceylon a letter of credit, authorising the merchants to draw on them at three, four, or six months' sight, for any sums not exceeding 10,000*l.* at one time, the drafts to be covered within two, three, or five months (according as they had been issued at three, four, or six months), by remittances on good London houses. And the bankers thereby agreed with the merchants, and also, as a separate engagement, with the bona fide holders respectively of the bills, that the bills should be duly accepted on presentation and paid at maturity. The course of dealing between the parties was this—if the remittances sent as cover for the merchants' drafts matured later than the drafts accepted, interest was debited by the bankers against the

merchants from the date of the maturity of the acceptances to that of the maturity of the remittances, while if the remittances matured earlier than the acceptances, interest was credited to the merchants. In all cases the bankers dealt with the remittances as they thought expedient, and the proceeds were paid into the general banking account of their firm. Under this letter of credit a number of bills were drawn by the merchants on the bankers, and were accepted by them, and other bills were remitted by the merchants to cover the acceptances, the letters which accompanied the remittances always describing them as sent to cover particular drafts which were specified in the letters. The bankers stopped payment and filed a liquidation petition, under which a trustee was afterwards appointed. In consequence of their stoppage the merchants also stopped payment. At the date of the liquidation petition acceptances under the letter of credit to the amount of 11,535*l.* were outstanding, to meet which the bankers had received from the merchants remittances to the amount of 3,009*l.*, of which two bills remained in specie in the hands of the bankers, the others having been converted by them into cash. After the filing of the petition two other bills, which had been posted by the merchants before they knew of the stoppage of the bankers, came into the hands of the receiver appointed under the petition. The merchants' firm consisted of two partners, one of whom was insane, and resident in Germany. The sane partner procured an adjudication of insolvency against himself in Ceylon, and under this insolvency an assignee was appointed. The sane partner deposed that "under this insolvency my estate, and also the estate of my firm, so far as legally can be, is now being administered," and this evidence was not contradicted.—Held, that the joint estate of the merchants, as well as that of the bankers, was under a forced administration, and that consequently the rule in *Waring, Ex parte* (19 Ves. 345), applied. Held, therefore, that the proceeds of the four remitted bills which were in specie at the commencement of the liquidation must be applied, not in paying the whole of the acceptances rateably, nor in paying rateably all those acceptances to meet which remittances had been sent before the filing of the liquidation petition, but in paying those acceptances to meet which the four bills had been appropriated by the letters with which they were sent. When remittances are sent under such circumstances to cover drafts of the remitter accepted by the remittee, the remittee may, so long as he is solvent, be entitled by mercantile usage or the course of dealing between the parties, to deal with the remittances as he pleases; but so soon as he becomes insolvent, the remitter is entitled to insist on having the remittances applied in paying the acceptances, and that right is the foundation of the rule in *Waring, Ex parte* (19 Ves. 345), but the right extends only to those remittances which remain in specie at the date of the insolvency. *Dever, Ex parte, Suso, In re*, 14 Q. B. D. 611; 54 L. J., Q. B. 390; 53 L. T. 131; 33 W. R. 625—C. A.

Specific Appropriation of Goods to meet.]—J. carried on business as a merchant at Liverpool under the firm of "S., J., & Co.," and also at Pernambuco, in partnership with the defen-

dant C., under the firm of "J., P., & Co." Both firms employed B. as their agent in New York. The firm at Pernambuco were in the habit of receiving orders from persons there for the purchase of goods in New York. Upon receipt of these orders that firm instructed the Liverpool firm, who instructed B. B. then purchased the goods and shipped them to the Pernambuco firm, at the same time sending the bills of lading to that firm. To enable him to pay for the goods, B. drew bills of exchange on the Liverpool firm and sold them in New York. The bills were not drawn for the precise amount of the shipments, but for round sums which were brought into the account current between B. and the Liverpool firm. B. advised the Liverpool firm of the bills, and with the advice forwarded a statement of his account with them. To each bill was attached a counterfoil headed "Advice of draft," and containing a memorandum of the date and amount of the bill and the name of the drawer, with the words "Against shipments per" (naming the vessel). "Please protect the draft as advised above." The Liverpool firm, on the bills being presented to them for acceptance, detached the counterfoils and retained them in their own possession. The plaintiffs were the holders for value of three bills drawn by B. on the Liverpool firm in accordance with the above course of dealing, the goods purchased with the proceeds of the bills being shipped by B. to the Pernambuco firm, and the bills of lading being also sent to that firm. On the 10th of June, 1879, the Liverpool firm stopped payment, and on the following day the goods arrived at Pernambuco, and were, with the bills of lading, delivered to the persons who had ordered them, the purchase-money being received by the Pernambuco firm. The three bills of exchange being dishonoured by the Liverpool firm, the plaintiffs brought an action against the Pernambuco firm claiming to have the bills paid out of the proceeds of the goods, on the ground that the latter had been specifically appropriated to meet the bills, but the defendants claimed to retain the proceeds against a debt due to them from the Liverpool firm:—Held, that there had been no such specific appropriation. *Banner, Ex parte* (2 Ch. D. 278), considered. *Phelps v. Comber*, 29 Ch. D. 813; 54 L. J., Ch., 1017; 52 L. T. 873; 33 W. R. 829; 5 Asp. M. C. 428—C. A.

—Insolvency of Acceptor—Rights of Holder and Drawer—Interest credited by Acceptor to Drawer.]—

Bankers in London, at the request of M., who was acting as the agent in London of S., a merchant at Shanghai, on the 16th of March, 1883, granted to S. a letter of credit for 20,000*l*. The letter authorized S. "to draw on us at four months' sight for any sums not exceeding 20,000*l*., such draft or drafts to be accompanied by bills of lading and invoices of tea, purchased according to order of M., and shipped by steamers to London, and marine insurance policies relating thereto, and these documents to be surrendered to us against our acceptances. And we hereby agree with you, and also as a separate engagement with the bona fide holders respectively of the bills drawn in compliance with the terms of this credit, that the same shall be duly accepted on presentation, and paid at maturity, if drawn and negotiated on or before the 31st of December, 1883." It was agreed that a com-

mission of 1 per cent. should be paid to the bankers on all drafts drawn under the credit, and M. agreed that he would meet all the acceptances on or before their due dates, "the usual rate of 2½ per cent. being allowed on all prepayments." Bills were drawn by S. under this credit against various parcels of tea consigned by him to M. for sale. In each case the bill mentioned the parcel of tea against which it was drawn, and purported to be drawn under the letter of credit, the date of which was mentioned, and the bills of lading and other shipping documents were in each case attached to the bill. S., in each case, advised the bankers of the drawing of the bill, mentioning the tea against which it was drawn, and the name of the vessel by which it was shipped. S. discounted the bills with a Chinese bank, and their agent in London presented the bills for acceptance, and in exchange for the acceptance delivered the bills of lading and other documents attached to the London bankers, in whose name the tea was then warehoused with a dock company. As M. from time to time required portions of the tea for delivery to purchasers, the bankers handed to him warrants or delivery orders, he paying them the value of the tea comprised therein. The moneys thus received were paid to the credit of the general current account of the bankers with their own bankers. In an account in their books with M., they debited him with the amounts of the acceptances, and credited him with the amounts received by the sales, and with 2½ per cent. according to the agreement. The London bankers suspended payment, and filed a liquidation petition before their acceptances matured:—Held, that, having regard to the terms of the letter of credit, the bill-holders could not claim any specific appropriation of the teas to meet the acceptances. *Frith v. Forbes* (4 D., F. & J. 409) distinguished. *Dever, Ex parte, Suse, In re*, 13 Q. B. D. 766; 51 L. T. 437; 33 W. R. 290—C. A.

But held, that S. was entitled to have the teas which remained in specie at the date of the suspension (but not the proceeds of the sale of the teas which were sold before the suspension), applied in payment of the acceptances. *Id.*

—Direction on Bill to charge it to Account of Cargo as advised—Contemporaneous Letter of Advice.]—A. purchased from B. & Co. in America a bill of exchange, dated the 5th of August, 1875, payable sixty days after sight, for 2,500*l*., drawn upon K. in London, on the face of which was a direction "to charge the same on account of cheese per *Britannic*, and lard per *Greece* as advised," and on the same day B. & Co. wrote to K. a letter of advice, inclosing bills of lading for the cheese and lard, and informing K. that as against these they valued on him at sixty days' sight for 2,500*l*. in favour of A. The bill was not accepted, K. having heard that B. & Co. had suspended payment on the 7th of August; but, on the arrival of the consignments in England, K. took possession of them, and realized them, receiving the proceeds, out of which he claimed to retain a balance due to him on the general account between him and B. & Co. From the evidence as to the course of dealing between A. and B. & Co., it appeared that B. & Co. had for many years previously been in the habit of consigning American produce to K., and drawing bills on him in a similar form to that of the

5th of August, but that there had not been any practice of specifically appropriating the remittances to meet any particular bills. A. brought an action against B., and the trustee in bankruptcy of B. & Co. claiming to be entitled to a charge on the proceeds of the cheese and lard in priority to all other persons. No question was raised as between K. and the trustee in bankruptcy as to their respective rights:—Held, that A. was not entitled to the charge claimed, either (1) on the ground that the direction on the face of the bill of exchange operated as an equitable assignment; or (2) that on the authority of *Frith v. Forbes* (4 D. F. & J. 409), the letter of advice created a specific appropriation of the remittances to meet the bill in favour of B. & Co., the benefit of which was transferred to A. by the direction on the bill of exchange. *Brown v. Kough*, 29 Ch. D. 848; 54 L. J., Ch. 1024; 52 L. T. 878; 34 W. R. 2; 5 Asp. M. C. 433—C. A.

The case of *Frith v. Forbes*, if and in so far as it is intended to lay down that, as a general principle of law, such a letter of advice created a specific appropriation in favour of the consignors and drawers of the bill, the benefit of which was transferred by the direction on the bill to the bill-holders—is erroneous, and must not be followed. *Id.*

d. Property held by Bankrupt as Trustee.

Sale of Goods.—Where goods have been sold to a debtor and there is no evidence to show that the sale was by sample, the mere fact that a letter is subsequently written by the vendee to the vendor stating that he would not accept the goods but would hold them for the vendor and try to sell them for him (to which letter no answer is returned by the vendor), will not constitute the vendee a trustee for the vendor within s. 44 of the Bankruptcy Act, 1883, so as to prevent the vendee's trustee in bankruptcy from claiming such goods as part of the estate of the bankrupt. *Fabian, Ex parte, Landrock, In re*, 1 M. B. R. 62—Cave, J.

Wife's Separate Property in Possession of Husband—Marriage Settlement made Abroad.]

—The rule that a husband is a trustee for his wife of her separate property when no other trustee has been appointed, applies to that which becomes her separate property by virtue of a marriage contract entered into in a foreign country. When, therefore, such property is in the possession of a husband at the commencement of his bankruptcy it does not pass to his trustee. *Sibeth, Ex parte, Sibeth, In re*, 14 Q. B. D. 417; 54 L. J., Q. B. 322; 33 W. R. 556—C. A.

Wife's Chose in Action—Ante-nuptial Parol Agreement to Settle—Gift by Husband to Wife.]

—On a marriage it was verbally agreed between the husband and the wife that a sum of money standing to the credit of the wife on deposit at a bank in her maiden name should be her separate property. Nothing further was done; but after the marriage the money, with the husband's consent, remained at the bank in the wife's maiden name; and she received the interest on it for two years after the marriage, when she drew the money out of the bank. The trustee

in the subsequent liquidation of the husband having claimed payment of the money from the wife as part of her husband's property:—Held, that there had been a gift of the money by the husband to the wife after the marriage; that he had become a trustee of it for her as her separate property; and that, consequently, it did not pass to the trustee in his liquidation. *Whitehead, Ex parte, Whitehead, In re*, 14 Q. B. D. 419; 54 L. J., Q. B., 240; 52 L. T. 597; 33 W. R. 471; 49 J. P. 405—C. A.

Loan for Specific Purpose—Bankruptcy of Borrower.]

—Where money is advanced by way of loan for the purpose of being applied for a specific purpose and upon the undertaking of the borrower so to apply it, a duty is cast upon the borrower which places him in the position of a trustee of the money advanced, and in the event of the bankruptcy of the borrower before the undertaking has been fulfilled the lender is entitled to follow and recover the money in the same manner as if it had been in terms a trust fund. *Gibert v. Gonard*, 54 L. J., Ch. 439; 52 L. T. 54; 33 W. R. 302—North, J.

Payment to Cestui que Trust—Terms—Costs.]

—The bankrupts were stockbrokers who had been employed by the applicant to buy certain specific shares for him, and had received payment for the same. These shares, with others, were deposited by the bankrupts with B. & Co., as security for an advance. When the bankruptcy became known B. & Co. sold the shares, reimbursed themselves, and handed over the balance to the trustee. Upon the applicants sending in a claim for the balance another claimant retired:—Held, that the money might be paid over to the applicant on the terms that his solicitor would give a personal undertaking to repay so much as the court might order at any time within three years. Held, also, that the costs of the applicant must be borne by him, since it would be unjust that the expense of enforcing his claim should be borne by the general body of the creditors. *Rankart, Ex parte, Blakeway, In re*, 52 L. T. 630—Cave, J.

e. Salary and Income.

“Salary”—Service Terminable by Notice—Commercial Traveller.]

—A. was employed as a commercial traveller at a salary of 100l. a year, terminable by a week's notice. A. became bankrupt, and the county court judge ordered him to pay 20l. every year out of such salary to his trustee in bankruptcy according to the provisions of the Bankruptcy Act, 1883, s. 53, sub-s. 2:—Held, that A. received a “salary” within the meaning of the section, and that the order was right. *Brindley, Ex parte, Brindle, In re*, or *Brindley, Ex parte, Brindley, In re*, 56 L. T. 498; 35 W. R. 596; 4 M. B. R. 104—D.

“Income”—Voluntary Allowance—Retired Officer of Indian Army.]

—A voluntary allowance granted by the Secretary of State for India to an officer of the Indian army on compulsory retirement, to which the recipient has no claim or right, and which can be withdrawn at any time at the discretion of the Secretary of State, is not “income” within the meaning of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53,

sub-s. 2, and therefore an order cannot be made for the payment of such allowance to the trustee in bankruptcy of the recipient. *Webber, Ex parte, Webber, In re*, 18 Q. B. D. 111; 56 L. J., Q. B. 209; 55 L. T. 816; 35 W. R. 308; 3 M. B. R. 288—D.

—Future Earnings of Professional Man.]

—The word "income" in s. 90 of the Bankruptcy Act, 1869, applies only to an "income" ejusdem generis with a "salary," and does not enable the court to set aside for the benefit of the creditors of a professional man, who is an undischarged bankrupt, any part of his prospective and contingent earnings in the exercise of his personal skill and knowledge. *Benwell, Ex parte, Hutton, In re*, 14 Q. B. D. 301; 54 L. J., Q. B. 53; 51 L. T. 677; 33 W. R. 242—C. A.

The remuneration of an uncertified bankrupt, acting as an election agent or as a solicitor in legal proceedings, is within the term "personal earnings" and does not vest in the official assignees. *Ebbs, In re*, 19 L. R., Ir. 81—Bk.

f. Materials being used by Bankrupt in Execution of Contracts.

What passes to Trustee.]—The principles applicable to the sale of part of a ship are equally applicable to the sale of part of any corpus manufactum in course of construction. And it follows that it is competent for parties to agree for a valuable consideration that a specific article shall be sold and become the property of the purchaser as soon as it has reached a certain stage; but it is a question of construction in each case at what stage the property shall pass; and a question of fact whether that stage has been reached. On the other hand, materials provided by the builders as portions of the fabrics, whether wholly or partially finished, cannot be regarded as appropriated to the contract, or as "sold," unless they have been "affixed," or in a reasonable sense made part of the corpus. *Wood v. Bell* (6 B. & B. 355), and *Tripp v. Armitage* (4 M. & W. 687) approved. *Seath v. Moore*, 11 App. Cas. 350; 55 L. J., P. C. 54; 54 L. T. 690; 5 Asp. M. C. 586—H. L. (Sc.).

A contract for the building of a ship provided that, if at any time the builder should cease working on the ship for fourteen days, or should allow the time for completion and delivery of the ship to expire for one month without the same having been completed and ready for delivery, or in the event of the bankruptcy or insolvency of the builder, it should be lawful then and thenceforth for the buyer to cause the ship to be completed by any person he might see fit to employ, or to contract with some other person for the completion of the work agreed to be done by the builder, and to employ such materials belonging to the builder as should be then on his premises, and which should either have been intended to be, or be considered fit and applicable for the purpose:—Held, that, so far as this clause applied to the bankruptcy of the builder, it was void as against the trustee in his bankruptcy as being an attempt to control the user after bankruptcy of property vested in the bankrupt at the date of the bankruptcy, and as depriving the trustee of the right to elect whether he would complete the ship or not as might seem most advantageous for the

creditors under the bankruptcy, and transferring that right of election to the buyer. *Barter, Ex parte, Walker, In re*, 26 Ch. D. 610; 53 L. J., Ch. 802; 51 L. T. 811; 32 W. R. 809—C. A.

Held, also, that, this clause having been put in force by the buyer on the filing of a liquidation petition by the builder, the user of the builder's goods in the completion of the ship could not be justified on the ground of a subsequent cesser of work on the ship. *Id.*

g. Of Married Women.

Trade carried on separately from Husband—Life Estate—Marriage Settlement.]—Real property was by a marriage settlement vested in a trustee for trust for a married woman for life and her separate use without restriction on anticipation, with remainder to such persons as she might appoint, with remainder in default of appointment. The married woman carried on a trade separately from her husband and became bankrupt:—Held (Lord Esher, M. R., dissenting), that the trustee in bankruptcy in claiming the life estate was not interfering with or affecting the settlement within s. 19 of the Married Women's Property Act, 1882, and that it passed to him under the bankruptcy under s. 1, sub-s. 5 of the Act. *Boyd, Ex parte, Armstrong, In re*, 21 Q. B. D. 264; 57 L. J., Q. B. 553; 59 L. T. 806; 36 W. R. 772; 5 M. B. R. 200—C. A.

—Separate Property—General Power of Appointment.]—By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 5, "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole":—Held, that the expression "separate property" includes only that which would, if the woman was unmarried, be her "property," and does not therefore, include a general power of appointment by deed or will, of which she is the donee, but which she has not exercised; and a married woman who has traded separately from her husband, and who has been adjudicated a bankrupt, cannot be compelled to execute a deed exercising such a power in favour of the trustee in the bankruptcy. *Gilchrist, Ex parte, or Armstrong, Ex parte, Armstrong, In re*, 17 Q. B. D. 521; 55 L. J., Q. B. 578; 55 L. T. 538; 34 W. R. 709; 51 J. P. 292; 3 M. B. R. 193—C. A.

Wife's Estate—Bankruptcy of Husband—Right of Trustee in Bankruptcy to administer.]

—A husband's right to administer to his wife's estate is not such a right as will vest in the trustee under his bankruptcy. Where the husband of a deceased intestate had left this country and had been adjudicated bankrupt before he had administered to his wife's estate, the court refused to regard his right to administer as property divisible among his creditors under s. 44 of the Bankruptcy Act, but made a grant of administration to the wife's estate to the trustee, under s. 73 of the Court of Probate Act. *Turner, In goods of*, 12 P. D. 18; 56 L. J., P. 41; 57 L. T. 372; 35 W. R. 384—Butt, J.

h. In Other Cases.

Power of Appointment.]—A debtor had a general power of appointment by deed or will :—Held, that his trustee in liquidation had no power after the death of the debtor to appoint the property the subject of the power. *Nichols to Nissey*, 29 Ch. D. 1005 ; 55 L. J. Ch. 146 ; 52 L. T. 803 ; 33 W. R. 840—Pearson, J.

Contingent Interest—Possibility—Interest in Policy of Assurance for benefit of Wife.]—A policy of insurance on the life of a husband for the benefit of his wife was, in 1876, effected with an insurance company which carried on business at New York, through their branch office in London. The application of the policy was made by him on behalf of his wife. The premiums were made payable in London. By the policy the company promised to pay the amount assured to the wife for her sole use, if living, and, if she were not living, to the children of the husband, or, if there should be no such children, to the executors or assigns of the husband, at the London office. The policy also provided that, on the completion of a period of ten years from its issue, provided it should not have been previously terminated by lapse or death, the legal owner should have the option of withdrawing the accumulated reserve and surplus appropriated by the company to the policy. The husband paid the premiums until July, 1883, when he filed a liquidation petition under the Bankruptcy Act, 1869. In 1884 he obtained his discharge. After 1883 the wife paid the premiums out of her separate estate. In 1886 the wife exercised the right of withdrawal, and the company paid 295%, in respect of the policy :—Held, that, even if the sum thus paid did not by virtue of the policy belong to the wife for her separate use, the husband's contingent interest in it at the time when he obtained his discharge was a mere possibility, and that, consequently, it did not pass to the trustee in the liquidation. *Dever, Ex parte, Susc, In re*, 18 Q. B. D. 660 ; 56 L. J., Q. B. 552—C. A.

Title Deeds—Bankrupt's Wife Tenant for Life.]—Under the will of her father, the wife of a bankrupt was tenant for life of some land, though not for her separate use. The trustee in bankruptcy of the husband applied to the court to order the title deeds of the property, which were in the custody of the registrar by order of the county court judge, to be delivered up to him in order that he might sell the life interest, and hand over the deeds to the purchaser. It appeared that the wife was about to apply to the Divorce Court for a divorce :—Held, that the trustee had no absolute right to the deeds, and the court having a discretion in the matter, under the circumstances ordered the deeds to remain in court. *Rogers, Ex parte, Pyatt, In re*, 26 Ch. D. 31 ; 53 L. J., Ch. 936 ; 51 L. T. 177 ; 32 W. R. 737—C. A.

Assignment of Book Debts carries the Books.]—An assignment of the book debts of a debtor will carry the books, so that the person entitled to the book debts under the deed is entitled to the books of account : rule 259 of the Bankruptcy Rules, 1883, only applies to the case of a person not entitled to the books setting up a claim to

them. *Official Receiver, Ex parte, White, In re*, 1 M. B. R. 77—Cave, J.

Right to "Books of Account."]—The 259th rule of the Bankruptcy Rules, 1883, which provides that "no person shall, as against the official receiver or trustee, be entitled to withhold possession of the books of accounts belonging to the debtor, or to set up any lien thereon," is to be construed strictly, and will not be extended to vouchers, counterfoils of cheques, books, correspondence, and other papers, in the hands of another person, although such documents would be of material assistance to the trustee in preparing his accounts of the bankrupt's estate. *Godfrey, Ex parte, Winslow, In re*, 16 Q. B. D. 696 ; 55 L. J., Q. B. 238 ; 54 L. T. 306 ; 34 W. R. 534 ; 3 M. B. R. 60—Cave, J.

Trustee under Deed of Assignment—Moneys and Property received.]—The bankrupts had executed a deed of assignment to F. of the whole of their property for the benefit of creditors. The deed contained a provision for the payment in the first instance out of assets of the costs and expenses of F. The petition was founded on the deed as an act of bankruptcy, and when the trustee in bankruptcy applied to F. for payment to him of assets in his hands, F. claimed to retain them against a larger sum due to him for expenses of work and labour done by him :—Held, that the only right of F. was to prove for his claim, and the court, on motion, ordered him to pay to the trustee the assets in his hands. *Official Receiver, Ex parte, Richards, In re*, 32 W. R. 1001 ; 1 M. B. R. 242—Wills, J.

When a debtor executes a general assignment for the benefit of creditors, and the trustee carries on the business under the deed, receiving and making payments until a receiving order is made in bankruptcy on the petition of certain creditors who have not signed the deed, and whose petition is founded on the general assignment as an act of bankruptcy, the official receiver is entitled to delivery up of the property in the possession of the trustee under the deed, and an account from him of the value of the property of the debtor, of which he took possession and which he has converted, i.e., an account treating him as a trespasser, or he may adopt his actions and have an account treating the trustee as his agent. *Vaughan, Ex parte, Riddeough, In re*, 14 Q. B. D. 25 ; 33 W. R. 151 ; 1 M. B. R. 258—D.

2. PROCEEDINGS FOR DISCOVERY AND PROTECTION OF PROPERTY.

Power to summon Witnesses—In what Cases.]—The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27—which enables the court on the application of the trustee to summon before it for examination the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, &c.—does not apply to the trustee under a composition or scheme of arrangement which has been duly approved by the court under s. 18 of the act. *Whinney, Ex parte, Grant, In re*, 17 Q. B. D.

238; 55 L. J., Q. B. 369; 54 L. T. 632; 34 W. R. 539; 3 M. B. R. 118—C. A.

The provisions of s. 27 of the Bankruptcy Act, 1883, do not apply to an administration of the estate of a person dying insolvent under s. 125 of the act. There is no power in cases of such administration, either under s. 27 or under r. 58 (Bankruptcy Rules, 1883), to summon a person to be examined for the purpose of discovery of the deceased debtor's estate. *Hewitt, Ex parte, Hewitt, In re*, 15 Q. B. D. 159; 54 L. J., Q. B. 402; 53 L. T. 156; 2 M. B. R. 184—D.

Examination of Trustee—Notice.—Where an application is made under s. 27 of the Bankruptcy Act, 1883, for the examination of a trustee in bankruptcy, it would seem that notice of such application should be served on the trustee. *Stevens, Ex parte, Whicher, In re*, 5 M. B. R. 173—D.

Against whom Order granted.—The property of the bankrupt was sold by the trustee to the bankrupt's brother for a sum sufficient to pay in full all the creditors whose names were set out in the statement of affairs. After the assets had been distributed, the fact of the bankruptcy was ascertained by a creditor whose name had been omitted from the statement, and it being admitted that a better price might probably have been obtained for the property than had actually been realised, an application was made by the creditor under s. 27 of the Bankruptcy Act, 1883, for an order for the examination of the trustee, the bankrupt, and his brother:—Held, that the creditor was entitled to make such an application, and that the order ought to be made as against the bankrupt and his brother, but that in the absence of evidence of mala fides or collusion there was nothing to justify the court in making an order against the trustee. *Id.*

Refusal of Witness to Answer.—When a witness is summoned, under s. 27 of the Bankruptcy Act, 1883, for examination concerning the debtor's dealings or property, the judge is not bound to accept at once as conclusive the denial of the witness that he has dealt with such property, but the witness may be further questioned in order to test his credibility. *Purvis, In re* (56 L. T. 579), explained. *Tilly, Ex parte, Scharrer, In re*, 20 Q. B. D. 518; 59 L. T. 188; 36 W. R. 388; 5 M. B. R. 79—C. A.

Refusal to produce Letter-book.—A witness was examined under this sect. 27 of the Bankruptcy Act, 1883, before the registrar, and produced certain letters torn from a letter-book in his possession, but refused to produce the book itself, as he swore that it contained no letters relating to the debtor, his dealings or his property, other than those produced. On an application being made to commit the witness under rule 88 (Bankruptcy Rules, 1883):—Held, that the witness's answer must be accepted, as the object of the section was not to enable a trustee by cross-examination to make out a case. *Rooke, Ex parte, Purvis, In re*, 56 L. T. 579—Cave, J.

Application by Friendly Creditor—Abuse of Process of Court.—The court will not allow its process to be used to do indirectly that which the process of the court will not allow to be done directly. Where therefore an application

was made by a friendly creditor for discovery of documents, nominally for the purpose of carrying out proceedings to expunge a proof, but in reality for the purpose of reopening, after the time for appeal had elapsed, the question as to whether the receiving order had been properly made against the bankrupt or not:—Held, that the application was an attempt by the contrivance of the creditor and the bankrupt, in the interest of the bankrupt, to use the process of the court to do that which, if the bankrupt himself asked the court, the court would not allow to be done; and that the registrar was right in refusing the application. *Kirk, Ex parte, Dashwood, In re*, 3 M. B. R. 257—C. A.

County Court Judge—Contempt of Court—Committal.—By the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 96 (which is substantially re-enacted by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57, the court had power under certain circumstances to summon persons to attend and give evidence or produce documents, and in case of refusal to cause such persons to be apprehended and brought up for examination. By s. 66 (which is substantially re-enacted by s. 100 of the Act of 1883) judges of local courts of bankruptcy had for the purposes of the act, in addition to their ordinary powers as county court judges, all the powers and jurisdiction of judges of the High Court of Chancery, and their orders might be enforced accordingly. A county court judge sitting in bankruptcy summoned a person to attend under s. 96; this summons was disobeyed, and the judge thereupon made an order for the committal of the person so summoned:—Held, that the remedy for disobedience to the summons was not confined to that prescribed by s. 96, but the judge had power, under s. 66, to make the order for committal. *Reg. v. Croydon County Court Judge*, 13 Q. B. D. 963; 53 L. J., Q. B. 545; 51 L. T. 102; 33 W. R. 68—C. A.

Protection of Property—Injunction—Undertaking as to Damages.—H. A. advanced to J. the sum of 90*l.* upon a bill of sale void under the Bills of Sale Act, 1882, inasmuch as the whole amount of interest was calculated in a lump sum which was to become due and payable upon failure in payment of any instalment. Default was made in the payment of the second instalment, and H. A. entered into possession, whereupon H. N. A., a son of H. A., advanced a sum of 130*l.* in order to pay off his father, whose partner he had recently become. Upon the debtor filing his petition in bankruptcy, the registrar granted an injunction restraining H. N. A. from further proceedings under the second bill of sale until further order:—Held, that the injunction was wrong in form and ought to have been until a certain day, and to have contained an undertaking as to damages. *Abrams, Ex parte, Johnstone, In re*, 50 L. T. 184; 1 M. B. R. 32—Cave, J.

Application by Equitable Mortgagee for a Sale—Conduct of Sale.—When an equitable mortgagee applies to the court to realize his security, the conduct of the sale is in the discretion of the court. As a general rule, where the security is sufficient, the conduct of the sale will be given to the trustee, but where the security is insufficient the conduct of the sale will be given to the mortgagee. In either case the costs

charges, and expenses of the trustee, properly incurred, will be a first charge upon the proceeds of sale. *Harrison, Ex parte, Jordan, In re*, 13 Q. B. D. 228; 53 L. J., Q. B. 554; 50 L. T. 594; 33 W. R. 153; 1 M. B. R. 51—Cave, J.

Majority of Creditors opposed to Litigation—Proceedings by Minority to set aside Settlement.—When a minority of the creditors of a bankrupt are dissatisfied with the refusal of the trustee to take proceedings to recover property alleged to be part of the bankrupt's estate, and desire to institute such proceedings themselves, they must, in the first instance, apply to the trustee for leave to use his name, and offer him a proper indemnity. If he refuses, they are entitled to apply to the court for leave to use the name of the trustee on giving him an indemnity against costs. *Kearsley, Ex parte, Genese, In re*, 17 Q. B. D. 1; 55 L. J., Q. B. 325; 34 W. R. 474; 3 M. B. R. 57—Cave, J.

Debtor Retaining Possession of Premises—Committal.—Where a debtor refused to deliver up possession of the premises occupied by him at the request of the trustee in bankruptcy, the court made an order for his committal for contempt. *Trustee, Ex parte, Cow, In re*, 2 M. B. R. 23—Field, J.

IX. PROOF OF DEBTS.

1. *Debts entitled to Priority.*
2. *In respect of what Debts.*
3. *By and against Particular Persons.*
4. *Practice on Proof.*
5. *Expunging Proof.*
6. *Rejection of Proof.*

1. DEBTS ENTITLED TO PRIORITY.

Wages—"Workman," who is—Piecework.—H., who acted for the bankrupt as general foreman and overlooker of a brickyard in which he also worked, in the place of a weekly wage undertook the manufacture of bricks by piecework, and to be paid so much per thousand for the bricks produced. For this purpose he continued to employ the men who had been working for the bankrupt at the same rate of wages, other persons being engaged and paid separately by the bankrupt to do part of the work. He also continued exclusively in the service of the bankrupt, and to act as general manager of the brickworks. He was liable to be discharged at a week's notice by the bankrupt, who had the right to discharge and engage all men working under H., and to make alterations in the rate paid per thousand for the bricks:—Held, that the position occupied by H. was that of a workman within the meaning of s. 40, sub-s. 1 (c), of the Bankruptcy Act, 1883, and not that of a contractor; and that he was entitled in priority under that section to the wages due to him in respect of services rendered to the bankrupt before the date of the receiving order. *Hollyoak, Ex parte, Field, In re*, 35 W. R. 396; 4 M. B. R. 63—Cave, J.

—Computation of Time—"Four months before date of Receiving Order."—In the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52),

s. 40, sub-s. 1 (b)—which directs that the wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order, not exceeding 50*l.*, shall be paid in priority to all other debts—the four months are those "next" before the date of the receiving order; and where an interim receiver has been appointed, the four months are to be computed from the date of the order appointing the interim receiver. *Fox, Ex parte, Smith, In re*, 17 Q. B. D. 4; 55 L. J., Q. B. 288; 54 L. T. 307; 34 W. R. 535; 3 M. B. R. 63—Cave, J.

—Deductions to pay Doctor.—By an arrangement between employers and their workmen certain deductions were made from the workmen's wages (which were paid monthly) for a "doctor's fund" which was established for the purpose of paying a doctor, who attended the workmen and their families and supplied them with medicines in case of illness. The sums thus deducted were handed over by the employers to the doctor from time to time. There was no contract in writing between the employers and the workmen authorizing the employers to make the deductions, nor was there any evidence that the doctor had accepted the liability of the employers. The employers filed a liquidation petition, and at this time there stood to the credit of the "doctor's fund," in their books, a sum of 149*l.*, which had arisen from deductions thus made from the workmen's wages, and had not yet been paid over to the doctor:—Held, that there had been no valid payment (within the Truck Act) of the 149*l.* to the workmen, and that they were entitled to be paid the 149*l.* in full out of the employers' estate as unpaid wages. *Cooper, Ex parte, Morris, In re*, 26 Ch. D. 693; 51 L. T. 374—C. A.

Whether, if the 149*l.* had been, in pursuance of the arrangement, actually paid over by the employers to the doctor, in discharge of a debt for which the workmen were liable, or if the doctor had accepted the liability of the employers, the Truck Act would, notwithstanding the absence of a contract in writing signed by the workmen, have applied—*Quære. Ib.*

Local Rate.—On 12th Jan., 1887, at the time of filing his petition the bankrupt was tenant of a house under a lease for twenty-one years. The trustee in bankruptcy did not disclaim, but on the 1st Feb., 1887, he sold his interest in the lease, the bankrupt remaining in occupation as tenant under the purchaser. There was due from the bankrupt at the date of the receiving order, a local board rate made on 8th October, 1886, for the half year from the 30th September, 1886, to 25th March, 1887, and payable in advance:—Held, that the estate of the bankrupt was liable to pay the rate for the whole half-year. *Ystradfoedwg Local Board, Ex parte, Thomas, In re*, 57 L. J., Q. B. 39; 58 L. T. 113; 36 W. R. 143; 4 M. B. R. 295—Cave, J.

Apprenticeship Premium—Application to whom made.—An application under s. 41 of the Bankruptcy Act, 1883, for the return of an apprenticeship premium paid to the bankrupt as a fee ought to be made to the registrar and not to the judge in court. *Gould, Ex parte,*

Richardson, In re, 35 W. R. 381; 4 M. B. R. 47—Cave, J.

2. IN RESPECT OF WHAT DEBTS.

Calls—Unascertained Liability.—The liability in respect of calls of a liquidating member of a company where the liquidation proceedings commenced prior to the winding-up of the company, and are pending at the time of the winding-up, is a debt or liability which is not "incapable of being fairly estimated," and which is therefore provable in the liquidation. When, therefore, under those circumstances, a company in the course of winding-up has failed to carry in a proof for calls in the liquidation proceedings of a member of the company, and the liquidating member obtains his discharge, he cannot afterwards be placed on the list of contributors. *Furdoonjee's case* (3 Ch. D. 264) discussed and not followed. *Mercantile Mutual Marine Insurance Association, In re, Jenkin's case*, 25 Ch. D. 415; 53 L. J., Ch. 593; 50 L. T. 150; 32 W. R. 360—Chitty, J.

Mortgage—Building Society—Premiums on Advance.—Under a mortgage to a building society the principal sum advanced, together with a fixed sum by way of premium for the advance and interest on the whole amount due, was payable by monthly instalments:—Held, that in the liquidation of the mortgagor, the society was entitled to prove for the whole amount of the premium, and was not restricted to the proportionate part which had accrued due at the date of the liquidation. *Bath, Ex parte, Phillips, In re*, 27 Ch. D. 509; 51 L. T. 520; 32 W. R. 808—C. A.

Postponement of Charge at request of Bankrupt—Implied Promise to indemnify.—In order to enable a mortgagor to obtain a further advance from the first mortgagee on the security of the mortgaged property, the second mortgagee agreed to postpone his charge to a then existing third charge in favour of the first mortgagee, and to the fresh advance. The mortgagor became bankrupt, and when the property was afterwards sold by the first mortgagee, the proceeds of the sale were insufficient to pay the whole of the amount due to him, though they exceeded the amount of the first mortgage:—Held, that the second mortgagee was entitled to prove in the bankruptcy for the amount which he would have received out of the proceeds of sale if he had not consented to postpone his charge, on the ground that the court was entitled to infer an implied promise by the bankrupt to indemnify the second mortgagee against any loss which might result from the postponement of his charge. *Ford, Ex parte, Chappell, In re*, 16 Q. B. D. 305; 55 L. J., Q. B. 406—C. A.

Costs—Award—Bankruptcy before Award.—An order was made by consent that all matters in dispute in an action should be referred, the costs to be in the arbitrator's discretion; during the arbitration the defendant became bankrupt, and his trustee wrote to the arbitrator denying that the award would be binding and revoking the submission. The arbitrator in his award ordered the defendant to pay certain costs:—Held, that the bankruptcy did not operate as a revocation of the submission, and that the trustee

had no power to revoke the submission, and that therefore the creditor could prove for his costs in the bankruptcy. *Edwards, Ex parte, Smith, In re*, 3 M. B. R. 179—D.

Contingent Liability.—A possibility of having to pay costs is not a debt provable in bankruptcy, though it may in some cases be a "contingent liability." *Semble, per Lindley, L. J., Vint v. Hudspeth*, 30 Ch. D. 234; 54 L. J., Ch. 844; 52 L. T. 774; 33 W. R. 738—C. A. See also *Bluck, Ex parte, Bluck, In re*, post, col. 151.

Covenant to Pay Premiums on Policy of Assurance—Value of—Mode of Ascertainment.—Where, in an arrangement matter, a creditor held policies of insurance which the arranging debtor had covenanted to keep up:—Held, that the value of the creditor's interest in the covenant was a sum which the insurance company would accept as a present payment, by way of commutation of the annual premiums, to keep the policies subsisting. *Bank of Ireland, Ex parte, S., In re*, 17 L. R., Ir. 507—Bk.

Lease—Assignment of—Liability of Assignor for Rent, &c.—The assignee of a lease of certain premises became bankrupt, and rent being in arrear, judgment was recovered by the landlord against the assignor of the lease, who had covenanted to pay the rent. The assignor proved against the estate of the bankrupt for the amount so paid, and also in respect of his contingent liability for the rent for the remainder of the term; the last-mentioned proof was rejected by the trustee:—Held, that the proof must be admitted, and that an estimate must be made by the trustee of the value of the liability under s. 37, sub-s. 4 of the Bankruptcy Act, 1883. *Verdi, Ex parte, Hinks, In re*, 3 M. B. R. 218—Cave, J. See also *Hardy v. Fothergill*, post, col. 186.

Proviso for Determination on Bankruptcy—Proof by Lessors.—When a lease contains a proviso or condition: "that on breach of any of the covenants, such lease shall cease, determine, and be void, to all intents and purposes whatsoever," such words must be construed to mean void at the election of the lessor. A lease contained a proviso that if the lessee should become bankrupt or insolvent, the lease should cease, determine, and be void. The lessee having become bankrupt, the trustee in bankruptcy rejected a proof put in by the lessor founded on such lease, upon the ground that on the bankruptcy, the lease became void:—Held, that such rejection by the trustee was wrong, and the proof must be allowed. *Leathersellers' Company, Ex parte, Tickle, In re*, 3 M. B. R. 126—Cave, J.

Covenant for Future Settlement of Money.—Where by a marriage settlement, the settlor covenanted that he, during his life or his representatives within twelve months after his death, would pay the sum of 5,000*l.* to the trustees to be held by them on the trusts of the settlement, and the settlor subsequently became bankrupt:—Held, that a covenant for payment of a sum of money not specifically ear-marked, was not within s. 47, sub-s. 2 of the Bankruptcy Act, 1883, as a covenant for the future settlement of money or property in which the settlor had no interest at the date of his marriage, but that the trustees were entitled to prove against the

estate. *Bishop, Ex parte* (8 L. R. Ch. 718), followed. *Cooper, Ex parte, Knight, In re*, 2 M. B. R. 223—D.

Order for Payment of Alimony.]—Future weekly or monthly payments of alimony, payable by a husband by virtue of an order of the Divorce Court made under s. 1 of the Act 29 & 30 Vict. c. 32, are not capable of valuation, and are not a "debt or liability" within the meaning of s. 37 of the Bankruptcy Act, 1883. They cannot, therefore, be proved in the bankruptcy of the husband, and he is, notwithstanding his bankruptcy, liable to continue the payments. *Linton, Ex parte, Linton, In re*, 15 Q. B. D. 239; 54 L. J., Q. B. 529; 52 L. T. 782; 33 W. R. 714; 49 J. P. 597; 2 M. B. R. 179—C. A.

Bill drawn abroad on Acceptor in England—Proof by Drawer for Re-Exchange.]—Notwithstanding the provisions of s. 57 of the Bills of Exchange Act, 1882, the drawer of a foreign bill of exchange upon an acceptor in England is entitled, upon the bill being dishonoured and protested, to recover from the acceptor damages in the nature of re-exchange, which the drawer is by the foreign law liable to pay to the holder of the bill. And, under s. 37 of the Bankruptcy Act, 1883, the drawer, though he has not paid these damages, can prove in the bankruptcy of the acceptor in respect of his contingent liability to pay them. *Roberts, Ex parte, Gillespie, In re*, 18 Q. B. D. 286; 56 L. J., Q. B. 74; 56 L. T. 599; 35 W. R. 128—C. A.

Receiver in Administration Action against Trustee of Testator's Estate.]—In an action to administer a testator's estate, 11,000*l.* was found due from the two trustees of the will. One of the trustees having been adjudicated a bankrupt, his co-trustee sought to prove for 6,400*l.*, part of the 11,000*l.*; and the receiver in the administration action sought to prove for 4,600*l.*, the balance of the 11,000*l.* The bankrupt's own beneficial share in the testator's estate was 1,600*l.*—Held, that the receiver was only entitled to prove for the 4,600*l.* less the 1,600*l.*, the bankrupt's beneficial share. *Parker, Ex parte, Chapman, In re*, 35 W. R. 595; 4 M. B. R. 109—D.

3. BY AND AGAINST PARTICULAR PERSONS.

Rights of Parties to Deed of Assignment.]—The debtor executed an assignment of his property to a trustee for the benefit of his creditors. The deed provided for the distribution of the assets by the trustee rateably among all the creditors, and contained a covenant by which "in consideration of the premises," the creditors, parties to the deed, agreed to "release the debtor from all claims and demands" against him. The debtor was adjudicated bankrupt upon the petition of a non-executing creditor, the act of bankruptcy proceeded upon being the execution of the deed:—Held, that the deed sufficiently showed that the release was not intended to bind the executing creditors in the event of bankruptcy, and that they were entitled to prove. *Official Receiver, Ex parte, Stephenson, In re*, 20 Q. B. D. 540; 57 L. J., Q. B. 451; 58 L. T. 589; 36 W. R. 624; 5 M. B. R. 44—D.

A trader assigned substantially the whole of his property to a creditor in consideration of a release by the creditor of the debt. There was a secret verbal agreement that the assignee should pay the assignor's debts, and in pursuance of this the assignee paid out several executions and also paid some arrears of rent due to the landlord of the assignor. On it being decided that the deed was void as against the assignor's trustee in bankruptcy:—Held, that the assignee was not entitled to payment in full out of the bankrupt's estate of the sums which he had paid under the agreement, but that he could only prove for them in the bankruptcy. *Chaplin, Ex parte, Sinclair, In re*, 26 Ch. D. 319; 53 L. J., Ch. 732; 51 L. T. 345—C. A.

Husband and Wife—Loan by Wife to Husband's Firm.]—By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3, any money of a wife lent by her to her husband for the purpose of any trade or business carried on by him shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount of such money after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied:—Held, that where a wife lends her money to a trading partnership, of which her husband is a member, she is, notwithstanding the section, entitled to prove, on the bankruptcy of the partnership, against the joint estate in competition with other creditors. *Nottingham, Ex parte, Tuff, In re*, 19 Q. B. D. 88; 56 L. J., Q. B. 440; 56 L. T. 573; 35 W. R. 567; 4 M. B. R. 116—Cave, J.

Loan by Wife to Husband.]—S. 3 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), has no application to a loan by a wife to her husband for purposes unconnected with his trade or business. *Tidswell, Ex parte, Tidswell, In re*, 56 L. J., Q. B. 548; 57 L. T. 416; 35 W. R. 669; 4 M. B. R. 219—Cave, J.

H. was married to his wife in 1864, and she subsequently became entitled to certain moneys under the wills of her father and grandfather. These moneys she lent to her husband for the purposes of his business, upon the terms that he would execute a settlement of the moneys upon her, which was done. Upon the bankruptcy of H. a proof was tendered upon the settlement and rejected:—Held, that the settlement was not invalidated by s. 3 of the Married Women's Property Act, 1882, since that section was not retrospective and could not affect previously existing rights. *Home, Ex parte, Home, In re*, 54 L. T. 301—Cave, J.

Wife in Husband's Liquidation—Onus of Proof.]—The meaning of s. 3 of the Married Women's Property Act, 1882, is that where money or other estate of the wife is lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise, she cannot prove, for the purpose of voting only or at all, until after the other creditors are satisfied. The onus of proof that the money was not lent for such purpose is on the wife. *District Bank of London, Ex parte, Genese, In re*, 16 Q. B. D. 700; 55 L. J., Q. B. 118; 34 W. R. 79—Cave, J.

Lessor and Assignees — Mortgage.]—The bankrupts were assignees of a lease, and the trustees refused to admit a proof by the lessor, who was also mortgagor, against their joint estate:—Held, that privity of estate remained between the mortgagor and the bankrupts, and that the proof must be admitted. *James, Ex parte, Malden, In re, 55 L. T. 708—D.*

See, also, cases ante, col. 142.

Retired Partner against Surviving Partners—Competition with Creditors.]—A devise of real estate upon trust to pay debts does not prevent the operation of the Statute of Limitations when the testator leaves no real estate to support the trust—A., B. and C., carried on business in co-partnership. In 1875, A. retired from the firm, his share being purchased by B. and C., the continuing partners. On his retirement, A., at the request of the continuing partners, paid certain mortgage debts of the business, and took transfers to himself of these mortgage debts with the securities for the same. He also at their request lent them money on mortgage of other portions of the partnership property. He died in 1876. B. and C. continued the business until 1883, when they became bankrupt. At this time there were cash creditors of the old firm still unpaid, who carried in proofs against the joint estate of B. and C. The executors of A. also carried in a proof against the separate estates of B. and C. for (1) the balance of the purchase-money of A.'s share; (2) the mortgage debts paid off by A. on transfer to himself; (3) the moneys lent by A. on mortgage after his retirement. This proof was rejected by the trustee on the ground that to admit it would infringe against the rule forbidding a partner to prove in competition with his own creditors:—Held, that as the debts proved by the cash creditors were, as against A.'s estate, statute-barred, the rule did not apply, and that the proof must be admitted. *Smith, Ex parte, Hepburn, In re, 14 Q. B. D. 394; 54 L. J., Q. B. 422—Cave, J.*

The rule that neither a partner, nor a retired partner, nor the representatives of a deceased partner, can prove in the bankruptcy of the continuing or surviving partner or partners in competition with the joint creditors of the firm of which the partner, or retired or deceased partner was a member, has no application unless there has been actually proved in the bankruptcy some debt in respect of which the bankrupt or bankrupts and the retired or deceased partner were jointly liable. The mere possibility that such debts may be proved in the bankruptcy is not sufficient to introduce the application of the rule. *Andrews, Ex parte, Wilcoxon, In re, 25 Ch. D. 505; 53 L. J., Ch. 411; 50 L. T. 679; 32 W. R. 650—C. A.*

Partner in one Firm the secret and sole Principal in another Firm—Proof by one Firm against the other.]—A. and B. traded in partnership as A. & Co. in England and abroad, A. managing the home business and B. the branch abroad. C. and D. carried on business in England as D. & Co. under an agreement by which C. was to be the sole principal of D., who was to be the manager of the business at a salary with a share of profits. Business transactions took place in England between A. & Co. and D. & Co., and on the bankruptcy of both firms a large balance was due to A. & Co. from D. & Co. C.

was in fact the agent of A., who was the secret and sole principal of D., but this was unknown to B. and D. until after the bankruptcy, and D. had held himself out to A. & Co. and others as a principal. The trustee of A. & Co. tendered a proof against the estate of D. for the balance due from D. & Co. to A. & Co.:—Held, that the proof could not be sustained, for that, under the circumstances, there was no contract between D. and A. that D. should pay for the goods that had been supplied. *Gliddon, Ex parte, Wakeham, In re, 13 Q. B. D. 43—Cave, J.*

Against Separate Estate of Partners—Breach of Trust by Firm—Joint Judgment.]—Where a firm is adjudicated bankrupt on a judgment debt recovered against the firm jointly, if the partners are also severally liable in respect of the same matter by reason, for instance, of its arising out of breach of trust, the several liability of the partners is not, solely by reason of the creditor having sued for and obtained a joint judgment, merged in such judgment, so as to preclude a proof by the judgment creditor against their respective separate estates. *Chandler, Ex parte, Davison, In re, 13 Q. B. D. 50; 50 L. T. 635—Cave, J.*

—Fraudulent Pledge by Partnership Firm.]—A partnership firm wrongfully pledged to their bankers, to secure a debt of the firm, the delivery warrants of some brandy which had been left in their custody in the ordinary course of business by the owner. One of the partners in the firm had no knowledge of the fraud. The debt due by the firm to the bankers was also secured by a separate guarantee of the innocent partner. The firm filed a liquidation petition, and the bankers sold the brandy, and applied the proceeds of sale in part payment of their debt. The owner of the brandy knew nothing of the pledge until the stoppage of the firm. The separate estate of the innocent partner was sufficient to pay all his separate creditors in full (including the balance remaining due to the bankers), and to leave a surplus:—Held, that the owner of the brandy was entitled to have the bankers' securities marshalled, and, to the extent of the value of the brandy, to have the benefit of the guarantee, and to prove against the separate estate of the innocent partner. *Alston, Ex parte (4 L. R., Ch. 168), followed. Salting, Ex parte, Stratton, In re, 25 Ch. D. 148; 53 L. J., Ch. 415; 49 L. T. 694; W. R. 450—C. A.*

—Trust Money paid by Trustee to his own Firm.]—A testator bequeathed to trustees, for the benefit of a person who subsequently became insane, certain securities producing 250*l.* per annum. The trustees, after payment of the expenses of the lunatic, had a balance in hand; one of the trustees paid in the balance to a bank in which he was partner. The firm became bankrupt, and a proof for the balance was lodged by the administrator of the lunatic, who was also a trustee under the will, against the separate estate of the bankrupt trustee:—Held, that proof against the separate estate must be admitted, but without prejudice to any right which the trustee in bankruptcy might have to claim contribution from the bankrupt's co-trustees. *Mein, Ex parte, Ridgway, In re, 3 M. B. R. 212—Cave J.*

Double Proof—Breach of Trust—Partnership.]—Trust funds were handed by the trustees for investment to a firm in which one of the trustees was a partner. These funds were misappropriated by the firm, who subsequently became bankrupt:—Held, that the trustees could, under Sched. II, r. 18, prove for the amount so misappropriated both against the joint estate of the firm and also against the separate estate of the defaulting trustee. *Sheppard, Ex parte, Parkers, In re*, 19 Q. B. D. 84; 56 L. J., Q. B. 338; 57 L. T. 198; 35 W. R. 566; 4 M. B. R. 135—Cave, J.

— Joint and Several Contract — Partners.]—Two partners entered into a joint and several covenant to pay A. B. a certain sum. The firm having become bankrupt, A. B. tendered proof against the joint estate as well as against the separate estates of the partners:—Held, that, there being a joint and several liability, the creditor was entitled to prove against both estates, and that it was immaterial whether the money had been advanced for the purposes of the partnership or not. *Stone, Ex parte* (8 L. R., Ch. 914) commented on. *Berner, Ex parte, Laine, In re*, 56 L. J., Q. B. 153; 56 L. T. 170—Cave, J.

Against Firm by Secured Creditor—Partnership Debt—Security on Separate Estate.]—A father and son were partners in business. The father mortgaged real estate, which was his separate property, to the bankers of the firm, to secure the balance for the time being of the current account of the firm. Afterwards he contracted to sell the real estate, and the bankers joined in the conveyance to the purchaser on the terms of an agreement that the father should deposit the purchase-money with the bankers in his own name, at interest; that the deposit should be a security to the bankers for the debt of the firm, but that, subject to that security, the deposit should remain the separate property of the father; that, until payment of the debt of the firm, the father should not be entitled to withdraw any part of the deposit, but, until demand by the bankers for payment of the debt, he should be at liberty to draw out half-yearly the interest on the deposit; and that, in case demand should be made by the bankers for payment, they might, at any time after the expiration of twelve months from the making of the demand, but not sooner, apply the deposit, and the interest thereon from the time of making the demand, in or towards the payment of the debt of the firm. The father also entered into a covenant for payment of the debt of the firm. This arrangement was carried out:—Held, that, the arrangement being a bona fide one for the purpose of giving a security to the bankers, in substitution for their security on the real estate, the bankers could prove in the liquidation of the father and son against the joint estate for the full amount of their debt, without deducting the amount of the deposit, and that no set-off arose by virtue of s. 39 of the Bankruptcy Act, 1869. *Caldicott, Ex parte, Hart, In re*, 25 Ch. D. 716; 53 L. J., Ch. 618; 50 L. T. 651; 32 W. R. 396—C. A.

Trustee and cestui que trust—Joint and several Liability—Proof against Separate Estate.]—A testator bequeathed certain sums to

each of his children, and directed the trustees of his will to continue his business, and with the consent of his children to employ in the business any part of the general estate, paying interest for it. A bill in equity having been filed against the trustees by parties interested under the will, an arrangement was entered into, by which the sums to be paid to the testator's children under the will were fixed at a certain amount, and the times of payment fixed, the trustees undertaking to secure payment by mortgages of the testator's estate, and to make such assurances as the court should think necessary or proper. This arrangement was sanctioned by the court, and the appellants, who were children of the testator, assented to it. The mortgages were not executed, nor was the money due to the appellants paid. One of the trustees became possessed of the whole property, and carried on the business alone, and afterwards filed a petition for liquidation. An order was made in the Chancery suit, declaring that the appellants were entitled to a lien on the property for the money due to them. The appellants claimed to prove against the separate estate of the liquidating debtor:—Held, that until the arrangement was carried out the trustees of the will remained trustees for the appellants in respect of the money due to them, and therefore were severally as well as jointly liable, and were also severally liable because they had agreed to give mortgages, which, if properly drawn, would contain several covenants to pay, and therefore the appellants were entitled to prove against the debtor's separate estate. *Craven, Ex parte, King, Ex parte, Ingham, In re*, 52 L. T. 714—C. A.

Secured Creditor—Mortgage of Policy of Insurance—Covenant to pay Premiums—Valuing Security.]—The holder of a policy of insurance on his own life mortgaged it as security for a debt and covenanted with the mortgagees to pay the annual premiums. The mortgagor having become bankrupt the mortgagees valued the policy and proved in the Irish Court of Bankruptcy for the difference between that value and the debt, as provided by the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58):—Held, that the mortgagees were not entitled under sect. 47 to prove in addition for the value of the covenant to pay premiums. *Deering v. Bank of Ireland*, 12 App. Cas. 20; 56 L. J., P. C. 47; 56 L. T. 66; 35 W. R. 634—H. L. (Ir.)

— Who are.]—The vesting of an arranging debtor's property in the official assignees of the Court of Bankruptcy and a trustee, pursuant to resolution, upon trust to secure the payment to the creditors in the arrangement matter of the composition agreed on does not place such creditors in the position of secured creditors within the Bankruptcy Acts. *Guilfoyle, In re*, 15 L. R., Ir. 238—C. A. See *Charrington, Ex parte, Dickinson, In re*, post, col. 155.

4. PRACTICE ON PROOF.

Judgment recovered after Act of Bankruptcy.]

—When a creditor claims to prove in a bankruptcy in respect of a debt which came into existence after the commission of the act of bankruptcy on which the fiat was based (the

bankruptcy being under the Bankruptcy Act, 1849, the onus is on him to prove that he had no notice of the act of bankruptcy before the creation of the debt. *Revell, Ex parte, Tollemache, In re* (No. 2), 13 Q. B. D. 727; 54 L. J., Q. B. 92; 51 L. T. 379; 33 W. R. 289—C. A.

When in support of a claim to prove a debt in a bankruptcy the only evidence of the debt is a judgment, and that judgment has been obtained after the act of bankruptcy, the judgment debt cannot be proved. *Bonham, Ex parte, Tollemache, In re*, 14 Q. B. D. 604; 54 L. J., Q. B. 388; 52 L. T. 17; 33 W. R. 628—C. A.

Judgment—Proof of Consideration.—When a claim is made to prove in a bankruptcy in respect of a judgment debt, though the judgment is *prima facie* evidence of the debt, it is not conclusive evidence, and, if the circumstances are suspicious, the court will call upon the claimant to prove the consideration for the judgment, and if he is unable to prove it, by reason of the loss of documents, or the lapse of time or otherwise, the proof will be rejected. *Anderson, Ex parte, Tollemache, In re*, 14 Q. B. D. 606; 54 L. J., Q. B. 383; 52 L. T. 786—C. A.

The Court of Bankruptcy is not conclusively bound by a judgment for a debt, but has power, on a claim to prove the debt in the bankruptcy of the judgment debtor, to inquire into the consideration for the debt. *Revell, Ex parte, Tollemache, In re*, 13 Q. B. D. 720; 54 L. J., Q. B. 89; 51 L. T. 376; 33 W. R. 288—C. A. S. C. and S. P. *Edwards, Ex parte, Tollemache, In re*, 14 Q. B. D. 415—C. A., on application for leave to appeal to the House of Lords.

Evidence—Bankrupt's Statement of Affairs.—An admission made by a bankrupt in his statement of affairs that a debt is due from him, is not after his death admissible evidence as against his assignee in bankruptcy of the existence of the debt, merely because it might turn out that there was a surplus after paying the creditors. *Edwards, Ex parte, Tollemache, In re*, 14 Q. B. D. 415—C. A.

Time for sending in Proof—Res Judicata.—On appeal from the rejection by the trustee in bankruptcy of a proof of debt carried in by the liquidator of a mutual insurance company for the sum of 85*l.*, the amount due from the bankrupts as contributors in respect of calls, and also for the estimated sum of 100*l.* for further calls which had accrued before the date of the receiving order but had not been then ascertained, the county court judge allowed the proof as to the 85*l.*, and directed the proof as to the 100*l.* to stand over. On 30th July, 1886, proof for the ascertained sum of 74*l.* in substitution for the 100*l.* was tendered and was rejected by the trustee on the grounds (1) that the claim was made too late by reason of the fact, that on 9th July notice to declare a dividend had been inserted in the Gazette, by which 28th July was specified as the last day for claims to be sent in; and (2) that the alleged claim had already been adjudicated upon by the court:—Held, that the notice in question did not prevent the creditor from making the claim, and that the proof in respect of the further calls was not *res judicata*, and must be allowed. *Whitehaven Mutual Insur-*

ance Society, Ex parte, Shepherd, In re, 4 M. B. R. 130—D.

Re-Proof—Dispensing with.—If, in the opinion of the court, a debt has been sufficiently established, it may dispense with a proof over again for the purpose of voting, under s. 16, sub-s. 2, of the Bankruptcy Act, 1869, and Rule 67 of the Bankruptcy Rules, 1870. *McHenry, In re*, 35 W. R. 20—C. A.

Amendment of Proof.—Where an application made by a secured creditor for leave to withdraw or amend his proof put in from inadvertence for the full amount of the debt, and without mentioning the security, was refused by the county court judge:—Held, that there was clearly no intention to give up the security, and that proof for the full amount of the debt having been put in from inadvertence, leave to amend ought to have been granted. *Mesham, Ex parte, King, In re*, 2 M. B. R. 119—D.

A mortgagee who has valued his security, will in a proper case be allowed, under rule 13 in Schedule 2 to the Bankruptcy Act, 1883, to amend his valuation and proof, notwithstanding the opposition of a subsequent mortgagee. *Arden, Ex parte, Arden, In re, or Arden v Deacon*, 14 Q. B. D. 121; 51 L. T. 712; 33 W. R. 460; 2 M. B. R. 1—D.

Where, in an arrangement matter, a creditor made his proof of debt, including a sum for which he held security, and was represented by a solicitor at both sittings at which the arrangement was carried, the court refused leave to withdraw or amend the proof by excluding the secured debt. *Robinson, Ex parte, O. D., In re*, 15 L. R. Ir. 496—Bk.

Secured Creditor.—A creditor of a bankrupt held as security for his debt a policy of insurance on the life of the bankrupt for 200*l.* This security the creditor in his proof in the bankruptcy valued at 21*l.* The trustee gave notice of his intention to redeem at that value. Shortly afterwards the bankrupt died, and 200*l.* became due on the policy; the creditor claimed to amend his valuation and proof by increasing the value of the security to 200*l.*:—Held, that the creditor was entitled to amend at any time before the trustee had redeemed it by payment to the creditor of its assessed value. *Norris, Ex parte, Sadler, In re*, 17 Q. B. D. 728; 56 L. J., Q. B. 93; 35 W. R. 19; 3 M. B. R. 260—C. A.

5. EXPUNGING PROOF.

Judgment for Costs—Liability incurred subsequently to Receiving Order—Locus Standi of Bankrupt.—The plaintiff in an action filed his petition, and a receiving order was made during the hearing of the action. The action was continued in the name of the plaintiff, and two days after the date of the receiving order the defendant recovered judgment, with costs. At a meeting of creditors to consider a scheme for composition, the chairman allowed the defendant to vote in respect of his claim for costs, and by reason of his vote the scheme was rejected and the debtor made a bankrupt:—Held, that the debtor was entitled to move to expunge the vote of the defendant, and also that the defendant's debt was not provable in bankruptcy,

as the bankrupt's liability did not arise out of an obligation incurred before the date of the receiving order, and that the proof must, therefore, be expunged. *Bluck, Ex parte, Bluck, In re*, 56 L. J., Q. B. 607; 57 L. T. 419; 35 W. R. 720; 4 M. B. R. 273—Cave, J.

Application by Creditor.—A creditor who has proved a debt in a bankruptcy has an interest which entitles him to apply to the court to expunge the proof of another creditor which has been admitted by the trustee. *Merriman, Ex parte, Stenson, In re*, 25 Ch. D. 144; 53 L. J., Ch. 403; 50 L. T. 226; 32 W. R. 281—C. A.

Application by Creditor for Bankrupt's benefit.—An application made by one creditor under r. 25 of sched. 2 of the Bankruptcy Act, 1883, to expunge another creditor's proof, will not be granted if it appears that the sole object of the application, though nominally made in the name of a creditor, is to benefit the bankrupt. *Rooney, Ex parte, Tallerman, In re*, 57 L. J., Q. B. 509; 58 L. T. 886; 36 W. R. 864; 5 M. B. R. 119—Cave, J.

6. REJECTION OF PROOF.

Appeal against—Time and Procedure.—If a creditor desires to appeal against the rejection of his proof by the trustee he must give notice of motion in the usual way under r. 19 of the Bankruptcy Rules, 1883, and within the twenty-one days limited by the 174th rule. The old practice of applying to the court, in the first instance, to fix a time and day for hearing such an application no longer obtains. *Morrison, Ex parte, Gillespie, In re*, 14 Q. B. D. 385; 52 L. T. 55; 33 W. R. 751; 1 M. B. R. 278—Cave, J.

A proof against the estate of the bankrupt was filed in Sept., 1884, and rejected by the trustee. Upon an appeal against the rejection of the proof, a preliminary objection was raised to the effect that the rejection was out of time. Rule 173 provides that, subject to the power of the court to extend the time, the trustee within fourteen days after the receipt of a proof shall, in writing, either admit or reject it wholly or in part, or require further evidence in support of it.—Held, that the objection was not good, and that the question being one merely of procedure, the right course for the registrar of the county court to have taken would have been to have treated the application as a motion to expunge the proof on behalf of the trustee. *Fenton, Ex parte, Sissling, In re*, 53 L. T. 967; 2 M. B. R. 289—D.

Where, on an appeal from the rejection of a proof by the trustee the objection is taken that such rejection was not made within the fourteen days required by Rule 173 of the Bankruptcy Rules, 1883, the court will allow such objection, but will treat the application as a motion to expunge the proof on behalf of the trustee, and will deal with the case accordingly. *Spamer, Ex parte, Voght, In re*, 3 M. B. R. 164—Cave, J.

Costs—Unreasonable Rejection by Trustee.—The court in reversing the decision of the trustee in a bankruptcy rejecting a proof, ordered him to pay the costs personally, being of opinion that he had acted unreasonably and improperly in

rejecting it. *Brown, Ex parte, Smith, In re*, 17 Q. B. D. 488; 3 M. B. R. 202—C. A.

A trustee in bankruptcy rejected a proof tendered in respect of a debt for which judgment had been entered against the bankrupt in the Queen's Bench Division under a judge's order by consent, on the ground that the order had not been filed as required by s. 27 of the Debtors Act (32 & 33 Vict. c. 62), so that the judgment was void. The trustee in rejecting the proof acted under the directions of the committee of inspection.—Held, that there was no ground for contending that the invalidity of the judgment affected the right of the plaintiff to prove for the debt for which the action was brought; that the decision of the trustee must be reversed with costs, to be paid by him personally; and that the fact that he had acted under the directions of the committee of inspection did not affect his liability. *Id.*

Conduct of Creditor.—A proof in respect of money lent was tendered against the estate by the father of the bankrupt, but rejected by the trustee, on the ground that no notice of the alleged debt appeared in the bankrupt's books, and that it was barred by the Statute of Limitations.—Held that, though the Statute of Limitations did not apply, the court considered that the difficulty had arisen from the conduct of the creditor himself in allowing the debt to remain without formal acknowledgment or entry in the books, by reason of which the trustee had been compelled to come to the court in the course of his duty; and that though the proof would be allowed, such order must be without costs, the trustee to take his costs out of the estate. *Des Vignes, Ex parte, Des Vignes, In re*, 5 M. B. R. 143—Cave, J.

Security for Costs—Creditor resident Abroad.

—The court has no jurisdiction to order a creditor resident abroad, who is appealing from the rejection of his proof by the trustee, to give security for the costs of such appeal. *Izard, Ex parte, Vanderhaege, In re*, 20 Q. B. D. 146; 58 L. T. 236; 36 W. R. 525; 4 M. B. R. 27—Cave, J.

Appeal by Creditor—Locus Standi of Bankrupt.

—At the first meeting of the creditors of a bankrupt the chairman rejected the proof tendered by a creditor for the sum at which the bankrupt had entered and sworn to the debt in his statement of affairs. On appeal by the creditor from such rejection.—Held, that the bankrupt had no locus standi to appear and oppose the appeal, even though he had been served with notice of appeal. *Smith, Ex parte, Knight, In re*, 1 M. B. R. 74—Cave, J.

X. MUTUAL DEALINGS—SET-OFF.

Time for.—Where there are mutual dealings between a debtor and his creditors, the line as to set-off must, as a general rule, and in the absence of special circumstances, be drawn at the date of the commencement of the bankruptcy. *Reid, Ex parte, Gillespie, In re*, 14 Q. B. D. 963; 54 L. J., Q. B. 342; 52 L. T. 692; 33 W. R. 707; 2 M. B. R. 100—Cave, J.

Claim to Return of Goods Pledged—Detinue.

—The plaintiff company had deposited cigars with the defendants to secure a debt. An order for winding up the company was afterwards made, and, the secured debt having been paid off, the liquidator of the company claimed a return of the cigars, but the defendants refused to give them up. The liquidator brought an action of detinue for the cigars. Their value having been assessed in the action, the defendants claimed by way of counterclaim to set off another debt due from the company to them against such value by virtue of the conjoint effect of s. 38 of the Bankruptcy Act, 1883 (the "mutual dealings" section), and s. 10 of the Judicature Act, 1875, which applies the rules of bankruptcy law to cases of winding up:—Held, that they were not entitled to do so on the ground that s. 38 is only applicable where the claims on each side are such as result in pecuniary liabilities, whereas the right of the plaintiffs was to a return of the goods. *Eberle's Hotel Company v. Jonas*, 18 Q. B. D. 459; 56 L. J., Q. B. 278; 35 W. R. 467—C. A.

Deposit for Special Purpose—Debts.—Where money has been deposited with a person for a specific purpose, which fails, it cannot, upon the bankruptcy of the depositor, be retained as a set-off by the depository against debts due to him from the depositor. *Wright v. Watson*, 1 C. & E. 171—Pollock, B.

Partnership Debt—Security on Separate Estate.—A father and son were partners in business. The father mortgaged real estate, which was his separate property, to the bankers of the firm, to secure the balance for the time being of the current account of the firm. Afterwards he contracted to sell the real estate, and the bankers joined in the conveyance to the purchaser on the terms of an agreement that the father should deposit the purchase-money with the bankers in his own name, at interest; that the deposit should be a security to the bankers for the debt of the firm, but that, subject to that security, the deposit should remain the separate property of the father; that, until payment of the debt of the firm, the father should not be entitled to withdraw any part of the deposit, but, until demand by the bankers for payment of the debt, he should be at liberty to draw out half-yearly the interest on the deposit; and that, in case demand should be made by the bankers for payment, they might, at any time after the expiration of twelve months from the making of the demand, but not sooner, apply the deposit, and the interest thereon from the time of making the demand, in or towards the payment of the debt of the firm. The father also entered into a covenant for payment of the debt of the firm. This arrangement was carried out:—Held, that, the arrangement being a bona fide one for the purpose of giving a security to the bankers, in substitution for their security on the real estate, the bankers could prove in the liquidation of the father and son against the joint estate for the full amount of their debt, without deducting the amount of the deposit, and that no set-off arose by virtue of s. 39 of the Bankruptcy Act, 1869. *Caldicott, Ex parte, Hart, In re*, 25 Ch. D. 716; 53 L. J., Ch. 618; 50 L. T. 651; 32 W. R. 396—C. A.

XI. INVALID AND PROTECTED TRANSACTIONS.

1. *Executions.*
2. *Distresses.*
3. *Fraudulent Conveyances.*
4. *Fraudulent Preferences.*
5. *Assignments of Property.*
6. *Other Dealings by Bankrupt.*
7. *Dealings with Property by Agent.*

1. EXECUTIONS.

Elegit—Delivery in Execution—Seizure.—An execution against lands is "completed by seizure" within s. 45, sub-s. 2, of the Bankruptcy Act, 1883, as soon as the sheriff has delivered the lands to the execution creditor under a writ of elegit, though a receiving order is afterwards made before the sheriff makes a return to the writ. *Hobson, In re*, 33 Ch. D. 493; 55 L. J., Ch. 754; 55 L. T. 255; 34 W. R. 786—V.-C. B.

—Goods—Seizure but no Delivery.—By the Bankruptcy Act, 1883, s. 146, "the sheriff shall not under a writ of elegit deliver the goods of a debtor, nor shall a writ of elegit extend to goods," and by s. 169, which repeals, amongst other enactments, so much of 13 Edw. 1, c. 18, as relates to the chattels of the debtor, save only his oxen and beasts of the plough, it is enacted that "the repeal effected by this act shall not affect any thing done before the commencement of this act under any enactment repealed by this act; nor any right or privilege acquired or duty imposed, or liability or disqualification incurred, under any enactment so repealed." Some days before the 1st of January, 1884, when the Bankruptcy Act, 1883, came into operation, the sheriff entered into possession and seized goods of the defendant, under a writ of elegit issued under statute 13 Edw. 1, c. 18, at the suit of the plaintiff, a judgment creditor of the defendant, but no delivery of such goods had been made to the plaintiff before the 1st of January, 1884:—Held, that the Bankruptcy Act, 1883, had not deprived the plaintiff of his right to the delivery of such goods. *Hough v. Windus*, 12 Q. B. D. 224; 53 L. J., Q. B. 165; 50 L. T. 312; 32 W. R. 452; 1 M. B. R. 1—C. A.

On the 22nd December, 1883, the sheriff entered into possession of the goods of W. by virtue of a writ of elegit, but had not, at the time that the Bankruptcy Act, 1883, came into operation, nor subsequently, delivered them to the creditor. On the 31st January, 1884, the debtor was adjudicated a bankrupt, and an order was made by the registrar restraining the sheriff from proceeding further upon the writ of elegit in order that the matter might be referred to the bankruptcy judge to determine the question whether an act of bankruptcy committed subsequently to the time when the Bankruptcy Act, 1883, came into operation, and intervening between seizure and delivery, had affected the rights of the creditor:—Held, that the creditor's rights were not impaired, and that the circumstances were such as were intended to be dealt with by the temporary provisions of s. 169 of the Bankruptcy Act, 1883, and not by the permanent provisions of s. 45 of the same act. *Hough*,

Ex parte, Windus, In re, 50 L. T. 212; 32 W. R. 540; 1 M. B. R. 22—Cave, J.

— Assignment to Trustees under Resolution of Creditors after Writ lodged with Sheriff.]—The plaintiffs signed judgment against the defendants on the 12th July, and on the same day delivered a writ of elegit to the sheriff, who did not seize the goods until the 20th September, when they were in the possession of the claimants. On the 11th July the defendants closed their place of business in order to prevent executions being levied, and kept them closed until the 16th July, when they filed a petition for the liquidation of their affairs by arrangement or composition under the Bankruptcy Act, 1869, and at a meeting of creditors on the 27th August it was resolved that a composition of 7s. 6d. in the pound should be accepted and secured by an assignment of the whole of the assets of the defendants to the claimants as trustees, and that a proper deed of assignment should be executed by the defendants. On the 11th September the claimants received a written notice from the plaintiffs that the writ of elegit had been lodged with the sheriff, and on the 17th September, that is, before the goods were seized, the defendants executed the deed of assignment to the claimants in pursuance of the resolution of the creditors:—Held, that the plaintiffs were entitled to the goods. *Ehlers v. Kauffman*, 49 L. T. 806—D.

Equitable Execution — Completion — Secured Creditor.]—Execution was issued against the goods of a debtor by a judgment creditor, and two days afterwards the creditor obtained an order for the appointment of a receiver. The debtor was shortly after this adjudicated bankrupt on his own petition, at which time the goods were unsold:—Held, first, that the order appointing a receiver of the debtor's goods did not constitute the execution creditor a secured creditor; secondly, that the order did not amount to equitable execution; and thirdly, that if it did, s. 45 of the Bankruptcy Act, 1883, applied, and the execution not having been completed by sale at the time of the making of the receiving order in bankruptcy, the execution creditor was not entitled to retain the benefit of it against the trustee. *Charrington, Ex parte, or Moore, Ex parte, Dickinson, In re*, 22 Q. B. D. 187; 53 L. J., Q. B. 1; 60 L. T. 138; 37 W. R. 130; 6 M. B. R. 1—C. A.

Charging Order Nisi.]—An order nisi charging shares under 1 & 2 Vict. c. 110, s. 14, is not "an execution against the goods of a debtor" within s. 45 of 46 & 47 Vict. c. 52 (the Bankruptcy Act, 1883). *Hutchinson, Ex parte, or Plowden, Ex parte, Hutchinson, In re*, 16 Q. B. D. 515; 55 L. J., Q. B. 582; 54 L. T. 302; 34 W. R. 475; 3 M. B. R. 19—D.

Garnishee Order—"Receipt of Debt"—Money paid into Court.]—A creditor having obtained a garnishee order in respect of a debt due to the judgment debtor, a third person intervened claiming that the debt was due to her; and the garnishee, under an order of the court, paid the amount into court to abide further order. A receiving order having been subsequently made against the judgment debtor, the third person withdrew her claim:—Held, that there had been

no "receipt of the debt" by the creditor within the meaning of s. 45 of the Bankruptcy Act, 1883, so as to entitle him to retain it against the judgment debtor's trustee in bankruptcy. *Butler v. Wearing*, 17 Q. B. D. 182; 3 M. B. R. 5—Manisty, J.

"Seizure and Sale"—Interpleader—Completion of Execution.]—Goods of the debtor were taken in execution by the plaintiff under a judgment for a sum exceeding 20*l.* The goods having been claimed by a third person, an interpleader order was made on March 16 directing that, unless payment were made or security given by the claimant according to the provisions of the order, the sheriff should sell the goods and pay the proceeds of the sale into court. The claimant did not comply with the provisions of the order, and ultimately withdrew his claim. On March 28 the goods were sold and the proceeds paid into court on April 6. On April 7 notice of a bankruptcy petition having been presented against the debtor was served on the sheriff, and the debtor was adjudged bankrupt on such petition:—Held, that under ss. 45 and 46 of the Bankruptcy Act, 1883, the trustee in bankruptcy of the debtor was entitled as against the plaintiff to the money in court. *Heathcote v. Livesley, or Livesey, In re*, 19 Q. B. D. 285; 56 L. J., Q. B. 645; 36 W. R. 127; 51 J. P. 471—D.

Where a sheriff has seized goods on behalf of an execution creditor, but is ordered before sale to withdraw in favour of the receiver in an action in the Chancery Division, the execution has not been "completed" within s. 45 of the Bankruptcy Act, 1883, and the goods seized pass to the trustee in bankruptcy of the debtor. *MacKay v. Merritt*, 34 W. R. 433—V.-C. B.

— Payment by Judgment Debtor before Sale—Right to Proceeds.]—On 3rd February, the sheriff seized goods of a debtor under an execution for more than 20*l.*, and on 4th February, before sale, the debtor paid the amount of debt and costs. On 13th February, a petition was presented against the debtor, on which he was adjudicated bankrupt; the trustee claimed the money from the sheriff:—Held, that the payment out by a debtor of an execution upon his goods is not a "sale" within the meaning of s. 46, sub-s. 2, of the Bankruptcy Act, 1883, and that the money was received by the sheriff for the judgment creditors, who were entitled to it, as against the trustee in bankruptcy. *West Cannock Colliery Company, Ex parte, Pearson, In re*, 3 M. B. R. 187—D.

Writs of Fi Fa. for more and for less than 20*l.*—Title to Proceeds.]—Where the sheriff sells under an execution for more than 20*l.*, and within fourteen days afterwards receives notice of a bankruptcy petition, the effect of s. 46, sub-s. 2, of the Bankruptcy Act, 1883, is not to render the sale absolutely void, but to deprive the execution creditor of the fruits of the sale, and to transfer them to the trustee in the bankruptcy for the benefit of the general body of the creditors.—Where, therefore, a sheriff is in possession under several writs, some for more and some for less than 20*l.*, and proceeds to sell, the writs are payable in order of priority so long as there are funds to pay; but, if he receives notice of a bankruptcy petition within fourteen days after the sale, only those writs are entitled to be paid

which are for less than 20%, and which would have been paid had not bankruptcy supervened. *Crosthwaite, Ex parte, Pearce, In re*, 14 Q. B. D. 966; 54 L. J., Q. B. 316; 52 L. T. 518; 33 W. R. 614; 2 M. B. R. 105—Cave, J.

Notice of Petition—"Sheriff."—The notice of a bankruptcy petition mentioned in sub-s. 2 of s. 46 of the Bankruptcy Act, 1883, must be served on the sheriff or his recognized agent (such as the under-sheriff) for the purpose of receiving such notices; it is not sufficient to serve it upon an ordinary bailiff or man in possession.—The effect of the provision of s. 168 that "sheriff includes any officer charged with the execution of a writ or other process," is to bring within s. 46 officers of inferior courts who discharge for those courts duties similar to those which the sheriff discharges for the High Court.—On F., the sergeant-at-mace of the Mayor's Court of London, proceeding to execute a warrant issued to enforce a judgment for more than 20%, obtained in that court, he found H., an officer of the sheriffs of London, in possession of the goods of the debtor under a writ issued by the Queen's Bench Division, and thereupon, in accordance with the usual practice, he delivered the warrant to H. for execution. H. sold the goods, and out of the proceeds paid the amount of the warrant to F. The next day notice was served on H. of a bankruptcy petition having been presented against the debtor on which he was afterwards adjudged bankrupt. No notice of the petition was served on F.:—Held, by Cave, J., that, by virtue of s. 168, H. must under the circumstances be deemed to be "the sheriff" for the purposes of s. 46, sub-s. 2; and that therefore the trustee in the bankruptcy was, as against the execution creditor, entitled to the money.—Held, by the Court of Appeal, that, even if an effectual notice could ever have been served on H., a notice served on him after he had handed over the money to F., and his agency for F. had thus been determined, was ineffectual, and that consequently the execution creditor was entitled to the proceeds of sale. *Warren, Ex parte, Holland, In re*, 15 Q. B. D. 48; 54 L. J., Q. B. 320; 53 L. T. 68; 33 W. R. 572; 2 M. B. R. 142—C. A.

— **Form—Writing.**—The notice to be served on a sheriff of a bankruptcy petition having been presented against or by the debtor under s. 46, sub-s. 2, of the Bankruptcy Act, need not necessarily be in writing. *Curtis v. Wainbrook Iron Co.*, 1 C. & E. 351—Grove, J.

Retention of Proceeds—Period from which Fourteen Days runs.—By sub-s. 2, s. 46, Bankruptcy Act, 1883, "Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding 20%, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon . . . the sheriff shall pay the balance to the trustee in the bankruptcy." On the 9th Feb., 1888, the sale by the sheriff of the debtor's goods under an execution was completed, but the proceeds were not paid over by the purchaser until after that date. On the 23rd February a petition was taken to the office to be filed against the debtor, but was

refused by the clerk as irregular, and on the 24th February a proper petition was presented and filed. The execution creditor moved for a declaration that he was entitled to the proceeds of sale as against the trustee in bankruptcy:—Held, that no petition was presented within the meaning of the section until the 24th February; that the fourteen days commenced to run from the completion of the sale, and not from the receipt of the proceeds of sale by the sheriff; that the petition was therefore filed too late, and the execution creditor was entitled to the money. *Ross, Ex parte, Cripps, In re*, 21 Q. B. D. 472; 58 L. J., Q. B. 19; 59 L. T. 341; 36 W. R. 845; 5 M. B. R. 226—Cave, J. Appeal compromised, 33 S. J. 28—C. A.

"Costs of the Execution"—What are.—Expenses incurred by a sheriff for the cost of cutting, carrying, threshing, and dressing corn which has been taken in execution, are not "costs of the execution" within the meaning of s. 46, sub-s. 1, of the Bankruptcy Act, 1883, and therefore if before sale notice of a receiving order against the execution debtor is served on the sheriff, and the goods are delivered to the official receiver or trustee, such expenses are not a charge on the goods, and must be disallowed on taxation of the sheriff's costs. *Conder, Ex parte, Woodham, In re*, 20 Q. B. D. 40; 57 L. J., Q. B. 46; 58 L. T. 116; 36 W. R. 226—D.

When the bankruptcy of a judgment debtor supervenes after seizure, but before sale, by the sheriff under a writ of fi. fa., the sheriff is not entitled to poundage under the words "costs of execution" in sub-s. 1 of s. 46 of the Bankruptcy Act, 1883. *Ludmore or Ludford, In re*, 13 Q. B. D. 415; 53 L. J., Q. B. 418; 51 L. T. 240; 33 W. R. 152; 1 M. B. R. 131—Cave, J.

Relation back of Trustee's Title—Composition falling through.—The title of a trustee in bankruptcy to the bankrupt's property relates back under s. 11 of the Bankruptcy Act, 1869, to the original act of bankruptcy, although composition proceedings were taken in the first instance which were afterwards superseded by bankruptcy. When such a supersession takes place the title of the trustee in bankruptcy is prior to that of a creditor who has seized and sold the debtor's goods with notice of the original act of bankruptcy. *Barron v. Ehlers*, 1 C. & E. 432—Mathew, J.

Expiration of Restraining Order.—Judgment having been obtained against W. H. S., and execution having been issued but not levied, W. H. S. filed his petition for liquidation, and an order was made appointing L. receiver and manager, and an order restraining the creditor from further proceedings under the judgment until four days after the first meeting of creditors. This being held, no resolutions were passed, and the sheriff went into possession. Upon the receiver claiming all moneys in respect of the estate, an interpleader summons was taken out, and ultimately an issue was directed to be tried:—Held, that the restraining order having expired, the execution creditor was entitled to proceed with his execution. *Lomas v. Ward*, 50 L. T. 275—Cave, J.

Rights of Landlord of Premises—Rent.—A landlord can only claim under 8 Anne, c. 14,

from a party levying execution, the rent due at the time of taking the goods, and not that which accrues afterwards. A sheriff sold goods under a fi. fa., but the vendee allowed them to remain on the premises for more than three weeks. There was a quarter's rent due at the time, but the landlord did not distrain:—Held, that not having done so he could not recover, under 8 Anne, c. 14, the rent from the tenant's trustee in bankruptcy to whom the sheriffs had paid the proceeds of sale. *Pollen Trustees, Ex parte, Davis, In re*, 55 L. J., Q. B. 217; 54 L. T. 304; 34 W. R. 442; 3 M. B. R. 27—Cave, J.

2. DISTRESSES.

By Gas Company—Rent.—By their special act (39 & 40 Vict. c. 119, s. 44) the corporation of Walsall were empowered "to recover from any person any rent or charge due to them from him for gas supplied, by the like means as landlords are for the time being by law allowed to recover rent in arrear":—Held, that after the filing of a liquidation petition by a customer, the corporation were entitled as against the trustee in the liquidation to levy a distress in respect of a sum due by the debtor for gas supplied to him before the filing of the petition. *Harrison, Ex parte, Peake, In re*, 13 Q. B. D. 753; 53 L. J., Ch. 977; 51 L. T. 878—C. A.

Held, also, that the corporation were not, within the meaning of s. 34 of the Bankruptcy Act, 1869, "other persons" to whom any rent was due by the debtor, but, by virtue of s. 44 of the special act, they were entitled to the rights given to landlords by s. 34. *Ib.*

The payment due to a gas company for gas supplied, though it is called "rent" in some acts of Parliament, is not really of the nature of rent, and consequently a gas company does not come within the words "other person to whom any rent is due" in s. 34 of the Bankruptcy Act, 1869. These words apply only to a person who, though he is not the landlord of the bankrupt, fills a position analogous to that of a landlord because he is entitled to receive that which is "rent" strictly so called. *Ib.*

3. FRAUDULENT CONVEYANCES.

Post-nuptial Settlement—Solvency of Settlor at Date of Settlement.—Upon an application under s. 47 of the Bankruptcy Act, 1883, to set aside a post-nuptial settlement within ten years of its execution, it appeared that if the life interest reserved to the settlor under the settlement were taken into account, he was able to pay his debts at the date of the settlement, but that if it were not taken into account, he was insolvent:—Held, that the settlor's life interest ought to be taken into account in estimating his solvency, and that the settlement was valid as against the trustee in bankruptcy of the settlor. *Trustee, Ex parte, Lowndes, In re*, 18 Q. B. D. 677; 56 L. J., Q. B. 425; 56 L. T. 575; 35 W. R. 549; 4 M. B. R. 139—D.

Purchase or Dealing with Bankrupt in Good Faith and for Valuable Consideration.—By a post-nuptial settlement made in pursuance of an arrangement between the settlor and his father, the settlor assigned a policy of insurance upon his life to trustees on trusts for the benefit

of his children, the settlor's father at the same time conveying certain leasehold property to the trustees on similar trusts. The transaction was entered into in good faith for the purpose of securing a provision for the children, and not with any intention to defraud or defeat the settlor's creditors. The settlor having become bankrupt within two years from the date of the settlement and subsequently dying, the official receiver in bankruptcy claimed the money payable under the policy on the ground that the settlement was void under s. 91 of the Bankruptcy Act, 1869:—Held, that the settlement was valid, on the ground either that it was not within s. 91 of the Bankruptcy Act, 1869, the bankrupt's father being a purchaser in good faith for valuable consideration within that section, or that it was protected under s. 94, sub-s. 3, of the same Act, as being a dealing with the bankrupt by the father made in good faith and for valuable consideration without notice of any act of bankruptcy (see ss. 47 and 49 of the Bankruptcy Act, 1883). *Hillman, Ex parte, Pumfrey, In re* (10 Ch. D. 622), discussed and explained. *Hance v. Harding*, 20 Q. B. D. 732; 57 L. J., Q. B. 403; 59 L. T. 659; 36 W. R. 629—C. A.

Void Settlement—Costs of Trustees of Settlement—Lien on Trust Fund.—Trustees of a settlement, originally valid, but which becomes void on the bankruptcy of the settlor, are entitled as against the trustee in bankruptcy to a lien on the trust property for expenses properly incurred in the performance of their duty as trustees. *Official Receiver, Ex parte, Holden, In re*, 20 Q. B. D. 43; 57 L. J., Q. B. 47; 58 L. T. 118; 36 W. R. 189—D.

The settlor of a post-nuptial settlement brought an action to set it aside. The trustees of the settlement defended the action, which was dismissed with costs, but the costs were not paid. —The settlor became bankrupt within two years after the date of the settlement, which accordingly became void under s. 47 of the Bankruptcy Act, 1883:—Held, that, as the settlement was originally valid, and as the costs of the action had been incurred by the trustees in the performance of their duty as trustees, they were entitled, as against the official receiver, to a lien on the trust fund for such costs. *Ib.*

Retrospective Effect of Bankruptcy Act.—Sect. 47 of the Bankruptcy Act, 1883, which avoids certain voluntary settlements executed by a bankrupt, is not retrospective (*i.e.*, does not apply to settlements executed before the Act came into operation) so far as its provisions differ from those of s. 91 of the Bankruptcy Act, 1869. Therefore it does not apply to a settlement executed by a non-trader before the Act came into operation, and a provision that a settlement executed within ten years before the bankruptcy of the settlor shall be void as against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the interest of the settlor in the settled property had passed to the trustees of the settlement on the execution thereof, does not apply to any settlements executed before the Act came into operation. Per Lord Esher, M.R., and Lopes, L.J. Sect. 47 is retrospective so far as it is a re-enactment of s. 91 of the Bankruptcy Act, 1869.—Per Fry, L.J. Quære, whether s. 47 is retrospective at all. *Todd, Ex parte, Ashcroft, In re*,

19 Q. B. D. 186; 56 L. J., Q. B. 431; 57 L. T. 835; 35 W. R. 676; 4 M. B. R. 209—C. A.

"Settlement"—What is—Voluntary.—In 1877 a trader executed a voluntary deed, which recited that he desired to settle certain shares in a company, upon the trusts therein declared, for the benefit of his wife, himself, and his children, and that he was about to transfer the shares into the names of two persons therein named as trustees. And it was agreed that the trustees should stand possessed of the shares, so soon as the same should be transferred to them, upon trust to pay the dividends to the wife during her life, for her separate use without power of anticipation, and after her death upon certain trusts for the benefit of the settlor, and the issue of the marriage. The deed did not contain any covenant by the settlor to transfer the shares to the trustees. At the date of the deed the shares were standing in his name. On its execution the certificates were handed over to the trustees, who shortly after gave notice of the deed to the company. The settlor continued to receive the dividends as he had done before, and applied them to his own use. In 1886 he transferred the shares into the names of the trustees, and was soon afterwards adjudicated a bankrupt:—Held, by Lord Esher, M.R., and Lopes, L.J., that the deed of 1877, inasmuch as it imposed no legal obligation on the settlor with regard to the shares, was not a "settlement" within the meaning of s. 47.—But held, by all the court, that the transfer of the shares to the trustees in 1886 was a "settlement" within s. 47, and that, being voluntary and made after the Act came into operation, and within two years before the adjudication of bankruptcy, it was void as against the trustee in the bankruptcy. *Id.* See also *Harvey, Ex parte, Player, In re*, post, col. 167.

Money advanced by Wife to Husband—Covenant to Settle.—H. was married to his wife in 1864, and she subsequently became entitled to certain moneys under the wills of her father and grandfather. These moneys she lent to her husband for the purposes of his business, upon the terms that he would execute a settlement of the moneys upon her, which was done. Upon the bankruptcy of H. a proof was tendered upon the settlement, and rejected on the ground that it was a voluntary settlement within the meaning of section 91 of the Bankruptcy Act, 1869:—Held, that the settlement being a mere contract, and not a dealing with property, was not within section 91 of the Bankruptcy Act, 1869. *Home, Ex parte, Home, In re*, 54 L. T. 301—Cave, J.

Seemle, that the transaction was upheld on the ground of bona fides, and that if the court had found that the intention of the parties had been that the settlement should make the husband absolute owner, and at the same time secure the moneys to the wife, it would have declared the settlement void as a fraud on the bankruptcy law. *Id.*

Fraudulent Conveyances—13 Eliz. c. 5.—See FRAUDULENT CONVEYANCE.

4. FRAUDULENT PREFERENCES.

Assignment of Lease, Goodwill and Stock.—The debtor, who carried on business at two different premises, within a few days of filing

his petition, executed an assignment of the lease, goodwill, and stock of one of the premises to a judgment creditor who was threatening to levy execution in full satisfaction of the whole judgment debt, the judgment creditor undertaking to redeem the lease which had been mortgaged, and to pay rent, &c.:—Held, that there was no proof that the debtor's motive was to prefer the creditor; that at the time of the assignment the judgment creditor could seize and have his debt paid out of the goods at both the places of business of the debtor, and that the effect of the assignment was to relieve the debtor of liability at one place of business, and could not be deemed a fraudulent preference. *Official Receiver, Ex parte, Wilkinson, In re*, 1 M. B. R. 65—Cave, J.

"Suffering Judicial Proceedings"—Non-appearance to Writ.—A debtor failed to enter an appearance to a specially endorsed writ served on him by his father-in-law. Judgment was signed on the 15th of May (the earliest day possible), a writ of elegit was issued the same day, and on the 16th of May the sheriff seized the defendant's goods. The inquisition was held on the 19th of May, and the goods were delivered to the plaintiff in part satisfaction of his debt. On the 22nd of May the defendant filed a liquidation petition, and his statement of affairs showed that his debts were 6,542l. and his assets 607l. He had committed no act of bankruptcy before the filing of the petition. He had before the writ was issued been advised by a solicitor, who acted for the father-in-law, and who issued the writ and signed the judgment on his behalf. The debtor also consulted that solicitor after the issue of the elegit, and that solicitor filed the petition for him. The trustee in the liquidation claimed to set aside the judgment and the subsequent proceedings under it as a fraudulent preference:—Held, that though the circumstances were suspicious, yet, having regard especially to the fact that, when the transactions took place, no creditor was in a position to take proceedings in bankruptcy against the debtor, he not having committed any act of bankruptcy, the trustee had failed to prove that the debtor had allowed judgment to go against him by default with the view of preferring the father-in-law. *Lancaster, Ex parte, Marsden, In re*, 25 Ch. D. 311; 53 L. J., Ch. 1123; 50 L. T. 223; 32 W. R. 483—C. A.

A fraudulent preference is not per se an act of bankruptcy. But held, upon the evidence, that a certain transaction between a son and his father, upon the eve of the bankruptcy of the former, was not a fraudulent preference. *Luck, Ex parte, Kemp, In re*, 49 L. T. 809; 32 W. R. 296—C. J. B.

Pressure of Creditor on Bankrupt.—Section 53 of the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 8), avoiding preferences given within three months before bankruptcy, has not altered the old law, which permitted such transactions, if carried out at arm's length under coercion or pressure—e.g., a threat of prosecution; and a security granted under such circumstances is not invalid, as being based upon an agreement to stifle a prosecution if there be no contract on the part of the creditor to permanently abandon criminal proceedings. The principle above stated:—Held, applicable to the case of a commercial traveller, who was also a customer, of a wholesale grocery firm, and who,

in the former capacity having in his hands moneys of the firm, as well as being indebted to them for goods supplied, on the eve of bankruptcy delivered to them, upon a threat of immediate prosecution, certain unopened chests of tea which he had received from them, and also gave them a mortgage security for the balance of his debt. *Boyd, In re*, 15 L. R. Ir. 521—C. A.

Motive of Debtor—Payment to make good Breach of Trust.—In order that a payment or transfer of property, made by a bankrupt within three months before the presentation of the petition on which he was adjudicated a bankrupt, should amount to a fraudulent preference within s. 48 of the Bankruptcy Act, 1883, it is essential that it should have been made by him "with a view of giving a preference" to the creditor to whom it was made; it is not sufficient that the creditor was in fact preferred. The court must, therefore, in each case consider as a question of fact what was the real or dominant motive of the bankrupt in making the payment or transfer, and, if the court comes to the conclusion that the bankrupt's real motive was (e.g.) to save himself from exposure or from a criminal prosecution, the payment or transfer is not a fraudulent preference. It is also essential that the relation of debtor and creditor should have existed between the parties at the time when the payment or transfer was made. Consequently, a voluntary payment to make good a breach of trust committed by the bankrupt is not within s. 48. *Stubbins, Ex parte* (17 Ch. D. 58), followed. *Taylor, Ex parte, Goldsmid, In re*, 18 Q. B. D. 295; 56 L. J., Q. B. 195; 35 W. R. 148—C. A.

Payments made previous to bankruptcy, in restitution of a breach of trust by a person "unable to pay his debts as they become due" cannot be recovered by the trustee on the ground of fraudulent preference, since the relation of debtor and creditor has been held not to be created between co-trustees, or between a trustee and his cestui que trust, within the meaning of s. 48 of the Bankruptcy Act, 1883. *Stubbins, Ex parte* (17 Ch. D. 58), and *Taylor, Ex parte* (18 Q. B. D. 295), followed. *Ball, Ex parte, Hutchinson, In re*, 35 W. R. 264—C. A.

— **Payment to Creditor with object of benefiting Debtor's Surety.**—A payment that is made by a debtor on the eve of bankruptcy to a particular creditor, not with the object of preferring that creditor, but with the object of benefiting the debtor's surety, is not a payment "with a view of giving such creditor a preference over the other creditors" within the meaning of s. 48 of the Bankruptcy Act, 1883, and is therefore not void as against the trustee in bankruptcy. *Official Receiver, Ex parte, Mills, In re*, 58 L. T. 871; 5 M. B. R. 55—C. A.

On an application by the trustee to declare void, on the ground of fraudulent preference, an assignment of certain patent rights, and also the payment of a sum of money made by the debtor within three months of a bankruptcy petition being presented against him, to his uncle, who had guaranteed the payment of a debt due from such debtor to another person, the objection was raised that the payment now sought to be set aside had been made in consequence of the guarantee and not "in favour of any creditor."—Held, that the assignment was

clearly a fraudulent preference, and that on the facts of the case, the uncle of the debtor at the time of the payment of the money to him, being independently of the guarantee a creditor for goods sold, such payment was also void. *Official Receiver, Ex parte, Bear, In re*, 3 M. B. R. 129—Cave, J.

Alleged Purchase of Debt by Third Party.—Where a creditor having knowledge of an act of bankruptcy refused to accept money from his debtor, but subsequently executed an assignment of the debt to a friend of the debtor who was stated to be willing to purchase the debt at its full value, and it appeared that such alleged purchaser was altogether ignorant of the matter, the money paid to the creditor being in reality borrowed by the debtor himself for that purpose a few days prior to a receiving order being made against him:—Held, that the trustee in bankruptcy was entitled to the money so paid. *Daniel, Ex parte, Roberts, In re*, 5 M. B. R. 213—Cave, J.

Assignment of Proceeds of Sale of Property.—G., a farmer, whose lease was about to expire in September, 1884, placed all his live and dead stock in the hands of an auctioneer to realize, and in order to prevent H., who held a judgment for 130*l.* against him, and also a promissory note for 38*l.*, from stopping the sale, G. signed and gave the following letter addressed to the auctioneer:—"I authorise and request you to pay to H. out of the first proceeds of the sale of my farming live and dead stock (after satisfying the landlord's claim for rent) the sum of 168*l.*, being the amount due from me to him, and I hereby appropriate the sum of 168*l.* out of the proceeds of such sale for the purpose of such payment accordingly—Dated, August 18, 1884." G. then owed other debts of about 150*l.* The goods were sold by the auctioneer on August 21, and realized 276*l.* gross. The net proceeds after payment of rent amounted to 142*l.* A receiving order was made on October 22. The crops on the farm sold or paid for by the incoming tenant realized 148*l.*, and G.'s furniture 12*l.* G. had no other property. The trustee in bankruptcy claimed the 142*l.*:—Held, that H. was entitled to the 142*l.*, and the transaction in question was not a fraudulent preference. *Jenkins, Ex parte, Glanville, In re*, 33 W. R. 523; 2 M. B. R. 71—Cave, J.

5. ASSIGNMENTS OF PROPERTY.

Moneys due under Building Contract.—A building contract provided that payments should be made, as the work proceeded, of such sums on account of the price of the work as should be stated in the certificates of an architect, such certificates to be given at the architect's discretion at the rate of 80 per cent. upon the contract value of the work done at the dates of such certificates, and that the remaining 20 per cent. should be retained till the completion of the work. The contract empowered the building owners, in the event of the contractors committing an act of bankruptcy, to discharge them from the further execution of the work and employ some other person to complete it, and to deduct the amount paid to such other person for completing the same from the contract price. The contractors assigned a portion of the reten-

tion moneys, i.e., the price of work done under the contract retained under the before-mentioned provision, by way of mortgage to secure a debt, and notice of the assignment was given to the building owners. After making such assignment the contractors filed a petition for liquidation, the works then remaining incomplete. A trustee in liquidation and a committee of inspection were appointed. The trustee, in pursuance of a resolution of the committee, completed the work, himself advancing money for that purpose, of which an amount exceeding that of the retention moneys assigned as aforesaid was still unpaid, there being no other assets from which he could be recouped in respect thereof. The trustee and the mortgagees both claimed the amount of the retention moneys assigned as aforesaid from the building owners. On an interpleader issue to try the title to such moneys:—Held, that, in the absence of anything to show that the building owners had exercised the power of taking the work out of the contractor's hands, the trustee must be taken to have completed the work under the original contract as trustee of the contractors' estate, and not as a person employed to complete the work in substitution for the contractors; that the assignment of the retention moneys held good as against the trustee; and that the mortgagees were therefore entitled to succeed. *Tooth v. Hallett* (4 L. R., Ch. 242) distinguished. *Drew v. Josolyne*, 18 Q. B. D. 590; 56 L. J., Q. B. 490; 57 L. T. 5; 35 W. R. 570—C. A.

A shipbuilder agreed to build a vessel, the price to be paid in specified instalments. Part of the work having been done, but less than the value of such part having been paid to the builder, he charged in favour of a creditor the instalment due to him on the delivery of the vessel. Before the ship was completed he became bankrupt. The trustee in the bankruptcy completed the vessel, and in so doing expended less than the amount which remained to be paid by the purchaser:—Held, that the charge, being upon money which had been already earned by the builder, was valid as against the trustee. *Nicholls, Ex parte* (22 Ch. D. 782) and *Tooth v. Hallett* (4 L. R., Ch. 242) distinguished. *Moss, Ex parte, Toward, In re*, 14 Q. B. D. 310—C. A. Affirming 54 L. J., Q. B. 126; 52 L. T. 188—D.

Materials Used by Bankrupt in Execution of Contracts.—*See Barter, Ex parte, Walker, In re*, ante, col. 134.

Benefit of Creditors—Rights of Trustee under Deed and Official Receiver.—When a debtor executes a general assignment for the benefit of creditors, and the trustee carries on the business under the deed, receiving and making payments until a receiving order is made in bankruptcy on the petition of certain creditors who have not signed the deed, and whose petition is founded on the general assignment as an act of bankruptcy, the official receiver is entitled to delivery up of the property in the possession of the trustee under the deed, and an account from him of the value of the property of the debtor, of which he took possession and which he has converted, i.e., an account treating him as a trespasser, or he may adopt his actions and have an account treating the trustee as his agent. *Vaughan, Ex parte, Riddough, In re*, 14 Q. B. D. 25; 33 W. R. 151; 1 M. B. R. 258—D.

See also *Official Receiver, Ex parte, Richards, In re*, 32 W. R. 1001; 1 M. B. R. 242—Wills, J.

A trader assigned substantially the whole of his property to a creditor in consideration of a release by the creditor of the debt. There was a secret verbal agreement that the assignee should pay the assignor's debts, and in pursuance of this the assignee paid out several executions and also paid some arrears of rent due to the landlord of the assignor. On it being decided that the deed was void as against the assignor's trustee in bankruptcy:—Held, that the assignee was not entitled to payment in full out of the bankrupt's estate of the sums which he had paid under the agreement, but that he could only prove for them in the bankruptcy. *Chaplin, Ex parte, Sinclair, In re*, 26 Ch. D. 319; 53 L. J., Ch. 732; 51 L. T. 345—C. A.

On 20th August, 1885, in pursuance of a resolution passed at a meeting of creditors, the debtor executed a deed of assignment vesting the estate in a trustee for their benefit. On 28th October, 1885, a petition was presented against the debtor, the act of bankruptcy alleged being the execution of the deed; and on 31st October the trustee under the deed paid out of moneys collected by him from the assets, the sum of 20*l.* to a firm of solicitors, being the amount of their bill of costs incurred in connexion with the meeting of creditors, and collecting certain book-debts and in preparing the deed of assignment. On the 20th January, 1886, a receiving order was made against the debtor, and subsequently the trustee under the deed sent to the official receiver a cheque for the balance in his hands after deducting the amount paid to his solicitors, together with an account of receipts and payments in connexion with the estate:—Held, that the trustee under the deed must refund the money so paid to the solicitors. *Rawlings, Ex parte, Forster, In re*, 58 L. T. 114; 36 W. R. 144; 4 M. B. R. 292—Cave, J.

— **Application for re-payment of Money paid at Creditors' request before Receiving Order.**—In June, 1886, the debtor executed an assignment for the benefit of his creditors, under which the applicant was employed to prepare a statement of affairs, and, it appearing that the landlord was threatening a distress for rent, the applicant, upon the instructions of the creditors, paid the amount due. In July, 1886, a receiving order was made against the debtor, and the official receiver declined to repay the money so advanced by the applicant for the benefit of the creditors without an order of the court:—Held, that under the circumstances and looking to the fact that a majority of the creditors in number and value were of opinion that the payment made by the applicant was beneficial and should be refunded, repayment ought to be allowed, but that the official receiver was entitled to deduct his costs of the hearing from the amount. *Lovering, Ex parte, Aysheford, In re*, 35 W. R. 652; 4 M. B. R. 164—Cave, J.

6. OTHER DEALINGS BY BANKRUPT.

Advance to Son to Start in Business.—The bankrupt, in or about 1882, more than two years before bankruptcy, advanced to his son E. the sum of 650*l.* to purchase building stock and set up in business. E. found 150*l.* for capital, and

carried on the business, and at the date of the bankruptcy was possessed of stock and capital to the value of about 500*l.*:—Held, that, this was not a voluntary settlement under s. 47 as interpreted by sub-s. 3 of that section. *Harvey, Ex parte, Player, In re*, 15 Q. B. D. 682; 54 L. J., Q. B. 554—D.

Gift of Chattels.—In 1866 A., soon after the birth of his son T., purchased a pipe of wine for his son, and had it bottled and laid down in his cellar, and from that time it remained intact in the cellar and was known in the family and amongst their friends as T.'s wine. In 1885 A. became bankrupt:—Held, that there was not sufficient evidence of an intention to make an immediate present gift of the wine to T., and that it passed to the trustee in bankruptcy. *Ridgway, Ex parte, Ridgway, In re*, 15 Q. B. D. 447; 54 L. J., Q. B. 570; 34 W. R. 80; 2 M. B. R. 248—Cave, J.

Transfer of Shares to Son.—The bankrupt, in 1880, handed to his son a sum of money to be invested in shares in a ship, which was so invested by the son. The shares were afterwards sold by the son for 450*l.*, which sum he handed over to his sister upon a sort of implied trust for the benefit of their father and mother:—Held, that handing the sum for investment was a conveyance or transfer of property within the meaning of 46 & 47 Vict. c. 52, s. 47, sub-s. 3. *Harvey, Ex parte, Player, In re*, 54 L. J., Q. B. 553; 53 L. T. 768—D.

Money paid to procure Withdrawal of Prosecution.—A banking company commenced a prosecution against a customer for having obtained credit from them under false pretences, which is, by s. 13 of the Debtors Act, 1869, made a misdemeanor. At this time the bank had notice of an act of bankruptcy committed by the customer. On the day on which the summons was to be heard by the magistrate, H. (whose wife was an aunt of the customer's wife) signed an undertaking that, if the magistrate would allow the summons to be withdrawn, he would pay the bank the sum which the customer had obtained from them by the false pretences. An application was made to the magistrate by the customer's solicitor to allow the summons to be withdrawn. The application was assented to by the bank's solicitor, and was granted by the magistrate. H. then paid the money to the bank. The bank manager believed that H. was paying the money out of his own pocket. The customer was soon afterwards adjudicated a bankrupt, upon the act of bankruptcy of which the bank had notice. The trustee in the bankruptcy discovered that the money which H. had paid to the bank had been previously handed to him by the bankrupt's wife, she having, with the bankrupt's knowledge, taken it for the purpose of paying the bank out of a bag of money belonging to the bankrupt:—Held, that, the consideration for the payment to the bank being the stifling of a prosecution, there was no legal consideration, and that, though H., being in pari delicto, could not have recovered the money from the bank, the trustee, to whom by virtue of the relation back of his title to the act of bankruptcy, the money really belonged, could recover it. *Caldecott, Ex parte* (4 Ch. D. 150) distinguished. *Wolverhampton and Stafford-*

shire Banking Company, Ex parte, Campbell, In re, 14 Q. B. D. 32; 33 W. R. 642; 1 M. B. R. 261—D.

Money paid to Avoid Arrest.—Where a bankrupt, after the making of the receiving order, pays money out of his estate to avoid arrest under an order of commitment made prior to the date of the receiving order for default in payment of an instalment of a judgment debt, the money so paid can be recovered by the trustee in bankruptcy. *Stewart, Ex parte, Ryley, In re*, 15 Q. B. D. 329; 54 L. J., Q. B. 420; 33 W. R. 656; 2 M. B. R. 171—Cave, J. Compare *Manning, In re*, 30 Ch. D. 480; 34 W. R. 111—C. A.

Money paid by Debtor to Solicitor to oppose Petition.—On the presentation of a bankruptcy petition against a debtor, and an order for the appointment of an interim receiver having been made, such debtor instructed his solicitor to oppose the petition, and to move to rescind the interim order, and then paid to such solicitor at his request 25*l.* on account of costs of counsel's fees and other expenses for that purpose. The application to rescind the interim order was dismissed, and the debtor was subsequently adjudicated bankrupt. The trustee in the bankruptcy thereupon claimed the 25*l.* from the solicitor as money received by him from the debtor with knowledge of the act of bankruptcy on which the receiving order was made:—Held, that the application of the trustee must be refused; that it was right that a debtor should have legal assistance and advice against a bankruptcy petition; and that a debtor would be practically defenceless if money paid to a solicitor for services rendered on such an occasion could afterwards be recovered by the trustee. *Payne, Ex parte, Sinclair, In re*, 15 Q. B. D. 616; 53 L. T. 767; 2 M. B. R. 255—Cave, J.

7. DEALINGS WITH PROPERTY BY AGENT.

With regard to dealing with a debtor's property after an act of bankruptcy has been committed, an agent is on the same footing as other persons. *Gibson, Ex parte, Lamb, In re*, 55 L. T. 817—D.

Payment by Agent—Act of Bankruptcy of Principal—Liability to Repay to Trustee.—An agent, who, in obedience to the previous direction of his principal, pays away money of the principal which is in his hands, knowing before he makes the payment (though he did not know when he received the money) that the payment will when completed constitute an act of bankruptcy on the part of the principal, is not liable to the trustee in the subsequent bankruptcy of the principal for the money so paid away. The trustee could recover the money from the agent only on the ground that he had paid away the money of the trustee, and in such a case the money would become the trustee's money only on the completion of the act of bankruptcy to which his title would relate back, i.e., not until after the money had left the agent's hands. *Helder, Ex parte, Lewis, In re*, 24 Ch. D. 339; 53 L. J., Ch. 106; 49 L. T. 612—C. A.

Payment by Bankrupt to Creditor's Agent—Liability of Agent.—Pending the hearing of a bankruptcy petition, and with notice of the act of bankruptcy on which it was founded, the solicitor of the petitioning creditor, as his agent, received from the debtor various sums of money as consideration for successive adjournments of the hearing of the petition, and these sums he paid over, or accounted for to his client (the petitioning creditor). Afterwards an adjudication was made on the petition:—Held, that the solicitor having received the money with notice of the act of bankruptcy to which the title of the trustee related back, the payment by him was a wrongful act, and he was liable to repay the money to the trustee, and was not discharged by the payment to his own principal. *Edwards, Ex parte, Chapman, In re*, 13 Q. B. D. 747; 51 L. T. 881; 33 W. R. 268; 1 M. B. R. 238—C. A.

XII. COMPOSITION, LIQUIDATION, AND SCHEMES OF ARRANGEMENT.

1. *Under the Bankruptcy Act, 1883.*
2. *Under Prior Statutes.*

1. UNDER THE BANKRUPTCY ACT, 1883.

General Principles — Approval of Court — Wishes of Creditors.—In determining whether to approve a scheme of arrangement of the affairs of a debtor, which has been accepted by his creditors under the provisions of s. 18 of the Bankruptcy Act, 1883, the Court must form its own judgment whether the terms of the scheme are reasonable or calculated to benefit the general body of creditors, and must not be influenced by the wishes of the majority of the creditors. *Reed, Ex parte, Reed, In re*, 17 Q. B. D. 244; 55 L. J., Q. B. 244; 34 W. R. 493; 3 M. B. R. 90—C. A.

By s. 18, sub-s. 6 of the Bankruptcy Act, 1883, it is provided that if any such facts are proved as would under this Act justify the court in refusing, qualifying, or suspending the debtor's discharge, the court may, in its discretion, refuse to approve the composition or scheme:—Held, on an appeal by the petitioning creditor, from an order of the court approving a scheme of arrangement, that it is in the discretion of the court whether it will refuse to approve a scheme or not; that all matters must be duly weighed by the court, and discretion exercised, and that the decision of the court will not be set aside on appeal unless it is manifestly wrong. *Ledger, Ex parte, Postlethwaite, In re*, 3 M. B. R. 169—C. A.

The registrar, in deciding whether he will or will not approve a composition or scheme of arrangement accepted by the creditors of a bankrupt, is exercising a judicial discretion, and the Court of Appeal will not readily set aside his order. It is the duty of the registrar to form his own judgment, and not to be influenced by the wishes of the creditors. *Campbell, Ex parte, Wallace, In re*, 15 Q. B. D. 213; 54 L. J., Q. B. 382; 53 L. T. 208; 2 M. B. R. 167—C. A.

In the exercise of his discretion as to the approval of a composition or scheme, the registrar ought to consider both, the interest of the creditors and the conduct of the debtor, and if it is manifest that the composition or scheme is the best thing for the creditors, the registrar is not

bound to refuse to approve of it because the debtor has been guilty of offences under s. 28, sub-s. 3, of the act. *Kearsley, Ex parte, Genese, In re*, 18 Q. B. D. 168; 56 L. J., Q. B. 220; 56 L. T. 79; 3 M. B. R. 274—C. A.

In determining whether a composition accepted by creditors under the provisions of s. 18 is reasonable, the court must exercise its own judgment, though it will take into account the fact that the creditors are mainly interested in the question. The court must have regard to the debtor's assets and liabilities, and if, for a large proportion of the debts set down in his statement of affairs, proofs have not been tendered, or if the court considers that the proofs which have been tendered require to be investigated by a trustee, the court ought to decline to approve of the composition. *Rogers, Ex parte, Rogers, In re*, 13 Q. B. D. 438; 33 W. R. 354; 1 M. B. R. 159—D.

The county court judge, before giving his approval to a composition or scheme, which has been accepted by the majority of creditors, should consider not only whether or not the creditors are likely to be benefited by it, but also the requirements of commercial morality by examining into the conduct of the debtor with reference to trading. A. carried on business and became bankrupt. After two years A. started in business again without capital, but took into partnership a man who had some capital. The firm failed, and paid their creditors 3s. 3½d. in the pound. Both partners applied for their discharge, but the court refused to discharge A., as he had committed certain offences under the Bankruptcy Act. Two years afterwards, A. offered his creditors a composition of 1s. in the pound, all the estate to be handed over to him, and the bankruptcy annulled; the majority of the creditors accepted the offer, but the county court judge refused his approval:—Held, that the decision was correct, and that the approval must be refused. *McTear, Ex parte, McTear, In re*, 59 L. T. 150; 5 M. B. R. 182—D.

— **Court of Appeal overruling Judge below.**—The Court of Appeal will not overrule the exercise of the discretion of the judge of first instance as to the approval of a composition or scheme unless clearly satisfied that he was wrong. *Rogers, Ex parte, Rogers, In re*, supra; *Reed, Ex parte, Reed, In re*, supra; *Kearsley, Ex parte, Genese, In re*, supra, and cp. cases, post, cols. 182, 182.

— **"Injustice to Creditors."**—A scheme of arrangement confirmed by the creditors on an exaggerated, but not fraudulent, valuation of certain property of the debtor by which twenty shillings in the pound was to be paid out of such property, and it was assigned to trustees for the purpose:—Held, on its appearing that the property did not realise enough to pay the composition, that the scheme could not "proceed without injustice to the creditors" within the meaning of s. 18, sub-s. 11, of the Bankruptcy Act, and the debtor was adjudicated bankrupt. *Moon, Ex parte, Moon, In re*, 19 Q. B. D. 669; 56 L. J., Q. B. 496; 35 W. R. 743; 4 M. B. R. 263—C. A.

— **Sale of Assets without the Jurisdiction.**—The debtors were merchants having a house in England and a house in South America. Assets of large amount, forming the principal

part of the estate, were in South America, without the jurisdiction. A scheme was proposed for the sale of these assets to one of the partners who resided in South America for about their estimated value, such partner agreeing to pay the purchase-money by quarterly instalments extending over four years. Under the scheme the trustee was to insure the purchaser's life for about one-sixth of the amount payable, but there was no other provision as to security. The scheme was recommended by the committee of inspection, who were creditors for a large amount, and by an accountant who, at their instance, had gone to South America and examined the affairs of the house there. The official receiver also made a report in favour of the proposal. The county court judge refused to approve of the scheme:—Held, that the judge had exercised his discretion wrongly, and that the scheme ought to be approved by the court as being reasonable and for the benefit of the general body of the creditors. *Smith, Ex parte, Staniar, In re*, 20 Q. B. D. 544; 58 L. T. 884; 36 W. R. 608; 5 M. B. R. 67—D.

— **Reasonableness—Attempt to give Trustee under Scheme Powers of Trustee in Bankruptcy.**—A scheme of arrangement of the affairs of a debtor provided that his property, which would become divisible among his creditors if he were adjudged a bankrupt, should vest in a trustee to be appointed by the creditors, and that the trustee should administer the property under the supervision of a committee of inspection in the like manner, and with the like powers and duties, and subject to the like conditions in all respects, as though the debtor had been adjudged bankrupt, and the trustee had been appointed trustee in the bankruptcy; and that the provisions of s. 27 of the Bankruptcy Act, 1883, relating to the discovery of the property of a bankrupt, should, so far as the same were applicable, apply to the proceedings under the scheme:—Held, that, inasmuch as s. 27 does not apply to a scheme of arrangement under s. 18, and cannot by agreement between a debtor and his creditors be incorporated in such a scheme, the scheme gave the creditors no greater advantage than they would have had in a bankruptcy, while it deprived them of some of the powers which they would have had, and of the control of the court in the administration of the estate. That, consequently, the scheme was neither reasonable nor calculated to benefit the general body of creditors, and ought not to be approved by the court. *Bischoffsheim, Ex parte, Aylmer, In re*, 19 Q. B. D. 33; 56 L. J., Q. B. 460; 56 L. T. 801; 35 W. R. 532; 4 M. B. R. 152—C. A.

The provisions of sub-s. 6 of s. 28 of the Bankruptcy Act, 1883, cannot, by agreement between a debtor and his creditors, be incorporated into a scheme of arrangement of the debtor's affairs under s. 18, nor can a jurisdiction, similar to that which is conferred on the court by sub-s. 6 in the case of a bankruptcy, be given to the court by agreement between the debtor and his creditors in the case of a scheme of arrangement. *Bischoffsheim, Ex parte, Aylmer, In re*, 20 Q. B. D. 258; 57 L. J., Q. B. 168; 36 W. R. 231—C. A.

A scheme of arrangement of a debtor's affairs accepted by his creditors under s. 18, provided that the debtor should, prior to the approval of

the scheme, consent to judgment being entered against him by the trustee under the scheme for the full amount of the debts proveable thereunder, such judgment to have the same effect, and to be enforceable in the like manner and to the like extent, as though the debtor had been adjudged bankrupt under the proceedings, and the court had granted him an order of discharge conditional upon his consenting to judgment being entered against him by the trustee, and such judgment had been entered accordingly:—Held, that, as the judgment could not be enforced either at common law or under the act, or by agreement, the scheme, so far as it purported to give the judgment, was illusory and of no effect, and that it ought not to be approved by the court. *Id.*

— **Provision for Debtor's Discharge.**—A scheme for the arrangement of the affairs of debtors who had presented a bankruptcy petition, duly assented to by the creditors, as provided by s. 18 of the Bankruptcy Act, 1883, contained, inter alia, provisions for the appointment of a trustee and a committee of inspection, and also a provision that "the debtors shall be discharged when the committee of inspection shall so resolve":—Held, that the latter provision was not in accordance with the intention of the act, and was unreasonable, and that, though the debtors asked that the scheme might be approved by the court, the approval ought not to be given. *Clark, Ex parte, Clark, In re*, 13 Q. B. D. 426; 53 L. J., Ch. 1062; 51 L. T. 584; 32 W. R. 775; 1 M. B. R. 143—C. A.

Retrospective Effect.—The quasi-penal provisions of sub-ss. 2 and 3 of s. 28 of the Bankruptcy Act, 1883, are retrospective, i.e., they apply to acts done by the debtor before the act came into operation, if the proceedings are instituted under that act. *Rogers, Ex parte, Rogers, In re*, 13 Q. B. D. 438; 33 W. R. 354; 1 M. B. R. 159—D.

Rash and Hazardous Speculation.—A trader, after he knew that one of his debtors who owed him about 32,000*l.* was in pecuniary difficulties, allowed him, in the course of eighteen months, to increase his debt to 65,000*l.*, and to the extent of 11,000*l.* this increase was due to accommodation bills. The trader then stopped payment, and presented a bankruptcy petition. The debt of 65,000*l.* was apparently irrecoverable:—Held, that the debtor had been guilty of rash and hazardous speculations, and that on this ground (inter alia) the court ought to refuse to approve of a composition which his creditors had, under the provisions of s. 18, agreed to accept. *Id.*

Where a debtor, as the managing director of a mining company (the mines being undeveloped), advanced both his own and borrowed money to the company, which subsequently became insolvent:—Held, that the debtor had been guilty of rash and hazardous speculation, and that on a petition in bankruptcy being presented against him, the registrar was right in refusing to approve of the composition offered. *Young, Ex parte, Young, In re*, 2 M. B. R. 37—C. A.

A debtor having incurred large debts by gambling and Stock Exchange transactions, his creditors accepted a composition of 2*s.* in the pound. The county court judge refused to sanction the composition on the ground that the

debtor had been guilty of "rash and hazardous speculation" within the meaning of ss. 18, 28, Bankruptcy Act, 1883.—Held, that the county court judge had exercised his discretion rightly. *Thornber, Ex parte, Barlow, In re*, 3 M. B. R. 304—C. A. Affirming 56 L. T. 168—D. See also post, col. 181.

Report of Official Receiver.]—The report of the official receiver is under s. 18 of the Bankruptcy Act, 1883 (as it is under s. 28), *prima facie* evidence of the statements contained in it. *Campbell, Ex parte, Wallace, In re*, 15 Q. B. D. 213; 54 L. J., Q. B. 382; 53 L. T. 208; 2 M. B. R. 167—C. A.

Composition after Adjudication — Confirmation.]—A special resolution of creditors under s. 23 of the Bankruptcy Act, 1883, entertaining a proposal for a composition after an adjudication of bankruptcy, requires confirmation at a second meeting of the creditors, in the same way as a special resolution under s. 18 entertaining a similar proposal before adjudication. *Kearsley, Ex parte, Genese, In re*, 18 Q. B. D. 168; 56 L. J., Q. B. 220; 56 L. T. 79; 3 M. B. R. 274—C. A.

— Power of Court to Enforce.]—The court has the same power to enforce the payment of a composition agreed to under s. 23 of the Bankruptcy Act, 1883, after an adjudication of bankruptcy, as it has, under sub-s. 10 of s. 18, to enforce the payment of a composition agreed to under that section before any adjudication of bankruptcy has been made. *Godfrey, Ex parte, Lazarus, In re*, 18 Q. B. D. 670; 56 L. J., Q. B. 369; 35 W. R. 533; 4 M. B. R. 121—C. A.

Specific Performance against Person giving Bond—Alteration in Scheme.]—The trustee in a bankruptcy entered into a written agreement with the defendants whereby it was agreed that the defendants should purchase the assets of the bankrupt for such a sum as would pay the expenses of the bankruptcy and the preferential debts in full within fourteen days after the approval of the scheme by the court, and a certain composition to the unsecured creditors, and that on the approval of the scheme by the court the bankruptcy should be annulled. The creditors by a requisite majority passed a resolution agreeing to the scheme of arrangement as proposed, but adding a clause that a bond should be given by the defendants for payment of the money. The court afterwards approved the agreement signed by the defendants, and annulled the bankruptcy.—Held, in an action by the trustee against the defendants for specific performance of their agreement, that the creditors not having accepted the scheme proposed in the form in which the defendants had agreed to it, there had been no approval of the scheme by the court, and the agreement could not be enforced against the defendants. *Lucas v. Martin*, 37 Ch. D. 597; 57 L. J., Ch. 261; 58 L. T. 862; 36 W. R. 627—C. A.

Failure to Pay—Order to be made—Official Receiver.]—On an application to the court to approve a composition, the official receiver reported that he had a sufficient sum in his hands for payment thereof; the report was founded on the estimate given by the debtor in his statement of affairs which subsequently proved to be wrong; an order was asked for against the official

receiver personally to make up the required sum.—Held, first, that the applicants were not entitled to an order against the official receiver personally, and secondly, that if a debtor forms a wrong estimate of his position, unless the amount found to be necessary to pay the composition agreed upon is procured, the proper order for the court to make is one adjudging such debtor bankrupt, and annulling the composition. *Foster, Ex parte, Webster, In re*, 3 M. B. R. 132—Cave, J.

Discovery of Debtor's property—Power to summon Witnesses.]—The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27—which enables the court on the application of the trustee to summon before it for examination the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, &c.—does not apply to the trustee under a composition or scheme of arrangement which has been duly approved by the court under s. 18 of the act. *Whinney, Ex parte, Grant, In re*, 17 Q. B. D. 238; 55 L. J., Q. B. 369; 54 L. T. 632; 34 W. R. 539; 3 M. B. R. 118—C. A.

Application to Rescind Receiving Order—Scheme.]—After a receiving order had been made against the debtor on his own petition, a scheme was put forward by him which the creditors were willing to accept, and the debtor thereupon, with the assent of the creditors, applied to the county court to rescind the receiving order.—Held, that the registrar was right in refusing to rescind the receiving order under the circumstances, and that if the debtor was desirous of substituting a scheme, he must proceed in the manner provided by s. 18 of the Bankruptcy Act, 1883. *Dixon, Ex parte, Dixon, In re*, 37 W. R. 161; 5 M. B. R. 291—C. A. Affirming 59 L. T. 776—D.

Court fees—Scheme or Composition.]—The proposal put forward by a debtor provided, that all the property of such debtor divisible amongst his creditors should vest in a trustee, and subject to the provisions of the scheme, be administered according to the law of bankruptcy; that in addition the sum of 100*l.* a year out of a pension of 297*l.* belonging to the debtor should be paid to the trustee under the scheme until, with the rest of the debtor's property, all the costs relating to the bankruptcy should have been paid, and the creditors should have received 15*s.* in the pound; that after payment of 15*s.* in the pound and of all the costs, the trustee should hand over the surplus of the estate to the debtor; and that, as from the date of the confirmation of the scheme by the court, the debtor should be released and discharged from all debts provable under the bankruptcy. On the application to the court for approval.—Held, that the arrangement had more of the elements of a scheme than of a composition, and that the fee must be paid on the estimated value of the 100*l.* a year as an asset. *Griffith, in re*, 3 M. B. R. 111—Cave, J.

2. UNDER PRIOR STATUTES.

a. Liquidation.

Application by Trustee for Directions—Right of Debtor to be heard.]—Where a trustee in a

liquidation applied to the county court for directions as to the acceptance of an offer for the purchase of the debtors' property, and notice was given to the debtors, but at the hearing of the application the county court judge refused to hear the solicitor for the debtors or to receive evidence on their behalf:—Held, that notice having been given to the debtors, they ought to have been heard, and that an appeal lay from such refusal of the county court judge to do so. Whether, when a trustee applies to the court for directions in any particular matter, the debtor is, in any event, entitled to appear and be heard, *quære*. *Webb, Ex parte, Webb, In re*, 4 M. B. R. 52—Cave, J.

Adjudication—Relation back of Trustee's Title.—The power to adjudicate a debtor a bankrupt under s. 126 of the Bankruptcy Act, 1869, was an independent power, and was not made on the act of bankruptcy constituted by the filing of the liquidation petition, and consequently there was no relation back of the trustee's title to that act of bankruptcy unless committed within six months, or at the most twelve months, of the adjudication. *Sharp v. McHenry*, 38 Ch. D. 428; 53 L. J., Ch. 961; 57 L. T. 606—Kay, J.

Resolutions—Registration—Locus Standi to oppose.—"Creditor."—Upon the hearing of an application to register liquidation resolutions, no one has a locus standi to be heard in opposition but a creditor who has previously proved a debt in the mode prescribed by the rules. A person who claims to be a creditor, and in that character to oppose the registration, cannot prove his debt when he comes before the registrar to oppose. If he has not previously proved a debt he cannot be heard. *Bagster, Ex parte, Bagster, In re*, 24 Ch. D. 477; 53 L. J., Ch. 124; 49 L. T. 272; 32 W. R. 215—C. A.

Composition or Scheme of Settlement of Bankrupt's Affairs—Approval of Court.—Under s. 28 of the Bankruptcy Act, 1869, the court is not bound to approve of resolutions passed by the creditors of a bankrupt authorizing the trustee to accept a composition, or assent to a general scheme of settlement of the bankrupt's affairs, even if it sees that the majority have been acting *bonâ fide* in the interest of the creditors, and that better terms cannot be obtained for the creditors. *Strawbridge, Ex parte, Hickman, In re*, *infra*.

It is the duty of the court to look at all the circumstances, and to have regard to the moral aspect of the case, and not to give its approval to the proposed arrangement, although it may be for the benefit of the creditors, if it can see that the money which they are to receive under it is to be paid in order to hush up and prevent investigation into some discreditable transaction. *Id.*

In determining whether it shall sanction a composition or liquidation by arrangement entered into under ss. 125 and 126 of the Bankruptcy Act, 1869, in accordance with the provisions of s. 170 of the Bankruptcy Act, 1883, the court or registrar is not bound by the statement of affairs of the debtor put forward and agreed to by the creditors, but is entitled to inquire into the statement for the purpose of seeing whether such composition or liquidation is

reasonable and calculated to benefit the general body of creditors. *McAlpine, Ex parte, McAlpine, In re*, 1 M. B. R. 126—Cave, J.

b. Composition.

Notice of Meeting.—The notice of meeting for the purpose of approving of a scheme under s. 28 of the Bankruptcy Act, 1869, should state clearly and fairly the nature of the proposals to be brought forward. *Strawbridge, Ex parte, Hickman, In re*, 25 Ch. D. 266; 53 L. J., Ch. 323; 49 L. T. 638; 32 W. R. 173—C. A.

Secured Creditor proving for Balance of Debt above assessed Value of Security.—The effect of rule 272 of the General Rules, 1870, read together with s. 126 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), is that in composition proceedings under s. 126 a secured creditor, who proves for the balance of his debt after deducting the assessed value of his security, and afterwards realises the security, must pay to the debtor any surplus realised above the assessed value, after allowing interest upon the assessed value from the assessment until the realization. *Société Générale de Paris v. Geem*, 8 App. Cas. 606; 53 L. J., Ch. 153; 49 L. T. 750; 32 W. R. 97—H. L. (E.).

Valuation of Security—Duty of Creditor to assent to Debtor's Valuation.—Where in composition proceedings under s. 126 of the Bankruptcy Act, 1869, a creditor appeared in the debtor's statement of affairs as a partly secured creditor in respect of a certain debt, and the debtor in the statement valued the security at "nil," the creditor need not take any step to signify his assent to such valuation, but the debtor must pay or tender the amount of the composition on that debt, and in default thereof the original debt revives. *Hawes v. Bauman*, 34 W. R. 116—C. A.

Secured Creditor—Deposit of Goods—Bill given—Composition paid to Indorsee.—The plaintiff gave credit to the defendants for goods sold and made advances to them; goods were deposited by the defendants with the plaintiff as security, and bills were drawn by the plaintiff and accepted by the defendants for the amounts of the goods sold and advances made. The plaintiff indorsed away such bills for value. During the currency thereof the defendants filed a petition for liquidation under the Bankruptcy Act, 1869, and their creditors duly resolved to accept a composition. The holders of the bills, by arrangement between themselves and the plaintiff, claimed and were paid the composition on the total amounts of the bills, the plaintiff paying them the balance thereof. The plaintiff did not send in any proof or claim any dividend, but he realized his security by sale of the goods deposited, and claimed to hold the proceeds against the balance so paid by him upon the bills:—Held, that the plaintiff had no right to do so, as by such arrangement the holders of the bills had in effect received the composition for the benefit of the plaintiff, so that according to the bankrupt law he was bound to account to the defendants for the amount by which the composition paid on the bills exceeded that which would have been paid if the value of the security had been previously deducted. *Baines v. Wright*,

16 Q. B. D. 330; 55 L. J., Q. B. 99; 54 L. T. 724; 34 W. R. 211—C. A.

Subsequent Adjudication—Relation back of Trustee's Title.—Where the creditors of a debtor have resolved to accept a composition under s. 126 of the Bankruptcy Act, 1869, and the debtor is subsequently adjudicated a bankrupt under the last clause of that section, there is no relation back of the trustee's title to the act of bankruptcy committed by the debtor in filing his petition, so as to invalidate a payment made by him between the filing of the petition and the adjudication of bankruptcy. *McDermott, Ex parte, McHenry, In re*, 21 Q. B. D. 580; 36 W. R. 725—C. A.

Vesting of Property—Subsequent Bankruptcy—Waiver of Rights.—An arranging debtor carried a composition of 20s. in the pound, payable by instalments, secured by vesting all the debtor's property in the official assignees and a trustee, to whom power was given, in the event of the debtor making default in payment of any of the instalments, to realize the property and apply the proceeds in payment of the composition. After payment of some of the instalments, the debtor made default in payment of the composition. Subsequently the debtor was adjudicated a bankrupt, and he carried a composition after bankruptcy of 2s. 6d. in the pound, which composition was paid to all his creditors, including those under the arrangement, and amongst others to A. and B. Neither A. nor B. attended or voted at the meeting at which the composition in the bankruptcy was carried, but A. proved, and A. and B. received the 2s. 6d. in the pound:—Held that neither A. nor B. had thereby waived or released their rights under the arrangement. *Guilfoyle, In re*, 15 L. R., Ir. 238—C. A.

Unpunctual Payments—Discharge of Debtor.—By composition resolutions it was agreed to accept 2s. in the pound, payable within three months, and secured to the satisfaction of the trustee; the debtor to be allowed his discharge on the trustee certifying that he was satisfied with the security; the liquidation to be closed on payment of the composition. The trustee certified that he was satisfied with the sureties, but the debtor did not apply for his discharge. The first instalment was paid with the aid of the sureties, and the last, three months after the time fixed by the resolutions, out of after-acquired property. The debtor subsequently applied for, but had been refused, his discharge, and the liquidation had not been closed:—Held, that the bargain between the debtor and his creditors contained in the resolutions must be carried out in its entirety, and that the debtor having failed to pay the composition, was not entitled to his discharge, and consequently that the after-acquired property vested in the trustee. *Hintz, Ex parte, Hintz, In re*, or *Heintz, Ex parte, Heintz, In re*, 53 L. J., Ch. 398; 49 L. T. 683; 32 W. R. 295—C. J. B.

Punctual Payment of Instalments—Default.—A trustee appointed by the creditors in composition proceedings to receive and distribute the debtor's assets is entitled to be put in funds in cash by the debtor in time to enable him to pay the instalments upon the date fixed for payment thereof. A right to seize and sell

the debtor's property given as security for the punctual payment of an instalment does not upon default of punctual payment postpone the relegation of the creditors to their common law rights till after the realization of the security. *Brinton v. Maddison*, 1 C. & E. 68—Lopes, J.

Non-payment—Trustee in Funds.—Where a trustee for creditors in composition proceedings under the Bankruptcy Act of 1869 might, but for his default, have been in funds to pay an instalment on the due date, the legal consequences, so far as the debtor is concerned, are the same as if the trustee had been in funds. *Burgess v. Gillespie*, 1 C. & E. 321—Cave, J.

Amended Proof—Time for Payment.—Where, after a composition payable at fixed dates has been agreed upon, a creditor sends in an amended proof for a larger sum, the trustee is entitled to a reasonable time from the sending in of such amended proof for payment of the amount due thereon. *Id.*

Withdrawal of Proof—Creditor procuring Composition Arrangement—Fraud discovered.—The plaintiffs, who were creditors of the defendant, a trader, in insolvent circumstances, took an active part in procuring the acceptance of a scheme of composition of the defendant's affairs, and obtained proxies from the debtor's other creditors. At a meeting of the creditors the plaintiffs withdrew the proof of their debt against the estate of the defendant on the ground that, owing to a fraudulent statement on his part on an earlier occasion, they had been induced to forbear to press their claim against him. They, however, proposed a resolution that a composition of 11s. 3d. in the pound should be accepted in satisfaction of the debts due from the debtor, and by using the proxies held by them they carried the resolution. A dividend of 11s. 3d. in the pound was received by the plaintiffs on their proof. They subsequently brought their action in the county court for the unpaid balance of their debt, and the county court judge gave a verdict and judgment for the amount claimed. The defendant obtained a rule nisi to set aside the verdict and judgment or for a new trial:—Held, on the argument of the rule, that the plaintiffs, having acted as they had done, had assented to the composition otherwise than by proving their debt and accepting a dividend on it, and that they could not maintain an action for the unpaid balance of their debt, and that judgment should be entered for the defendant. *Thorpe v. Dakin*, 52 L. T. 856—D.

XIII. COMPOSITION DEEDS.

Preference of One Creditor—Effect of.—A deed of arrangement for the payment of a composition made between a debtor and his creditors must, whether it is or is not made under the provisions of a statute, be based and carried out on the principle of perfect equality. The law implies, in the absence of any express provision to the contrary, a term or condition in such a deed that the debtor agrees with the creditors, and the creditors agree with him and with each other, that all who are parties to the deed shall come in and be placed on exactly the same

footing; so that the acceptance by one creditor of a bonus or gratuity beyond that secured to all by the deed will, if that bonus is paid with the knowledge of the debtor, though not by him or out of his estate, entitle any other creditor who is a party to the deed to avoid it, and to proceed as though the deed were cancelled. *Daughlish v. Tennent* (2 L. R., Q. B. 49) approved. *Milner, Ex parte, Milner, In re*, 15 Q. B. D. 605; 54 L. J., Q. B. 425; 53 L. T. 652; 33 W. R. 867; 2 M. B. R. 190—C. A.

Secret Bargain with Particular Creditor—Effect of.]—By a composition deed the creditors of H., in consideration of the payment of the composition, agreed to release to H. all debts owing from him to them respectively, on condition that, if H. made default in payment of the composition, the deed should be void. P., one of the creditors, at the time of executing the deed, made a secret bargain with H., by which he was to receive from H. a larger proportion of his debt than any of the other creditors. H. having made default in paying the composition, P. presented a bankruptcy petition against him. The registrar refused to make a receiving order:—Held, that the effect of the secret bargain was that the release of P.'s debt was absolute and the condition void, and that the refusal of the registrar to make a receiving order was right. *Phillips, Ex parte, Harvey, In re*, 36 W. R. 567—C. A.

Instalment unpaid—Right of Creditor.]—Under a composition arrangement, payable in three instalments, each secured by the promissory note of the arranging debtor and his sureties, default was made in the payment of the second instalment, but the third was paid. The creditor thereupon sued for the original debt, less the amount of the first and third instalments:—Held, that the creditor was entitled to revert to his right to sue for the original debt, and the court refused to restrain him from doing so. *D., In re*, 21 L. R., Ir. 281—Bk.

Construction—Failure of Debtor to comply with terms.]—Where a deed of arrangement, by which a debtor agreed to pay his creditors in full by certain quarterly instalments, contained a clause that if default be made for the space of 21 days in paying any one instalment, then it should be lawful for the trustee under the deed by notice in writing to declare such deed void, "and in such event the creditors shall be entitled to enforce their claims as if the deed had never been made or executed":—Held, that the specific and limited condition was meant to take the place of the general and implied condition, and that as the trustee had not given the notice, a creditor under the deed was not entitled to serve a bankruptcy notice and present a petition on account of the debt due to him. *Goas, Ex parte, Clement, In re*, 3 M. B. R. 153—C. A.

Inconsistency between Recitals and Operative part.]—A deed of composition executed by a debtor who had filed a bankruptcy petition recited that the debtor was possessed of or entitled to the real and personal estate specified in a schedule to the deed, and that in accordance with his desire to pay his creditors 20s. in the pound, and in order that the composition should be secured, he had agreed with the trustee to assign to him all the property set forth in the

schedule, upon the trusts thereafter contained. By the operative part the debtor, "for effectuating the said desire, and in pursuance of the said agreement," assigned to the trustee "all and singular the several properties, chattels, and effects set forth in the said schedule hereto, and all the estate, right, title, interest, claim, and demand" of the debtor "in, to, and upon the said chattels, properties, and effects, and all other the estate (if any)" of the debtor. The debtor was, under the trusts of a post-nuptial settlement, entitled to a life interest in certain property. This life interest was not mentioned in the schedule:—Held, that the general words of the assignment were controlled by the recital, which showed that the deed was intended to apply only to the property specified in the schedule, and that the life interest did not pass to the trustee. *Daves, Ex parte, Moon, In re*, 17 Q. B. D. 275; 55 L. T. 114; 34 W. R. 752—C. A.

Creditors setting up adverse Claim—Execution refused.]—Incumbrancers who had claimed priority over a creditors' deed and failed in their contention, were not allowed afterwards to execute and take the benefit of the deed. *Meredith, In re, Meredith v. Facey*, 29 Ch. D. 745; 54 L. J., Ch. 1106; 33 W. R. 778—Pearson, J.

XIV. THE DISCHARGE AND RE-OPENING BANKRUPTCY.

1. *Discharge under the Bankruptcy Act, 1883.*
2. *Discharge under Prior Statutes.*
3. *Re-opening Bankruptcy.*
4. *Effect of Discharge.*

1. DISCHARGE UNDER THE BANKRUPTCY ACT, 1883.

Duty of Court where any Offences committed.]—Upon an application by a bankrupt for his discharge under s. 28 of the Bankruptcy Act, 1883, where any of the offences specified in sub-s. (3) of that section are proved to have been committed, the court must either refuse the order or suspend its operation, or grant an order subject to conditions; and the court cannot in such a case grant an unconditional discharge. *Board of Trade, Ex parte, Heap, In re*, 4 M. B. R. 314—D.

General Principles on which Court acts.]—In considering the question of a bankrupt's discharge, the court is bound to have regard, not to the interests of the bankrupt, or of the creditors alone, but also to the interests of the public, and of commercial morality. Although facts may not be absolutely proved, which would, under s. 28, sub-s. 2, of the Bankruptcy Act, 1883, compel the court to refuse any discharge, yet, where gross misconduct within the section is shown on the part of the bankrupt, the court is perfectly justified in declining to grant a discharge upon conditions, and in making an order absolutely refusing to such bankrupt any discharge at all. *Badcock, Ex parte, Badcock, In re*, 3 M. B. R. 138—D.

Conduct of Bankrupt before Commencement of Act.]—Upon an application by a bankrupt under s. 28 of the Bankruptcy Act, 1883,

for an order of discharge, the court may take into consideration conduct of the bankrupt of the nature mentioned in sub-s. 3, though it took place before the commencement of the act, and in that sense s. 28 is retrospective. *White, In re* (33 L. J., Bk. 22), explained and distinguished. *Salaman, Ex parte, Salaman, In re*, 14 Q. B. D. 936 ; 54 L. J., Q. B. 238 ; 52 L. T. 378 ; 2 M. B. R. 61—C. A.

Rash and Hazardous Speculations.—A solicitor who had no capital of his own bought land in the city of London by means of money which he borrowed on the security of mortgages of the land, his intention being to sell it at an advanced price. He afterwards borrowed more money on a further mortgage for the purpose of building on the land. The land was valued by professional valuers at considerably more than the amount borrowed. He was unable to sell or to let the property, and he became a bankrupt:—Held, that he had been guilty of “rash and hazardous speculations,” and that the registrar was right in granting him an order of discharge subject to the condition that, after setting aside out of his earnings 300*l.* a year for the maintenance of himself and his family, he should pay over to the official receiver the balance of his earnings, until he should have paid 10*s.* in the pound on all the debts which had been, or might be, proved in the bankruptcy. *Ib.* See also ante, col. 172.

Contracting Debt without Expectation of Paying.—Two partners, who had no capital of their own, commenced business by means of borrowed money, assigning to the lender as security their leasehold premises, the goodwill of their business, and all their existing and after-acquired stock-in-trade, fixtures, furniture, and book-debts, giving him the power to take possession at any time. They contracted debts in carrying on the business, and became bankrupts. The mortgagee took possession under his deed, and his security was insufficient. The registrar granted the bankrupts a discharge, on condition of their consenting to judgment being entered up against them by the trustee for the whole of the debts provable in the bankruptcy:—Held, that the bankrupts had contracted debts without having at the time of contracting them any reasonable or probable ground of expectation of being able to pay them, and that the registrar's decision was right. *White, Ex parte, White, In re*, 14 Q. B. D. 600 ; 54 L. J., Q. B. 384 ; 33 W. R. 670 ; 2 M. B. R. 42—C. A.

Judgment entered against Debtor for Debt.—

A debtor at the time when the action was commenced in which final judgment was obtained against him, upon which the receiving order was subsequently made, carried on business in partnership with his father, and had a considerable income. During the pendency of the proceedings in the action, the debtor paid away the money belonging to him in the business, and also received notice from his father to quit the partnership. The county court judge granted the bankrupt his discharge on the terms that he should pay to the trustee in his bankruptcy the sum of 700*l.* out of his earnings or income or any after-acquired property:—Held, on appeal, that the order of the county court judge must be modified, and that there would be an order

granting to the bankrupt his discharge on consenting to judgment being entered against him in the terms of s. 28, sub-s. 6, of the Bankruptcy Act, 1883. *Allestree, Ex parte, Clarkson, In re*, 2 M. B. R. 219—D.

An order was made by a county court judge, directing that the discharge of the bankrupts should be allowed as soon as a sufficient sum was paid to the trustee in the bankruptcy to make up a dividend of 5*s.* in the pound. On appeal, the objection was taken that the order in question was wrong in form:—Held, that the proper order to be made under the circumstances was that the discharge of the bankrupts should be granted, subject to judgment being entered against them under s. 28, sub-s. 6, of the Bankruptcy Act, 1883, for such amount and under such conditions as set out in the order. *Small, Ex parte, Small, In re*, 3 M. B. R. 296—D.

— Consent to Judgment, when Required.]

—The court will not require a bankrupt, as a condition of his discharge, to consent to judgment being entered against him for the balance of his debts, unless there is some evidence that he is likely to acquire property sufficient to satisfy such judgment. *Aynaud, Ex parte, Bullen, In re*, 36 W. R. 836 ; 5 M. B. R. 243—C. A.

Omission to keep “usual and proper Books of Account.”—

By s. 28 of the Bankruptcy Act, 1883, it is provided that the court shall refuse a bankrupt an order of discharge, or suspend the operation of the order, or grant a conditional order, upon proof “that the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy.” A bankrupt, who carried on business as a hatter, bought some houses with the intention of selling them at a profit for building purposes, and also incurred liabilities in promoting an hotel company. He had kept proper books of account in relation to his business as a hatter, but he had kept no books in respect of his purchases of houses, or of his transactions in relation to the hotel company:—Held, by Lord Esher, M.R., and Lopes, L.J., that the bankrupt was not required to keep any books relating to the building speculations, and that the omission to keep such books could not be taken into account as a reason for refusing or suspending his order of discharge:—By Fry, L.J., that the building speculations were “business” transactions, and that the bankrupt was bound to keep books in relation to them. *Board of Trade, Ex parte, Mutton, In re ; or Mutton, Ex parte, Mutton, In re*, 19 Q. B. D. 102 ; 56 L. J., Q. B. 395 ; 56 L. T. 802 ; 35 W. R. 561 ; 4 M. B. R. 180—C. A. See *Reed, Ex parte, Reed, In re*, post, col. 187.

Appeal from Discretion.—Where all the facts have been brought before the registrar, and he has exercised his discretion as to the terms on which a bankrupt should obtain his discharge, the Court of Appeal will not interfere with such decision on an allegation that the punishment imposed was too lenient, unless it is perfectly clear that the decision was wrong. *Cooper, Ex parte, Chase, In re*, 3 M. B. R. 228—C. A.

On an application by a bankrupt for his discharge, the official receiver reported that the bankrupt had brought himself within the provisions of s. 28, sub-s. (3), of the Bankruptcy Act, 1883, in that he had been guilty of rash and hazardous speculations by reason of certain gambling transactions upon the Stock Exchange, and the county court judge refused to grant any order of discharge:—Held, that under the circumstances and taking into consideration the facts that the bankrupt was not a trader, and that only one of the offences specified in the subsection had been reported against him, the proper order was to suspend the order of discharge for three years. *Rankin, Ex parte, Rankin, In re*, 5 M. B. R. 23—D. And see ante, col. 170.

— **Wrong Conclusion of Fact.**—Though the registrar has, under s. 28 of the Bankruptcy Act, 1883, a judicial discretion as to granting, or refusing, or suspending a bankrupt's order of discharge, and the Court of Appeal will not readily interfere with the exercise of his discretion, if he has taken a right view of the facts, yet if, in the opinion of that court, he has come to a wrong conclusion of fact with regard to the bankrupt's conduct, they will vary his decision by absolutely refusing an order of discharge when he has only suspended it. *Castle Mail Packets Company, Ex parte, Payne, In re*, 18 Q. B. D. 154; 35 W. R. 89; 3 M. B. R. 270—C. A.

— **Report of Official Receiver Unfounded.**—Although the Divisional Court in Bankruptcy will not readily interfere with the exercise of the discretion of a county court judge refusing the discharge of a bankrupt, yet if the decision of such judge is founded solely on the report of the official receiver, and, on appeal, the statements contained in such report are proved to be unfounded and are capable of explanation, the Divisional Court will vary the order of the county court judge, and will grant to the bankrupt his order of discharge, subject to such conditions as in the nature of the case it may think fit. *Sultzberger, Ex parte, Sultzberger, In re*, 4 M. B. R. 82—D.

Order made under a Mistake—Course to be pursued.—After an order had been made suspending the discharge of a bankrupt for five years, certain facts were brought to the notice of the county court judge from which he came to the conclusion that the opinion he had formed of the debtor's conduct at the time of the application for discharge was a mistaken one. On appeal by the bankrupt from the order made on the application for his discharge:—Held, that the proper course was for the appeal to stand over in order that an application might be made to the county court judge to review his decision. *Dowson, Ex parte, Dowson, In re*, 4 M. B. R. 310—D.

Duty of Debtor to aid in Realisation of Estate—Medical Examination.—The principal asset of a bankrupt was a contingent reversionary interest which was saleable if the bankrupt's life were insured. The trustee having requested the bankrupt to submit to a medical examination with a view to a policy being effected, the bankrupt refused to do so without giving any reason, although he had not long

before his bankruptcy submitted to such an examination for the purpose of raising money on his interest, and although he admitted that since then he had contracted no disease, and that he knew of no reason why he should not submit to such an examination:—Held (Lord FitzGerald dissenting), that the obligation imposed upon a bankrupt by s. 24 of the Bankruptcy Act, 1883, to "do all such acts and things in relation to his property, and the distribution of his property among his creditors, as may be reasonably required by the trustee" and to "aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors," did not include an obligation to submit to a medical examination, and that the refusal to submit was not a ground upon which the bankrupt's discharge could be refused or suspended under s. 28. *Board of Trade v. Block*, 13 App. Cas. 570; 58 L. J., Q. B. 113; 59 L. T. 734; 37 W. R. 259; 53 J. P. 164—H. L. (E.).

Application for Discharge—Appeal.—See *Williams, Ex parte, Williams, In re*, and *Rankin, Ex parte, Rankin, In re*, post, col. 203.

Registrar's Fee—Consent Judgment for over 50l.—County Court.—Where a county court grants a bankrupt his discharge subject to his consenting to judgment being entered up against him by the trustee for the balance of debts provable under the bankruptcy, the county court has jurisdiction under r. 240 of the Bankruptcy Rules, 1886, to enter up such judgment, although the amount exceeds 50l.; but, the rule being silent as to fees, the registrar is not entitled to any fee in respect of such judgment. *Howe, In re*, 18 Q. B. D. 573; 56 L. J., Q. B. 257; 35 W. R. 380; 4 M. B. R. 57—Cave, J.

2. DISCHARGE UNDER PRIOR STATUTES.

Application for, before close of Bankruptcy—Meeting, how Summoned.—When a meeting of the creditors of a bankrupt under the Bankruptcy Act, 1869, is summoned by the trustee (for the purpose, e.g., of ascertaining whether the creditors will assent to an application by the bankrupt for an order of discharge), it is only necessary that it should be summoned by means of a notice sent by the trustee to each creditor in accordance with the provisions of rule 95; it is not necessary that advertisements of the meeting should be published, as provided by rule 89 in reference to the first meeting of the creditors. Sect. 78 has not the effect of incorporating the Bankruptcy Rules into the act for the purposes of construction. But even if the rules are to be considered as, by virtue of s. 78, incorporated into the act, s. 21 does not make rule 89 applicable to meetings summoned by the trustee, a special provision for the summoning of such meetings being made by rule 95. *Cohen, Ex parte, Cohen, In re*, 13 Q. B. D. 56; 53 L. J., Ch. 641; 50 L. T. 347; 32 W. R. 669—C. A.

Discharge by Composition Resolutions.—See *Heintz, Ex parte, Heintz, In re*, ante, col. 177.

Certificate of Conformity—Effect of Suspending Order.—In July, 1848, an order was made that the grant of a certificate of conformity to a bankrupt be suspended for three years. During

the period of suspension the Bankruptcy Act of 1849 came into operation; which provided (s. 199) that "every certificate of conformity, allowed by any commissioner before the time appointed for the commencement of this act, though not confirmed according to the laws in force before that time, shall discharge the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands made provable under the fiat"—Held, that as by virtue of that section, confirmation of the order of July, 1848, was no longer required, that order became, at the expiration of the period of suspension, of itself a complete discharge to the bankrupt, and that property acquired by him after the expiration of that period belonged to him and not to the assignee in the bankruptcy. *Dove, In re, Bousfield v. Dove*, 27 Ch. D. 687; 53 L. J., Ch. 1099; 33 W. R. 197—Pearson, J.

3. RE-OPENING BANKRUPTCY.

Fraud and Misrepresentation — Burden of Proof.—H. C. O. and E. having for some time previous to 1879 carried on business in partnership, and the firm being at that time largely indebted, H. C. O., at that date, retired in favour of F. O., his son, leaving to him his share of the debts and liabilities. H. C. O. retained a lien upon the partnership property. On the 12th July, 1879, H. C. O. died, having executed a codicil to his will authorising his executors to sell his share in the business. The executors allowed E. and F. O. to carry on the business subject to a lien upon the property, machinery, &c., retained by the executors. In May, 1880, F. O. and E. filed their petition, and a receiver was appointed, who carried on the business as tenant to the executors, and to whom E. and F. O. rendered a statement of affairs, from which it was alleged that a certain claim which the firm had against J. was omitted, and in which a patent, which was afterwards sold for 800*l.*, was said to have been mentioned as being of no value. On the 20th May a composition of 1*s.* 8*d.* was accepted, and the bankruptcy was closed. The trustee applied to the county court judge to reopen the bankruptcy, and appealed from his refusal to do so:—Held, that if it had been proved that the bankrupts were aware of their claims against J., and of the value of the patent at the time when the statement of affairs was made, the bankruptcy ought to be reopened, but that the trustee had failed to make out an affirmative case, and that the burden of proof lay upon him. *Owtram, In re, Marshall v. Edleston*, 50 L. T. 592—Cave, J.

4. EFFECT OF DISCHARGE.

Future and Contingent Liabilities.—"Liability incapable of being estimated."—The assignee of a lease for a term of years covenanted to indemnify the lessees against damages for breach of their covenants with the lessors to repair and yield up the demised premises in repair at the end of the term. Eight years before the term expired, the assignee filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869, and obtained an order of discharge. The lessees were not scheduled in the debtor's statement of affairs, no notices were sent to them,

and they tendered no proof in the liquidation in respect of the assignee's possible liability at the end of the term upon his covenant to indemnify. After the term expired, the lessors having recovered damages against the lessees upon the covenants for repair, the lessees claimed an indemnity from the assignee in respect of his covenant to indemnify:—Held, that the claim of the lessees was barred, under s. 49 of the Bankruptcy Act, 1869, by the order of discharge, the effect of s. 31 being to make the assignee's future and contingent liability on his covenant to indemnify a debt provable in the liquidation, unless an order of the court declared it to be a liability incapable of being fairly estimated. *Hardy v. Fothergill*, 13 App. Cas. 351; 58 L. J., Q. B. 44; 59 L. T. 273; 37 W. R. 177; 53 J. P. 36—H. L. (E.).

A tenant in possession of premises under an agreement for a lease for twenty-one years, from Michaelmas, 1861 (the lease to contain a covenant to repair and leave in repair) liquidated by arrangement in 1872, and got his discharge in 1880. The trustee took no steps with regard to the premises which the tenant continued to occupy till Michaelmas, 1882:—Held, that the tenant was bound to leave the premises in the state of repair required by the agreement. *Ponsford v. Abbott*, 1 C. & E. 225—Lopes, J.

Liability incurred by means of Fraud.—Three directors of a bank passed resolutions for loans to be paid by the company to certain persons, and the company afterwards sued another director and recovered judgment against him for some of the loans which were unpaid; in an action by the director against his three co-directors, one of whom went into liquidation and obtained his discharge:—Held, that his liability, being a "liability incurred by means of breach of trust" within the meaning of s. 49 of the Bankruptcy Act, 1869, his discharge did not release him. *Ramskill v. Edwards*, 31 Ch. D. 100; 55 L. J., Ch. 81; 53 L. T. 949; 34 W. R. 96—Pearson, J.

Statute of Limitations.—C., a broker, sold without authority bonds left with him by A., a customer, for safe custody, and misappropriated the proceeds. C. became bankrupt, and the sale being then discovered, A. proved for the value. The creditors passed a resolution under the Bankruptcy Act, 1869, s. 28, accepting a proposal that T., a friend of the bankrupt, should pay a composition of 6*d.* in the pound on all the debts in full discharge thereof, and that on such payment the bankruptcy should be annulled. A. received the composition, but did not otherwise assent to the arrangement. In August, 1880, the bankruptcy was annulled. In May, 1886, an order in the Chancery Division was made for administration of the estate of C., who had died in the interval:—Held, that the debt due from C. to A. was incurred by fraud within the meaning of s. 15 of the Debtors Act, 1869; that s. 15 applied not only to compositions and arrangements under ss. 125 and 126 of the Bankruptcy Act, 1869, but to arrangements under s. 28, and that the debt, therefore, was not discharged by the arrangement:—Held, also, that as the debt was incurred by fraud which was not discovered till after the adjudication, and an action could not be brought while the bankruptcy was in force, the Statute

of Limitations did not begin to run till the bankruptcy was annulled, and as an order for administration was made within six years from that time, A. was entitled to prove in the administration for the unpaid part of his debt. *Crosley, In re, Munns v. Burn*, 35 Ch. D. 266; 57 L. T. 298; 35 W. R. 790—C. A.

XV. OFFENCES.

"Obtaining credit"—Undischarged Bankrupt—Jurisdiction.]—

In order to convict an undischarged bankrupt under 46 & 47 Vict. c. 52, s. 31, of the offence of "obtaining credit to the amount of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt," it is not necessary that there should be a stipulation to grant credit in the contract between the parties; it is sufficient if a credit in fact is obtained. The prisoner, an undischarged bankrupt, living in Newcastle-on-Tyne, bought a horse from the prosecutor, a farmer in Ireland, for 22*l.*, free of expenses to the vendor, who by the prisoner's direction delivered the horse on board a steamer at Larne; no stipulation was made as to the time or mode of payment, and the prisoner did not disclose the fact that he was an undischarged bankrupt. The prisoner paid for the carriage of the horse on its delivery to him at Newcastle, and immediately sold it, and refused to pay the price to the prosecutor:—Held (Manisty, J., dissenting), that there was evidence to go to the jury of an obtaining of credit by the prisoner within the meaning of s. 31 of the Bankruptcy Act, 1883:—Held, also, that the offence was committed in Newcastle-on-Tyne. *Reg. v. Peters*, 16 Q. B. D. 636; 55 L. J., M. C. 173; 54 L. T. 545; 34 W. R. 399; 50 J. P. 631; 16 Cox, C. C. 36—C. C. R.

—Order for Goods less than £20, delivery of Goods over £20.]—The offence of obtaining credit to the extent of 20*l.* or upwards by an undischarged bankrupt is committed where the bankrupt receives and keeps goods of the value of 20*l.* or upwards without paying for them, or informing the creditor of the fact of his being an undischarged bankrupt, or repudiating the contract, although the goods were sent in execution of an order for goods of a less value than 20*l.* *Reg. v. Juby*, 55 L. T. 788; 35 W. R. 168; 51 J. P. 310; 16 Cox, C. C. 160—C. C. R.

XVI. THE BANKRUPT.

Duty of Trader as to keeping Accounts.]—In order that a trader may fulfil the requirements of sub-s. 3 (a) of s. 28 of the Bankruptcy Act, 1883, his books must be kept in such a way as to show at once, without the necessity of a prolonged investigation by a skilled accountant, the state of his business. *Reed, Ex parte, Reed, In re*, 17 Q. B. D. 244; 55 L. J., Q. B. 244; 34 W. R. 493; 3 M. B. R. 90—C. A.

Statement of Affairs—Contents of.]—In a debtor's statement of his affairs presented to the first meeting of his creditors under a liquidation petition under the Bankruptcy Act, 1869, he is bound only to show the state of his affairs at the date of the filing of the petition, and is not,

therefore, bound to calculate interest on interest-bearing debts beyond that date. *Fewings, Ex parte, Sneyd, In re*, 25 Ch. D. 338; 53 L. J., Ch. 545; 50 L. T. 109; 32 W. R. 352.

—**Estoppel.]—**The plaintiff gave a bill of sale on his furniture to the defendants to secure an advance. Before the payment of the first instalment due under the bill of sale he filed a petition in bankruptcy, and in his statement of affairs returned the defendants as secured creditors. The defendants seized and sold the furniture, and the proceeds being insufficient to pay their debt they proved for the residue. A composition of 2*s.* 6*d.* in the pound was proposed, and on the report of the official receiver was sanctioned by the court and paid to the creditors, including the defendants. The plaintiff subsequently brought an action for the wrongful seizure of his goods, alleging that the bill of sale was invalid:—Held, that the plaintiff having in the bankruptcy proceedings treated the bill of sale as valid, and obtained thereby an advantage to himself, could not afterwards allege that the bill of sale was invalid so as to entitle him to recover in this action. *Roe v. Mutual Loan Fund*, 19 Q. B. D. 347; 56 L. J., Q. B. 541; 35 W. R. 723—C. A.

Liability for Costs—Action by Executrix and Husband—Bankruptcy of Husband.]—

A feme covert sued as executrix, and (the action being brought before the Married Women's Property Act, 1882, came into operation) her husband was joined as co-plaintiff. After the action was set down, but before trial, the husband filed a liquidation petition, and obtained his discharge thereunder. When the action came on for trial the plaintiffs did not appear, and the action was dismissed with costs:—Held, that the husband, who had no beneficial interest which could pass to the trustee under his liquidation, having allowed the action (which was a continuing action after his liquidation) to come on for trial was liable for the costs. *Vint v. Hudspeth*, 30 Ch. D. 24; 54 L. J., Ch. 844; 52 L. T. 774; 33 W. R. 738—C. A.

—**Order against, to pay Costs.]—**The court has jurisdiction to order an undischarged bankrupt to pay costs. *Castle Mail Packets Co., Ex parte, Payne, In re*, 18 Q. B. D. 154; 35 W. R. 89; 3 M. B. R. 270—C. A.

Action for maliciously procuring Bankruptcy.]

—A bankrupt whose adjudication in bankruptcy has not been set aside cannot maintain an action for maliciously procuring the bankruptcy; and such an action may be summarily dismissed upon summons as frivolous and vexatious. *Whitworth v. Hall* (2 B. & Ad. 695) approved. *Metropolitan Bank v. Pooley*, 10 App. Cas. 210; 54 L. J., Q. B. 449; 53 L. T. 163; 33 W. R. 709; 49 J. P. 756—H. L. (E.).

—**Action for Maintenance.]—**A bankrupt cannot maintain an action for maintenance on the ground that the defendant incited and supported bankruptcy proceedings in which he had no common interest, since the cause of action (if any) passed to the trustee in bankruptcy; and such an action may be summarily dismissed upon summons as frivolous and vexatious. *Id.*

Security for Costs—When required.—Judgment having been given restraining the defendants from making, selling, or using instruments of a certain construction, as being an infringement of the plaintiff's patent, and ordering delivery of all instruments so constructed, the defendants appealed, but before the appeal was ready for hearing became bankrupt:—Held, that the defendants, though bankrupts, had still such an interest in being relieved from the injunction as entitled them to proceed with the appeal on giving security for costs. *United Telephone Company v. Bassano*, 31 Ch. D. 630; 55 L. J., Ch. 625; 54 L. T. 479; 34 W. R. 537—C. A.

An order was made dismissing the appeal unless within a certain time the bankrupts gave security for costs, or the trustee in bankruptcy made himself a party to the proceedings. *Id.*

That a receiving order in bankruptcy has been made against a plaintiff is no ground for requiring him to give security for costs. *Rhodes v. Dawson*, 16 Q. B. D. 548; 55 L. J., Q. B. 134; 34 W. R. 240—C. A.

Notwithstanding a receiving order, the debtor can sue for the recovery of what belongs to him, and he cannot be regarded as the mere instrument of the official receiver or the creditors so that security for costs can be required of him. *Malcolm v. Hodgkinson* (8 L. R., Q. B. 209) commented on. *Id.*

Medical Examination of, to effect Life Insurance.—A bankrupt cannot be compelled to answer questions or submit to a medical examination of which the sole object is to enable an insurance to be effected on the bankrupt's life, with a view to the better or more profitable realisation of the bankrupt's life interest in certain property. *Bullock, Ex parte, Garnett, In re*, 16 Q. B. D. 698; 55 L. J., Q. B. 77; 53 L. T. 769; 34 W. R. 79—Cave, J.

The principal asset of a bankrupt was a contingent reversionary interest, which was saleable if the bankrupt's life were insured. The trustee having requested the bankrupt to submit to a medical examination with a view to a policy being effected, the bankrupt refused to do so without giving any reason, although he had not long before his bankruptcy submitted to such an examination for the purpose of raising money on his interest, and although he admitted that since then he had contracted no disease, and that he knew of no reason why he should not submit to such an examination:—Held (Lord FitzGerald dissenting), that the obligation imposed upon a bankrupt by s. 24 of the Bankruptcy Act, 1883, to "do all such acts and things in relation to his property, and the distribution of his property among his creditors, as may be reasonably required by the trustee" and to "aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors," did not include an obligation to submit to a medical examination, and that the refusal to submit was not a ground upon which the bankrupt's discharge could be refused or suspended under s. 28. *Board of Trade v. Block*, 13 App. Cas. 570; 58 L. J., Q. B. 113; 59 L. T. 734; 37 W. R. 259; 53 J. P. 164—H. L. (E.).

Application by Bankrupt for delivery of Documents—Pending Criminal Proceedings.—Where

after the annulment of bankruptcy proceedings, application was made by the bankrupt for an order against the trustee to deliver up books and papers, and a statement of account, and it appeared that the trustee, with the solicitors and committee of inspection, had been indicted by the bankrupt for conspiracy in bringing about the bankruptcy with intent to defraud, which indictment was then pending:—Held, that in the face of the criminal proceedings, the application could not then be allowed; and that the proper course under the circumstances was to order the case to stand over until after the trial upon the indictment had taken place, or until its abandonment. *Palmer, Ex parte, Palmer, In re*, 3 M. B. R. 267—C. A.

Disqualification of—Refusal of Certificate—"Misfortune without any Misconduct."—By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32, sub-s. 1, bankruptcy disqualifies a person from exercising certain offices, but by (2) this disqualification is removed if the bankrupt "obtains from the court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part." A. was convicted for libel, and sentenced to three months' imprisonment with hard labour, and ordered to pay the costs of the prosecution. A. had borrowed on a bill of sale to pay the costs of his defence, and on conviction borrowed on a second bill of sale to pay off the former one, and to meet the newly accrued costs. The prosecution caused his bankruptcy, and he was thereby disqualified from exercising the office of vestryman. The county court judge granted him his discharge, but refused a certificate under s. 32:—Held, that the county court judge was right, and that the bankruptcy was not caused by "misfortune without any misconduct":—Held, also, that the "misconduct" in s. 32 is not limited to the cases referred to in ss. 24, 28. *Burgess, Ex parte, Burgess, In re*, 57 L. T. 200; 35 W. R. 702; 4 M. B. R. 186—D.

By s. 32 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), certain disqualifications are imposed upon a bankrupt, which are to be removed if he obtains from the court his discharge, with a certificate that his bankruptcy was "caused by misfortune without any misconduct on his part." The debtor instituted a suit for a divorce against his wife and co-respondents on the ground of her adultery. At the trial the jury found that the wife had not committed adultery, and the petition was dismissed, and the debtor was ordered to pay the costs of his wife and of the co-respondents. The means of the debtor both before and after the commencement of the proceedings were wholly insufficient to pay these costs, and he was adjudged a bankrupt on the petition of one of the co-respondents:—Held, that the bankruptcy of the debtor had not been "caused by misfortune without any misconduct on his part" within the meaning of s. 32, and that he was not entitled to the certificate described in the section. *Campbell, Lord Colvin, In re*, 20 Q. B. D. 816; 59 L. T. 194; 36 W. R. 582; 5 M. B. R. 94—C. A.

XVII. EFFECT OF BANKRUPTCY.

Forfeiture of Interest—Discharge of Bankrupt.—Under a marriage settlement, the husband was, subject to the life interest therein of

his wife, entitled to receive the income of certain property settled by the wife during his life, provided always that if the husband should "charge, assign, or otherwise dispose of the said income, or any part thereof, or purport so to do, or shall become bankrupt, or present a petition, or call a meeting, to do any other definite legal act for the liquidation of his affairs," the trust declared of the income in his favour should cease, and during the remainder of his life the trustees might at their discretion apply the whole or any part of the income for the support and benefit of the husband and two specified children of the wife, or any one or more of them, as the trustees should think fit, and should apply the surplus (if any) of the income in another way. The husband during the lifetime of the wife filed a liquidation petition, and a trustee of his property was appointed. The husband obtained his discharge before the death of the wife. After the death of the wife, the trustee assigned for value to the husband all the property belonging to him at the commencement of the liquidation, and devolving on him subsequently up to the date of his discharge, other than what had been already received by the trustee. The liquidation was not formally closed, but the trustee never made any claim to the income of the settled property:—Held, that a forfeiture of the life interest had taken place. *Robertson v. Richardson*, 30 Ch. D. 623; 55 L. J., Ch. 275; 33 W. R. 897—Pearson, J.

—**Bankruptcy annulled.**—A testator gave his residuary real and personal estate to trustees upon trust, to pay one-third of the rents and proceeds to his son until he should die or become bankrupt, or assign, charge, or incur, or attempt to assign, charge, or incur the same or any part thereof, or do something whereby the same or some part thereof would by operation of law or otherwise if belonging absolutely to him become vested in, or payable to, some other person or persons, with a gift over on the failure or determination of the trust. Shortly before the death of the testator, insolvency proceedings were instituted against the son in Melbourne, where he was living, and trustees of his estate were appointed, who gave notice to the trustees of the testator's will to pay over to them any sums in their hands to which the bankrupt was entitled. The insolvency proceedings were very shortly afterwards annulled, and it appeared that the insolvency trustees had not received any thing from the trustees of the will:—Held, that, notwithstanding the annulment of the insolvency proceedings, the clause of forfeiture had taken effect. *Broughton, In re, Peat v. Broughton*, 57 L. T. 8—Chitty, J.

—**Goods seized under Execution but not Sold.**—Under the terms of a marriage settlement, the rent and profits of land were payable to M. for life, or until he should be adjudged a bankrupt "or should commit or knowingly permit, or suffer to be committed any act whereby his interest in all or any of the said several lands, or any part thereof, might become the property of a third party for any time or term whatsoever," or that the lands, or any part of them, should be taken in execution or any proceedings taken to sell the same by any person or persons whatsoever. A judgment was obtained against M., a writ of *fi. fa.* issued, and some cows were seized by the sheriff, but returned, the debt having been paid:

—Held, that under the words "commit, or knowingly permit, or suffer to be committed, any act whereby his interest might become the property of a third party," no forfeiture of M.'s interest in the lands had occurred. *Ryan, In re*, 19 L. R., Ir. 24—Bk.

—**Filing Petition—Composition Deed.**—A debtor was entitled under a post-nuptial settlement to a life interest subject to a proviso that if he should assign, charge, or otherwise dispose of the income, or should become bankrupt, "or do or suffer anything whereby the income, if payable to him absolutely, would become vested in any other person," then the trust declared in his favour should cease, and during the remainder of his life the trustees might apply the income for the benefit of his wife and children:—Held, that neither the filing of a bankruptcy petition nor the execution of a composition deed worked a forfeiture of the debtor's life interest. *Amherst's Trusts, In re* (13 L. R., Eq. 464) distinguished. *Daves, Ex parte, Moon, In re*, 17 Q. B. D. 275; 55 L. T. 114—Cave, J.

—**Composition — By Firm of which a Member.**—Presentation by a firm of a petition for liquidation under the Bankruptcy Act, 1869, followed by acceptance by the creditors of a composition, operates as a forfeiture of an interest limited in 1862 to the use of A., who was a member of the firm, during his life "or until he should be outlawed or declared bankrupt, or become an insolvent within the meaning of some act of Parliament for the relief of insolvent debtors." *Nixon v. Verry*, 29 Ch. D. 196; 54 L. J., Ch. 736; 53 L. T. 18; 33 W. R. 633—Chitty, J.

—**Colonial Bankruptcy.**—In 1838 a settlement of real estate in England was made, and thereby the trustees were to pay the rents and profits to S. L. for life or until he should commit an act of bankruptcy, or commit any act, or any event should occur, whereby the rents, if settled absolutely upon or in trust for him, should be forfeited to or become vested in any other person whomsoever, and there was a gift over upon the happening of any such event. S. L. in 1875 was residing in New South Wales, and was adjudged insolvent by the court of the colony, the act of the colony vesting all property of the insolvent "whosoever the same might be known or found" in the commissioner therein mentioned. On summons taken out by S. L. under the Settled Land Act, 1882, to have trustees appointed:—Held, that in consequence of the insolvency in New South Wales, the property had become forfeited, and had gone over to those in remainder. *Levy's Trusts, In re*, 30 Ch. D. 119; 54 L. J., Ch. 968; 53 L. T. 200; 33 W. R. 895—Kay, J.

—**Forfeiture of Lease—On Tenant "being Bankrupt."**—A lease (executed in 1880) of a mill and warehouse, for twenty-one years, contained a proviso that in case (inter alia) the lessees should during the term be bankrupts, or file a petition in liquidation, the term should cease. After the Bankruptcy Act, 1883, came into operation, the lessees presented a bankruptcy petition, and a receiving order was made:—Held, that the presentation of the petition caused a forfeiture of the term. *Gould or Goold, Ex*

parte, Walker, In re, 13 Q. B. D. 454; 51 L. T. 368; 1 M. B. R. 168—D.

— **Election of Lessor.**—When a lease contains a proviso or condition, "that on breach of any of the covenants, such lease shall cease, determine, and be void, to all intents and purposes whatsoever," such words must be construed to mean void at the election of the lessor. A lease contained a proviso that if the lessee should become bankrupt or insolvent, the lease should cease, determine, and be void. The lessee having become bankrupt, the trustee in bankruptcy rejected a proof put in by the lessor founded on such lease, upon the ground that on the bankruptcy, the lease became void:—Held, that such rejection by the trustee was wrong, and the proof must be allowed. *Leathersellers' Company, Ex parte, Tickle, In re*, 3 M. B. R. 126—Cave, J.

Arbitration—Bankruptcy before Award.—An order was made by consent that all matters in dispute in an action should be referred; during the arbitration and before award the defendant became bankrupt:—Held, that bankruptcy did not operate as a revocation of the submission. *Edwards, Ex parte, Smith, In re*, 3 M. B. R. 179—D.

XVIII. PRACTICE.

1. *Generally.*
2. *Staying Proceedings.*
3. *Transfer of Proceedings.*
4. *Evidence.*
5. *Costs.*

1. GENERALLY.

Solicitor's Right of Audience.—A solicitor has a right of audience on an appeal to the divisional court from a county court sitting in bankruptcy. *Reynolds, Ex parte, Barnett, In re*, 15 Q. B. D. 169; 54 L. J., Q. B. 354; 53 L. T. 448; 2 M. B. R. 122—D. See *Russell, Ex parte, Elderton, In re*, post, col. 208.

Solicitor to be authorised in Writing.—The Bankruptcy Act, 1883, s. 17, sub-s. 4, enacts with reference to the public examination of a debtor under that act, "that any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor concerning his affairs, and the causes of his failure":—Held, that a solicitor who appears at a bankruptcy court for a creditor who has tendered a proof, is the creditor's representative within the meaning of that sub-section, and is therefore not entitled so to question the debtor without being authorised in writing and producing his authority if required by the court to do so. *Reg. v. Greenwich County Court Registrar*, 15 Q. B. D. 54; 54 L. J., Q. B. 392; 53 L. T. 902; 33 W. R. 671; 2 M. B. R. 175—C. A.

— **Application for Rule.**—Query, if such solicitor, when his right of audience has been so denied to him, is "a party," within the meaning of s. 43 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), who is entitled to apply to the superior court for a rule to compel the county court judge to give him audience. *Id.*

Bringing Infants before the Court—Avoidance of Settlement.—When it is desired to bring an infant before the court, the proper course is to apply for the appointment of a guardian ad litem. Where on an appeal from a county court, the divisional court in bankruptcy directs such appeal to stand over in order that certain persons, some of whom are infants, may be made parties, it would appear that an application for the appointment for a guardian ad litem should be made to the county court. *Trustee, Ex parte, Lowndes, In re*, 3 M. B. R. 216—Cave, J.

Motion to Commit—Affidavit of Service—Substituted Service.—The motion to commit should refer to the affidavit of service. In order to obtain an order for substituted service, it must be shown that the person sought to be served knows of the motion and intentionally keeps out of the way. *Board of Trade, Ex parte, Pearce, In re*, 1 M. B. R. 111, 135—Cave, J.

Court Fees—Application by Official Receiver as Trustee.—An official receiver when applying to the court in his capacity of trustee, is not exempt from the fee of 5s. prescribed in Table A. to the order of October 25, 1886. The exemption only applies when he makes the application in his capacity of official receiver. *Trustee, Ex parte, Whitaker, In re*, 21 Q. B. D. 261; 57 L. J., Q. B. 527; 59 L. T. 255; 36 W. R. 736; 5 M. B. R. 178—Cave, J. See *Board of Trade, Ex parte, Rowlands, In re*, ante, col. 94.

Fresh First Meeting, when ordered.—See *M'Henry, Ex parte, M'Henry, In re*, 24 Ch. D. 35; 53 L. J., Ch. 27; 48 L. T. 921; 31 W. R. 873—C. A. *May, Ex parte, May, In re*, 12 Q. B. D. 497; 53 L. J., Q. B. 571; 50 L. T. 744; 32 W. R. 839; 1 M. B. R. 50—C. A.

2. STAYING PROCEEDINGS.

Effect of—Receiver.—When receivers appointed in an action commenced in the Chancery Division are discharged by order of the judge in bankruptcy, their office determines from the date of the order by which they were discharged. The remuneration of such receivers is to be assessed by the registrar. *Official Receiver, Ex parte, Parker, In re*, 1 M. B. R. 39—Cave, J.

Personal Misconduct of Bankrupt.—The plaintiff in an action in the Chancery Division having failed to pay into court, when ordered, a sum of money which he had received in a fiduciary capacity, was served with a notice of motion for a writ of attachment against him. He thereupon filed his petition in bankruptcy, and applied to the Court of Bankruptcy, under s. 9 of the Bankruptcy Act, 1883, to stay further proceedings in the action on the ground that the claim against him was a debt provable in his bankruptcy:—Held, that his application must be refused, for that no good reason was shewn why the Court of Bankruptcy should interfere. *Mackintosh, Ex parte, Mackintosh, In re*, 13 Q. B. D. 235; 51 L. T. 208; 33 W. R. 140; 1 M. B. R. 84—Cave, J.

Seemingly, the jurisdiction conferred on the Court of Bankruptcy by s. 9 of the Bankruptcy Act, 1883, is discretionary, and will not, as a general rule, be exercised in favour of a bankrupt per-

sonally, where he has by some misconduct in some other proceedings rendered himself liable to imprisonment. *Ib.*

Action for Debt provable.]—The defendant presented a petition in bankruptcy on which a receiving order was made on the 24th October, 1885. The plaintiff brought his action against the defendant on the balance of an account on the 19th September, 1887. The defendant applied for an order to stay the action on the ground that a bankruptcy petition had been presented by him and a receiving order made against him, and that the action being in respect of a debt provable in the bankruptcy, had been commenced without leave of the court. Both the master and the judge at chambers refused to make the order as prayed. The defendant appealed:—Held, that the appeal ought to be allowed, and the action restrained, as there were no special or exceptional circumstances which would entitle the court to allow it to continue. *Brownscombe v. Fair*, 58 L. T. 85—D.

Actions in Chancery Division—Pending Application in Court of Bankruptcy.]—In January, 1885, S. commenced an action against M. for an account of what was due to him on the security of a mortgage of certain freehold property and a bill of sale of certain chattels, both dated the 7th of August, 1879, and to enforce those securities by foreclosure or sale. It was subsequently agreed that M. should execute a further bill of sale in favour of S., and that nothing should be done by S. to enforce his securities before the 30th June, 1886. A bill of sale was accordingly executed on the 3rd July, 1885. On the 25th March, 1886, M. was adjudicated a bankrupt; and on the 26th May, 1886, two persons were duly appointed trustees in his bankruptcy, and were afterwards added as parties to the action. On the 27th May, 1886, S. applied to the Court of Bankruptcy for an order that one of such trustees in bankruptcy, who had also been appointed receiver of the bankrupt's property, might be directed to withdraw from possession of the chattels comprised in the bills of sale. This application was, however, adjourned at the request of the trustees, and, for various reasons, had never been brought on again, and was still pending in the Court of Bankruptcy. In July, 1886, S. commenced an action against the trustees in bankruptcy for an account of what was due to him on the security of the bill of sale dated the 3rd July, 1885, and to enforce such security by foreclosure or sale. A motion was subsequently made by the trustees in bankruptcy, under s. 10 (2) of the Bankruptcy Act, 1883, that all further proceedings in the two actions might be stayed until further order, on the ground that S.'s application to the Court of Bankruptcy was still pending, and had not been adjudicated upon, and that the same questions would have to be determined on the hearing of that application as those which arose in the actions, viz., whether the bills of sale were or were not fraudulent and void, and that such questions would be better tried in the Court of Bankruptcy than in the Chancery Division:—Held, that under the circumstances of the case, it would not be proper that the actions should be stayed, as questions would probably arise fitter for the consideration of the Chancery Division than of the Court of Bankruptcy: that the

question in each case must be decided on the facts therein, and that the discretion of the court was unlimited; and that the fact of S. having made an application to the Court of Bankruptcy did not deprive him of his right to proceed in the actions, as such application only related to the chattels, and not to the real estate. *Sharp v. McHenry*, 55 L. T. 747—Kay, J.

Pending Appeal from Bankruptcy Notice.]—*See ante*, col. 113.

3. TRANSFER OF PROCEEDINGS.

Notice—Parties to be Served.]—Notice of an application to transfer the proceedings in a bankruptcy from a county court to the High Court, or vice versa, must be served upon the official receiver. *Jack, In re*, 18 Q. B. D. 682; 35 W. R. 735; 4 M. B. R. 150—Cave, J.

Upon an application for transfer of proceedings, notice should be served on the bankrupt and the official receiver, notwithstanding that a trustee may have been appointed. *Trustee, Ex parte, Yapp, In re*, 55 L. T. 820—Cave, J. *See also Andrews, Ex parte, Andrews, In re, ante*, col. 113.

When ordered—Proof.]—When an application is made under s. 102, sub-s. 4, of the Bankruptcy Act, 1883, for the transfer of an action pending in another Division of the High Court, some proof must be adduced that advantage is likely to be derived by reason of such transfer to the judge in bankruptcy. Whether in a case where a receiving order has been made, but the debtor has not been adjudicated a bankrupt, the court has any jurisdiction to make such order, *quære*. *Official Receiver, Ex parte, White, In re*, 1 M. B. R. 77—Cave, J.

— Discretion—Appeal.]—There is no absolute rule that a question relating to the estate of a bankrupt ought to be determined by the Court of Bankruptcy, and not by the High Court, whenever the trustee in the bankruptcy is, by virtue of the bankruptcy law, claiming by a higher title than that of the bankrupt himself. It is a matter of judicial discretion in each case how the question shall best be tried. In such a matter the Court of Appeal ought not readily to overrule the discretion of the bankruptcy judge. *Reynolds, Ex parte, Barnett, In re*, 15 Q. B. D. 169; 54 L. J., Q. B. 354; 53 L. T. 448; 33 W. R. 715; 2 M. B. R. 147—C. A.

To what Court and to whom made.]—On 4th February a receiving order was made against one partner in the High Court; and on 6th February the other partner presented a petition in a county court. On an application by the partner against whom a receiving order had been made in the High Court for an order to transfer the proceedings in the county court against the other partner to the High Court:—Held, that the application for transfer ought to be made to the county court and that in any event the application was one that ought to have been made to the registrar and not to the judge in court. *Nicholson, Ex parte, Nicholson, In re*, 3 M. B. R. 46—Cave, J.

An application for the transfer of bankruptcy proceedings from the London Court of Bankruptcy to the county court is an application which should be made to the bankruptcy judge at chambers. *Official Receiver, Ex parte, Williams, In re*, 5 M. B. R. 103—Cave, J.

Two partners in trade presented a bankruptcy petition in a county court. Their statement of affairs showed that they had lost nearly 200,000*l.* in five years' trading. Some of the creditors applied to the judge for a certificate that in his opinion the proceedings would be more advantageously conducted in the London court. The judge refused the application, on the ground that it was premature. An appeal was presented, but was afterwards withdrawn, and on this occasion some correspondence took place between the solicitors of the applicants and the solicitors of other creditors who opposed the proposed transfer. The application was afterwards renewed, and there was evidence that the debtors owed a large amount to creditors in London, Liverpool, and other places, and that, in order to carry out a proper investigation of their accounts, it would be necessary to refer to the books of various merchants in London with whom they had traded, and also to the books of their bankers and of the bankers' London agents. The judge refused the application, on the ground that the applicants were estopped by the correspondence between the solicitors from making it:—Held, that there was no such estoppel, and that, as the judge had therefore decided on a wrong ground, he had in effect refused to exercise his discretionary power, and there was an appeal from his decision: that under the circumstances the proceedings would be more advantageously conducted in the London court, and that the certificate asked for ought to have been granted, and the Divisional Court itself granted the certificate. *Soanes, Ex parte, Walker, In re*, 13 Q. B. D. 484; 1 M. B. R. 193—D.

Costs.—If an agreement not to renew the application for a certificate had been in fact entered into between the solicitors of the applicants and the solicitors of the other creditors, it could not have affected the power of the court to make the certificate, though it might have affected the right of the applicants to costs.—Per Cave, J. Order made that the applicants should have their costs out of the debtors' assets, in case the creditors should ultimately approve of the proposed transfer. *Id.*

4. EVIDENCE.

Vivâ Voce—Leave.—Where in a case to be heard before the judge in bankruptcy it is desired to use vivâ voce evidence, the application for leave to give such vivâ voce evidence must be made beforehand to the judge and not to the registrar. *Adamson, Ex parte, Hagan, In re*, 3 M. B. R. 117—Cave, J.

Vivâ voce evidence in support of a motion may be given at the hearing; but special leave for that purpose must be previously obtained. *Kearsley, Ex parte, Genese, In re*, 17 Q. B. D. 1; 55 L. J., Q. B. 325; 34 W. R. 474; 3 M. B. R. 57—Cave, J.

Where parties agree that the evidence on the hearing of a motion shall be taken vivâ voce instead of by affidavit, it is unnecessary to obtain

the leave of the judge, but written notice must be given to the clerk of the court, who will enter the case in a special list of motions to be heard with vivâ voce evidence, and an application must subsequently be made to the court to fix a day for the hearing of the motion. Where there is no such agreement a motion for leave to take the evidence vivâ voce must be made in the usual way. *Budden, Ex parte, Underhill, In re*, 18 Q. B. D. 115; 35 W. R. 336; 3 M. B. R. 282—Cave, J.

— **County Court.**—The rule laid down, that leave to use vivâ voce evidence at the hearing of a motion in bankruptcy must be obtained on a separate application made before the motion comes on to be heard, does not apply to the county courts. *Watkins or Watkinson, Ex parte, Wilson, In re*, 57 L. T. 201; 35 W. R. 668; 4 M. B. R. 238—D.

Affidavit sworn Abroad.—When an affidavit or proof in bankruptcy is sworn abroad before a British consul, or vice-consul, a notarial certificate in verification of the signature and qualification of the consul or vice-consul, is not required. The notarial certificate is only required when such an affidavit or proof is sworn before a foreign functionary. *Magee, Ex parte, Magee, In re* 15 Q. B. D. 332; 54 L. J., Q. B. 394; 33 W. R. 655—Cave, J.

Of Custom—Witnesses.—Where the fact of a custom existing in a particular trade has to be decided, the case is one proper to be tried with the assistance of a jury, and with witnesses, and not upon affidavit evidence only. *Callow, Ex parte, Jensen, In re*, 4 M. B. R. 1—D.

Public Examination of Bankrupt—Admissibility of.—The answers of a bankrupt on his public examination are not admissible in subsequent motions in the same bankruptcy against parties other than the bankrupt. Upon a motion by the trustee against a creditor to set aside as fraudulent a transfer of certain goods to him by the bankrupt, the trustee tendered in evidence the answers of the bankrupt upon his public examination:—Held, that such evidence was not admissible. *Board of Trade, Ex parte, Brunner, In re*, 19 Q. B. D. 572; 56 L. J., Q. B. 606; 57 L. T. 418; 35 W. R. 719; 4 M. B. R. 255—Cave, J.

5. COSTS.

Trustees' Solicitor—Scale where Assets do not exceed £300—Costs "payable out of the Estate."

—By the Bankruptcy Rules, 1886, r. 112: (2) Subject to the provisions of No. 1 of the scale of costs, where the estimated assets of the debtor do not exceed the sum of 300*l.* a lower scale of solicitors' costs shall be allowed in all proceedings under the act in which costs are payable out of the estate. The trustee having been ordered by the court to pay the costs of unsuccessful proceedings under the act with power to recover them out of the estate:—Held, that such costs were not liable to be taxed upon the lower scale above mentioned. *Jaynes, Ex parte, Dowson, In re*, 21 Q. B. D. 417; 57

L. J., Q. B. 522; 59 L. T. 446; 36 W. R. 864; 5 M. B. R. 240—Cave, J.

— **Sale of Bankrupt's Property subject to Incumbrances.**—Where the property of a bankrupt is sold subject to incumbrances, the solicitor of the trustee in bankruptcy is—under r. 9 of Schedule I. of the General Order under the Solicitors' Remuneration Act, 1881, and the Bankruptcy Rules, 1886, General Regulations, Part VII., r. 2—entitled to a percentage on the gross amount of the purchase-money and not merely on the amount realised from the equity of redemption. *Harris, Ex parte, Gallard, In re*, 21 Q. B. D. 38; 57 L. J., Q. B. 528; 59 L. T. 147; 36 W. R. 592; 5 M. B. R. 123—Cave, J.

— **Administrative Work—Work done.**—When a trustee in bankruptcy has, with the authority of the committee of inspection, employed a solicitor to assist him in the performance of his duties as trustee in reference to the distribution of the bankrupt's estate, the giving of notices, and winding-up the bankruptcy, the costs of such solicitor must be taxed upon the principle that a solicitor is not to charge solicitor's charges for administrative work, but only such charges as are fair and reasonable, having regard to the work done. *Board of Trade, Ex parte, Pryor, In re*, 59 L. T. 256; 5 M. B. R. 232—Cave, J.

— **Costs of Taxation.**—Under an ordinary reference to tax the costs of the solicitor to a trustee in bankruptcy, the taxation is regulated by the practice of the Court of Bankruptcy, and the provisions of the Act 6 & 7 Vict. c. 73, have no application. There is no rule in the Court of Bankruptcy that, if on such a taxation the amount of the solicitor's bill is reduced by more than one-sixth, he is to pay the costs of the taxation. *Marsh, Ex parte, Marsh, In re*, 15 Q. B. D. 340; 54 L. J., Q. B. 557; 53 L. T. 418; 34 W. R. 620; 2 M. B. R. 232—C. A.

— **Review of Taxation of Bill.**—An application by the Board of Trade for a review of taxation of the costs of a solicitor under r. 104 of the Bankruptcy Rules, 1883, can only be made for the benefit of the estate, and where there is no estate and no trustee such rule will not apply. *Phillips, Ex parte, Rodway, In re*, 1 M. B. R. 228—Wills, J.

Order for Taxation as between Solicitor and Client—Time for.—Rule 98 of the Bankruptcy Rules, 1883, only empowers the court to direct that costs shall be taxed and paid as between solicitor and client at the time when the order is made awarding the costs. If such a direction is not given at that time, the court has no power to give it subsequently. *Shoolbred, Ex parte, Angell, In re*, 14 Q. B. D. 298; 54 L. J., Q. B. 87; 51 L. T. 678; 33 W. R. 202; 2 M. B. R. 5—C. A.

— **Taxation refused.**—On the bankruptcy of G. his father tendered a proof, which was objected to as to two-thirds by the trustee and expunged by the county court judge. The proof, after amendment, was again rejected and expunged, against which an appeal was lodged. Pending the hearing of the appeal the trustee was advised that the proof was good, and entered

into a compromise with G. (the father), whereby his claim was considerably reduced on the terms that his costs and those of an opposing creditor should be taxed as between solicitor and client. Against a refusal to order taxation the trustee appealed:—Held, that the refusal was right; that the application to the county court judge for an order for taxation amounted to an invitation to him to declare that his unreversed decision was wrong; and that the costs must be paid by the trustee personally. *Edmunds, Ex parte, Green, In re*, 53 L. T. 967—D.

— **Consent Order—Approval by Court.**—Where a form of order by consent in a motion contained an agreement by one of the parties—the trustee in bankruptcy—to pay the costs of the other "as between solicitor and client":—Held, that such a form of order could not be approved by the court. *Scantlebury, Ex parte, Guy, In re*, 4 M. B. R. 300—Cave, J.

Of Petitioner—Power of Court to order.—The second meeting of creditors under a bankruptcy petition (held to consider the confirmation of a scheme of arrangement of the debtor's affairs accepted at the first meeting) is not a "proceeding in court" within the meaning of sub-s. 1 of s. 105 of the Bankruptcy Act, 1883, and the court has no power to order the costs of the petitioner incidental to that meeting to be paid out of the debtor's estate. But the court has power to order the petitioner's costs incidental to the public examination of the debtor to be paid out of the estate. *Board of Trade, Ex parte, Strand, In re*, 13 Q. B. D. 492; 53 L. J., Q. B. 563; 1 M. B. R. 196—D.

— **Payment to Creditor — Protection of Estate.**—Where a petitioning creditor incurs costs in trying to protect the estate, and the official receiver comes to the conclusion that the estate has been thereby substantially benefited, these costs should in general be allowed and paid to the petitioning creditor. *Angier, Ex parte, Johnstone, In re*, 32 W. R. 1001; 1 M. B. R. 213—Cave, J.

Shorthand Notes.—It is the invariable practice of the Bankruptcy Court to refuse the costs of shorthand writer's notes unless the application is made at the commencement of the case. *Reid, Ex parte, Gillespie, In re*, 33 W. R. 707—Cave, J.

Against Board of Trade.—Although the Board of Trade act in a public capacity, the court will not in a proper case consider them as differing from an ordinary litigant. *Phillips, Ex parte, Rodway, In re*, 1 M. B. R. 232—Wills, J.

Payment to Applicant of Balance paid to Trustee.—The bankrupts were stockbrokers who had been employed by the applicant to buy certain specific shares for him, and had received payment for the same. These shares, with others, were deposited by the bankrupts with B. & Co., as security for an advance. When the bankruptcy became known B. & Co. sold the shares, reimbursed themselves, and handed over the balance to the trustee. Upon the applicants sending in a claim for the balance another claimant retired:—Held, that the money might

be paid over to the applicant on the terms that his solicitor would give a personal undertaking to repay so much as the court might order at any time within three years. Held, also, that the costs of the applicant must be borne by him, since it would be unjust that the expense of enforcing his claim should be borne by the general body of the creditors. *Rankart, Ex parte, Blakeway, In re*, 52 L. T. 630—Cave, J.

Costs against Bankrupt.—*See ante*, col. 188.

Costs against Trustee.—*See ante*, col. 94.

Costs of Appeal.—*See infra*.

XIX. APPEAL.

1. *Jurisdiction.*
2. *Parties.*
3. *In what Cases.*
4. *Notice of—Time for.*
5. *The Deposit—Security for Costs.*
6. *Leave to Appeal.*
7. *Costs.*
8. *Other Points.*

1. JURISDICTION.

To what Court.—All appeals from decisions of the High Court of Justice in bankruptcy matters, whether given in court or chambers, lie to her Majesty's Court of Appeal and not to a divisional court of the High Court. *Oastler, Ex parte, Friedlander, In re*, 51 L. T. 309—C. A.

Agreement for Costs of Solicitor.—A solicitor agreed to conduct certain bankruptcy proceedings on the terms that his costs should not exceed 10l. In the course of the proceedings his clients left him and employed other solicitors, and he sent in a bill of costs for a larger amount than 10l. The county court judge, sitting in bankruptcy, declared the agreement to be void, because it did not contain a provision that the solicitor originally employed might conduct the bankruptcy proceedings to an end. At the hearing of the appeal a preliminary objection was lodged on behalf of the respondent that the court sitting as a court of appeal in bankruptcy matters only, had no jurisdiction to deal with the question at all.—Held, that by virtue of the Bankruptcy Amendment Act, 1884, the court had jurisdiction to hear the appeal. *Payton, Ex parte, Owen, In re*, 52 L. T. 628; 2 M. B. R. 87—D.

2. PARTIES.

"Person aggrieved."—An unpaid creditor of a bankrupt is a "person aggrieved" by the improper granting of an order of discharge to the bankrupt, and as such is entitled to appeal against the order. *Castle Mail Packets Company, Ex parte, Payne, In re*, 18 Q. B. D. 154; 56 L. J., Q. B. 625; 35 W. R. 89; 3 M. B. R. 270—C. A.

When an application made by the official receiver under s. 20 of the Bankruptcy Act, 1883, and r. 191 of the Bankruptcy Rules, 1886, for an immediate adjudication of bankruptcy against a debtor, on the non-approval of a scheme of arrangement, has been refused or

adjourned, the official receiver is a "person aggrieved" by the order, and as such is entitled to appeal against it. (Fry, L.J., dissenting.) *Official Receiver, Ex parte, Reed, In re*, 19 Q. B. D. 174; 56 L. J., Q. B. 447; 56 L. T. 876; 35 W. R. 660; 4 M. B. R. 225—C. A.

Board of Trade—Order of Discharge.—Rule 237 of the Bankruptcy Rules, 1886, which gives the Board of Trade a right to appeal from an order of discharge where the official receiver has reported facts which would justify the refusal of an unconditional discharge, is a rule for carrying into effect the objects of the Bankruptcy Act, 1883, within the meaning of s. 127, and is therefore valid. *Board of Trade, Ex parte, Stainton, In re*, 19 Q. B. D. 182; 57 L. T. 202; 35 W. R. 667; 4 M. B. R. 242—D.

Witness—Refusal of Court to order Witness to answer.—When an appeal is brought against the refusal of the court to order a witness to answer questions put to him during his examination, the witness cannot be made a party to the appeal. *Tilly, Ex parte, Scharrer, In re*, 20 Q. B. D. 518; 59 L. T. 388; 36 W. R. 388; 5 M. B. R. 79—C. A.

3. IN WHAT CASES.

Court of Appeal—Special Case.—An appeal lies to the Court of Appeal from the decision of the High Court upon a special case for its opinion stated by a county court judge sitting in bankruptcy under sub-s. 3 of s. 97 of the Bankruptcy Act, 1883. *Daves, Ex parte, Moon, In re*, 17 Q. B. D. 275; 55 L. T. 114; 34 W. R. 752; 3 M. B. R. 105—C. A.

Summons wrongly entitled "In Bankruptcy."—The judge of a county court not having jurisdiction in bankruptcy made an order of committal against the appellant upon a judgment summons under s. 5 of the Debtors Act, 1869. The judgment summons having by mistake been marked with the words "In bankruptcy," an appeal was brought to the divisional court.—Held, that no appeal could lie from the order complained of, to the divisional court in bankruptcy. *Watkins, Ex parte, Watkins, In re*, 3 M. B. R. 146—D.

Application for Directions—Right of Debtor to be heard.—Where a trustee in a liquidation applied to the county court for directions as to the acceptance of an offer for the purchase of the debtors' property, and notice was given to the debtors, but at the hearing of the application the county court judge refused to hear the solicitor for the debtors or to receive evidence on their behalf.—Held, that notice having been given to the debtors, they ought to have been heard, and that an appeal lay from such refusal of the county court judge to do so. Whether, when a trustee applies to the court for directions in any particular matter, the debtor is, in any event, entitled to appear and be heard, *quære*. *Webb, Ex parte, Webb, In re*, 4 M. B. R. 52—Cave, J.

Transfer of Proceedings—Certificate of Judge.—The refusal of the judge of a county court to grant a certificate, under rule 16 of the Bank-

ruptcy Rules, 1883, that in his opinion the proceedings under a bankruptcy petition would be more advantageously conducted in another court, is an order from which an appeal lies, if the judge has refused to exercise his discretion in the matter. In such a case the Court of Appeal, if it is of opinion that the certificate ought to have been granted, will not refer the matter back to the county court, but will itself grant the certificate. *Soanes, Ex parte, Walker, In re*, 13 Q. B. D. 484; 1 M. B. R. 193—D.

Order refusing Prosecution of Bankrupt.]—An appeal will lie to the divisional court from the refusal of the county court judge to order the prosecution of a fraudulent bankrupt. *Jones, Ex parte, Stephens, In re*, 2 M. B. R. 20—D.

Order for Discharge.]—Semble, that an order made in the county court under the Bankruptcy (Discharge and Closure) Act, 1887, being an order made in a bankruptcy matter, may be appealed from to the Divisional Court in Bankruptcy, though no right of appeal is expressly given by the act itself. *Williams, Ex parte, Williams, In re*, 5 M. B. R. 162—D.

From Receiving Orders.]—See ante, VI., 4, c.

Small Bankruptcy—No Leave to Appeal.]—Upon an appeal against the decision of a county court registrar sitting in bankruptcy a preliminary objection was lodged that, the case being one of a small bankruptcy under s. 121 of the Bankruptcy Act, 1883, the leave to appeal rendered necessary by r. 199 of the Bankruptcy Rules, 1883, had not been obtained. On a contention that this rule was ultra vires:—Held, that the appeal could not be heard, that this right of appeal was not a common law but a statutory right, and that the same statute which gave the right of appeal was competent to give an authority to modify the right by general rules framed in a prescribed manner. *Dale, Ex parte, Dale, In re*, 52 L. T. 627; 33 W. R. 476; 2 M. B. R. 92—D.

Application for Discharge.]—Rule 273 (6) of the Bankruptcy Rules, 1886, which provides that in small bankruptcies no appeal shall lie from any order of the court except by leave of the court, does not preclude the debtor from appealing, without leave, against a refusal to grant him his discharge. *Rankin, Ex parte, Rankin, In re* (No. 1), 20 Q. B. D. 341; 58 L. T. 120; 36 W. R. 526; 4 M. B. R. 311—D.

Leave obtained after Notice of Appeal.]—In a small bankruptcy under section 121 of the Bankruptcy Act, 1883, an appeal to the Divisional Court was heard, although the leave of the county court judge was not obtained when the notice of appeal was given and served. *Gibson, Ex parte, Stockton, In re*, 2 M. B. R. 189—D.

Appointment of Trustee—Time.]—The difficulty caused by the refusal of a county court judge to give leave to appeal from an order made by him in a small bankruptcy cannot be got rid of by the creditors, after such leave has been refused, appointing a trustee under s. 121 of the Bankruptcy Act, 1883, whereupon "the bankruptcy shall proceed as if an order for summary administration had not been made," at

any rate where the appeal by such trustee is not brought within 21 days. Whether the difficulty can be so got rid of, even though the trustee appointed does appeal within that time, quære. *March, Ex parte, Richards, In re*, 4 M. B. R. 233—D.

4. NOTICE OF—TIME FOR.

Notice—Debtor not shewing cause against Petition.]—When a debtor gives no notice under r. 36 of his intention to shew cause against a bankruptcy petition, and the petition is consequently heard in his absence, and the court refuses to make an adjudication, if the petitioning creditor desires to appeal against the refusal he must serve notice of the appeal on the debtor. *Warburg, Ex parte, Whalley, In re* (No. 1), 24 Ch. D. 364; 53 L. J., Ch. 336; 49 L. T. 243—C. A.

Substituted Service.]—In a proper case the Court of Appeal has jurisdiction to make an order for substituted service of a notice of appeal, though no express provision to that effect is contained in the rules of court. *Id.*

Time for—Appeal from Registrar.]—An appeal from the decision of the registrar declining to make a receiving order must be brought within twenty-one days. *Dear, Ex parte, Courtenay, In re*, 1 M. B. R. 89—C. A.

From County Court to Judge.]—Unless the notice of appeal appears on the face of it to have been filed within twenty-one days, it is incumbent upon an appellant to be prepared with evidence to shew that the notice was sent off to the registrar of the county court "forthwith." *Hill, Ex parte, Darbyshire, In re*, 53 L. J., Ch. 247—C. J. B.

Notice sent by Post.]—If notice of a bankruptcy appeal is sent by post, as provided by s. 142 of the Bankruptcy Act, 1883, quære whether the notice will be in time unless the letter is received by the respondent before the expiration of the twenty-one days limited for appealing. *Arden, Ex parte, Arden, In re*, or *Arden v. Deacon*, 14 Q. B. D. 121; 51 L. T. 712; 33 W. R. 460; 2 M. B. R. 1—D.

Rejection of Proof.]—If a creditor desires to appeal against the rejection of his proof by the trustee, he must give notice of motion in the usual way under r. 19 of the Bankruptcy Rules, 1883, and within twenty-one days limited by r. 174. *Morrison, Ex parte, Gillespie, In re*, 14 Q. B. D. 385; 52 L. T. 55; 33 W. R. 751; 1 M. B. R. 278—Cave, J.

Application for Discharge.]—Notice of appeal from an order made by the court on application by a bankrupt for his discharge should be a fourteen days' notice. Where such notice was not given and the objection was taken at the hearing, the court directed the case to stand over for a week until the required time had elapsed. *Brown, Ex parte, Landau, In re*, 4 M. B. R. 253—C. A.

Setting aside Bankruptcy Notice.]—Notice of appeal from the refusal of an order to

set aside a bankruptcy notice should be a fourteen days' notice. Where such notice was not given, the court directed the case to stand over to a certain day until the required time had elapsed, and that notice was to be given to the creditor that the court had appointed such day for the hearing of the appeal. *Phillips, Ex parte, Phillips, In re*, 5 M. B. R. 187—D.

— **Extension of—Bonâ fide Mistake—Delay.]**

—Although the time allowed for appeal in bankruptcy matters may be extended by the court, yet some ground must always be shown why this should be done. Where a bonâ fide mistake in the estimation of a proof has been committed, the trustee in bankruptcy ought not to be permitted to take advantage of such a mistake, but when a creditor took no steps to reverse the decision of a county court judge refusing to allow such proof to be amended or withdrawn for more than a year and a half, the court could not permit the case to be reopened. *Charles, Ex parte, Tricks, In re*, 3 M. B. R. 15—Cave, J.

5. THE DEPOSIT—SECURITY FOR COSTS.

Deposit, dispensing with—Appeal by Board of Trade.]—In the case of an appeal to the Divisional Court in Bankruptcy by the Board of Trade, Rule 131 of the Bankruptcy Rules, 1886, does not apply, and the Board of Trade being a government department is entitled to have the appeal entered without lodging any deposit. *Board of Trade, Ex parte, Mutton, In re*, 4 M. B. R. 115—D.

— **Bankrupt unable to find Amount.]**—Where an application was made by a bankrupt under Rule 131 of the Bankruptcy Rules, 1886, for leave to dispense with the deposit of 20*l.* required to be lodged upon an appeal by him from an order of the registrar refusing to annul the adjudication:—Held, that the inability of the bankrupt himself to find the means for making the deposit, or to obtain the necessary sum from his friends, did not constitute such grounds as would justify the court in granting the application. *Grepe, Ex parte, Grepe, In re*, 4 M. B. R. 128—C. A.

Where an application was made by a debtor who had presented a bankruptcy petition against himself, to dispense with the deposit of 20*l.* required to be lodged upon an appeal against a decision of the registrar rescinding the receiving order at the request of the official receiver under s. 14 of the Bankruptcy Act, 1883:—Held, that the debtor's alleged inability to raise the necessary sum did not on the facts of the case constitute such a special circumstance under r. 113 of the Bankruptcy Rules, 1883, as to justify the court in granting the application. *Robertson, In re*, 2 M. B. R. 117—C. A.

— **Increasing Amount of Deposit.]**—The deposit paid by a bankrupt on entering a bankruptcy appeal was ordered to be increased, on the ground that he had been already engaged in protracted and uniformly unsuccessful litigation with the respondents respecting the matters in question. *McHenry, In re*, 17 Q. B. D. 361; 55 L. J., Q. B. 496; 35 W. R. 20—C. A.

Security for Costs—Proof by Creditor resident Abroad.]—The court has no jurisdiction to order a creditor resident abroad, who is appealing from the rejection of his proof by the trustee, to give security for the costs of such appeal. *Izard, Ex parte, Vanderhaege, In re*, 20 Q. B. D. 146; 58 L. T. 236; 36 W. R. 625; 5 M. B. R. 27—Cave, J.

6. LEAVE TO APPEAL.

When granted.]—Upon a question of fact the Court of Appeal will not give leave to appeal to the House of Lords. *Miles, Ex parte, Isaacs, In re*, 15 Q. B. D. 47—C. A.

Where the sum at stake is not large and the court entertains no doubt as to the principle involved, leave to appeal to the Court of Appeal will not be given. *Wolverhampton Banking Company, Ex parte, Campbell, In re*, 14 Q. B. D. 37—D.

To what Court application made.]—An application for leave to appeal under s. 2 of the Bankruptcy Appeals (County Court) Act, 1884, from the decision of a divisional court sitting as a court of appeal from a county court in bankruptcy, should be made in the first instance to a divisional court. *Nickoll, Ex parte, Walker, In re*, 1 M. B. R. 249—C. A.

Such an application for leave to appeal ought to be made to the divisional court immediately after such divisional court has pronounced its decision. *Ib.*

From County Courts—Terms.]—In granting leave to appeal a county court judge ought not to limit or qualify his leave to appeal. *Serjeant, Ex parte, Sandars, In re*, 52 L. T. 516—D.

Amount involved under 50*l.*]—Rule 111 (2) of the Bankruptcy Rules, 1883, which provides that no appeal to the Court of Appeal shall be brought from any order relating to property when it is apparent from the proceeding that the money or money's worth involved does not exceed 50*l.*, unless by leave of the court, was authorised by s. 127 of the Bankruptcy Act, 1883, taken in connexion with s. 104, sub-s. 2 (d):—Quære, whether, even if a rule was made in excess of the power given by s. 127, it would, after it had been laid before Parliament and issued, acquire the force of a statute under s. 127 (2). *Foreman, Ex parte, Hann, In re*, 18 Q. B. D. 393; 56 L. J., Q. B. 161; 55 L. T. 820; 35 W. R. 370; 4 M. B. R. 16—C. A.

Receiving Order rescinded—Summary Administration.]—On 2nd July, 1886, a receiving order was made against the debtor, and on 15th July, 1886, an order for the summary administration of the estate. On 10th September, 1886, an application by the debtor to rescind the receiving order was allowed; the petitioning creditor having appealed against such rescission, the objection was taken that no leave to appeal had been obtained, but the court allowed the appeal to proceed. Whether in such a case where the receiving order has been rescinded, an appeal by the petitioning creditor against the rescission is an appeal against an order made in a summary administration for

which leave is necessary, *Quære. Baynes, Ex parte, Clarke, In re*, 4 M. B. R. 80—D.

In Small Bankruptcies.]—See cases ante, col. 203.

7. COSTS.

Appearance of Trustee.]—A trustee in bankruptcy who is served with notice of an appeal, and who appears, and only asks for his costs, will not be allowed his costs of appearance. *Arden, Ex parte, Arden, In re*, or *Arden v. Deacon*, 14 Q. B. D. 121; 51 L. T. 712; 33 W. R. 460; 2 M. B. R. 1—D.

Official Receiver appearing.]—As a general rule, and in the absence of special circumstances, the official receiver ought not to appear upon the hearing of an appeal, unless he is required to do so by the court, and, if he appears unnecessarily, he will not be allowed any costs. He is not justified in appearing merely to defend his report. *Reed, Ex parte, Reed, In re*, 17 Q. B. D. 244; 55 L. J., Q. B. 244; 34 W. R. 493; 3 M. B. R. 90—C. A.

As a general rule the official receiver, though served with a notice of appeal, ought not to appear on the hearing, unless there are special circumstances which he desires to bring before the court, and, in the absence of special circumstances, he will not be allowed his costs of appearance. *Dixon, Ex parte, Dixon, In re*, 13 Q. B. D. 118; 53 L. J., Ch. 769; 50 L. T. 414; 32 W. R. 837; 1 M. B. R. 98—C. A.

The official receiver will not be allowed his costs of appeal, even if he was served with notice of appeal, unless his appearance was necessary. *White, Ex parte, White, In re*, 14 Q. B. D. 600—C. A.

Creditors appearing.]—Creditors served with notice of appeal by a bankrupt, from an order granting him a conditional discharge, will not be allowed their costs of appearing on the hearing of the appeal when the official receiver or trustee appears. *Salaman, Ex parte, Salaman, In re*, 14 Q. B. D. 936—C. A.

Official Receiver — Successful Appellant — Priority.]—An order made by a county court, on the application of the official receiver, setting aside a payment made by a debtor as a fraudulent preference, having been reversed on appeal:—Held, that the costs of the appellants and of the official receiver in both courts must be paid out of the debtor's assets, the costs of the appellants having priority. *Leicestershire Banking Company, Ex parte, Dale, In re*, 14 Q. B. D. 48; 33 W. R. 354—D.

Preliminary Objection—Notice.]—The solicitor of a respondent, if he is aware of a preliminary objection to an appeal, ought, as a matter of courtesy, to inform his opponent of it without delay, but the omission to do so is not, if the appeal is dismissed on the preliminary objection, a sufficient reason for depriving the respondent of the costs of the appeal. *Speight, In re* (13 Q. B. D. 42), and *Blease, Ex parte* (14 Q. B. D. 123), not followed. *Shead, Ex parte, Mundy, In re*, 15 Q. B. D. 338; 53 L. T. 655; 2 M. B. R. 227—C. A.

When the respondent to an appeal intends to

take a preliminary objection he should give notice to the appellant of his intention so to do. If no such notice is given and the objection prevails, the appeal will be dismissed without costs. *Brooks, Ex parte, Speight, In re*, 13 Q. B. D. 42—Cave, J.

A respondent to an appeal who intends to rely on a preliminary objection ought to give notice to the appellant of his intention so to do. If he does not, and the objection is successful, the appeal will be dismissed without costs. *Speight, In re* (13 Q. B. D. 42) followed. *Blease, Ex parte, Blinkhorn, In re*, 14 Q. B. D. 123; 33 W. R. 432; 1 M. B. R. 280—D.

Shorthand Writer's Notes.]—As a general rule the application to allow the costs of shorthand writer's notes of evidence as the costs of a successful appellant should be made at the hearing, but the mere omission to make the application then does not prevent its being made subsequently:—Semble, if the application is made on a subsequent day and is successful, the court ought to make the applicant pay the costs of the application, as they were caused by his own omission. *Steed, Ex parte, Day, In re*, 33 W. R. 80; 1 M. B. R. 251—Cave, J.

— **By whom Appointed.]**—Where the shorthand writer is appointed at the instance of one party, he cannot recover the costs of the notes unless under special circumstances. Where the appointment is made by both parties, the costs should be paid by the unsuccessful party. *Id.*

8. OTHER POINTS.

Solicitor's Right of Audience.]—The right of audience given to a solicitor in bankruptcy matters by s. 151 of the Bankruptcy Act, 1883, is limited to the High Court, and does not extend to the Court of Appeal. *Russell, Ex parte, Elderton, In re*, 4 M. B. R. 36—C. A. See *Reynolds, Ex parte, Barnett, In re*, ante, col. 193.

Application to Stay Proceedings—To what Court made.]—Where an application was made to a divisional court of which the judge in bankruptcy was not a member, for an order to stay proceedings pending an appeal from an order of a county court judge:—Held, that the divisional court had no jurisdiction to hear or decide the application. *Moon, In re*, 3 M. B. R. 74—D.

Refusal of Registrar to carry out Order—Procedure to compel Obedience.]—Upon appeal from a county court in a bankruptcy proceeding, the divisional court allowed the appeal, and ordered money, which had been paid into the county court to abide the result of the appeal, to be paid out to the appellant. The divisional court also gave leave to appeal to the Court of Appeal, but made no order for a stay of proceedings. The registrar of the county court having refused to pay out the money until the time for appealing to the Court of Appeal had elapsed:—Held, that the refusal was unjustifiable, but that, the registrar being an officer of the county court, the divisional court had no jurisdiction over him personally to enforce compliance with the order. *Croydon County Court (Registrar), Ex parte, or Brown, Ex parte*,

Wise, In re, 17 Q. B. D. 389; 55 L. J., Q. B. 362; 54 L. T. 722; 34 W. R. 711; 3 M. B. R. 174—C. A.

XX. ADMINISTRATION OF INSOLVENT ESTATES IN BANKRUPTCY.

Jurisdiction—Order affecting Rights of Stranger.]—A county court judge sitting in bankruptcy has no jurisdiction, unless by consent, to order payment to the official receiver of money received under a garnishee order attaching a debt due to the estate of a deceased debtor, which is being administered according to the law of bankruptcy under s. 125 of the Bankruptcy Act, 1883. *Ellis, Ex parte, Crowther, In re*, 20 Q. B. D. 38; 57 L. J., Q. B. 57; 58 L. T. 115; 36 W. R. 189; 4 M. B. R. 305—D.

— To order Transfer.]—Where a testator, having previously carried on business in England, was for more than six months previous to his death an inmate of a lunatic asylum in Scotland, and died insolvent, and an administration action was commenced by a creditor; on motion, on behalf of the plaintiff:—Held, that the court had jurisdiction, under sub-s. 4 of s. 125 of the Bankruptcy Act, 1883, to make an order transferring the proceedings to the county court within the jurisdiction of which the testator formerly carried on his business. *Senhouse v. Mawson*, 52 L. T. 745—V.-C. B.

Transfer when Ordered.]—The power given by s. 125 of the Bankruptcy Act, 1883, to transfer the proceedings in an action brought for the administration of an insolvent estate to the Court of Bankruptcy, is a discretionary one, and it will not be exercised where the estate is small, the number of creditors is small, and considerable expense has been already incurred in chambers in the proceedings under an administration/judgment:—Semble, that an application for transfer can only be made by a creditor who has absolutely proved his debt. *Weaver, In re, Higgs v. Weaver*, 29 Ch. D. 236; 54 L. J., Ch. 749; 52 L. T. 512; 33 W. R. 874—Pearson, J.

Order, how made—Time.]—When proceedings for the administration of a deceased debtor's estate have been commenced in the Chancery Division of the High Court, and an order has been made, under sub-s. 4 of s. 125 of the Bankruptcy Act, 1883, for the transfer of the proceedings to the court exercising jurisdiction in bankruptcy, that court may make an administration order on an ex parte application by a creditor, but the order cannot be made until the expiration of two months from the date of the grant of probate or letters of administration, unless with the concurrence of the legal personal representative, or unless it is proved that the debtor committed an act of bankruptcy within three months prior to his decease. *May, Ex parte, May, In re*, 13 Q. B. D. 552; 1 M. B. R. 232—D.

Under s. 125 of the Bankruptcy Act, 1883, a transfer to the county court may be ordered after judgment and further subsequent proceedings in the administration action. Any right of retainer of the legal personal representative, when the transfer will be for the benefit of the creditors generally, cannot be permitted to

stand in the way of a transfer being ordered. *York, In re, Atkinson v. Powell*, 36 Ch. D. 233; 56 L. J., Ch. 552; 56 L. T. 704; 35 W. R. 609—Stirling, J.

Discovery—Order for Examination of Debtor's Widow.]—The provisions of s. 27 of the Bankruptcy Act, 1883, do not apply to an administration of the estate of a person dying insolvent under s. 125 of the Act. There is no power in cases of such administration, either under s. 27 or under r. 58 (Bankruptcy Rules, 1883), to summon a person to be examined for the purpose of discovery of the deceased debtor's estate. *Hewitt, Ex parte, Hewitt, In re*, 15 Q. B. D. 159; 54 L. J., Q. B. 402; 53 L. T. 156; 2 M. B. R. 184—D.

Avoidance of Voluntary Settlements.]—Section 47 of the Bankruptcy Act, 1883, which avoids certain voluntary settlements executed by a bankrupt, does not apply to the administration of the estate of a deceased insolvent by the court of bankruptcy under s. 125 of the Act. *Official Receiver, Ex parte, Gould, In re*, 19 Q. B. D. 92; 56 L. J., Q. B. 333; 56 L. T. 806; 35 W. R. 569; 4 M. B. R. 202—C. A.

Savings Bank Officer—Priority.]—The actuary of a savings bank died insolvent, owing the bank money received in his capacity of actuary:—Held, that in an action in the Chancery Division for the administration of the actuary's estate the bank would be entitled to priority by virtue of s. 14 of the Savings Banks Acts, 1863; but that s. 40 of the Bankruptcy Act, 1883, takes away the right to such priority in bankruptcy proceedings. Section 125 of the Bankruptcy Act, 1883, discussed. *Williams, In re, Jones v. Williams*, 36 Ch. D. 573; 57 L. J., Ch. 264; 57 L. T. 756; 36 W. R. 34—North, J.

Landlord's Claim for Rent—What Arrears.]—Upon the construction of ss. 42 and 125 of the Bankruptcy Act, 1883, an order obtained in the Chancery Division by a creditor for administration of a deceased debtor's estate, not followed by any proceedings in bankruptcy, is not equivalent to or included in the term "order of adjudication" (s. 42) so as to limit the power of the landlord, or other person to whom rent is due from the deceased person's estate, to recover by distress one year's rent only accrued due prior to the date of the administration order. *Fryman's Estate, In re, Fryman v. Fryman*, 38 Ch. D. 468; 57 L. J., Ch. 862; 58 L. T. 872; 36 W. R. 631—Chitty, J.

BARRISTER.

Conduct of Action—Authority to Compromise.]—On the trial of an action for malicious prosecution, the defendant's counsel, in the absence of the defendant and without his express authority, assented to a verdict for the plaintiff for 350*l.* with costs upon the understanding that all imputations against the plaintiff were withdrawn:—Held, that this settlement was a matter which was within the apparent general authority of counsel, and was binding on the defendant.

Matthews v. Munster, 20 Q. B. D. 141; 57 L. J., Q. B. 49; 57 L. T. 922; 36 W. R. 178; 52 J. P. 260—C. A.

— **Undertaking not to Appeal.**—Counsel has authority to undertake on behalf of his clients not to appeal, and not the less so after the judge has given judgment on the merits. *West Devon Great Consols Mine, In re*, 38 Ch. D. 51; 57 L. J., Ch. 850; 58 L. T. 61; 36 W. R. 342—C. A.

Admission of Facts—Proof dispensed with.—At the trial of an action counsel for one of the parties made an admission that an order made by the Court of Session in Scotland, nominating the curator of a lunatic subscriber to the Customs Annuity and Benevolent Fund on behalf of the lunatic as “nominee,” had the same effect as if it had been a nomination made by the subscriber himself (being sane), but the judge did not consider himself bound by that admission, and held that the Scotch court had no jurisdiction to appoint a “nominee” on behalf of the lunatic subscriber:—Held, that as the question of the jurisdiction of the Scotch court to make such an order was a question of fact, proof of which, like proof of other facts, might be dispensed with by the admission of counsel, the judge was wrong in going into that question. *Urquhart v. Butterfield*, 37 Ch. D. 357; 57 L. J., Ch. 521; 57 L. T. 780; 36 W. R. 376—C. A.

Jurisdiction of Court to Commit—Untrue Affidavits.—On a motion to commit a barrister and counsel in a case to prison for contempt of court, the court held that it is the barrister's duty when he knew affidavits were about to be used which amounted to chicanery to disclose the fact, and that his fault did not consist in not throwing up his brief, but in having made himself a party to a fraud, by conspiring with others in inducing a person to make these affidavits, which were used to delude the court. *Linwood v. Andrews*, 58 L. T. 612—Kay, J.

In Canada—Recovering Fees—Petition of Right.—According to the law of Quebec, a member of the bar is entitled, in the absence of special stipulation, to sue for and recover on a quantum meruit in respect of professional services rendered by him, and may lawfully contract for any rate of remuneration which is not contra bonos mores, or in violation of the rules of the bar. Where a member of the bar of Lower Canada (Quebec) was retained by the government as one of their counsel before the Fisheries Commission sitting in Nova Scotia:—Held, that in absence of stipulation to the contrary, express or implied, he must be deemed to have been employed on the usual terms according to which such services are rendered, and that his status in respect both of right and remedy was not affected either by the *lex loci contractus* or the *lex loci solutionis*. *Kennedy v. Brown* (13 C. B., N. S. 677) commented upon. *Reg. v. Doutre*, 9 App. Cas. 745; 53 L. J., P. C. 84; 51 L. T. 669—P. C.

Held, further, that the Petition of Right (Canada) Act, 1876, s. 19, sub-s. 3, does not in such case bar the remedy against the Crown by petition. *Id.*

BASTARDY.

Service of Summons—“Last Place of Abode.”—A bastardy summons was on the 18th May left at the house of a baker at Sunbury, in whose employ the defendant had been from the 25th September previous to the 20th April, when he went to Southampton and took lodgings there, but left certain effects at the former place until the 14th May, when he removed them. On the 19th May he sailed for the West Indies with a ship on which he had obtained a situation:—Held, that the summons was left at his last place of abode within the meaning of the 4th section of the Bastardy Laws Amendment Act, 1872, and that the justices had therefore jurisdiction on the hearing of it to make an order against him in his absence. *Reg. v. Lee*, 58 L. T. 384; 36 W. R. 415; 52 J. P. 344—D.

A bastardy summons was taken out on 8th October, and served on the defendant by being left at the house of the defendant's father where the defendant had lived for some years, but the father stated to the constable who served the summons that his son had gone away and that he did not know where he was. The defendant afterwards made an affidavit, in which he said that in September he left his father's house as he had found employment with a farmer at Gloucester, that he had no intention of returning, and that from 26th September to 12th May he had lived continuously in lodgings where he was employed, and that he knew nothing of the summons until he saw a report of it in a newspaper:—Held, by Manisty, J., that his father's house was “the last place of abode” of the defendant and that the service was good, following *Reg. v. Higham* (7 E. & B. 557), but held by Stephen, J., that the defendant's “last place of abode” was at Gloucester, and that the service at the father's house was bad, following *Reg. v. Evans* (19 L. J., M. C. 151). *Reg. v. De Winton*, 59 L. T. 382—D. See *S. C.* in C. A., 53 J. P. 292.

— **In Scotland—Jurisdiction of Justices.**—The Summary Jurisdiction (Process) Act, 1881 (44 & 45 Vict. c. 24), does not enable a bastardy summons to be issued by justices in England and served in Scotland upon the putative father domiciled and resident in Scotland; and if a summons is so served and the putative father does not appear before the justices they have no jurisdiction to make a bastardy order against him. *Berkley v. Thompson*, 10 App. Cas. 45; 54 L. J., M. C. 57; 52 L. T. 1; 33 W. R. 525; 49 J. P. 276—H. L. (E.).

Evidence—Power to compel Witnesses to Answer.—By 7 & 8 Vict. c. 101, s. 70, justices may, at the request of any party to bastardy proceedings before them, summon any person to appear and give evidence upon the matter of such proceedings, and if the person summoned neglect or refuse to appear, the justices, by warrant, may require such person to be brought before them or any justices before whom such proceedings are to be had, “and if any person coming or brought before any such justice in any such proceedings refuse to give evidence thereon,” the justices may commit such person to the house of correction:—Held (A. L. Smith, J., dissenting), that the power to commit extended

to any witness, and was not confined to witnesses who appeared in answer to a summons or warrant. *Reg. v. Flavell*, 14 Q. B. D. 364; 52 L. T. 133; 33 W. R. 343; 49 J. P. 406—D.

Order—Defect in issue of Summons—Waiver.]

—By the 3rd section of the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), any single woman who may be with child, or who may be delivered of a bastard child, may, within the time therein specified, making application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, "and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty sessions to be holden, after the expiration of six days at least, for the petty sessional division, city or borough, or other place in which such justice usually acts." On the 15th of January, 1884, a single woman made application under this section to a justice, who thereupon issued a summons to the putative father to appear on the 1st of February. On that day, the putative father objected to the summons, on the ground that it was not duly served, and thereupon another justice issued a fresh summons, returnable on the 15th February. On that date the case was heard on its merits, no objection being taken to the summons, and an order was made on the putative father for payment of 5s. per week :—Held, on rule for certiorari, that the issuing of the summons by a justice of the peace, other than the justice to whom the application was made, was an irregularity waived by the appearance of the putative father, and his failing to take the objection at petty sessions, and not an illegality nullifying the order. *Reg. v. Fletcher*, 51 L. T. 334; 32 W. R. 828; 48 J. P. 407—D.

No Application by Mother within a Year—

Order obtained by Guardians.]—On the 3rd August, 1883, the respondent, an inmate of the workhouse of the parish of S., gave birth to a bastard child. On the 26th July, 1884, while she was still an inmate of the S. workhouse with her child, the guardians of the said parish applied for a bastardy summons against the appellant as the putative father of the child, and on the 11th August, 1884, an order was made against the appellant, adjudging him to pay a weekly sum towards the relief of the child. On the 1st September, 1884, the appellant paid two several sums to the guardians under the said order, but at no other time made any payment either to the guardians or to the respondent. Subsequently the respondent discharged herself and her child from the workhouse, so that the child became no longer chargeable to the parish. On the 8th December, 1884, the respondent applied for a bastardy summons against the appellant. The summons was heard on the 22nd December, and the appellant appeared and contended that the order could not be made, as the respondent was too late in her application. The magistrate made the order :—Held, that the magistrate had no jurisdiction to make the order, as the order obtained by the guardians could not be treated as though obtained by the mother, whose application on her own behalf was not made until more than twelve months after the birth of the child, and was consequently out of

time. *Billington v. Cyples*, 52 L. T. 854; 49 J. P. 582—D.

Dismissal of Application on the Merits—Res judicata.]—The mother of a bastard child, whose applications at petty sessions for a summons against the putative father are dismissed, may within twelve months of the birth of the child renew such application any number of times; and a dismissal on the merits of an application is no bar to the jurisdiction of the justice to entertain a fresh application. *Reg. v. Hall*, 57 L. T. 306—D.

Appeal to Quarter Sessions—Form of Notice of.]—An appeal to sessions against an order made on a bastardy summons can, since the passing of the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), only be brought subject to the conditions and regulations contained in the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). The notice of appeal must therefore state the general grounds of appeal as required by s. 31, sub-s. 2, of that act. *Reg. v. Shingler*, or *Shingler v. Smith*, 17 Q. B. D. 49; 55 L. J., M. C. 147; 54 L. T. 759; 34 W. R. 490; 51 J. P. 152—D.

BEER-HOUSE AND BEER-SHOP.

See INTOXICATING LIQUORS.

BENEFICE.

See ECCLESIASTICAL LAW.

BENEFIT SOCIETY.

See FRIENDLY SOCIETY.

BETTING.

See GAMING.

BIGAMY.

See CRIMINAL LAW.

BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES.

- I. FORM AND OPERATION OF, 215.
- II. THE CONSIDERATION, 216.
- III. PARTIES TO, 217.
- IV. CHEQUES, 218.
- V. INDORSEMENT AND TRANSFER, 220.
- VI. ACCEPTANCE, 221.
- VII. PRESENTMENT, 221.
- VIII. PAYMENT—EFFECT OF, AS PAYMENT, 221.
- IX. ACTIONS ON.
 1. *Statute of Limitations*, 222.
 2. *Damages*, 223.
- X. APPROPRIATION OF PROPERTY. — See BANKRUPTCY (PROPERTY).
- XI. SENDING WITH BILLS OF LADING.—See SHIPPING (BILLS OF LADING).
- I. FORM AND OPERATION OF.

When Negotiable.—A bill of exchange was drawn on the Bank of England for 7,000*l.* "which sum is on account of the dividends and interest due on the capital and deeds registered in the books of the " bank in the names of C. and B., "which you will please charge to my account and credit according to a registered letter I have addressed to you":—Held, that the bill was negotiable. *Boyse, In re, Crofton v. Crofton, infra.*

Agreement or Promissory Note.—A policy of assurance providing for payment of 100*l.* on the 18th of May, 1867, or, upon notice by the assured, of the surrender value of his policy as on the 18th of May last preceding notice to surrender, such value to be fixed according to specified tables, is chargeable with the stamp duty of 6*d.* as an agreement, and not with the stamp duty of 1*s.* as a promissory note for 100*l.* *Mortgage Insurance Corporation v. Inland Revenue Commissioners*, 21 Q. B. D. 352; 57 L. J., Q. B. 630; 36 W. R. 833—C. A. Affirming 58 L. T. 766—D.

At the trial of an action to recover money alleged to be due under an agreement, the plaintiff put in evidence (inter alia) the following document:—"I, J. Dawe, promise to pay J. Yeo on his signing a lease . . . the sum of 150*l.*—J. Dawe." The document, which bore a penny stamp, was stamped at the trial as an agreement. The plaintiff alleged that it embodied the result of previous negotiations in reference to a lease. The defendant alleged that the document was a promissory note within s. 49 of the Stamp Act, 1870. A verdict was given for the plaintiff, and it being doubtful whether there was evidence of the agreement, he was left to move for judgment:—Held (diss. Bowen, L.J.), that the document was not a promissory note within the

meaning of s. 49 of the Stamp Act, 1870, inasmuch as that act does not apply to a document which is neither given nor accepted as a promissory note and is not in fact such a note. *Yeo v. Dawe*, 53 L. T. 125; 33 W. R. 739—C. A.

Per Bowen, L.J. The section applies to every document which substantially comprises an effective promise to pay. *Ib.*

Stamping.—Section 51, sub-s. 2, of the Stamp Act, 1870, includes bills payable on demand. Therefore a bill drawn in France on the Bank of England was properly stamped by the holder affixing to it and cancelling a penny adhesive stamp. *Boyse, In re, Crofton v. Crofton*, 33 Ch. D. 612; 56 L. J., Ch. 135; 55 L. T. 391; 35 W. R. 247—North, J.

As Donatio Mortis Causa.—See WILL.

II. THE CONSIDERATION.

Debt in Præsentia payable in Futuro.—The existence of an agreement by which A. has undertaken, for good consideration, to pay B. a sum of money at a stipulated time, is a good consideration for a promissory note for the same sum given by A. to B., and payable on demand. Upon a dissolution of partnership, an agreement was entered into, which, after reciting that one of the partners had brought 2,000*l.* into the business, provided that the other partner should pay him that sum within three years, with interest at five per cent., in full satisfaction of all his share in the stock, credits and effects of the partnership, and should indemnify him against the debts of the partnership. Subsequently, a promissory note for the same 2,000*l.*, payable on demand, was given to the retiring partner:—Held, that there was a sufficient consideration for the note. *Stott v. Fairlamb*, 53 L. J., Q. B. 47; 49 L. T. 525; 32 W. R. 354—C. A.

Renewal of Promissory Note.—A promissory note was made by the defendant in favour of the plaintiff, and the jury found that there was no consideration for that note. The note had been renewed from time to time during a period of two years for an increased amount at each renewal without any further pecuniary or tangible consideration actually passing. An action was brought on the last note so made:—Held, that such note was void for want of consideration. *Forman v. Wright* (11 C. B. 481) and *Southall v. Rigg* (11 C. B. 481), followed. *Edwards v. Chancellor*, 52 J. P. 454—D.

Note given for Gambling Transactions—Indorsement.—The plaintiff brought an action to recover the amount due on two promissory notes given by the defendant to B. in respect of certain gambling transactions on the Stock Exchange, and indorsed over by B. to the plaintiff for valuable consideration:—Held, that the plaintiff's right to recover was not affected by the fact that he had notice of the notes having been given by the defendant to B. in respect of gambling transactions, the consideration for the notes not being illegal, but falling only within the category of void contracts under 8 & 9 Vict. c. 109. *Lilley v. Rankin*, 56 L. J., Q. B. 248; 55 L. T. 814—D.

Validity—Security for Sums secured by void

Bill of Sale.—The defendant gave the plaintiffs a bill of sale of personal chattels to secure the repayment of a sum of money and interest; and at the same time, and as part of the same transaction, gave them his promissory note for the payment of the same sum and interest by instalments of the same amounts, and to be paid on the same days, as provided by the bill of sale. The promissory note also stipulated that in the event of any of the instalments falling into arrear the whole amount outstanding should immediately become due and payable. In an action on the promissory note :—Held, that, though the stipulation in the promissory note rendered the bill of sale void, the promissory note was good, and the plaintiffs were entitled to recover. *Monetary Advance Company v. Cater*, 20 Q. B. D. 795; 57 L. J., Q. B. 463; 59 L. T. 311—D.

III. PARTIES TO.

Drawn on Partnership—Acceptance by Firm and one Partner.—A bill of exchange was drawn against a firm of B. & Co. B., one of the partners, accepted the bill, signing the name of the firm "B. & Co.," and adding his own underneath. B. died, and the holder of the bill took out an originating summons for the administration of B.'s estate, on which an order was made for the administration of the estate, distinguishing the separate from the partnership debts :—Held, that the acceptance of the bill was the acceptance of the firm, and that the addition of B.'s name did not make him separately liable. And, it having been proved that B.'s estate was insufficient for the payment of his separate debts, and therefore that no part would be available for payment of the partnership debts, the summons was dismissed. *Barnard, In re, Edwards v. Barnard*, 32 Ch. D. 447; 55 L. J., Ch. 935; 55 L. T. 40; 34 W. R. 782—C. A.

Acceptance in Name of Individual—Authority to accept.—The defendant, a partner in a firm of C. Brothers, agreed with her co-partner that the partnership should be dissolved, that the affairs of the firm should be liquidated by an agent, who should realise the assets, and pay the creditors, and that the business should thereafter be carried on by the defendant. The defendant and the agent opened a joint banking account, and requested the bank to honour drafts signed by either of them. Cheques were drawn on the joint account, signed by the agent in the names of the defendant and himself, and bills were drawn on C. Brothers, and accepted by the agent in the names of the defendant and himself, and honoured. The defendant knew nothing of these cheques and bills. The plaintiff sued as indorsee for value of a bill of exchange, drawn on C. Brothers, accepted by the agent in the names of himself and the defendant, and made payable at the bank where the joint account was opened :—Held, that the agent had no authority to accept the bill in the defendant's name, so as to bind her, and that, not being a partner in the firm of C. Brothers, he had no authority to accept bills drawn on the firm, and the defendant was not liable. *Kirk v. Blurton* (9 M. & W. 284) commented on and distinguished. *Odell v. Cormack*, 19 Q. B. D. 223—Hawkins, J.

Retired Partner—Compromise of Actions.—

The defendant was a partner in the firm of G. & Co. from 1st January to 30th June, 1885, and no notice was given to the plaintiff of his retirement. Between those dates the plaintiff discounted an acceptance indorsed by G. & Co., which was dishonoured. The plaintiff sued G. & Co. for the amount, and G. & Co. brought a cross-action against the plaintiff for recovery of the bill. Both actions were stayed by order of the court on G. & Co. giving to the plaintiff a second acceptance for the amount of the first and 10% for costs, and the plaintiff giving up certain securities for the debt which were in his possession. The second acceptance was dishonoured, and the plaintiff sued the defendant upon it as a member of the firm of G. & Co. :—Held, that the defendant was not liable, as the bill of exchange was given in settlement of legal proceedings, which involved a give-and-take between the parties, and was made without his knowledge or consent. *Crane v. Lewis*, 36 W. R. 480—Denman, J.

Directors—Bills accepted ultra vires.—A bill of exchange payable to order and addressed to the B. & I. Co., which was incorporated under local acts and had no power to accept bills, was accepted by the defendants, who were two of the directors of the company, and also by the secretary, as follows :—"Accepted for and on behalf of the B. & I. Co., G. K., F. S. P., directors—B. W., secretary." The bill was so accepted and given by the defendants to the drawer, the engineer of the company, on account of the company's debt to him for professional services, and although he was told by the defendants that they gave him the bill on the understanding that he should not negotiate it, but merely as a recognition of the company's debt to him, as the company had no power to accept bills, yet the defendants knew that he would get it discounted, and they meant that he should have the power of doing so. The bill was indorsed by the drawer to the plaintiffs for value, and without notice of the understanding between him and the defendants :—Held, that the defendants were personally liable, as by their acceptance they represented that they had authority to accept on behalf of the company, which being a false representation of a matter of fact and not of law, gave a cause of action to the plaintiffs, who had acted upon it. *West London Commercial Bank v. Kitson*, 13 Q. B. D. 360; 53 L. J., Q. B. 345; 50 L. T. 656; 32 W. R. 757—C. A. Affirming 47 J. P. 824—D.

IV. CHEQUES.

Negotiability — Holders for Value.—A banker's draft or cheque is substantially a bill of exchange, attended with many, though not all the privileges of such a document; and both in England and Scotland it is regarded as a negotiable instrument; consequently the holder, to whom the property in it has been transferred for value, either by delivery or by indorsation, is entitled to sue upon it if upon due presentation it is not paid. *M'Lean v. Clydesdale Banking Company*, 9 App. Cas. 95; 50 L. T. 457—H. L. (Sc.)

Per Lord Blackburn: The definition given in s. 3 of the Bills of Exchange Act, 1882, embraces

in it a cheque, and that act is declaratory of the prior law. *Ib.*

On a Saturday A. gave a cheque on his account with the bank of S. in favour of B. for inter alia 250*l.*, crossed in blank. On the same day B. indorsed the cheque, and paid it into the bank of C., of which he was a customer. The bank of C., immediately on the receipt of the cheque carried the amount to B.'s credit, and thus reduced a debit balance standing against him. On the Monday following A. stopped payment of the cheque at the bank of S., consequently when the bank of C. presented it, payment was refused. The bank of C. sued A. in the sheriff's court for the amount. On appeal, the court of session found that the cheque was given to B. to reduce the balance at his debit with the bank of C.; that A. agreed the cheque should be so used; and that in pursuance of that agreement the cheque was indorsed to the bank of C., and given to them as cash, and the contents being put to B.'s credit the balance of his debit was thereby reduced:—Held, that in accordance with *Machay v. Dick* (6 App. Cas. 262), this house was limited to the finding of the court of session and the record; that the findings in fact were distinct, intelligible, and within the record; that it followed from them as a matter of law that the bank of C. were onerous holders of the cheque, and therefore the bank of S., not having paid the cheque on demand, the court below was right in holding that A. was liable. *Currie v. Misa* (10 L. R., Ex. 153; 1 App. Cas. 554) commented on. *De la Chaumette v. Bank of England* (9 B. & C. 208) explained. *Ib.*

Crossed—Unauthorized Signature per pro—Liability of Collecting Bankers.—The plaintiffs employed a traveller, who was to remit all cash, bills, and cheques to the plaintiffs every week. The traveller afterwards opened an account at the defendants' bank, and paid into this account, without the sanction or knowledge of the plaintiffs, seven cheques received by him on account of the plaintiffs and payable to the plaintiffs or order. These cheques were indorsed by the traveller "per pro B. & Co., H. S.," without authority. The defendants, without inquiry as to the traveller's authority to indorse, and with knowledge of his position, received the cheques as cash, and placed them at once to the traveller's credit. Six of these cheques were drawn on other bankers than the defendants, three of these being crossed "and Co." when received by them, and three being uncrossed. These six cheques were crossed by the defendants with the name of their London agents for collection. The seventh cheque was drawn upon the defendants themselves, and was not crossed. The traveller afterwards absconded with the proceeds of these cheques:—Held, in an action by the plaintiffs to recover the proceeds of these seven cheques, that the defendants were not protected by s. 82 of the Bills of Exchange Act, 1882, because, as regards the six cheques not drawn on the defendants, they had not received payment "without negligence." Held, also, that as regards the cheque drawn on the defendants themselves, they were protected by 16 & 17 Vict. c. 59, s. 19, because they had paid the cheque within the meaning of that section. *Bissell v. Fox*, 53 L. T. 193—C. A. Varying 1 C. & E. 395—Denman, J.

V. INDORSEMENT AND TRANSFER.

Of Cheques.—See *supra*.

Indorsement—What is.—The fact that one person writes his name on the back of a bill of exchange and hands it to another, does not necessarily constitute the former an indorser. *Westacott v. Smalley*, 1 C. & E. 124—Williams, J.

Liability of Indorser—Action by Drawer.—The rule that a drawer of a bill of exchange cannot sue an indorser, only applies where circuity of action would otherwise arise. Where the contract between a creditor, debtor and surety is embodied in a bill of exchange, in an action by the creditor against the surety on the bill, no other evidence save the bill is required to satisfy the Statute of Frauds if the obligation revealed on the face of the bill is the precise obligation the surety has agreed to undertake. *Holmes v. Durkee*, 1 C. & E. 23—Williams, J.

— **By Partner to Firm as Indorsees.**—No action will lie by a firm as indorsees of a bill of exchange against their indorsers if a member of the plaintiffs' firm be one of the indorsers. *Foster v. Ward*, 1 C. & E. 168—Williams, J.

— **Contribution inter se.**—The liabilities inter se of successive indorsers of a bill or note must in the absence of all evidence to the contrary be determined according to the ordinary principles of the law merchant, whereby a prior indorser must indemnify a subsequent one. But the whole circumstances attendant upon the making, issue and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it either as makers or indorsers; and reasonable inferences derived from these facts and circumstances are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law merchant would otherwise assign to them. *Macdonald v. Whitfield*, 8 App. Cas. 733; 52 L. J., P. C. 70; 49 L. T. 446; 32 W. R. 730—P. C.

Where the directors of a company mutually agree with each other to become sureties to the bank for the same debts of the company, and in pursuance of that agreement successively indorsed three promissory notes of the company:—Held, that they were entitled and liable to equal contribution inter se, and were not liable to indemnify each other successively according to the priority of their indorsements. *Reynolds v. Wheeler* (10 C. B., N. S. 561) approved. *Steele v. McKinlay* (5 App. Cas. 754) distinguished. *Ib.*

Foreign Indorsement—Acceptor Disputing Liability.—Bills of exchange were drawn in France by a domiciled Frenchman in the French language, in English form, on an English company, who duly accepted them. The drawer indorsed the bills and sent them to an Englishman in England:—Held, that the acceptor could not dispute the negotiability of the bills by reason of the indorsements being invalid according to French law. *Marseilles Extension Railway and Land Company, Smallpage and Brandon, In re*, 30 Ch. D. 598; 55 L. J., Ch. 116—Pearson, J.

For Collection—Rights against Acceptor.]—A person to whom a bill is restrictively indorsed for collection, who has paid the amount of such bill to the indorser, cannot, by reason of such payment, acquire rights on the bill against the acceptor where the amount of the bill has been paid to the indorser before maturity. *Williams v. Shadbolt*, 1 C. & E. 529—Cave, J.

VI. ACCEPTANCE.

In Blank—Right to fill up Drawer's Name after Death of Acceptor.]—A bill of exchange accepted for valuable consideration, with the drawer's name left blank, may be completed by the drawer's name being added after the death of the acceptor. A debtor gave his creditor a bill of exchange accepted by himself, but with the drawer's name left blank. The plaintiff at the same time, as a surety, deposited with the creditor certificates of stock in a joint stock company as collateral security for the debt. The debtor died without the creditor having filled in the name of the drawer, and his estate was insolvent. The bill was never presented for payment, nor was notice given to the plaintiff of its non-payment.—Held, that the creditor had not discharged the plaintiff from his suretyship by his omission to fill up the drawer's name and to give notice of the non-payment of the bill to the plaintiff. *Carter v. White*, 25 Ch. D. 666; 54 L. J., Ch. 138; 50 L. T. 670; 32 W. R. 692—C. A.

VII. PRESENTMENT.

Dispensing with.]—The drawer of a bill, after its maturity, wrote a letter to the holder in the following terms: "I accept notice of non-payment of my draft, and admit my liability to you therein in every manner as though the same had been given in a regular way." The bill in question had not in fact been presented for payment, but of this the drawer, when he wrote the letter, was ignorant.—Held, that there had been no dispensation by the drawer of the consequences of non-presentment for payment. *Keith v. Burke*, 1 C. & E. 551—Pollock, B.

Delay.]—A bill was drawn by B. in 1872 on the Bank of England. She had no account with the Bank of England; she had Government securities on which large dividends were due; the bill was presented for payment in 1880, after her death.—Held, that the delay in presentment did not release her estate, as she had no reason when she drew the bill to believe that the bill would be paid if presented. *Boyse, In re, Crofton v. Crofton*, 33 Ch. D. 612; 56 L. J., Ch. 135; 55 L. T. 391; 35 W. R. 247—North, J.

VIII. PAYMENT—EFFECT OF, AS PAYMENT.

Payment—Accommodation Bill.]—The rule that payment by the drawer of a bill of exchange to the holder does not discharge the holder's claim against the acceptor, does not apply where the bill has been accepted for the accommodation of the drawer. *Solomon v. Davis*, 1 C. & E. 83—Stephen, J.

Effect of, as Payment—Conditional Payment of Debt.]—Within seven days after the service of a bankruptcy notice the debtor gave to the creditor a promissory note, payable two months after date, for the amount of the debt, which note the creditor accepted.—Held, that the note being a conditional payment of the debt, the creditor could not, during the currency of the note, avail himself of the bankruptcy notice to obtain a receiving order against the debtor. *Matthew, Ex parte, Matthew, In re*, 12 Q. B. D. 506; 51 L. T. 179; 32 W. R. 813; 1 M. B. R. 47—C. A.

—Duty to stop Cheque.]—Where a debtor draws a cheque in payment of a debt, which cheque is duly honoured and paid, there is no debt owing or accruing from debtor to creditor between the giving of the cheque and payment thereof. There is no duty upon the debtor who is served with a garnishee order nisi between such dates to stop payment of the cheque. *Ellwell v. Jackson*, 1 C. & E. 362—Denman, J.

Of part of Account—Cheque to Balance Account—Cheque retained "on Account."]—A. sent B. a "cheque to balance account as per enclosed statement." The enclosed statement debited B. with a sum claimed on account of defects in work done. B. replied, acknowledging the receipt of the cheque "on account." and shortly afterwards sent A. a statement of account, omitting the sum claimed by A. for defective work, and debiting A. with a small sum for discount not allowed in his account, and, in the accompanying memorandum, said: "We would thank you for a remittance of the balance, or we shall be obliged to take proceedings to recover same." A. replied, sending a cheque for the discount claimed. B. kept and cashed the cheques. In an action for the balance, B. was nonsuited on the ground that having taken and cashed the first cheque, he was bound to apply it according to A.'s intention.—Held, that the nonsuit was wrong. *Ackroyd v. Smithies*, 54 L. T. 130; 50 J. P. 358—D.

IX. ACTIONS ON.

1. STATUTE OF LIMITATIONS.

When Time begins to run.]—B. in March, 1878, gave P. a cheque for 100*l.*, which was accepted by P. in discharge of a larger sum; in 1885, P. made a claim against B.'s estate in respect of this cheque. B. had not at the time of drawing the cheque sufficient moneys at his bank to meet it, and was negotiating a loan, which he expected shortly to complete, out of which the cheque would be paid. The loan was not completed. P. was informed of that fact. The cheque remained undated, and was never presented for payment.—Held, that the Statute of Limitations barred the claim, as the six years began to run when the letter was received stating that the loan would not be completed, and had long since elapsed. *Bethell, In re, Bethell v. Bethell*, 34 Ch. D. 561; 56 L. J., Ch. 334; 56 L. T. 92; 35 W. R. 330—Stirling, J.

In 1872, B. drew a bill of exchange at sight to her own order; she lived from that time to her death in 1878 at Marseilles with G., as his wife;

she indorsed the bill to G. In 1876, G. indorsed it to C. The bill was presented for payment in 1880:—Held, that time did not begin to run for the purpose of barring the right of action on the bill till presentation. *Boyse, In re, Crofton v. Crofton*, 33 Ch. D. 612; 56 L. J., Ch. 135; 55 L. T. 391; 35 W. R. 247—North, J.

2. DAMAGES.

Bill drawn Abroad on Acceptor in England—Bankruptcy of Acceptor—Proof by Drawer for Re-exchange.—Notwithstanding the provisions of s. 57 of the Bills of Exchange Act, 1882, the drawer of a foreign bill of exchange upon an acceptor in England is entitled, upon the bill being dishonoured and protested, to recover from the acceptor damages in the nature of re-exchange, which the drawer is by the foreign law liable to pay to the holder of the bill. And, under s. 37 of the Bankruptcy Act, 1883, the drawer, though he has not paid these damages, can prove in the bankruptcy of the acceptor in respect of his contingent liability to pay them. *Roberts, Ex parte, Gillespie, In re*, 18 Q. B. D. 286; 56 L. J., Q. B. 74; 56 L. T. 599; 35 W. R. 128—C. A.

—Dishonour for non-acceptance—Rights of Holder—Rate of Interest.—The A. Bank in 1886 drew two bills in Adelaide upon their London branch for 15,000*l.* and 20,000*l.* at sixty days after sight in favour of the B. Bank at Sydney. The bills were presented on the 1st and 23rd March, but acceptance was refused. An order for the compulsory winding-up of the A. Bank was made in the colony of South Australia on 12th April, 1886, and a similar order was made in England on the 8th June. The B. Bank brought in a claim in the English winding-up for the amount of the bills, expenses of protest, and interest at 10 per cent. The amount of the bills and expenses of protest and interest at 5 per cent. was paid without prejudice to the B. Bank's claim for further interest. This was a new claim by the B. Bank for 5 per cent. additional interest, to make up the original 10 per cent. It was admitted that the assets of the A. Bank would be sufficient to pay all claims in full, and that bills dishonoured in South Australia had been paid in the Australian winding-up with interest at 10 per cent. The law of South Australia as to bills of exchange is codified by a statute which is in precisely the same words as the Bills of Exchange Act, 1882, except that the rate of interest allowed for a dishonoured bill in which no special rate is mentioned is 10 per cent. instead of 5:—Held, that the bills having been purchased in Adelaide, the rights of the B. Bank were governed by s. 57 of the Act No. 112 of 1884 of South Australia, which is the same as s. 57, sub-s. 2, of the English Act, and provides for the case of bills dishonoured abroad: that *Roberts, Ex parte* (18 Q. B. D. 286), is an authority that the holder of a bill dishonoured abroad is only entitled to re-exchange as provided by s. 57, sub-s. 2, and not to interest provided by s. 57, sub-s. 1: that the B. Bank was therefore not entitled to interest, and that it was impossible to treat the interest at 10 per cent. claimed by them as a fixed sum due by the custom of Australia instead of re-exchange. *Commercial Banking Co. of Sydney, Ex parte, Commercial Bank of South*

Australia, In re, 36 Ch. D. 522; 57 L. J., Ch. 131; 57 L. T. 395; 36 W. R. 550—North, J.

BILLS OF SALE.

I. REGISTRATION.

1. *What Documents require Registration*, 224.
2. *Rectification and Renewal of Registration*, 232.
3. *Local Registration*, 234.
4. *Description of Grantor and Witnesses*, 234.
5. *Other Points*, 236.

II. STATUTORY FORM.

1. *General Principles*, 236.
2. *Time of Payment*, 238.
3. *Property comprised in*, 240.
4. *The Sum secured*, 242.
5. *Power of Seizure*, 245.
6. *Power of Sale*, 247.
7. *Maintenance of the Security*, 249.
8. *Defeasance of the Security*, 253.

III. STATEMENT OF CONSIDERATION, 255.

IV. OTHER MATTERS RELATING TO.

I. REGISTRATION.

1. WHAT DOCUMENTS REQUIRE REGISTRATION.

Assignment of Ship or Vessel—Dumb Barge.

—A dumb barge, propelled by oars, plying on the River Thames and carrying goods, wares, and merchandise (without passengers) is a vessel within the exception of the Bills of Sale Acts, 1878 and 1882, which excepts from registration as a bill of sale transfers or assignments of a ship or vessel or any share thereof. *Gapp v. Bond*, 19 Q. B. D. 200; 56 L. J., Q. B. 438; 57 L. T. 437; 35 W. R. 683—C. A.

Apparent possession.—Sect. 8 of the Bills of Sale Act, 1878, is still in force as regards absolute bills of sale. "Apparent possession" in that section means, "apparently in the possession of," as distinguished from "actually in the possession of," and goods may at the same time be in the true and actual possession of one person and in the apparent possession of another. *Robinson v. Tucker*, 1 C. & E. 173—Williams, J. Affirmed in C. A.

The plaintiff having purchased from an execution debtor his business and stock-in-trade, retained the vendor in his service as salesman at weekly wages, but sent notice of the change of ownership to the defendant, the execution creditor, as well as to the vendor's customers, advertised it three times in the newspapers, and changed the name over the door of the shop. The deed of assignment by the vendor to the plaintiff of the business, &c., was not registered as a bill of sale:—Held, that the goods were not in the "apparent possession" of the vendor within the meaning of the Bills of Sale Act, 1878, and that, therefore, the deed of assignment

did not require registration. *Gibbons v. Hickson*, 55 L. J., Q. B. 119; 53 L. T. 910; 34 W. R. 140—D.

Declaration of Trust—"Goods at Sea."—T. on obtaining an advance from his bankers signed an hypothecation note by which he undertook to hold certain goods, which had been shipped to him, in trust for the bankers, and to hand over the proceeds when he received the amount of the advance:—Held, that this note was a bill of sale within the definition of the Acts of 1878 and 1882, as being a declaration of trust without transfer and liable to the registration provisions, but that, the goods not having arrived at the date of the execution, it came within the exception as to "goods at sea" contained in the same definition, and so was not affected by these provisions. *Reg. v. Townshend*, 15 Cox, C. C. 466—Day, J.

"Assignment for Benefit of Creditors"—Mortgage of Leasehold and Fixtures.—A mortgage of leasehold property, and by a separate operative part of all and all manner of mill gear, millwright work, plant of wheelwright's shop, fixed and moveable machinery and plant then being, or which at any time thereafter during the subsistence of the security should be thereon, is, unless registered, null and void under section 1 of the Bills of Sale Act, 1854, as against a trustee to whom the mortgagor has assigned all his estate and effects for the benefit of all such of his creditors as should elect to execute the same, such an assignment being "an assignment for the benefit of the creditors of such person" within the meaning of the section. *Paine v. Matthews*, 53 L. T. 872—D.

Building Agreement—Clause vesting Materials in Landowner.—An agreement by a clause in an ordinary building contract that all building and other materials brought by the builder upon the land shall become the property of the landowner, is not a bill of sale within the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31). *Brown v. Bateman* (2 L. R., C. P. 272), and *Blake v. Izard* (16 W. R. 108), followed. *Reeve v. Whitmore* (4 De G., J. & S. 1), and *Holroyd v. Marshall* (10 H. L. C. 191), distinguished. *Reeves v. Barlow*, 12 Q. B. D. 436; 53 L. J., Q. B. 192; 50 L. T. 782; 32 W. R. 672—C. A.

License to take possession of Chattels as Security for Debt.—A document giving a license to take immediate possession of goods as a security for a debt is a bill of sale within s. 4 of the Bills of Sale Act, 1878, and is, therefore, also a bill of sale within the Bills of Sale Act, 1882. And although it is, from its nature, impossible that it should be made in the form given in the schedule to the Act of 1882, such a license is void under s. 9 of that Act as substantially deviating from the prescribed form. The ratio decidendi of *Close, Ex parte* (14 Q. B. D. 386) and *Cunningham and Co., In re* (28 Ch. D. 682) disapproved. *Clark, Ex parte*, or *Parsons, Ex parte, Townsend, In re*, 16 Q. B. D. 532; 55 L. J., Q. B. 137; 53 L. T. 897; 34 W. R. 329; 3 M. B. R. 36—C. A.

A document which gives a license to take immediate possession of goods as a security for a debt is a bill of sale within the acts, although it cannot be framed according to the scheduled

form; and it is void as not being in the prescribed form. *Hilton v. Tucker*, 39 Ch. D. 669; 57 L. J., Ch. 973; 59 L. T. 172; 36 W. R. 762—Kekewich, J.

Pledge of Goods bought on Credit.—Whatever documents are included in the expression "bill of sale" as defined by the Bills of Sale Acts, they must still, by force of s. 3 of the Bills of Sale Act, 1878, be limited to documents "whereby the holder or grantee has power to seize or take possession of any personal chattels comprised in or made subject to such" document. The acts therefore do not include letters of hypothecation accompanying a deposit of goods or pawn tickets given by a pawnbroker or in fact any case where the object and effect of the transaction are immediately to transfer the possession of the chattels from the grantor to the grantee.—A trader, whose banking account was largely overdrawn, and who required a further advance of 500*l.*, deposited with his bank the invoice of goods bought by him on credit and consigned to him by rail, and gave the bank a delivery order directed to the railway company requiring the company to hold the goods to the order of the bank. The invoice showed that the goods were bought on credit. On arrival of the goods the company sent the usual advice note to the bank stating that they held the goods to the order of the bank. The 500*l.* was then advanced, and a minute of the transaction, stating the rate of interest on the advance, the terms on which the goods were to be redeemed, &c., was entered in the bank ledger and was signed by the trader and stamped. Eleven months afterwards the trader became bankrupt:—Held, that as the effect of the transaction was immediately to transfer the possession of the goods to the bank, the delivery order and minute did not require registration as a bill of sale, and that the title of the bank was good as against the trustee in bankruptcy. *Close, Ex parte, Hall, In re, infra*.

Document accompanying Pledge—Power of Sale.—A document signed by the borrower of money at the time of depositing goods as security for the loan with the lender, and containing the terms of repayment and a power of sale, is not a bill of sale within the meaning of the Bills of Sale Act, 1882. *Hubbard, Ex parte, Hardwick, In re*, 17 Q. B. D. 690; 55 L. J., Q. B. 490; 59 L. T. 172, n.; 35 W. R. 2; 3 M. B. R. 246—C. A.

Where goods are pledged and delivered to the pledgee, a document explaining the transaction and stating what are the rights of the pledgee is not a bill of sale within the acts. *Hilton v. Tucker, supra*.

Transfer in Course of Business.—Semble, a pledge by a trader of stock-in-trade which he has bought on credit, and not paid for, is not a "transfer in the ordinary course of business of his trade or calling," within the exception contained in s. 4 of the Bills of Sale Act, 1878. *Close, Ex parte, Hall, In re*, 14 Q. B. D. 386; 54 L. J., Q. B. 43; 51 L. T. 795; 33 W. R. 228—Cave, J.

Where Grantor a Joint Stock Company.—Bills of sale given by joint stock companies are within the Bills of Sale Act, 1882. *Cunningham & Co., In re, Attenborough's Case*, 28 Ch. D. 682; 54

L. J., Ch. 448; 52 L. T. 214; 33 W. R. 387—Pearson, J.

Dock Warrant—Possession given to Grantee.]

—Where a security on goods with possession is given, the security is valid without registration. A wharfinger's warrant was indorsed over to a lender with an accompanying memorandum of terms of security including a power of sale:—Held, that there was a good security which did not require registration. *Id.*

“Trade Machinery”—“Fixed Motive Powers and fixed Power Machinery.”—The effect of s. 5 of the Bills of Sale Act, 1878, is to prevent the articles which by it are excluded from the definition of “trade machinery” from being “personal chattels” for any of the purposes of the Act. Consequently, an assignment of certain “fixed motive powers and fixed power machinery” does not require registration, although such machinery is fixed to the surface only and separated by intervening strata from the minerals charged. *Topham v. Greenside Glazed Fire Brick Company*, 37 Ch. D. 281; 57 L. J., Ch. 583; 58 L. T. 274; 36 W. R. 464—North, J.

Mortgage of Land not mentioning Fixtures—Power of Sale.—The owner of land and buildings which he used for the purposes of his business, and in which there was fixed machinery belonging to him, being “trade machinery” within the meaning of the Bills of Sale Act, 1878, mortgaged them in fee without any general words or any reference to fixtures or machinery. By the mortgage deed it was agreed that the powers in s. 19 of the Conveyancing and Law of Property Act, 1881, should be exercisable without such notice as required by the act. After the death of the mortgagor, his creditors insisted that this mortgage was void as to the trade machinery under the Bills of Sale Acts, 1878 and 1882:—Held, that the mortgage was not an assignment of the trade machinery, since the trade machinery only passed by virtue of being affixed to the freehold, and that the deed did not, apart from the power of sale, give a power to seize or to take possession of the trade machinery as chattels, since the mortgagee could only take possession of them by taking possession of the freehold: that the power of sale did not authorize the mortgagee to sell the trade machinery apart from the freehold: and, therefore, that the instrument was not a bill of sale within the meaning of the acts, and gave a valid security on the trade machinery. *Yates, In re, Batcheldor or Batchelor v. Yates*, 38 Ch. D. 112; 57 L. J., Ch. 697; 59 L. T. 47; 36 W. R. 563—C. A.

Part of Machinery.—By an unregistered deed made in 1875, the owners of a mill mortgaged in fee to the plaintiffs the mill, together with all the engines, plant, machinery, and gear described in the schedule. The schedule included certain driving belts which connected the power machinery with certain machines which were so affixed as to be part of the realty. The machines could not be worked without the belts, which would only fit other machines of nearly the same size. These belts were passed round the shafting and then laced together, and could not be removed from the shafting without being unlaced. They could be slipped off the machines

when the machines and shafting were not in motion. The mortgage contained no power to the mortgagee to deal with the belts separately from the freehold. The defendant, a trustee in bankruptcy of one of the mortgagors, removed the belts. In an action against him by the plaintiffs to recover the value:—Held, that the belts being essential parts of the fixed machines, formed part of the realty, and as such passed under the mortgage deed, which, therefore, did not require registration under the Bills of Sale Act, 1854. *Longbottom v. Berry* (5 L. R., Q. B. 123) followed. *Sheffield and South Yorkshire Permanent Building Society v. Harrison*, 54 L. J., Q. B. 15; 51 L. T. 649; 33 W. R. 144—C. A.

Growing Crops.—By s. 6 of the Bills of Sale Act, 1882, a bill of sale is valid as to growing crops separately assigned:—Held, that this means separately from the land, and that a bill of sale which assigns growing crops together with other articles is valid. *Roberts v. Roberts*, 13 Q. B. D. 794; 53 L. J., Q. B. 313; 50 L. T. 351; 32 W. R. 605—C. A.

Attornment Clause—Mortgage.—By s. 6 of the Bills of Sale Act, 1878, “Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given, or agreed to be given, by any person to any other person by way of security for any . . . debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale within the meaning of this act, of any personal chattels which may be seized under such power of distress; provided, that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament, which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent”:—Held, that an attornment clause in a mortgage of land, whereby, by reason of the relation of landlord and tenant thereby created, a power of distress is given to the mortgagee as security for the payment of interest in arrear, is a bill of sale within s. 6, and that the proviso applies only to cases in which the mortgagee, having previously taken possession of the mortgaged premises, has demised them to the mortgagor, and not to a case where the demise is created by the mortgage deed itself. Dicta in *Hall v. Comfort* (18 Q. B. D. 11) disapproved. *Kennedy, Ex parte, Willis, In re*, 21 Q. B. D. 384; 57 L. J., Q. B. 634; 59 L. T. 749; 36 W. R. 793; 5 M. B. R. 189—C. A.

An attornment clause in a mortgage made by way of demise is not rendered void by the Bills of Sale Acts, 1878 and 1882. *Hall v. Comfort*, 18 Q. B. D. 11; 56 L. J., Q. B. 185; 55 L. T. 550; 35 W. R. 48—D.

Public-house—Power to Distrain for Moneys due for Goods supplied.—An agreement for the letting of a public-house, whereby the tenant agreed not to take or sell any malt liquors or mineral waters other than such as should be purchased of the landlord, contained a proviso that if during the tenancy any sum or sums of money should be due from the tenant to the landlords in respect of any malt liquors or

mineral waters supplied by them to him, and such sum or sums should remain unpaid for the space of twenty-four hours after a demand in writing for payment thereof had been left upon the premises, it should be lawful for the landlords to enter and distrain upon the premises in respect of the amount due, &c. :—Held, that the agreement required registration as a bill of sale. *Pulbrook v. Ashby*, 56 L. J., Q. B. 376; 35 W. R. 779—Denman, J.

“Assurance of personal Chattels” — Sale of Goods—Entry in Auctioneer’s Book.]—Where a contract for sale of goods within s. 17, of the Statute of Frauds is valid solely by virtue of a memorandum in writing, such memorandum is an assurance of personal chattels within the Bills of Sale Act, 1878. *Roberts, In re, Evans v. Roberts*, 36 Ch. D. 196; 56 L. J., Ch. 952; 57 L. T. 79; 35 W. R. 684; 51 J. P. 757—Kay, J.

At a sale of farm produce by auction, W. bought a stack of hay for 40*l.* 5*s.* The auctioneer’s clerk signed the name of W. as purchaser in the auctioneer’s book, which was also signed by the auctioneer, and contained a copy of the conditions of sale, and specified the lot and the price. No part of the purchase-money was paid, one of the conditions being that the purchaser was to have six months’ credit, and the whole of the hay remained on the premises of the vendor and in his apparent possession. The entry in the auctioneer’s book was not registered as a bill of sale under the Bills of Sale Act, 1878. The hay was seized in execution under a judgment obtained by creditors of the vendor :—Held, that as the sale would have been void under s. 17 of the Statute of Frauds but for the memorandum of the contract contained in the auctioneer’s book, such memorandum was an assurance and a bill of sale under the Bills of Sale Act, 1878, and therefore void as against the execution creditors for want of registration. *Id.*

Lien or Charge for Purchase-money.]—A testator, who died in 1867, bequeathed all his property to his wife and two other persons upon certain trusts, and appointed them his executors, and empowered them to carry on his business of a wine merchant, with a direction that, on his youngest son attaining twenty-one, his sons should successively have the option of purchasing the business upon certain terms. The widow alone proved the will, and carried on the business until 1873, when a suit was instituted to administer the estate, and the business was continued under the direction of the court. In December, 1880, the widow died, having by her will appointed J. (a son of the testator) and one C. her executors, who were then made defendants to the administration action. In March, 1880, the youngest son attained twenty-one, and shortly afterwards J. (the other sons not desiring to purchase) offered to purchase the business as from the 30th of November, 1880, for 10,329*l.* 18*s.* The offer was accepted and sanctioned by the court, and the arrangement was embodied in an agreement dated the 15th September, 1882, which provided for the payment of the purchase-money with interest at a future time, and contained a declaration that J. and C., or other the trustees of the will of the testator, should have a lien or charge upon the business and effects agreed to be sold for the purchase-money and

interest, and that if default should be made in payment of the purchase-money and interest at the time appointed, or if J. should become bankrupt, then the same might be recovered by the said trustees by action at law. From the date of this agreement J. carried on the business as his own until October, 1885, when he was adjudicated a bankrupt. At this time the purchase-money was unpaid, and there still remained in specie certain wines and office furniture, which formed part of the testator’s estate, and which were sold by arrangement with the trustee in bankruptcy for 632*l.* 18*s.* C. claimed this sum as representing trust chattels which he was entitled to follow :—Held, that under the agreement the property in the chattels passed to J.; that the clause in the agreement conferring a lien or charge for the purchase-money operated as a bill of sale within sects. 4, 8, of the Bills of Sale Act, 1878, and, not having been registered, was void as against J.’s trustee in bankruptcy; and therefore that C. was not entitled to the money. *Coburn v. Collins*, 35 Ch. D. 373; 56 L. J., Ch. 504; 56 L. T. 431; 35 W. R. 610—Kekewich, J.

“Receipt for Purchase-money.”]—Where a receipt was given for 80*l.* as the purchase-money of 60,000 bricks, which remained in the possession of the seller :—Held, a document needing registration under the Bills of Sale Act, 1878. *Snell v. Heighton*, 1 C. & E. 95—Grove, J.

—Document not constituting Contract.]—By the 3rd section of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), that Act applies to every bill of sale whereby the holder or grantee has power to seize or take possession of any personal chattels comprised in or made subject to such bill of sale, and by the 4th section the expression “bill of sale” shall include receipts for purchase moneys of goods. On the 4th March, 1884, A. paid B. 200*l.* for the purchase of his furniture, taking at the time of the purchase and payment a receipt for the purchase-money. The furniture remained in the possession of B. until the 15th March, 1884, when A. removed it to a warehouse, paying for the removal and warehousing. On the 26th March, A. again removed it to a house which she let to B. from the 29th March, together with the furniture therein. On the 14th November the furniture was taken in execution under a judgment obtained against B. in proceedings commenced in July :—Held, in an interpleader issue, that the purchase of the furniture being a bonâ fide transaction, the claimant had a good title thereto apart from the receipt, and the receipt was therefore not a bill of sale within the meaning of the 4th section of the Bills of Sale Act, 1878, and did not require attestation and registration thereunder. *Preece v. Gilling*, 53 L. T. 763—D.

Where, upon an oral agreement by which title to a personal chattel was given by way of security for an advance, the grantor of such chattel signed a “receipt” which was not intended to and did not express the contract between the parties :—Held, that such document, not being an assurance, was not a bill of sale within the 4th section of the Bills of Sale Act, 1878; and that, the grantee in possession of the chattel under such agreement being able to defend his possession without reference to such document, his title was not affected by the provisions of the

Bills of Sale Acts. *Newlove v. Shrewsbury*, 21 Q. B. D. 41; 57 L. J., Q. B. 476; 36 W. R. 835—C. A.

"Inventory with Receipt"—Transaction complete without Document.—By s. 4 of the Bills of Sale Act, 1878, it is provided that the "expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels." Furniture, which was the property of C., was deposited in a warehouse in the name of J., who paid the warehouse charges. C. subsequently agreed to sell the furniture to J. and R. for 55*l.*, and they sent C. a cheque for that amount. C. then sent them a list of the furniture, with a receipt written at the end, and the furniture was shortly afterwards sent to them from the warehouse, the delivery order to the warehouse being signed by J.:—Held, that there had been a perfect and complete transaction of purchase and sale, by which J. and R. acquired a good title to the furniture, independently of the list and receipt, and that the document, therefore, was not a bill of sale within the meaning of the Bills of Sale Act, 1878. *Shepherd v. Pulbrook*, 59 L. T. 288—C. A.

The goods of B. were seized by the sheriff under a writ of *fi. fa.*, issued by E., and were sold by private contract to E., who agreed to let them to B.'s wife on certain terms. On completion of the sale the sheriff gave E. an inventory of the goods, and a receipt for the purchase-money. These documents were not registered under the Bills of Sale Act, 1878. B. remained in possession of the goods, which were afterwards seized by the sheriff under a writ of *fi. fa.*, issued by H.:—Held, that E. had a good title to the goods independently of the inventory and receipt, that those documents did not constitute a bill of sale within the meaning of the Bills of Sale Acts, and that E. was entitled to the goods as against H. *Haydon v. Brown*, 59 L. T. 810—C. A.

Invoice and Receipt—Hire and Purchase Agreement.—The B. Company, being in want of money, and being in possession of certain waggons in which they had an interest, applied to the respondents, who agreed to buy the waggons for 1,000*l.*, and advanced that sum, 257*l.* thereof being paid to the owners of the waggons, and the rest, 743*l.*, to the B. Company. The respondents received from the B. Company an invoice for the waggons and a receipt for the 743*l.*, and from the owners of the waggons a receipt for the 257*l.* At the same time the respondents leased the waggons to the B. Company for three years, at a yearly rent, payable quarterly, and calculated to replace the 1,000*l.* with seven per cent. interest, upon the terms that if all the payments were duly made the B. Company should have the option of purchasing the waggons at the end of the lease for a nominal sum, and that if the rent was not duly paid after demand the respondents should be entitled to repossess and enjoy the waggons as in their former estate, and that the agreement should thereupon cease and determine. The B. Company having made default in payment of the rent, the respondents claimed the waggons from a railway company into whose possession they had come,

but were resisted on the ground that the transaction was void under the Bills of Sale Acts, 1878 and 1882, the documents not being in the form prescribed by those acts for bills of sale:—Held, that the transaction was in fact a purchase by the respondents, and was not a mortgage by the B. Company or a security for the payment of money; that the documents in question were not bills of sale within the Bills of Sale Acts, but that even if they had been the respondents had made an independent title to the waggons. *Manchester, Sheffield, and Lincolnshire Railway v. North Central Wagon Company*, 13 App. Cas. 554; 58 L. J., Ch. 219; 59 L. T. 730; 37 W. R. 305—H. L. (E.).

Hiring Agreement—Loan.—In June, 1886, R. sold the furniture in his house to W. for 100*l.*, who handed him a cheque for the money, but no receipt was given. Shortly afterwards, by an agreement in writing, W. agreed to let the furniture to R. until the 10th July then next, and R. agreed to pay a rent of 100*l.* for the use of it during the term, as follows:—1*l.* (interest) on the signing thereof, 50*l.* on or before the 25th June then next, and 50*l.* on or before the 10th July then next. On breach of any of the stipulations, W. was to have power to remove and sell the furniture:—Held, that the agreement was a valid agreement for hire and not a bill of sale; and that therefore the transaction was unaffected by the Bills of Sale Acts, 1878 and 1882. *Redhead v. Westwood*, 59 L. T. 293—Kay, J.

—Assignment of, as Security.—The debtors deposited with a creditor as security for his debt certain hire-purchase agreements of furniture, and subsequently executed an assignment by which they assigned all their rights under the said agreements to the creditor. Due notice of the assignment was given to the hirers, and the debtors shortly afterwards became bankrupt:—Held, that the assignment was merely the assignment of a chose in action and that it did not require to be registered as a bill of sale, and that the creditor was entitled to the benefits of the agreements as against the trustee in the bankruptcy. *Rawlings, Ex parte, Davis, In re*, 60 L. T. 157; 37 W. R. 142—Cave, J.

Equitable Transfer of Existing Security.—An agreement accompanying the deposit of a registered bill of sale by way of equitable sub-mortgage is a "transfer or assignment" of a bill of sale which by section 10 of the Bills of Sale Act, 1878, need not be registered. *Turquand, Ex parte, Parkers, In re*, 14 Q. B. D. 636; 54 L. J., Q. B. 242; 53 L. T. 579; 33 W. R. 437—C. A.

Debentures of Company.—See COMPANY (DEBENTURES).

2. RECTIFICATION AND RENEWAL OF REGISTRATION.

Jurisdiction of Judge.—In 1875, a post-nuptial settlement was executed and registered as a bill of sale. In 1880, it was re-registered, but owing to inadvertence the registration was not renewed in 1885. Upon this omission being discovered, application was made to a judge in

chambers, and in October, 1886, leave under s. 14 of the Act of 1878 to renew the registration was granted. In November, 1886, the settlor became bankrupt. By an error in the affidavit filed in accordance with s. 11 upon the renewed registration in October, 1886, such registration became void. Upon this being discovered in February, 1887, the trustees of the settlement applied ex parte to the same judge to allow the error to be amended and the register rectified. An order was made to this effect, the judge stating his intention to be that the parties should be put back in the position they would have been in, in October, 1886, had no mistake been made. Upon an application by the settlor's trustee in bankruptcy to discharge or vary this order for the benefit of the creditors:—Held, that s. 14 conferred full power upon the judge in his discretion both to grant leave to renew the registration and to rectify the subsequent error. *Dobbin's Settlement, In re*, 56 L. J., Q. B. 295; 57 L. T. 277—D.

Sect. 14 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), enacts that a judge on being satisfied that the omission to register a bill of sale, or the omission or misstatement of the name, residence, or occupation of any person was accidental, or due to inadvertence, may in his discretion order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, &c., as he thinks fit to direct:—Held, that the power of rectification given by the section is limited by the description of "register" in s. 12 of the Act, and therefore, where the affidavit filed with the registrar under s. 10, sub-s. 2, has by inadvertence omitted to describe the residence and occupation of an attesting witness, the judge has no power to allow a supplemental affidavit to be filed supplying such particulars. *Crew v. Cummings*, 21 Q. B. D. 420; 57 L. J., Q. B. 641; 59 L. T. 886; 36 W. R. 908—C. A.

— **Extension of Time.**—The time for registration cannot be extended under the 14th section of the Bills of Sale Act, 1878, so as to defeat the vested right of an execution creditor. *Id.*

— **Time, how computed.**—The bill of sale, through inadvertence not being registered within the time limited by the Bills of Sale Act, 1879, leave was given on the ex parte application of the grantee to register within three days; and the bill of sale was registered on the fourth day from the order, reckoning an intervening Sunday. Prior to the ex parte application the grantors had executed a deed vesting all their property in trustees for the benefit of their creditors. On this act of bankruptcy they were subsequently adjudicated bankrupts, and the assignees filed a charge impeaching the validity of the bill of sale:—Held, first, that Sunday was not to be counted in the three days limited by the order for registration, and that therefore the registration had been effected within the time prescribed by that order. Secondly, that the validity of the order could only be questioned in the court in which it was made. Semble, also, that there was full jurisdiction to make the order under the circumstances as they existed at its date, and that the only ground for setting it aside

would be the suppression from the court of the creditor's deed, and the consequent act of bankruptcy. *Parke, In re*, 13 L. R., Ir. 85—Bk.

Section 14 not Retrospective.—A bill of sale, void for want of renewal of registration at the commencement of the Bills of Sale Act, 1878, cannot be renewed under s. 14 of that act. *Askew v. Lewis*, or *Lewis v. Driscoll*, 10 Q. B. D. 477; 48 L. T. 534; 31 W. R. 567; 47 J. P. 312; 1 C. & E. 34—Cave, J.

Where a bill of sale was, at the commencement of the Bills of Sale Act, 1878, void for want of renewal of registration, the time for renewal cannot be extended under s. 14 of that act. *Askew v. Lewis* (10 Q. B. D. 477) approved. *Official Receiver, Ex parte, Emery, In re*, 21 Q. B. D. 405; 57 L. J., Q. B. 629; 37 W. R. 21—C. A.

Bill of Sale under Act of 1854—Grantor and Grantee—Registration not renewed.—In 1873 S. executed a bill of sale of furniture to the respondents to secure a loan, with an absolute unconditional power to take possession and sell in case of default of payment upon demand. The bill was duly registered, but never re-registered. In 1883 the respondents, in order to protect the furniture from S.'s creditors, demanded payment and on default took possession of the furniture and sold it to C., giving him a receipt for the purchase-money though no money actually passed. At the same time C., not being able to pay, executed a bill of sale of the furniture to the respondents to secure the purchase-money. This bill was duly registered: the receipt was not registered. The transaction with C. was found by the jury to be a bona fide one. The furniture having been afterwards seized under a fi. fa. against S.:—Held, that the sale to C., being an absolute and bona fide transfer of the property, the bill of 1873 was spent and satisfied, and the Bills of Sale Acts of 1854, 1866, 1878, and 1882 had no application whatever to it at the time of the execution, whether the furniture was or was not at that time in the apparent possession of S.: and that the respondents were entitled to the furniture. *Cookson v. Swire*, 9 App. Cas. 653; 54 L. J., Q. B. 249; 52 L. T. 30; 33 W. R. 181—H. L. (E.).

3. LOCAL REGISTRATION.

Effect of Omission.—The omission of the registrar of bills of sale to transmit an abstract of a registered bill of sale to the registrar of the county court, within the district of which the chattels enumerated in the bill are situated, does not avoid the bill. *Trinder v. Raynor*, 56 L. J., Q. B. 422—D.

4. DESCRIPTION OF GRANTOR AND WITNESSES.

Grantor's Name—Intent to Mislead.—In a bill of sale given by husband and wife, and in the affidavit filed on registration, the grantors' names were described as "Alfred Salmon and Edith Campbell Salmon, wife of Alfred Salmon." The husband's true name was George Henry

Arthur Salmon, and the misdescriptions were purposely made by both the grantors in order to conceal the fact that they had given a bill of sale:—Held, that the registration of the bill of sale was not thereby rendered invalid. *Downs v. Salmon*, 20 Q. B. D. 775; 57 L. J., Q. B. 454; 59 L. T. 374; 36 W. R. 810—D. Cp. *Lee v. Turner*, *infra*.

Grantor's Occupation—Two distinct Trades—One Trade described.]—Where the grantor of a bill of sale is otherwise rightly described, the omission of some other description, which was not intended nor calculated to deceive, and did not in fact deceive, does not invalidate the bill of sale. The onus of proof of the omission being intended or calculated to deceive is upon the person who impugns the validity of the bill of sale on such ground. *Throssel v. Marsh*, 53 L. T. 321—D.

To comply with section 10 of 42 & 43 Vict. c. 50, sub-s. 2, it is necessary, in registering a bill of sale, to file a description of all, and not one alone out of several businesses followed by the grantor at the time of its execution, for the purpose of seeking to obtain a livelihood or wealth; and, therefore, when the grantor, a widow, at the time of the execution of a bill of sale, besides being possessed of a farm, carried on the business of a grocer and licensed vintner, and was described in the affidavit of the attesting witness as "widow and farmer;" it was held, that this was an insufficient description, and that the registration was bad. *Fitzpatrick, In re*, 19 L. R., Ir. 206—Bk.

— Misdescription.]—The grantor of a bill of sale was described in the bill of sale and in the affidavit filed upon registration as "Kendrick Turner, tutor," whereas, in fact, his name was Frederick Henry Turner, and he was a school-master:—Held, that the misdescription rendered the registration of the bill of sale void. *Lee v. Turner*, 20 Q. B. D. 773; 59 L. T. 320—D.

In a bill of sale the grantor was described as "contractor and financial agent":—Held, that the object of requiring the occupation of the grantor to be stated was merely to identify him and that there could not be a description of the grantor's occupation which could better tend to identify him. *Sharp v. McHenry*, 38 Ch. D. 428; 57 L. J., Ch. 961; 57 L. T. 606—Kay, J.

In an affidavit filed with a bill of sale under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10, sub-s. 2, R., the grantor of the bill of sale was described as "carrying on the business of a wine and spirit merchant, and dealer in provisions and general goods, at 4A, Dean Street, Liverpool, under the style of the London and Westminster Supply Association." At the time the bill of sale was granted, R., who formerly owned the business, was the manager, and received a salary:—Held, a misdescription. *Cooper v. Davis*, 32 W. R. 329—C. A. Affirming, 48 L. T. 831—D.

Description of Attesting Witness.]—"Walter Neve, of Luton, in the county of Bedford, solicitor":—Held, a sufficient description of an attesting witness within the meaning of the Bills of Sale Act, 1878. *Gardner v. Smart*, 1 C. & E. 14—Lopes, J.

5. OTHER POINTS.

Proof of Registration—Filing Affidavit.]—The production at the hearing of an interpleader issue, of a bill of sale, together with a certificate of registration, is no evidence that the proper affidavit was also filed in accordance with the Bills of Sale Act, 1878, s. 10, but the proper course is to adjourn the hearing for the production of evidence, and not hold the bill of sale void on this ground alone. *Turner v. Culpan*, 36 W. R. 278—D.

Registration of "Copy"—Blanks in Copy not in Original.]—A bill of sale was in due form and had no blanks left in it, but the copy that was registered contained blanks in the place where the principal sum was mentioned; in an action in which the validity of the bill of sale came in question:—Held, that the words "true copy" in s. 10, sub-s. 2, of the Bills of Sale Act, 1878, meant a copy that was essentially true, and it was not an essential matter with reference to the truth of the copy that it contained blanks which could not mislead anyone as to its effect. *Sharp v. McHenry*, 38 Ch. D. 428; 57 L. J., Ch. 961; 57 L. T. 606—Kay, J.

Statement that Attesting Solicitor was present.]—G. executed a bill of sale of chattels in favour of the plaintiff to secure a debt. The affidavit of attestation and execution did not, in terms, state that the attesting solicitor was present when the deed was executed, but it did state that the deponent was present, that it was duly attested, and that the deponent and the attesting solicitor were the only attesting witnesses:—Held, that the affidavit in effect stated that the attesting solicitor was present when the deed was executed, and that it was therefore in compliance with s. 10 of the Bills of Sale Act, 1878. *Cooper v. Zeffert*, 32 W. R. 402—C. A.

Attestation of Absolute Bill of Sale.]—An absolute bill of sale must be attested in the manner directed by s. 10, sub-s. 1, of the Bills of Sale Act, 1878, and therefore the attestation must state that, before the execution of the bill of sale, the effect thereof has been explained to the grantor by the attesting solicitor; otherwise the bill of sale will be void. *Casson v. Churchley*, 53 L. J., Q. B. 335; 50 L. T. 568—D.

Affidavit—Omission of Commissioner's Title.]—The affidavit filed on the registration of a bill of sale was sworn before a commissioner to administer oaths, but in the jurat he merely signed his name, and did not add his title as commissioner:—Held, that, notwithstanding this omission, the affidavit was sufficient. *Johnson, Ex parte, Chapman, In re*, 26 Ch. D. 338; 53 L. J., Ch. 763; 50 L. T. 214; 32 W. R. 693; 48 J. P. 648—C. A.

II. STATUTORY FORM.

1. GENERAL PRINCIPLES.

Same Legal Effect.]—A bill of sale which deviated from the statutory form will not be made void by s. 9 of the Bills of Sale Act, 1882, if it produces the precise legal effect—neither more nor less—of that form, and if the variance is not calculated reasonably to deceive those for

whose benefit the statutory form is provided. *Stanford, Ex parte, Barber, In re*, 17 Q. B. D. 259; 55 L. J., Q. B. 341; 54 L. T. 894; 34 W. R. 287, 507—C. A.

Seemingly, that a bill of sale which produces precisely the same legal effect as a document in the statutory form may still be void under s. 9, if, for instance, it contains prolix and useless recitals, and is generally framed with unnecessary prolixity. *Id.*—Per Fry, L. J.

By s. 9 of the Bills of Sale Act, 1882, a bill of sale is void unless made in accordance with the form in the schedule to the act:—Held, that a bill of sale is valid if it is substantially like the form. *Roberts v. Roberts*, 13 Q. B. D. 794; 53 L. J., Q. B. 313; 50 L. T. 351; 32 W. R. 605—C. A.

Statutory Form impossible.—Where it is impossible to make a bill of sale in the form given in the schedule to the Bills of Sale Act, 1882, such a document is void. *Parsons, Ex parte*, or *Clark, Ex parte, Townsend, In re*, 16 Q. B. D. 532; 55 L. J., Q. B. 137; 53 L. T. 897; 34 W. R. 329; 3 M. B. R. 36—C. A. See also *Hilton v. Tucker*, ante, col. 226.

—Indemnity to Surety—Amount and Time of Payment uncertain.—A bill of sale given by the grantor, “in consideration of the grantee having at the request of the grantor become guarantee, and having signed a promissory note for the payment of a sum of 45*l.* obtained by the grantor from one B., of which 32*l.* or thereabouts is now owing,” and further expressed to assign the chattels “by way of security for the payment of any moneys the grantee may be called upon to pay in respect of the guarantee, and interest thereon at the rate of five per cent. per annum,” and the grantor further agreeing “to pay the principal sum, and any further sums, together with interest then due, by monthly payments of 2*l.* on the first of every month,” is void under s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, as not being in accordance with the form prescribed by the act by reason of both the amount payable by the grantee under the guarantee and the time when such amount would become payable being uncertain. *Hughes v. Little*, 18 Q. B. D. 32; 56 L. J., Q. B. 96; 55 L. T. 476; 35 W. R. 36—C. A.

Departure from Statutory Form—Extent of Avoidance.—Where personal chattels and other property are mortgaged by a deed which is not made in accordance with the statutory form of a bill of sale, and is therefore, by s. 9 of the Bills of Sale Act, 1882, void as regards the “personal chattels,” such deed is valid as to the other property comprised in it, if it is possible to sever the security upon the personal chattels from that upon the other property. *Byrne, Ex parte, Burdett, In re*, 20 Q. B. D. 310; 57 L. J., Q. B. 263; 58 L. T. 708; 36 W. R. 345; 5 M. B. R. 32—C. A.

A deed assigned to the grantee as security for a debt “the several chattels and things specifically described” in the schedule to the deed. The schedule comprised “personal chattels,” and also a gas engine, which did not come within the definition of “personal chattels” contained in s. 4 of the Bills of Sale Act, 1878. The deed was not made in accordance with the statutory form of bill of sale contained in the schedule to

the Bills of Sale Act, 1882:—Held, that the deed was, under s. 9 of the Bills of Sale Act, 1882, void as to the “personal chattels,” but that it remained valid as to the gas engine. *Davies v. Rees* (17 Q. B. D. 408), explained and distinguished. *Id.* S. P. *Bansha Woollen Mills Co., In re*, 21 L. R., Ir. 181—M. R.

When a bill of sale includes a mortgage of chattels real, a deviation from the statutory form invalidates the instrument so far only as regards the chattels personal comprised in it, and does not avoid it so far as it is a mortgage of chattels real. *Davies v. Rees* (17 Q. B. D. 408) distinguished. *O'Dwyer, In re*, 19 L. R., Ir. 19—Bk.

Sect. 9 of the Bills of Sale Act, 1882, in avoiding a bill of sale which is not made in accordance with the form in the schedule to the Act, avoids it in toto—not merely as regards the personal chattels comprised in it—so that a covenant contained in it for the payment by the grantee of the principal and interest thereby secured is rendered void as against him. *Davies v. Rees*, 17 Q. B. D. 408; 55 L. J., Q. B. 363; 54 L. T. 813; 34 W. R. 673—C. A.

Assignment of Chattels as “beneficial owner.”—A bill of sale of chattels given by way of security for the payment of money by which the grantor purports to assign the chattels “as beneficial owner,” is not “in accordance” with the form given in the schedule to the Bills of Sale Act of 1882, and is therefore made void by s. 9 of that Act. *Stanford, Ex parte, Barber, In re*, supra.

Provision as to Possession of Instrument after Payment.—A bill of sale given as a security for the payment of money contained a stipulation that, as soon as the sums secured were satisfied, the grantee would give a receipt in full of all demands and indorse a copy of the same on the bill of sale, but the bill of sale and any documents signed by the grantor or any other person in relation to the loan should remain in the custody and be the property of the grantee:—Held, that this stipulation was a deviation from the statutory form given by the Bills of Sale Act, 1882, and that the bill of sale was therefore void. *Watson v. Strickland*, 19 Q. B. D. 391; 56 L. J., Q. B. 594; 35 W. R. 769—C. A.

2. TIME OF PAYMENT.

Principal payable in one sum.—A bill of sale given as security for money, by which the mortgage debt is made payable in one entire sum, is “in accordance with” the statutory form. *Watkins v. Evans*, 18 Q. B. D. 386; 56 L. J., Q. B. 200; 56 L. T. 177; 35 W. R. 313—C. A.

—Instalments on Conditions.—A. was the grantor of a bill of sale, by the terms of which he covenanted to pay the principal sum with interest thereon at a fixed rate upon the 1st June. The bill of sale further contained a covenant that, if the grantor did not break any of the covenants contained in the bill of sale, and paid to the grantee the principal sum and interest by monthly instalments, the first instalment being payable on the 1st June, the grantee would accept payment by such instalments. Upon the bankruptcy of A. the official receiver impugned the validity of the bill of sale:—

Held, that the condition in question was inserted in ease of the debtor, that the time of payment was certain and the bill of sale valid. *Payne, Ex parte, Cotton, In re*, 56 L. T. 571; 35 W. R. 476; 4 M. B. R. 90—D.

Unequal Payment of Principal.]—The form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, is, in respect of the covenant by the grantor to pay the principal sum secured "by equal payments" at specified times, directory and not obligatory; so that a covenant to pay the principal sum by unequal payments at the specified times does not render a bill of sale void. *Rawlings, Ex parte, Cleaver, In re*, 18 Q. B. D. 489; 56 L. J., Q. B. 197; 56 L. T. 593; 35 W. R. 281—C. A.

Payment Monthly—Whole Amount remaining Unpaid to be Due on Default.]—A bill of sale of personal chattels granted in 1884 to secure 80*l.* stated the stipulated times or time of payment of principal and interest as "by equal monthly payments of 8*l.*, the first payment to be made on the 1st of March next, but if default be made in any payment when it becomes due then the whole of the principal unpaid and the interest then due shall be at once payable":—Held, that the bill of sale was in accordance with the form in the Bills of Sale Act (1878) Amendment Act, 1882. *Lumley v. Simmons*, 34 Ch. D. 698; 56 L. J., Ch. 134; 35 W. R. 422—C. A.

Time must be Certain.]—See *Hughes v. Little*, supra, and cases infra.

Payment upon Demand.]—A bill of sale, given by way of security for payment of money, contained an agreement by the grantor to pay the sum advanced and interest upon demand made in writing, and gave power to the grantee to seize and sell the goods on default in payment on demand in writing:—Held, that the agreement to pay the money on demand was not an agreement to pay it at a stipulated time in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, and that therefore the bill of sale was void by s. 9 of that act. *Hetherington v. Groome*, 13 Q. B. D. 789; 53 L. J., Q. B. 577; 51 L. T. 412; 33 W. R. 103—C. A.

Semble, the sum secured should be made payable on a specified day, and a bill of sale making it payable on demand is contrary to such form. *Melville v. Stringer*, 13 Q. B. D. 392; 53 L. J., Q. B. 482; 50 L. T. 174; 32 W. R. 890—C. A.

A bill of sale which provides for repayment of the loan "on demand" is void. *Mackay v. Merritt*, 34 W. R. 433—V. C. B.

A bill of sale was given by way of indemnity to the grantee on his becoming security for the payment by the grantor of a sum of money, being an instalment of a composition due by him to his creditors. The grantor agreed that he would pay the said sum of money to his creditors on a given day, and the bill of sale provided that if he did not pay the money on the day named, and the grantee should be obliged to pay the same, the grantor would repay to the grantee the amount within seven days after demand in writing, with power in default to the grantee to seize and sell the goods:—Held, that the bill of sale did not contain an agreement to pay the money secured at a stipulated time in accord-

ance with the form given in the schedule of the Bills of Sale Act (1878) Amendment Act, 1882, and was therefore void. *Sibley v. Higgs*, 15 Q. B. D. 619; 54 L. J., Q. B. 525; 33 W. R. 748—D.

A bill of sale given by way of security for payment of money contained an agreement by the grantor to pay principal and interest up to demand, within twenty-four hours after demand in writing:—Held, that the bill of sale was void under s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, as not being in accordance with the form prescribed by that statute, the agreement to pay twenty-four hours after demand not being an agreement to pay within a stipulated time. *Clemson v. Townsend*, 1 C. & E. 418—Lopes, J.

Premiums paid by Grantee.]—A clause in a bill of sale under which a grantor agrees to keep up a fire insurance on the goods assigned, and which contains a stipulation that, in case of default by the grantor, all moneys expended by the grantee for keeping up the insurance, together with interest at a given rate, should "on demand be repaid" by the grantor, is not in contravention of the Bills of Sale Act (1878) Amendment Act, 1882. *Stanford, Ex parte, Barber, In re*, 17 Q. B. D. 259; 34 W. R. 237—C. A. Affirming 55 L. J., Q. B. 339—D.

3. PROPERTY COMPRISED IN.

Specifically Described—Inventory.]—By 45 & 46 Vict. c. 43, s. 4, the chattels comprised in a bill of sale are to be specifically described in the schedule:—Held, that the description "household furniture and effects, implements of husbandry" is insufficient, and an inventory of the chattels is necessary. *Roberts v. Roberts*, 13 Q. B. D. 794; 53 L. J., Q. B. 313; 50 L. T. 351; 32 W. R. 605—C. A.

A bill of sale was given by a picture-dealer with regard to (among other things, as to which no question arose) pictures, &c., forming stock-in-trade. Such bill of sale purported to assign "all and singular the several chattels and things specifically described in the schedule hereto annexed." The description in the schedule was "At 47, Mortimer Street; four hundred and fifty oil-paintings in gilt frames, three hundred oil-paintings unframed, fifty water-colours in gilt frames, twenty water-colours unframed, and twenty gilt frames":—Held, that the bill of sale did not comply with the requirements of section 4 of the Bills of Sale Act (1878) Amendment Act, 1882, and therefore was void as against an execution creditor so far as chattels claimed under the above description were concerned. *Witt v. Banner*, 20 Q. B. D. 114; 57 L. J., Q. B. 141; 58 L. T. 34; 36 W. R. 115—C. A.

Place where Goods Situated.]—Under the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), a bill of sale is not void for omitting to specify the house or place at which the goods assigned are situated. *Hill, Ex parte, Lane, In re*, 17 Q. B. D. 74; 3 M. B. R. 148—D.

After-acquired Property.]—A bill of sale assigned by way of security for the payment of money, chattels specifically described in the schedule to the bill of sale, "together with all other chattels and things the property of the mortgagor now in and about the premises [de-

scribed], and also all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things, or any part thereof, may have been removed), whether brought there in substitution for, or renewal of, or in addition to the chattels and things hereby assigned by way of security for the payment of the money. The grantor's goods assigned by the bill having been seized under an execution, the grantee under the bill claimed the goods specifically described in the schedule, and abandoned all claim to the rest:—Held, that the bill was not "in accordance with the form in the schedule to this Act annexed" as required by s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, and was therefore altogether void notwithstanding ss. 4, 5, and 6. *Thomas v. Kelly*, 13 App. Cas. 506; 58 L. J., Q. B. 66; 60 L. T. 114; 37 W. R. 353—H. L. (E.).

A bill of sale to secure an advance of money is void as not being in accordance with the form given in the schedule to the Bills of Sale (1878) Amendment Act, 1882, which contains a clause purporting to assign by way of security property which during the continuance of the security may be brought upon the premises in addition to or in substitution of that specifically assigned by it. *Levy v. Polack*, 52 L. T. 551—D.

A bill of sale dealing with after-acquired property is not by force of s. 4 void altogether. It is good against the grantor, and it is good against the execution creditors as to existing property, although void against them as to after-acquired property. *Roberts v. Roberts*, supra. But see preceding cases.

—**Pledge of, in course of Business.**—By a bill of sale dated February 3, 1881, M., by way of security, assigned to the plaintiff his goodwill and interest in a business carried on by him at W., and all the existing stock-in-trade, and all future stock-in-trade to be brought on to the business premises. M. pledged with the defendant, a pawnbroker, stock-in-trade which had been brought on to the premises after the date of the bill of sale; the defendant received the pledge in the ordinary course of business without notice, actual or constructive, of the bill of sale. In an action for detinue or conversion of the property so pledged:—Held, that the plaintiff had an equitable title to the after-acquired property, but that the legal property was in M., from whom the defendant derived a legal interest, which, in the absence of notice to the defendant of the prior equity, was to be preferred. *Joseph v. Lyons*, 54 L. J., Q. B. 1; 33 W. R. 145; 15 Q. B. D. 280; 51 L. T. 740—C. A. See also *Hallas v. Robinson*, 15 Q. B. D. 288; 54 L. J., Q. B. 364; 33 W. R. 246—C. A.

—**Chose in Action—Future Book Debts.**—A bill of sale assigned (inter alia) all the book debts due and owing, or which might during the continuance of the security become due and owing to the mortgagor:—Held, that the assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined, and passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mortgagor at the time of the assignment or in any other business. *Belding v. Read* (3 H. &

C. 955), and *D'Epincuil, In re* (20 Ch. D. 758), overruled; *Clarke, In re, Coombe v. Carter* (36 Ch. D. 348), approved. *Tailby v. Official Receiver*, 13 App. Cas. 523; 58 L. J., Q. B. 75; 60 L. T. 162; 37 W. R. 513—H. L. (E.).

4. THE SUM SECURED.

Amount payable must be certain.—A bill of sale given by the grantor, "in consideration of the grantee having at the request of the grantor become guarantee, and having signed a promissory note for the payment of a sum of 45*l.* obtained by the grantor from one B., of which 32*l.* or thereabouts is now owing," and further expressed to assign the chattels "by way of security for the payment of any moneys the grantee may be called upon to pay in respect of the guarantee, and interest thereon at the rate of five per cent. per annum," and the grantor further agreeing "to pay the principal sum, and any further sums, together with interest then due, by monthly payments of 2*l.* on the first of every month," is void under s. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, as not being in accordance with the form prescribed by the act by reason of both the amount payable by the grantee under the guarantee and the time when such amount would become payable being uncertain. *Hughes v. Little*, 18 Q. B. D. 32; 56 L. J., Q. B. 96; 55 L. T. 476; 35 W. R. 36—C. A.

Premiums, Rent, &c., added to Principal if unpaid by Grantor.—The grantor agreed (inter alia) to insure the assigned goods, and pay all premiums, and that upon default the grantee might do so, and "charge the costs thereof, with interest at the rate of 20 per cent. per annum," to the grantor, and that the same should be considered to be included in the security, and that the grantee might pay all rent, rates, and taxes at any time due in respect of the message in which the goods might be, and that thereupon all such payments made by the grantee, together with interest at the rate of 20 per cent. per annum, should be a charge on the goods, which should not be redeemed until full payment of all such sums and interest:—Held, on the authority of *Ex parte Stanford* (17 Q. B. D. 259), that the provisions for the payment of rent, rates, taxes and premiums by the grantee, and the charge of the sums so paid by him upon the goods, did not render the bill of sale void. *Goldstrom v. Tallerman*, 18 Q. B. D. 1; 56 L. J., Q. B. 22; 55 L. T. 866; 35 W. R. 68—C. A.

—**Seizure on Default.**—By a bill of sale given by way of security for the payment of money, the mortgagor covenanted to repay the principal sum of 300*l.*, with interest thereon at the rate of 40 per cent. per annum, by equal quarterly payments of 180*l.* each, on certain dates specified, until the whole of the said principal money and interest was repaid, and it was provided that, if the mortgagor did not pay the rent, rates, taxes and outgoings of the premises on which the goods assigned might be within seven days after the same respectively became payable, the mortgagees might, if they thought fit, pay such rent, rates, taxes and outgoings, and all sums of money so paid by the mortgagees, with interest thereon at the same rate as aforesaid, should be charged on the goods

assigned, and be recoverable in the same manner as the principal moneys and interest secured by the bill of sale:—Held, that such bill of sale was void as not being in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882. *Bianchi v. Offord*, 17 Q. B. D. 484; 55 L. J., Q. B. 486—Boweh, L. J.

By a bill of sale given to secure the repayment of an advance with interest thereon, at the rate of 40 per cent. per annum, by equal monthly payments of 4*l.* each until the whole of the principal money and interest should be paid, it was provided that, if the mortgagor did not pay the rent, rates, taxes and outgoings of the premises on which the goods assigned might be within seven days after the same should respectively become payable, the mortgagees might, if they thought fit, pay such rent, rates, taxes and outgoings, and all sums of money so paid by the mortgagees, together with interest thereon after the rate aforesaid, should be charged on the goods assigned, and should be recoverable in the same manner as the principal moneys and interest secured by the bill of sale; it was further provided that the goods assigned should be liable to seizure for any of the causes specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, but should not be liable to seizure for any other cause:—Held, that such bill of sale was void as not being in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, on the ground that it contained terms importing a power of seizure in contravention of the provisions of s. 7 of the Act. *Bianchi v. Offord* (17 Q. B. D. 484) followed; *Stanford, Ex parte, Barber, In re* (17 Q. B. D. 259), and *Goldstrom v. Tallerman* (18 Q. B. D. 1), distinguished. *Real and Personal Advance Company v. Clears*, 20 Q. B. D. 304; 57 L. J., Q. B. 164; 58 L. T. 610; 36 W. R. 256—C. A.

Whole amount for Interest due on non-payment of Instalment.—By a bill of sale the grantor assigned to the grantee the goods enumerated in the schedule thereto, by way of security for the payment of 300*l.* money advanced, and 180*l.* for agreed capitalized interest thereon at the rate of 60 per cent. per annum, making together the sum of 480*l.*, by instalments of a certain amount, at certain specified dates. The grantor also covenanted, amongst other things, that she would deliver to the grantee the receipts for rent, rates and taxes, in respect of the premises on which the goods assigned might be, when demanded, "in writing or otherwise;" and also that she would not make any assignment for the benefit of creditors, or file a petition for liquidation or composition with creditors, or do or suffer anything whereby she should render herself liable to be made or become a bankrupt. It was also by the said bill of sale agreed, that if the grantor should break any of the covenants, all the moneys thereby secured should immediately become due and be forthwith paid to the grantee, and it was provided that the chattels assigned should not be liable to seizure for any other cause than those specified in the Bills of Sale Act (1878) Amendment Act, 1882:—Held, that the bill of sale was void, as not made in the form given in the schedule. *Davis v. Burton*, 11 Q. B. D. 537; 52 L. J., Q. B. 636; 32 W. R. 423—C. A. Affirming, 48 L. T. 433; 47 J. P. 392—D. See also *Myers v. Elliott*, *infra*.

A bill of sale was given on the 19th June, 1885, to secure the repayment of a principal sum of 80*l.* and interest at the rate of 27 per cent. per annum, and it provided that the grantor will "duly pay to the grantees the principal sum aforesaid, together with the interest due, by eight equal payments of 13*l.* on the 19th September next, and on the 19th day in every succeeding third month, and that in case default is made in any one of the said instalments, then he will immediately thereafter pay to the grantees the whole amount remaining unpaid upon this security." This sum of 13*l.* was arrived at by lumping together the principal and interest, and making the whole repayable over a certain number of months by instalments amounting in all to 104*l.*, and as a further security a promissory note for 104*l.* was given by the grantor to the grantees:—Held, that the bill of sale was void on the ground that it made interest payable on a day certain irrespective of the period at which the interest would become due according to the ordinary course of events, and that the grantor had a cause of action for the seizure of the goods under the bill of sale. *Roe v. Mutual Loan Fund*, 56 L. T. 631—Pollock, B.

In default Principal and Interest due at once Payable.—A bill of sale of personal chattels granted in 1884 to secure 80*l.* stated the stipulated times or time of payment of principal and interest as "by equal monthly payments of 8*l.*, the first payment to be made on the 1st of March next, but if default be made in any payment when it becomes due then the whole of the principal unpaid and the interest then due shall be at once payable":—Held, that the bill of sale was in accordance with the form in the Bills of Sale Act (1878) Amendment Act, 1882. *Lumley v. Simmons*, 34 Ch. D. 698; 56 L. J., Ch. 329; 56 L. T. 134; 35 W. R. 422—C. A.

Interest—Bonus—Lump Sum.—A bill of sale, given to secure repayment of money, provided that the sum advanced, together with 15*l.* for agreed interest and bonus thereon, making in all 130*l.*, should be paid by monthly instalments of 10*l.* 16*s.* 8*d.*; that the grantee might seize the goods assigned if the grantor made default in payment of the sum thereby secured at the time therein provided for payment, or in the performance of any of the covenants therein contained and necessary for maintaining the security; and that, if the grantee seized the goods in consequence of a breach of any of the covenants therein contained, he might sell the same or any part thereof at the expiration of five clear days from the day of seizure:—Held, that the bill of sale was void as substantially deviating from the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, first, because it would entitle the grantee to seize and sell the goods for the whole 130*l.* secured on failure in payment of any one monthly instalment; secondly, because, the bill of sale not stating how much of the 15*l.* was bonus and how much interest, it was impossible to tell from its terms what was to be paid for interest. *Myers v. Elliott*, 16 Q. B. D. 526; 55 L. J., Q. B. 233; 54 L. T. 552; 34 W. R. 338—C. A.

Seemingly, that, even if the whole 15*l.* were to be regarded as interest, the bill of sale was void because it did not show the rate of interest to be paid as required by the statutory form.

Thorpe v. Cregeen, infra, questioned. *Id.* See also *Pearce, Ex parte, Williams, In re*, post, col. 247.

In a bill of sale, given by way of security for 30*l.* advanced and 5*l.* interest thereon, the grantor agreed to pay the principal sum, together with the interest then due, by five equal monthly payments of 7*l.* each. There was a power to seize and sell the goods (inter alia) on default in payment of the sum secured at the time provided for payment:—Held, that the interest was properly stated in accordance with the form in the schedule to the Bills of Sale Act, 1882, and that the bill of sale was valid. *Thorpe v. Cregeen*, 55 L. J., Q. B. 80; 33 W. R. 844—D. But see preceding case.

—**Rate per Month.**—A bill of sale of personal chattels granted in 1884 to secure 80*l.* stated the rate of interest as 1*s.* 5*d.* in the pound per month:—Held, that the bill of sale was in accordance with the form in the schedule to the Bills of Sale Act, 1878, Amendment Act, 1882. *Lumley v. Simmons*, supra.

—**Upon Interest—Unequal Payments.**—By a bill of sale goods were assigned as security for the repayment of 500*l.* and interest thereon at the rate of 60*l.* per cent. per annum, and the grantor agreed to pay “the principal sum aforesaid, together with the interest then due by twelve equal monthly payments of 41*l.* 13*s.* 4*d.*, until the whole of the said sum and interest shall be fully paid,” and that in default of payment of any “instalment” then the grantor would pay interest thereon at the rate aforesaid from the date when such instalment should become due until full payment thereof:—Held, that upon the true construction of the bill of sale interest upon interest was not reserved, but that the word “instalment” referred only to the monthly payments of principal:—Held, also, that the form of bill of sale in the schedule to the Bills of Sale Act, 1882, does not require that the payments of interest should be always of equal amount, and that therefore the bill of sale was not void on the ground that the payments of interest would vary in amount from time to time. *Goldstrom v. Tallerman*, 18 Q. B. D. 1; 56 L. J., Q. B. 22; 55 L. T. 866; 35 W. R. 68—C. A.

5. POWER OF SEIZURE.

Large Number of Grantees—Different Debts.]

—A bill of sale which is in its terms so complicated as to substantially vary from the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, is void by s. 9 of that act, notwithstanding it may not contravene any of the other sections. Therefore a bill of sale made between the grantor and four sets of mortgagees to secure different debts owing to each respectively at different times, with a declaration that in case of default in payment of any sum thereby secured or of any other default mentioned as a cause of seizure in s. 7 of that act, it should be lawful for the mortgagees to seize and sell the goods assigned:—Held, to be not in conformity with the form in the schedule, and void. *Melville v. Stringer*, 13 Q. B. D. 392; 53 L. J., Q. B. 482; 50 L. T. 774; 32 W. R. 890—C. A.

On Bankruptcy.—A bill of sale empowered

the grantee to seize the property in case (inter alia) the grantor “shall do or suffer any matter or thing whereby he shall become a bankrupt”:—Held, that this event was in substance equivalent to the event “if the grantor shall become a bankrupt” in which, by s. 7 of the Bills of Sale Act, 1882, a grantee is permitted to seize under a bill of sale, and that consequently the bill of sale was not void under s. 9. *Allam, Ex parte, Munday, In re*, 14 Q. B. D. 43; 33 W. R. 231—D.

If Grantor take benefit of “any Bankruptcy Act.”—A bill of sale contained a proviso giving power to the grantees to seize the chattels granted by the instrument if the “mortgagees should take the benefit of any Bankruptcy Act.” The Bankruptcy Act, 1883, enables a person not only to become a bankrupt but to effect a composition with his creditors:—Held, that the bill of sale was bad, as it conferred upon the grantees the power to seize on the grantors taking the benefit of any Bankruptcy Act, which was a larger power than the statutory power to seize conferred by the Bills of Sale Act, 1882, which was limited to the event of a grantor becoming a bankrupt. *Gilroy v. Bouey*, 59 L. T. 223—D.

Power to break open Doors.—A bill of sale contained a power, in case the grantee became entitled to seize the chattels, to break open doors and windows in order to obtain admission:—Held, that this did not constitute a departure from the form in the Bills of Sale Act, 1882, and that the bill of sale was valid. *Morritt, In re* (infra), followed. *Lumley v. Simmons*, 34 Ch. D. 698; 56 L. J., Ch. 329; 56 L. T. 134; 35 W. R. 422—C. A.

A bill of sale of personal chattels, given as security for money lent, contained a provision “that the power of sale conferred on the mortgagees by the Conveyancing Act, 1881, shall be exercisable by them in every respect as the 20th section of the said act had not been enacted.” An express power was given to seize the chattels for any of the causes specified in s. 7 of the Bills of Sale Act, 1882, but for no other cause, and for that purpose to break open the doors and windows of the premises where the chattels might be:—Held (Fry, L. J., dissenting), that the bill of sale was not made void by s. 9 of the Bills of Sale Act, 1882. *Official Receiver, Ex parte, Morrill, In re*, 18 Q. B. D. 222; 56 L. J., Q. B. 139; 56 L. T. 42; 35 W. R. 277—C. A.

In Unauthorized Event—Effect of Reference to Statute.—Semble, that if a bill of sale contains a power to seize in an event not authorized by the act, the insertion of a proviso that the goods shall not be liable to seizure for any cause other than those specified in s. 7 of the act, will not render the deed valid. *Furber v. Cobb*, 18 Q. B. D. 494; 56 L. J., Q. B. 273; 56 L. T. 689; 35 W. R. 398—C. A.

The grantor of a bill of sale agreed therein with the grantee that during the continuance of the security he would, on demand, produce to him his last receipts for rent, rates, and taxes, and would keep the assigned chattels insured, and, on demand, produce to the grantee the current premium for such insurance, and that, in case the borrower should at any time make

default in performance of any of the covenants, or should become bankrupt, or enter into liquidation for the benefit of, or compound with, his creditors, the principal and interest should become immediately payable without the necessity for any demand of payment, provided that the chattels assigned should not be liable to seizure for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882:—Held, that the bill of sale was not in accordance with the form in the schedule to the act annexed, and was therefore void under the 9th section. *Barr v. Kingsford*, 56 L. T. 861—D.

By a bill of sale executed two days before his bankruptcy, A. (the grantor), in consideration of 30*l.* paid to him by B., and also in consideration of 10*l.* charged by B. by way of bonus, assigned chattels to B. by way of mortgage for payment of 40*l.* A. thereby agreed that he would "forthwith" pay to B. the 40*l.*, together with interest and costs then due thereon, and also pay the rent, rates and taxes, and the premiums for insurance, and would "forthwith" after every payment produce and deliver to B. the receipts for the same. On default in payment of the sums thereby secured, "or if he should do or suffer anything whereby he should render himself liable to become a bankrupt, or remove, or suffer the chattels to be removed from the premises, or if execution should be or should have been levied against the goods of A.," or if he should make default in the performance of any of the covenants, or commit any breach thereof, it should be lawful for B. "forthwith or when and as soon as he should think fit" to enter and take possession, and after taking possession to relinquish and again take possession as often and whenever he should think fit. All expenses of entry and seizure (including a fee of 5 per cent. on the whole amount then due and secured by the bill of sale), and in the exercise by B. of any of the powers, rights and remedies therein contained, were to be added thereto and to form part of the sum secured, as if such costs, charges, payments, damages and expenses had originally constituted an integral part of the advance. It was also provided that further advances, not exceeding 100*l.*, might be made and added to the security; and it was finally provided (in the terms of the form in the schedule to the Bills of Sale Act, 1882), that the chattels thereby assigned should not be liable to seizure or to be taken possession of by B., for any cause other than those expressed in s. 7 of the act:—Held, having regard to the provision for bonus in addition to the sum actually paid by the grantee, and especially to the power to seize in events other than those mentioned in s. 7, that this bill of sale was void as being plainly in contravention of the provisions of the Act of 1882, and the form in the schedule thereto; and that the defects were not cured by the final proviso. *Peace, Ex parte, Williams, In re*, 25 Ch. D. 656; 53 L. J., Ch. 500; 49 L. T. 475; 32 W. R. 187—C. J. B.

Actions against Grantee for Seizing.]—See post, col. 260.

6. POWER OF SALE.

Whether to be Implied—Conveyancing Act.]

—A mortgagee of personal chattels, of which he has taken possession, has, without any express

power in the mortgage deed, upon default in payment of the mortgage money by the mortgagor, and after reasonable notice to him, power to sell the chattels. Consequently, if a bill of sale to which the Bills of Sale Act, 1882, is applicable, contains an express power for the grantee to seize the goods (such a power being authorised by that act as a provision "for the maintenance of the security"), the grantee, when he has seized the goods, has power to sell them after the expiration of the five days fixed by ss. 7 and 13 of that act. In such a case, therefore, the power of sale conferred by s. 19 of the Conveyancing Act, 1881, is not required, and is not incorporated, and a proviso in the deed excluding the operation of s. 20 of that act is merely superfluous, and does not invalidate the deed under s. 9 of the act of 1882. If a bill of sale subject to the act of 1882 contains provisions relating to the seizure of the goods, which are not contrary to any express provision of that act, though they may be in part void under the general law, it is not thereby rendered invalid. *Official Receiver, Ex parte, Morritt, In re*, ante, col. 246—Per Cotton, Lindley, and Bowen, L.JJ.

The enactment by the act of 1882 of a statutory form of bill of sale negatives, and is inconsistent with, the incorporation in a bill of sale subject to that act of the power of sale conferred by the Conveyancing Act, 1881, and the act of 1882 gives by implication to the grantee under such a bill of sale power to sell the goods at the expiration of five days after they have been seized. And, even if a power of sale is not given by implication, a power to seize the goods may be lawfully inserted in the deed, and the grantee, having seized the goods, can sell them as assignee of them, and, if the grantor does not redeem them within five days, his right of redemption will be barred. *Id.*—Per Lord Esher, M.R., and Lopes, L.J.

A mortgagee (as distinguished from a pledgee) of chattels has in the absence of statute, no implied power to sell them on default by the mortgagor, even if he has taken possession of them. But, at any rate, the Bills of Sale Act, 1882, implies that the power of sale conferred by s. 19 of the Conveyancing Act is, with the fetters on its exercise imposed by s. 20 of that act, imported into the scheduled form of bill of sale, and an attempt to exclude the operation of s. 20 will render a bill of sale void under s. 9 of the act of 1882. *Id.*—Per Fry, L.J.

A bill of sale, given as security for money, was in the form set forth in the schedule to the Bills of Sale Act, 1882, except that the mortgage debt (instead of being made payable by instalments) was made payable, with interest, in one sum, a month after the date of the deed, and there was a covenant by the grantor, in case the principal money should not be then paid, to pay interest half-yearly on the principal money remaining unpaid. There was also a covenant by the grantor to insure the chattels comprised in the deed, and to produce the receipts for premiums to the grantee:—Held, that the bill of sale was valid, and that interest being in arrear for more than two months, the grantee had power to seize the chattels, and to sell them after the expiration of five days from the seizure. *Watkins v. Evans*, 18 Q. B. D. 386; 56 L. J., Q. B. 200; 56 L. T. 177; 35 W. R. 313—C. A.

The power of sale was conferred by s. 19 of the

Conveyancing Act, 1881, subject to the restrictions imposed by s. 20 of that act and by s. 13 of the Bills of Sale Act of 1882. *Ib.*—Per Bowen and Fry, L.JJ.

The Conveyancing Act did not apply, but there was an implied power to seize and sell under the act of 1882. *Ib.*—Per Lord Esher, M.R.

The provisions of the Conveyancing Act, 1881, with regard to power of sale are not incorporated by the statutory form given by the Bills of Sale Act, 1882. *Calvert v. Thomas*, 19 Q. B. D. 204; 56 L. J., Q. B. 470; 57 L. T. 441; 35 W. R. 616—C. A.

Implied Trust of Purchase - Moneys.]—The power to sell the chattels assigned by a bill of sale carries with it implied trusts with respect to the moneys produced by the sale. Where the bill of sale contained an express declaration that the grantee should retain out of the sale moneys the principal sum, or so much thereof as might for the time being remain unpaid, and the interest then due, together with all costs, charges, payments, and expenses incurred or sustained in and about entering the grantor's premises and in discharging any distress, execution, or other incumbrance on the chattels assigned, and seizing, taking, retaining, and keeping possession thereof, and in and about the carriage, removal, warehousing, valuing, or sale thereof (including the cost of inventories, catalogues, or advertising):—Held, that the trusts declared of the sale moneys were such as might reasonably and properly be inserted, and did not differ from the trusts that would have been implied if there had been no such express declaration. *Rawlins, Ex parte, Cleaver, In re*, 18 Q. B. D. 489; 56 L. J., Q. B. 197; 56 L. T. 593; 35 W. R. 281—C. A.

Provision excusing Purchaser from Inquiry as to Default.]—A bill of sale which contains a provision that a purchaser on a sale after default in payment of an instalment due under the bill of sale, shall not be bound to inquire whether any such default has been made, is void, as substantially deviating from the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9. *Blaiberg v. Parsons, or Parsons v. Hargreaves*, 17 Q. B. D. 633; 55 L. J., Q. B. 408; 34 W. R. 717—D.

S.P. Blaiberg v. Beckett, 18 Q. B. D. 96; 56 L. J., Q. B. 35; 55 L. T. 876; 35 W. R. 34—C. A.

Time for.]—A bill of sale giving power to the grantee to sell on default in payment on demand without waiting for five clear days as required by s. 13 of the Bills of Sale Act, 1882, is invalid. *Hetherington v. Groome*, 13 Q. B. D. 789; 53 L. J., Q. B. 577; 51 L. T. 412; 33 W. R. 103—C. A.

7. MAINTENANCE OF THE SECURITY.

Generally—Effect of Agreement as to.]—A covenant not to remove the chattels without the consent of the grantees, is necessary for maintaining the security; and, semble, that an unqualified covenant to produce the receipts for rent, rates, and taxes on demand is also necessary. The expression “necessary for maintain-

ing the security,” means, not the maintenance of a sufficient security less than that agreed to be given, but the maintenance of the security created by the bill of sale, and the security is maintained only when the subject-matter of the charge, and the grantee's title to it, are preserved in as good plight and condition as at the date of the bill of sale. If a stipulation is not necessary for the maintenance of the security, it cannot be made so by the agreement of the parties. *Furber v. Cobb*, *infra*.—Per Sir James Hannen.

Chattels wearing out—Replacing by others.]

—A bill of sale of leasehold furniture contained an agreement that the grantor should replace any chattels and things that should be worn out by other articles of equal value, a clause permitting seizure and sale in certain events, and an agreement that the grantee after the sale might retain out of the sale moneys the cost of (among other things) discharging any distress, execution, or other encumbrance on the chattels, and of their removal, warehousing, valuing or sale. The form in the schedule to the Act permits the introduction of terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security:—Held, that the expression “defeasance” is large enough to include realization; that the stipulations in the deed related either to the maintenance or the realization of the security; and that the deed was substantially in conformity with the statutory form, and was valid. *Consolidated Credit Corporation v. Gosney*, 16 Q. B. D. 24; 55 L. J., Q. B. 61; 54 L. T. 21; 34 W. R. 106—D.

A bill of sale, given as security for money, assigned to the grantees, the chattels specifically described in a schedule, and which were stated to be then in a certain house. The grantor covenanted (*inter alia*) that he would not remove the chattels from the premises where they then were, without the previous consent in writing of the grantees; that he would not permit the chattels, or any part thereof, to be destroyed or injured, or to deteriorate in a greater degree than they would deteriorate by reasonable use and wear thereof, and would, whenever any of the chattels were destroyed, injured, or deteriorated, forthwith replace, repair, and make good the same; and that he would, on demand in writing, produce to the grantees his last receipt or receipts for the rents, rates, and taxes in respect of the premises where the chattels then were. And it was agreed that, in case default should be made by the grantor (*inter alia*) in the performance of any of the covenants thereinbefore contained on his part, all of which covenants were thereby declared and agreed to be necessary for the maintenance of the security thereby created, it should be lawful for the grantees after any such default without notice, immediately or whenever they should think fit, to seize and take possession of the chattels, and after the expiration of five clear days, to sell the same. At the end of the deed was a proviso that the chattels should not be liable to seizure or to be taken possession of by the grantees for any cause other than those specified in s. 7 of the Bills of Sale Act, 1882:—Held, that the covenants to replace and repair articles destroyed, injured, or deteriorated, was “necessary for maintaining the security,” and that the bill of sale was not void because power

was given to seize on a breach of that covenant. *Furber v. Cobb*, 18 Q. B. D. 494; 56 L. J., Q. B. 273; 56 L. T. 689; 35 W. R. 398—C. A.

Grantor not to Permit to Suffer himself to be sued.]—By a bill of sale the mortgagor agreed: (1) Not to permit or suffer himself to be sued for any debt or debts justly due or owing, &c. (2) On demand in writing to produce and show to the mortgagee the receipts for the rent, rates and taxes. (3) To insure the property assigned in offices in London or Westminster to be approved by the mortgagee, in default whereof it should be lawful for the mortgagee to insure and add the premiums paid by him to the security. The bill of sale empowered the mortgagee, on breach of any of the mortgagor's covenants, to seize, &c., and also contained a clause to the effect that the property should not be liable to seizure for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882:—Held, that the bill of sale was not void as failing to comply with the form required by the Bills of Sale Act, 1882. *Furber v. Abrey*, 1 C. & E. 186—Williams, J. Sed quære.

Insurance Premiums—Production of Receipts.]—An agreement in a bill of sale of chattels, that the grantor will pay all premiums necessary for insuring and keeping insured the chattels against loss by fire, and forthwith after every payment in respect of such insurance produce, and, if required, deliver to the grantee, the receipt or voucher for the same, is not unnecessary for the maintenance of the security, and does not contravene the Bills of Sale Act, (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43). *Hammond v. Hocking*, 12 Q. B. D. 291; 53 L. J., Q. B. 205; 50 L. T. 267—D.

Covenant for further Assurance.]—A covenant that the grantor, and all persons claiming through or under him, will at all times at his cost execute and do all such assurances and things for the further and better assuring all or any of the chattels assigned to the grantee, and enabling him to obtain possession of the same, as may by him be lawfully required, is a provision "for the maintenance of the security," the insertion of which in a bill of sale is permitted by the Act of 1882. *Rawlings, Ex parte, Cleaver, In re*, 18 Q. B. D. 489; 56 L. J., Q. B. 197; 56 L. T. 593; 35 W. R. 281—C. A.

Provision exempting Purchaser from Inquiry as to Default.]—A bill of sale contained powers for the grantees, upon default being made by the grantor in payment of any of the sums secured, to enter upon the premises and seize and sell the goods assigned, and a stipulation that upon any such sale the purchaser should not be bound to see or inquire whether any such default had been made:—Held, that this stipulation was not for the "maintenance" or for the "defeasance" of the security, within the meaning of s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, and of the instructions given in the form in the schedule to that act; that the effect of the stipulation was to alter, to the prejudice of the grantor, the legal rights which the act and the form were intended to secure to him, and therefore that the bill of sale was void under s. 9 as not being in accordance with the form. *Blaiberg v. Beckett*, 18 Q. B. D. 96; 56 L. J., Q. B. 35; 55 L. T. 876;

35 W. R. 34—C. A. *S. P. Blaiberg v. Parsons, or Parsons v. Hargreaves*, 17 Q. B. D. 336; 55 L. J., Q. B. 408; 34 W. R. 717—D.

Power to Value Goods and Purchase at Valuation.]—A power given to the grantee of a bill of sale to sell the goods "or to have them valued, and to purchase them at such valuation, and receive the moneys to arise from such sale or valuation," is not a term for the maintenance of the security within the meaning of the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, and, therefore, a bill of sale which contains a clause giving such power is void by s. 9. *Lyon v. Morris*, 19 Q. B. D. 139; 56 L. J., Q. B. 378; 56 L. T. 915—D.

What Expenses and Costs may be added to Security.]—A bill of sale contained a proviso making void the security on payment of the principal sum and interest and any expenses which the grantee might properly incur in lawfully seizing and removing the chattels, and any costs he might properly incur in defending and maintaining his rights under the bill; and a further power after five clear days from the day of seizure to remove and sell the chattels and retain out of the proceeds the principal unpaid and interest due, and all costs and expenses he might incur as aforesaid, and the expenses of sale. In an action for a declaration that the bill of sale was void as not being in accordance with the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882:—Held, that the bill was valid and did not in either of these respects offend against the statute. *Lumley v. Simmons*, 34 Ch. D. 698; 56 L. J., Ch. 329; 56 L. T. 134; 35 W. R. 422—C. A.

A bill of sale, which contained an express power of seizure and sale, provided that the mortgagee should out of the moneys to arise from any such sale as aforesaid in the first place pay "the expenses attending such sale or otherwise incurred in relation to this security:"—Held, that the bill of sale was void as not being in conformity with the statutory form given by the Bills of Sale Act, 1882. *Calvert v. Thomas*, 19 Q. B. D. 204; 56 L. J., Q. B. 470; 57 L. T. 441; 35 W. R. 616—C. A.

A bill of sale contained a covenant for the payment by the grantor of all rates, taxes, and outgoings whatsoever in respect of the house and premises, in default of which the grantor should pay the same and "charge the amount to the grantor," and all expenses to which he "might" be put, and "which said sums" should be "added to and form part of this security." The bill contained a power to seize for the causes mentioned in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882:—Held, that the bill of sale was bad, as being against the statutory form in giving to the grantee a larger right than he would have had if the form had been followed. *Mucey v. Gilbert*, 57 L. J., Q. B. 461—D.

Profits of Auctioneers allowed to Grantee.]—By a bill of sale given to grantees who were auctioneers, it was provided that in case of sale of the goods, they might out of the proceeds of sale, in the first place reimburse themselves the costs, charges, and expenses of and attending such sale, including therein their full charges and commission as auctioneers, as if they were selling on behalf of the grantor:—Held, that the

bill of sale was void, as this provision was not for the maintenance of the security, but for obtaining for the grantees, in addition to the security, their trade profit as auctioneers by the sale, an advantage they would not have had if the statutory form had been followed. *Furber v. Cobb*, 18 Q. B. D. 494; 56 L. J., Q. B. 273; 56 L. T. 689; 35 W. R. 398—C. A.

Unnecessary Terms—No Power to Seize.]—The insertion in a bill of sale of terms agreed to by the parties for the maintenance of the security, but which are not necessary for maintaining the security within the meaning of s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, does not render the bill of sale void, provided power is not given to the grantee to seize the goods for default in the performance of any covenant or agreement not necessary for maintaining the security. *Topley v. Corsbie*, 20 Q. B. D. 350; 57 L. J., Q. B. 271; 58 L. T. 342; 36 W. R. 352—D.

Unqualified Covenant to Produce Receipts—Power to seize.]—A bill of sale contained a clause in which the grantor agreed with the grantees that he would, during the continuance of the security, pay all rents, rates, taxes, assessments, or outgoings which ought to be paid by the tenant or occupier of the premises then occupied by him, on which the said chattels and things then were, or any other place or places where any of the said chattels and things included in the security might during its continuance be, and would take proper receipts for such payments, and would, on demand in writing, produce to the grantees or their authorised agents the receipts for every such payment as aforesaid . . . provided always, that the chattels thereby assigned should not be liable to seizure or be taken possession of by the grantees for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882 :—Held, that, as the covenant to produce the receipts was one for the maintenance of the security, there was a power to seize for a breach of it; but that though the covenant to produce was not qualified by the condition that the non-production of the receipts might be excused, yet the power to seize under the covenant was not unqualified, but limited to the ground provided by s. 7 of the Bills of Sale Act, 1882, and was not contrary to the form in the schedule, and the bill of sale was therefore good. *Turner v. Culpin*, 58 L. T. 340; 36 W. R. 278—D.

A bill of sale by which the grantee is empowered to seize goods upon failure by the grantor to produce the receipts for rent, rates and taxes, after a verbal demand, is invalid. *Davis v. Burton*, 11 Q. B. D. 537; 52 L. J., Q. B. 636; 32 W. R. 423—C. A. Affirming 48 L. T. 433; 47 J. P. 392—D.

Covenant to pay Interest on Mortgages of Premises.]—A bill of sale given as a security for the payment of money contained a covenant for the payment by the grantor of all interest on mortgages, if any, of the premises on which the goods assigned were or to which they might be removed :—Held, that this stipulation was a deviation from the statutory form and that the bill of sale was therefore void. *Watson v. Strick-*

land, 19 Q. B. D. 391; 56 L. J., Q. B. 594; 35 W. R. 769—C. A.

8. DEFEASANCE OF THE SECURITY.

Defeasance—What is—Replacing Chattels.]—*See Consolidated Credit Corporation v. Gosney*, ante, col. 250.

Recited Indenture—Agreement to perform Covenants.]—A bill of sale after reciting a certain indenture, contained, inter alia, an agreement by the grantor that he would "perform the covenants and stipulations contained in the said recited indenture;" but those covenants and stipulations did not appear in the bill of sale :—Held, that the bill of sale was therefore void under the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9. *Lee v. Barnes*, 17 Q. B. D. 77; 34 W. R. 640—D.

Two Documents—Promissory Note and Bill of Sale.]—Where a bill of sale, proper in its terms, is accompanied by another document which contains terms not allowed by the Bills of Sale Act, 1882, and the whole of the conditions of the transaction are gathered from the joint effect of the two documents, the bill of sale is void. *Simpson v. Charing Cross Bank*, 34 W. R. 568—D.

By a bill of sale, drawn in accordance with the form in the schedule of the Bills of Sale Act, 1882, and duly registered, the grantor assigned certain specified chattels to secure to the grantees the repayment of a sum of 80*l.*, and interest thereon at 30 per cent.; the principal sum to be paid, together with the interest then due, by equal monthly payments of 5*l.* 6*s.* on specified days until the whole sum and interest should be fully paid. The grantor at the same time gave a separate promissory note bearing the same date as the bill of sale, promising to pay the grantees, or order, 95*l.* 12*s.*, by equal monthly instalments of 5*l.* 6*s.*, payable on the same days as the monthly payments in the bill of sale, until the whole sum of 95*l.* 12*s.* should be fully paid; and the note contained a stipulation that in case of default in payment of any instalment the whole of the same sum should become due and payable :—Held, that by reason of this stipulation the promissory note was a defeasance of the bill of sale within the meaning of the Bills of Sale Act, 1878, s. 10, because if at any time the whole sum payable on the note were paid, the right of the grantees under the bill of sale would cease, and therefore the bill of sale was void. *Counsell v. London and Westminster Loan and Discount Company*, 19 Q. B. D. 512; 56 L. J., Q. B. D. 622; 36 W. R. 53—C. A.

The defendant gave to the plaintiffs a bill of sale of personal chattels to secure the repayment of a sum of money and interest; and at the same time, and as part of the same transaction, gave them his promissory note for the payment of the same sum and interest by instalments of the same amounts, and to be paid on the same days, as provided by the bill of sale. The promissory note also stipulated that in the event of any of the instalments falling into arrear the whole amount outstanding should immediately become due and payable. In an action on the promissory note :—Held, that, though the stipu-

lation in the promissory note rendered the bill of sale void, the promissory note was good and the plaintiffs were entitled to recover. *Monetary Advance Company v. Cater*, 20 Q. B. D. 785; 57 L. J., Q. B. 463; 59 L. T. 311.—D.

— **Agreement and Bill of Sale.**—Under s. 8 of the Bills of Sale Act (1878) Amendment Act, 1882, a bill of sale is void unless it "truly set forth the consideration for which it was given;" that is to say, it must show, on the face of it, the true agreement between the parties, and must not be dependent for its real effect upon some other instrument. Thus, when M. agreed in writing to execute in favour of S. certain instruments, including a bill of sale, as securities for a debt, the agreement providing, amongst other things, for payment of compound interest, and M. accordingly executed a bill of sale, which did not explain the real nature or extent of the agreement, and contained only such part of it as could properly be embodied in a bill of sale, it was held that the bill of sale was void. *Simpson v. Charing Cross Bank* (34 W. R. 568) followed. *Sharp v. McHenry*, 38 Ch. D. 428; 57 L. J., Ch. 961; 57 L. T. 606—Kay, J.

Provision exempting Purchaser from Inquiry as to Default.—See *Blairberg v. Beckett*, ante, col. 251.

III. STATEMENT OF CONSIDERATION.

General Requisites.—The consideration for a bill of sale is sufficiently stated, so as to satisfy the requirements of s. 8 of the Bills of Sale Act, 1878, if it is stated with substantial accuracy—if the true legal or business effect of what actually took place is stated. Strict literal accuracy of statement is not necessary. *Johnson, Ex parte, Chapman, In re*, 26 Ch. D. 338; 53 L. J., Ch. 763; 50 L. T. 214; 32 W. R. 693; 48 J. P. 648—C. A.

By s. 8 every bill of sale shall truly set forth the consideration for which it was given:—Held, that inaccuracies in the statement will not invalidate a bill of sale, if it is apparent from the terms of the instrument what the consideration really was. *Roberts v. Roberts*, 13 Q. B. D. 794; 53 L. J., Q. B. 313; 50 L. T. 351; 32 W. R. 605—C. A.

Consideration, 30l.—15l. Repayable on Demand—Immediate Demand.—A bill of sale expressed to be in consideration of 30l. of which 15l. is repayable on demand and the rest by monthly instalments, may, in the absence of evidence that the transaction is a sham, be valid, notwithstanding the Bills of Sale Act (1878) Amendment Act, 1882, s. 12, if 30l. is bona fide paid to the grantor, even although, at his own request, demand for 15l. is immediately made by the grantee, and is at once returned to him. *Davis v. Usher*, 12 Q. B. D. 490; 53 L. J., Q. B. 422; 51 L. T. 297; 32 W. R. 832—D.

Deduction of Bill of Costs.—A bill of sale in its operative part was stated to be given "in consideration of the sum of 10l. now paid by H. to C." In the preparation of the bill of sale D. acted as solicitor for both H. and C., and on the execution of the deed retained, with C.'s consent, 9l. out of the 10l. in payment of his bill of costs in the matter, and only handed C. the balance

of 1l.:—Held, that under the circumstances, the consideration was truly stated in the deed so as to satisfy s. 8 of the Bills of Sale Act, 1878, for that, on the execution of the deed, D. no longer held the money as agent for H. or had any duty to perform towards him, but held the money as C.'s agent, and could, with C.'s consent, retain the amount of his bill of costs. *Firth, In re* (19 Ch. D. 419), distinguished. *Hunt, Ex parte, Cann, In re*, 13 Q. B. D. 36—Cave, J.

Pre-existing Debt.—A bill of sale of stock-in-trade, fixtures and effects, was given in 1882 to secure the payment of 100l. and interest, the money being in the operative part of the instrument made payable on demand, though the agreement was recited as for a loan repayable "by instalments," the amount of which instalments was not specified. The bill of sale represented the 100l. consideration as a pre-existing debt. It appeared that 98l. had been owing from the grantor to the grantee, and that the attesting solicitor required the balance of 2l. to be paid over before execution. A payment was accordingly made, but the sum actually advanced was 20l.:—Held, that the consideration for the bill of sale was sufficiently stated. *Parke, In re*, 13 L. R., Ir. 85—Bank.

True Agreement—Two Documents.—Under s. 8 of the Bills of Sale Act (1878) Amendment Act, 1882, a bill of sale is void unless it "truly set forth the consideration for which it was given;" that is to say, it must show, on the face of it, the true agreement between the parties, and must not be dependent for its real effect upon some other instrument. Thus, where M. agreed in writing to execute in favour of S. certain instruments, including a bill of sale, as securities for a debt, the agreement providing, amongst other things, for payment of compound interest, and M. accordingly executed a bill of sale, which did not explain the real nature or extent of the agreement, and contained only such part of it as could properly be embodied in a bill of sale, it was held that the bill of sale was void. *Simpson v. Charing Cross Bank* (34 W. R. 568) followed. *Sharp v. McHenry*, 38 Ch. D. 428; 57 L. J., Ch. 961; 57 L. T. 606—Kay, J., and see cases, ante, col. 254.

Sum "then owing"—Acceptances unpaid.—A bill of sale purported to be given for 312l. "then owing" by the grantor to the grantee. As to 126l., part of that sum, the facts were as follows: The grantee at the grantor's request accepted certain bills of exchange for 126l. drawn on the grantor and made payable to the grantor's creditors, in order to secure a composition made by the grantor with his creditors. It was arranged that the grantee should pay, and he did pay, the bills at maturity. It was admitted that the transaction was bona fide, and that there was no intention to mislead. At the time of the execution of the bill of sale, the bills were not due and the grantee had not paid them:—Held, that the sum of 126l. was not "then owing" and that the consideration was not truly set forth, and therefore the bill of sale was bad. *Mayer v. Mindlevich*, 59 L. T. 400—D.

Bill of Sale given by way of Indemnity to a Surety.—By a bill of sale expressed to be given in consideration of the grantee thereof having at

the request of the grantor become guarantee, and signed a promissory note for the payment of a sum of 45*l.* by the grantor of which 32*l.* or thereabouts was then owing, the grantor assigned to the grantee certain chattels, described in a schedule, by way of security for any moneys which the grantee might be called upon to pay in respect of such guarantee and interest thereon at the rate of 5*l.* per cent. per annum, and the grantor agreed that he would pay to the grantee any sums as aforesaid together with interest then due by monthly payments of 2*l.* on the first of every month:—Held, that the consideration for which the bill of sale was given was sufficiently set forth. *Hughes v. Little*, 18 Q. B. D. 32; 56 L. J., Q. B. 96; 55 L. T. 476; 35 W. R. 36—C. A.

Sum "now paid"—New Bill of Sale in place of Invalid one.—A. made a bona fide advance to B. of 220*l.* which was secured by a bill of sale; after the day for repayment was past, the bill of sale was found to be invalid, thereupon a new bill of sale was by the agreement of all parties drawn up according to the form given in the Bills of Sale Act, 1882; it contained the words, "In consideration of the sum of 220*l.* now paid to B. by A. the receipt of which the said B. hereby acknowledges." No interest was charged, though it continued to be paid under the terms of the first bill of sale, and no fresh advance was made to B. :—Held, that the consideration was truly stated, and the bill of sale valid. *Nelson, Ex parte, Hockaday, In re*, 55 L. T. 819; 35 W. R. 264; 4 M. B. R. 12—C. A.

On the 12th of February a bill of sale was executed to secure an actual advance in cash of 1,500*l.* After its execution it was discovered that it contained some clauses which made it void under the Bills of Sale Acts. It was thereupon cancelled, and a new bill of sale was, on the 16th of February, executed in substitution for the first, and was registered on the 18th of February. The second deed contained nothing to show that it was given in place of a prior bill of sale, but it purported to be given "in consideration of 1,500*l.* now paid" by the grantee to the grantor:—Held, that the consideration was truly stated, and that it was not necessary to state the whole history of the transaction. *Allam, Ex parte, Munday, In re*, 14 Q. B. D. 43; 33 W. R. 231—D.

IV. OTHER MATTERS RELATING TO.

Who may give—Equitable Owner.—Upon a judgment against a husband and wife jointly, certain household furniture was taken in execution at the house where they resided. On an interpleader issue to try the title to such furniture as between the execution creditors and claimants, it appeared that before the marriage the husband had executed a deed declaring that the goods in question, which then belonged to the wife, should after the marriage continue to belong to her for her sole and separate use. The wife assigned the goods to the claimants by a bill of sale made prior to the execution and duly registered under the Bills of Sale Acts, 1878 and 1882, to which the husband was no party:—Held, that the bill of sale executed by the wife was valid under the Bills of Sale Acts, and that the claimants were entitled to the goods as against the execution

creditors. *Chapman v. Knight* (5 C. P. D. 308), discussed. *Walrond v. Goldmann*, 16 Q. B. D. 121; 55 L. J., Q. B. 323; 53 L. T. 963; 34 W. R. 272—D.

Retrospective Effect of Bills of Sale Acts.—In 1873, S. executed a bill of sale of furniture to the respondents to secure a loan, with an absolute unconditional power to take possession and sell in case of default of payment upon demand. The bill was duly registered, but never re-registered. In 1883 the respondents, in order to protect the furniture from S.'s creditors, demanded payment and on default took possession of the furniture and sold it to C., giving him a receipt for the purchase-money though no money actually passed. At the same time C., not being able to pay, executed a bill of sale of the furniture to the respondents to secure the purchase-money. This bill was duly registered: the receipt was not registered. The transaction with C. was found by the jury to be a bona fide one. The furniture having been afterwards seized under a fi. fa. against S.:—Held, that the sale to C. being an absolute and bona fide transfer of the property, the bill of 1873 was spent and satisfied, and the Bills of Sale Acts of 1854, 1866, 1878, and 1882 had no application whatever to it at the time of the execution, whether the furniture was or was not at that time in the apparent possession of S.; and that the respondents were entitled to the furniture. *Cookson v. Swire*, 9 App. Cas. 653; 54 L. J., Q. B. 249; 52 L. T. 30; 33 W. R. 181—H. L. (B.).

"Order and Disposition."—The Bills of Sale Act, 1882, repeals the 20th section of the Bills of Sale Act, 1878, in respect of bills of sale given by way of security, but not in respect of bills of sale given by way of absolute transfer, and therefore chattels comprised in a registered bill of sale given by way of absolute transfer are not in the order and disposition of the grantor within the Bankruptcy Act. *Swift v. Pannell*, 24 Ch. D. 210; 53 L. J., Ch. 341; 48 L. T. 351; 31 W. R. 543—Fry, J.

Notwithstanding the repeal of s. 20 of the Bills of Sale Act, 1878, by s. 15 of the Bills of Sale Act, 1882, the effect of s. 3 of the latter act is, that the grantee of a bill of sale, registered under the Act of 1878 before the coming into operation of the Act of 1882, is, so long as the registration is subsisting, entitled to the protection afforded by s. 20 against the "order and disposition" of the grantor, even when an act of bankruptcy is committed by the grantor after the coming into operation of the Act of 1882. *Izard, Ex parte, Chapple, In re*, 23 Ch. D. 409; 52 L. J., Ch. 802; 49 L. T. 230; 32 W. R. 218—C. A.

Second Bill of Sale—Cancellation of First.—Where doubts had arisen as to the validity of a bill of sale, and another was subsequently executed, which recited that it had been executed because doubts had arisen whether the first affidavit was sufficient:—Held, that the second bill of sale was intended to be effective only in the event of the first being invalid, and did not therefore cancel it. *Cooper v. Zeffert*, 32 W. R. 402—C. A.

Sale of Goods in ordinary course of Business.—Farm produce, &c., over which a bill of sale

had been granted, were seized by the landlord of a farm under a distress for rent, and were appraised at a considerably greater amount than the amount of rent due. The agent of the landlord, knowing that the tenant was indebted to the landlord in respect of the incoming valuation, but in ignorance of the bill of sale, allowed the tenant to sell a quantity of wheat which had been seized under the distress. Upon obtaining the amount realized by the sale of the wheat, the agent paid to the landlord the amount due under the valuation. In an action by the landlord against the tenant and the grantor of the bill of sale, for breach of the covenants of the lease of the farm, and for an injunction to restrain the removal of the goods, &c., the grantor of the bill of sale counter-claimed in respect of the amount so paid to the landlord:—Held, that the sale of the wheat under the circumstances was not a sale in the ordinary course of business, and that the grantee of the bill of sale was entitled to recover the amount realized thereon from the landlord. *Musgrave v. Stephens*, 47 J. P. 295; 1 C. & E. 38—Field, J.

Priority—Two Bills—Future Chattels.—By a bill of sale executed in 1875, R. granted to M. the after-acquired chattels which should be upon certain premises of R. The title of M. under the bill of sale ultimately vested in the defendant. R. brought upon the premises chattels acquired by him after 1875, and before the coming into operation of the Bills of Sale Act, 1882, by a bill of sale granted to the plaintiff these after-acquired chattels. The plaintiff had no notice of the bill of sale in favour of M. In January, 1884, the defendant seized the after-acquired chattels then upon the premises of R. The plaintiff demanded possession of them from the defendant, who refused to give them up; and the plaintiff thereupon brought an action to recover their value:—Held, that the plaintiff was entitled to recover from the defendant the value of the goods in question; for the grant of the after-acquired chattels to M. carried only an equitable interest, while the plaintiff, by the grant to him, took the legal interest without notice of the prior equitable interest vested in M., and had a better title than the defendant. *Joseph v. Lyons*, *infra*, followed. *Hallas v. Robinson*, 15 Q. B. D. 288; 54 L. J., Q. B. 364; 33 W. R. 426—C. A.

— Pledge of, in course of Business.—By a bill of sale dated February 3, 1881, M., by way of security, assigned to the plaintiff his good-will and interest in a business carried on by him at W., and all the existing stock-in-trade, and all future stock-in-trade to be brought on to the business premises. M. pledged with the defendant, a pawnbroker, stock-in-trade which had been brought on to the premises after the date of the bill of sale; the defendant received the pledge in the ordinary course of business without notice, actual or constructive, of the bill of sale. In an action for detinue or conversion of the property so pledged:—Held, that the plaintiff had an equitable title to the after-acquired property, but that the legal property was in M., from whom the defendant derived a legal interest, which, in the absence of notice to the defendant of the prior equity, was to be preferred. *Joseph v. Lyons*, 15 Q. B. D. 280; 54 L. J., Q. B. 1; 51 L. T. 740; 33 W. R. 145—C. A.

Seizure—Goods on Highway—Removal within Five Days.—By the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 13, chattels seized or taken possession of under a bill of sale "shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days." A horse and carriage were seized, under a bill of sale, in a public street, and at once removed to premises of the grantee, and after five days were sold by him:—Held, that the seizure in the street was lawful, and, in the absence of actual damage arising from the removal within the five days, no action would lie. *O'Neil v. City and County Finance Company*, 17 Q. B. D. 234; 55 L. T. 408; 34 W. R. 545—D.

— Removal within Five Days—Consent of Grantor.—The Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 13, provides that all chattels seized under a bill of sale shall remain on the premises where they were so seized for five clear days after seizure, is for the benefit of grantors only. Where, therefore, goods are seized and removed by the grantee, with the grantor's consent, within such period of five days, the grantor's landlord has no right of action against the grantee for loss of rent owing to such removal. *Lane v. Tyler*, 56 L. J., Q. B. 461—D.

Statement of Affairs, showing Grantee a Secured Creditor—Estoppel.—The plaintiff gave a bill of sale on his furniture to the defendants to secure an advance. Before the payment of the first instalment due under the bill of sale he filed a petition in bankruptcy, and in his statement of affairs returned the defendants as secured creditors. The defendants seized and sold the furniture, and the proceeds being insufficient to pay their debt they proved for the residue. A composition of 2s. 6d. in the pound was proposed, and on the report of the official receiver was sanctioned by the court and paid to the creditors, including the defendants. The plaintiff subsequently brought an action for the wrongful seizure of his goods, alleging that the bill of sale was invalid:—Held, that the plaintiff having in the bankruptcy proceedings treated the bill of sale as valid, and obtained thereby an advantage to himself, could not afterwards allege that the bill of sale was invalid so as to entitle him to recover in this action. *Roe v. Mutual Loan Fund*, 19 Q. B. D. 347; 56 L. J., Q. B. 541; 35 W. R. 723—C. A.

Act of Bankruptcy.—When a bill of sale of the whole of a trader's property is executed as security for an existing debt and a fresh advance, the true test whether the execution of the deed is an act of bankruptcy, is, was the fresh advance made by the lender with the intention of enabling the borrower to continue his business, and had he reasonable grounds for believing that the advance would enable the borrower to do so? If these questions can be answered in the affirmative, the execution of the deed is not an act of bankruptcy. *Johnson, Ex parte, Chapman*, *In re*, 26 Ch. D. 338; 53 L. J., Ch. 763; 50 L. T. 214; 32 W. R. 693—C. A.

The court ought not to look at the uncommunicated intention of the borrower, nor at the actual result of the loan. *Id.*

BIRDS.*See* WILD BIRDS.**BISHOP.***See* ECCLESIASTICAL LAW.**BOARD.***Of Health.*—*See* HEALTH.*Of Works.*—*See* METROPOLIS.*Local Government.*—*See* HEALTH.**BOMBAY CIVIL FUND.***See* INDIA.**BOND.***See* DEED.**BOOKS.***See* COPYRIGHT.**BOROUGH.***See* CORPORATION.*Parliamentary Vote.*—*See* ELECTION LAW.**BOTTOMRY.***See* SHIPPING.**BREWER.***See* INTOXICATING LIQUORS.**BRIDGE.***See* WAY.**BROKER.***See* PRINCIPAL AND AGENT.**BUILDING CONTRACTS,
LEASES AND ESTATES.**

I. BUILDING CONTRACTS.

II. BUILDING LEASES.

III. BUILDING ESTATES.

I. BUILDING CONTRACTS.

Submission, what included in—Revocation.]—

A building contract between the plaintiff and the defendants (Commissioners of Public Works), contained the following arbitration clause :—"It is hereby agreed that in case of any difference between the Commissioners and the contractor in relation to any of the works, matters, and things herein contracted for, or to the meaning of these presents or to the plans, sections, specifications, descriptions, or particulars, or to any money to be paid or retained, or to any act, matter or thing done, or omitted to be done, by either of the parties hereto, under or by virtue of any of the provisos, covenants or stipulations of these presents, and whether such difference shall relate to any act done by the Commissioners for the purpose of determining this contract . . . then, and in any such case, the same shall be referred to such arbitrator as the Commissioners shall appoint, whose decision shall be based upon the provisions of these articles, and shall be final, binding and conclusive upon the parties hereto." The plaintiff alleged that, whilst the works were in progress the Commissioners directed some of them to be suspended, and that they directed additional works, not provided for by the contract, to be executed; and in the present action, he claimed; (1) 1,112*l.* 10*s.* damages for the suspension; (2) 3,658*l.* 8*s.* 6*d.* for materials and labour in the additional works; (3) 570*l.* 10*s.* 2*d.* for furniture supplied to the Commissioners at their request; and (4) 66*l.* 15*s.* 4*d.* interest on these sums. After notice of action the Commissioners, by deed-poll, also signed by the plaintiff (and with his assent so testified), referred the plaintiff's claim for 5,408*l.* (being the total of the said sums) to the arbitration of K. The plaintiff, before any award was made, and before the submissions in the original contract or the last mentioned deed-poll were made rules of court, revoked the authority of K. as arbitrator and commenced the present action for the monies claimed, in which the Commissioners undertook to appear without prejudice to any of their rights, and before appearance entered, they applied to the court to stay the action, and for a compulsory order of reference to K. as arbitrator :—Held (1), that the plaintiff was entitled to revoke the appointment of K. and had effectively done so; (2) that item No. 1 of the claim was clearly outside the submission in the building contract; and the remaining items not being satisfactorily shown to be within the submission, and all the items being so far connected as to make it doubtful whether complete justice would be done to the parties, unless all were disposed of by the same tribunal, the court, in the exercise of its discretion, refused the application. *Moyers v. Soady*, 18 L. R., 1r. 499—Ex. D.

Assignment of Moneys due—Contractor Bank-

rupt—Completion by Trustee—Power to take Work out of Contractor's Hands.]—A building contract provided that payments should be made, as the work proceeded, of such sums on account of the price of the work as should be stated in the certificates of an architect, such certificates to be given at the architect's discretion at the rate of 80 per cent. upon the contract value of the work done at the dates of such certificates, and that the remaining 20 per cent. should be retained till the completion of the work. The contract empowered the building owners, in the event of the contractors committing an act of bankruptcy, to discharge them from the further execution of the work, and employ some other person to complete it, and to deduct the amount paid to such other person for completing the same from the contract price. The contractors assigned a portion of the retention moneys, *i.e.*, the price of work done under the contract retained under the before-mentioned provision, by way of mortgage to secure a debt, and notice of the assignment was given to the building owners. After making such assignment the contractors filed a petition for liquidation, the works then remaining incomplete. A trustee in liquidation and a committee of inspection were appointed. The trustee, in pursuance of a resolution of the committee, completed the work, himself advancing money for that purpose, of which an amount exceeding that of the retention moneys assigned as aforesaid was still unpaid, there being no other assets from which he could be recouped in respect thereof. The trustee and the mortgagees both claimed the amount of the retention moneys assigned as aforesaid from the building owners. On an interpleader issue to try the title to such moneys :—Held, that, in the absence of anything to show that the building owners had exercised the power of taking the work out of the contractor's hands, the trustee must be taken to have completed the work under the original contract as trustee of the contractors' estate, and not as a person employed to complete the work in substitution for the contractors; that the assignment of the retention moneys held good as against the trustee; and that the mortgagees were therefore entitled to succeed. *Tooth v. Hallett* (4 L. R. Ch. 242) distinguished. *Drew v. Josolyne*, 18 Q. B. D. 590; 56 L. J., Q. B. 490; 57 L. T. 5; 35 W. R. 570—C. A.

Fraud on Bankruptcy Law—Power for Buyer, in the event of Bankruptcy of Builder, to use Materials.]—A shipbuilding contract contained a clause to the effect that if at any time the builder should cease working on the ship for fourteen days, or should allow the time for completion and delivery of the ship to expire for one month without the same having been completed and ready for delivery, or in the event of the bankruptcy or insolvency of the builder, it should be lawful for the buyer to cause the ship to be completed by any person he might see fit to employ, and to employ such materials belonging to the builder as should be then on his premises, and which should either have been intended to be or be considered fit and applicable for the purpose :—Held, that the clause, so far as it related to the bankruptcy of the builder, was a fraud upon the bankrupt law and void as against the trustee. *Barter, Ex parte, Walker,*

In re, 26 Ch. D. 510; 53 L. J., Ch. 802; 51 L. T. 811; 32 W. R. 809—C. A.

The buyer having on the liquidation of the builder seized and used materials belonging to him for the purpose of completing the ship :—Held, that such user could not be justified under the contract by a subsequent cesser of work upon the ship. *Id.*

Property in Materials delivered but not fixed—Engineer's Certificates.]—By an agreement made between the plaintiff company and the defendant, a contractor, for the construction of a railway, it was provided that, once a month, the company's engineer should certify the amount payable to the contractor in respect of the value of the materials delivered, and that such certificates should be paid by the company seven days after presentation :—Held, that the property in the "materials delivered," upon their being certified for by the engineer, passed to the company, though the materials were not fixed. *Banbury and Cheltenham Direct Railway v. Daniel*, 54 L. J., Ch. 265; 33 W. R. 321—Pearson, J.

Clause vesting Materials in Landowner—Bill of Sale.]—An agreement, by a clause in an ordinary building contract, that all building and other materials brought by the builder upon the land shall become the property of the landowner, is not a bill of sale within the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31). *Brown v. Bateman* (2 L. R., C. P. 272), and *Blake v. Izard* (16 W. R. 108), followed. *Reeve v. Whitmore* (4 De G., J. & S. 1), and *Holroyd v. Marshall* (10 H. L. C. 191), distinguished. *Reeves v. Barlow*, 12 Q. B. D. 436; 53 L. J., Q. B. 192; 50 L. T. 782; 32 W. R. 672—C. A.

Architect's Certificate—Mistake.]—A building contract provided (1) that the builders were not to vary or deviate from the drawings or specifications, or execute any extra work of any kind whatsoever, unless upon the authority of the architect, to be shown, as in the contract stated, and that in all cases where such extras or variations exceeded the sum of 10*l.* the order or plan was to be further countersigned by two members of the building committee: (2) that the contract price should be paid within one month after the architect should be certified in writing that the whole of the said building had been completed and finished to his satisfaction; (3) that the decision of the architect with respect to the amount, state, and condition of the works actually executed, and also in respect of any and every question that might arise concerning the construction of the present contract, or the said plans, drawings, elevations, and specifications, or the execution of the work thereby contracted for, or in anywise relating thereto, should be final and without appeal. On the completion of the work, the architect certified that a certain sum was due, which sum included the price of extras above 10*l.* which had not been countersigned as required by the contract :—Held, that the building owners could not resist payment of any part of this sum, on the grounds (1) that the architect had by mistake certified for work not done and improperly done; (2) that his certificate included extras for an amount over 10*l.*, the order for which had not been countersigned by two members of the building committee; (3) that the architect had not

made sufficient allowances for work not done. *Lapthorne v. St. Aubyn*, 1 C. & E. 486—A. L. Smith, J.

— **Condition Precedent.**—Although the giving of a certificate by the architect be a condition precedent to a builder's right of payment for work done, the builder may nevertheless recover for the work done if the withholding of the certificate be due to the improper interposition of the employer, who prevented the architect from giving his certificate. *Brunsdon v. Beresford*, 1 C. & E. 125—Williams, J.

— **Extras.**—Where a building contract contained a clause that no extras should be paid for unless ordered in writing, and weekly bills delivered for the same, and this had not been done, though extras had been executed:—Held, that the fact that the architect's certificate for the final balance awarded a certain sum in respect of extras did not entitle the builder to recover, beyond the certified sum, for extras in respect of which no written orders had been given nor weekly bills delivered. *Brunsdon v. Staines Local Board*, 1 C. & E. 272—Mathew, J. And see *Lapthorne v. St. Aubyn*, supra.

— **Extension of Time.**—A contractor undertook to execute works, with additions, enlargement, &c., within a specified time, the architect having power to extend the time for completion in proportion to the extra work so ordered. Additions were ordered and executed, and caused delay in completion of the works beyond the time specified, but the architect did not extend the time:—Held, that the contractor was bound to complete the works within the time specified and was liable to pay damages for non-completion within the specified time. *Tew v. Newbold-on-Avon District School Board*, 1 C. & E. 260—A. L. Smith, J.

II. BUILDING LEASES.

Reservation of Minerals.—The holder of a building lease, where minerals are reserved, has a right to dig foundations for buildings about to be erected and dispose of the materials dug out, but not to do so in order to improve the surface as a building site. *Robinson v. Milne*, 53 L. J., Ch. 1070—North, J.

Agreement — Specific Performance.—The court will not decree the specific performance of a preliminary building agreement, nor give damages for the breach of such an agreement. *Wood v. Silcock*, 50 L. T. 251; 32 W. R. 845—V.-C. B.

III. BUILDING ESTATES.

Restrictive Covenant—Rights of Purchaser—Injunction.—An estate was laid out for building, and a great part of it had been sold. In 1882 some of the unsold part was put up for sale by auction, with a condition that the purchaser of certain lots was to covenant to expend on each of the dwelling-houses built not less than 1,200*l.* As to some lots there were other restrictions; and some were free from restriction. One of the plaintiffs bought some of the free lots,

and also a restricted lot, not being one of the first-named. Next year the unsold lots, together with another piece of land forming together the whole of the unsold parts of the estate, were put up for sale, with similar conditions as to the first-named lots; but as to other lots free from restrictions. All the lots were then sold, except the first-named lots, both plaintiffs being purchasers of free lots. The first-named lots were in the following year sold to the defendant, who entered into a covenant with the vendors not to build houses of less value than 1,200*l.* He now proposed to build houses of less value:—Held, that the doctrine of *Nottingham Patent Brick and Tile Company v. Butler* (16 Q. B. D. 778), ought to be extended to cover the present case, and that the plaintiffs were entitled to restrain the defendant from building houses of less value. The plaintiff in such a case is not obliged to prove damage in order to obtain an injunction. *Collins v. Castle*, 36 Ch. D. 243; 57 L. J., Ch. 76; 57 L. T. 764; 36 W. R. 300—Kekewich, J.

Assignees of Purchasers—Right to enforce against one another.—Sites of a row of houses in a town were conveyed by the same vendors to various persons, all about the same time, and the conveyances were substantially in the same form. In each case a rent-charge was reserved, and the purchasers covenanted that they would build the houses according to a plan, and that the outside of the houses should not after it was finished ever be altered. The assignees of a purchaser were making an addition to the front of one house and the assignees of the purchaser of an adjoining house sought to restrain the alteration:—Held, that it was a question of fact in each case whether the restrictions were merely matters of agreement between the vendor and the several purchasers for the protection of the vendor, or were intended to be for the common advantage of the several purchasers, and that in this case it was not shown that they were intended to be otherwise than for the benefit of the vendor, and the plaintiffs could not enforce them. *Western v. MacDermott* (2 L. R. Ch. 72) discussed. *Sheppard v. Gilmore*, 57 L. J., Ch. 6; 57 L. T. 614—Stirling, J.

Rights of Owner — Compensation — "Injuriously affecting."—Part of land laid out as a building estate was taken by a local board under an act incorporating the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), for the purposes of a sewage farm, whereby the value of other parts of the land near to the part so taken was depreciated, even in the absence of any nuisance arising from the sewage farm when made:—Held, that the owner of the estate was entitled to compensation under the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), s. 63, not only in respect of the land taken, but also for damage sustained by reason of the "injuriously affecting" the other lands by the exercise of the statutory powers. *Reg. v. Essex* 14 Q. B. D. 753; 54 L. J., Q. B. 459; 52 L. T. 926; 33 W. R. 214; 49 J. P. 87—D. Affirmed in *H. L.*, W. N., 1889, p. 76, sub nom. *Essex v. Acton Local Board*.

BUILDING SOCIETY.

- I. BORROWING POWERS.
- II. MORTGAGES—STATUTORY RECEIPT.
- III. SHARES, FINES AND DEDUCTIONS.
- IV. ARBITRATION IN CASE OF DISPUTES.
- V. ACCOUNTS.
- VI. GUARANTEES.
- VII. WINDING-UP.

I. BORROWING POWERS.

From non-members—By Directors—Power to Bind.]—One of the rules of a building society, formed under 6 & 7 Will. 4, c. 32, provided that the society "is established for the purpose of raising by monthly subscriptions and deposits on loans a fund to make advances to members of the value of their shares," &c. Another rule provided that the directors should meet at specified times, "for the purpose of conducting the business of the society." A third rule provided that at the end of every five years a general account of the affairs of the society should be prepared, showing the gross receipts and expenditure and liabilities, and that "if on taking the accounts there appears to be a deficiency of income, by which the society may be prevented from meeting its anticipated expenditure and liabilities, the amount of such deficiency shall be equitably and equally apportioned by the directors between the investing and borrowing members, and be paid forthwith by such monthly or quarterly instalments as the directors shall determine."—Held, that the first rule authorized the borrowing of money from persons not members of the society; that the second rule enabled the directors to exercise the power; and that the third rule did not enable the directors to pledge the individual credit of the members to the lenders of money to the society, but that, even if it did, and was thus ultra vires, as being inconsistent with the nature of a building society under the act, that rule might be rejected, leaving the borrowing power unaffected.—Held, that the lenders of money to the society were entitled, on its being wound up, to be paid out of the assets in priority to any of the members. *Mutual Aid Permanent Benefit Building Society, In re, Anson, Ex parte*, 30 Ch. D. 434; 55 L. J., Ch. 111; 53 L. T. 802; 34 W. R. 143—C. A.

Unlimited Power—Deposit of Deeds.]—A benefit building society, enrolled under 6 & 7 Will. 4, c. 32, by its 32nd rule authorized the directors from time to time, as occasion might require, to borrow any sums of money at interest from any persons; the borrowed money to be a first charge upon the funds and property of the society. Under this rule the directors borrowed large sums for the proper purposes of the society, and deposited with the lenders, as security, title deeds of properties which had been mortgaged to the society by advanced members.—Held, that the rule was valid, and that the lenders

were entitled in the winding-up to payment out of the assets, after satisfaction of the outside creditors, and in priority to the claims of all shareholders or members; but that the lenders must give up their securities to the official liquidator, the claim to special equitable charges upon specific properties being inconsistent with the true meaning of the rule, which was that all the moneys borrowed under it were to have the benefit, equally and *pari passu*, of a first charge upon the general funds and property. Lord Hatherley's dictum in *Laing v. Reed* (5 L. R., Ch. 8), as to an unlimited power of borrowing, overruled. *Murray v. Scott*, 9 App. Cas. 519; 53 L. J., Ch. 745; 51 L. T. 462; 33 W. R. 173—H. L. (E.)

Society not authorized to Borrow—Overdrawing Banker's Account—Lien.]—A benefit building society which had no power to borrow money, were permitted by their bankers to overdraw their account to a large amount; and in 1876 a memorandum of agreement was signed by the officers of the society and confirmed by the directors, stating that certain deeds of borrowing members which had been deposited with the bankers were deposited not only for safe custody but as a security for the balance from time to time due. In 1881 an order for winding up the society was made, and the bankers claimed to retain the deeds as security for the balance of their account. No evidence was given as to the application of the money which was advanced by the bankers; but the solicitors on both sides signed an admission that some part was applied in payment of members withdrawing from the society and the remainder in payment of salaries, legal expenses, and expenses of mortgaged property.—Held, that the overdrawing of the bankers' account was ultra vires, being a borrowing unauthorized either by the rules or the objects of the society, and therefore that the bankers had no lien on the deeds either under the agreement or by the course of dealing with the society. *Brooks v. Blackburn Building Society*, 9 App. Cas. 857; 54 L. J., Ch. 376; 52 L. T. 225; 33 W. R. 309—H. L. (E.).

—Money paid in Mistake of Law—Ratification.]—A benefit building society which had never been incorporated, and had no power to borrow money, was allowed by its bankers to make large overdrafts, and the directors of the society signed a memorandum giving the bankers a lien upon all the society's deeds, to secure all moneys which from time to time might be owing by the society to the bankers on the balance of the banking account. Annual balance-sheets, showing the amounts due to the bankers, were sent to all the members of the society, and adopted at the annual meetings. The society was afterwards ordered to be wound up, and as the overdrafts were ultra vires, being a borrowing unauthorized by the rules, the official liquidator brought an action against the bankers to recover all moneys which had been paid to them by the society, and applied by the bankers in discharge of their loan to the society.—Held, that it was no answer to such action that the moneys had been so applied by the order of the directors of the society under a mistake of law as to their power to borrow, since the acts of the directors, both in borrowing and in directing the application

of the moneys, were unauthorized and not binding on the society. Held, also, that there had been no ratification of such acts of the directors by all the members of the society, as such ratification could not be implied from merely seeing and not questioning the balance-sheet accounts which had been sent to them, and no ratification of such acts by the majority would bind the minority of the members. The bankers were, however, allowed to stand in the place of withdrawing members of the society who had been paid on notice of withdrawal out of moneys so advanced by the bankers, and to receive the amounts which would be payable to such members if they had not been paid off. The bankers were also to have the benefit of securities obtained by the society by means of the overdrafts allowed by the bankers, and to have the benefit of such securities according to their order of priority without being postponed until after other securities granted to the society. *Blackburn District Benefit Building Society v. Brooks*, 29 Ch. D. 902; 54 L. J., Ch. 1091; 53 L. T. 741—C. A.

— **Subsequent Powers—Deposit Note for past Loan—Estoppel.**—The directors of an unincorporated building society which had no borrowing powers borrowed money for the benefit of the society and gave to the lender as security the promissory notes of the directors. The society was afterwards incorporated under The Building Societies Act, 1874 (37 & 38 Vict. c. 42), and acquired borrowing powers. The appellant, who was the representative of the lender, applied to the society for repayment of the loan, but ultimately agreed to refrain from legal proceedings against the society on the directors giving him a deposit note for the amount due. The directors accordingly gave him a deposit note under the seal of the society, stating that the money was lent by the appellant on the date of the deposit note, and he thereupon gave up to them the promissory notes above mentioned:—Held, that the deposit note was not binding on the society. *Sheffield Building Society, In re, Watson, Ex parte*, 21 Q. B. D. 301; 57 L. J., Q. B. 609; 59 L. T. 401; 36 W. R. 829; 52 J. P. 742—D.

— **Trustees—Liabilities of Society discharged out of Borrowed Money.**—By rule 34 of a benefit building society it was provided that when the sum of 100*l.* for every share given out, together with all costs and other expenses of the society, should have been fully paid . . . the society was to be terminated, and the trustees were to indorse a receipt on the mortgage deeds, and deliver them up to the members. This was an action by advanced members of the society, which was established on the 11th April, 1864, against the trustees, to redeem their mortgages, on the ground that their monthly instalments had all been paid, all the unadvanced members had been paid off; there was no valid subsisting debt or liability, and the society terminated on the 11th April, 1884. There was no power for the trustees of the society to borrow, but the defendants, with the assent of the plaintiffs and other members of the society, borrowed money for the purposes of the society. The defendants claimed to stand in the place of the persons to whom they had made payments, for which the society was liable, out of the borrowed money. The court declared, that if any of the officers of the society had made any payments for which

the society was liable, there not being any moneys of the society out of which such payments could be made, such officers were entitled to stand in the place of the persons to whom such payments were made, and to maintain a claim against the society for the amount of such payments. *Owen v. Roberts*, 57 L. T. 81—Kay, J.

II. MORTGAGES—STATUTORY RECEIPT.

Priority—Tacking.—The lessee of a term, in November, 1865, mortgaged it to the trustees of a building society of which he was a member, to secure the payment by him of all moneys which might become due from him pursuant to the rules of the society. In September, 1868, the lessee of the term again mortgaged it to the plaintiff to secure the sum of 70*l.* then due from him to the plaintiff, and such further sums as should thereafter be advanced by the plaintiff. Notice of the mortgage to the plaintiff was not given to the building society. Previously to June, 1875, the lessee of the term applied to the defendants to advance to him the sum of 150*l.* on the security thereof. He informed them that the property was subject to the mortgage to the building society, but was not subject to any other incumbrance. In July, 1875, the defendants paid to the trustees of the building society the sum of 57*l.* 18*s.* 11*d.*, being the full amount due from the lessee of the term, and thereupon the trustees, under 6 & 7 Will. 4, c. 32, s. 5, signed a receipt indorsed on the deed of mortgage to the society, acknowledging that all moneys intended to be secured by the mortgage to the building society had been paid. In the same month the defendants paid to the lessee of the term the sum of 92*l.* 1*s.* 12*d.*, being the balance of the sum of 150*l.* agreed to be advanced, and thereupon he executed a mortgage of the term to the defendants to secure payment of the sum of 150*l.* The lessee of the term afterwards became insolvent. The present action for foreclosure having been brought in a county court, the judge, by his decree, declared that the hereditaments were subject, first, to a charge of what might be due to the defendants in respect of the 57*l.* 18*s.* 11*d.* paid by them to the building society; secondly, to a charge of what might be due to the plaintiff by virtue of the mortgage to him; thirdly, to a charge of what might be due to the defendants on the security of their mortgage, so far as the same might not be included in the first charge:—Held, that the priorities were correctly ascertained, and that the decree of the county court was right. *Robinson v. Trevor*, 12 Q. B. D. 423; 53 L. J., Q. B. 85; 50 L. T. 190; 32 W. R. 374—C. A.

Per Brett, M. R., and Bowen, L. J., that the present case fell within the principles laid down in *Pease v. Jackson* (3 L. R., Ch. 576). *Id.*

Per Baggallay, L. J., first, on the authority of *Pease v. Jackson* (3 L. R., Ch. 576), that the defendants had the better equity, and consequently the better right to call for the legal estate, and that the legal estate in the property comprised in the mortgage to the building society had vested in the defendants by virtue of the indorsed receipt; nevertheless that the security acquired by the defendants, by reason of the legal estate becoming vested in them, did not extend beyond the amount advanced by them to pay off the building society, and that, as regarded the fur-

ther advance, they were incumbancers puiſne to the plaintiff; ſecondly, that notwithstanding the Land Transfer Act, 1875, s. 129, the defendants, owing to the Vendor and Purchaſer Act, 1874, were precluded from treating the property veſted in them as ſecurity for the further ſum advanced by them to the leſſee of the term. *Fourth City Mutual Benefit Building Society v. Williams* (14 Ch. D. 140) commented on. *Ib.*

Land and four houſes thereon were veſted in a building ſociety as mortgagees; and on the ſociety being paid off by the plaintiff, by requeſt of the mortgagor, the mortgage deed, with a receipt indorſed in accordance with the 42nd ſection of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), was with other title-deeds handed to him, and the mortgagor ſhortly afterwards conveyed to him the property, on mortgage for a larger loan. The mortgagor had prior to the payment to the building ſociety conveyed one houſe in fee to the defendant, who was ignorant of the mortgage to the ſociety, and he at once took poſſeſſion of it, but the plaintiff knew nothing of the ſale and purchaſe:—Held, that the effect of the indorſed receipt was to veſt the legal eſtate in the plaintiff, and to give him, to the extent of the money paid to the ſociety and the intereſt thereon, priority over the defendant's claim. *Peaſe v. Jackson* (3 L. R., Ch. 576), *Fourth City Mutual Benefit Building Society v. Williams* (14 Ch. D. 140), and *Robinson v. Trevor* (12 Q. B. D. 423) diſcuſſed. *Sangster v. Cochrane*, 28 Ch. D. 298; 54 L. J., Ch. 301; 51 L. T. 889; 33 W. R. 221; 49 J. P. 327—Kay, J.

A piece of land was mortgaged to a friendly ſociety, and by way of ſecond mortgage to a banking company. A building ſociety agreed to pay off the firſt mortgage, and to make a further advance, having no notice of the ſecond mortgage. Accordingly by a deed indorſed on the firſt mortgage deed, the firſt mortgagees reconveyed to the mortgagor; and by another deed he conveyed the land to the building ſociety to ſecure the repayment of the ſum paid to the firſt mortgagees, and the further advance:—Held, that as the legal eſtate had paſſed by a reconveyance and not by a receipt under 38 & 39 Vict. c. 60, s. 16, ſub-s. 7, it was veſted in the building ſociety, and gave them priority over the ſecond mortgagees. *Robinson v. Trevor* (12 Q. B. D. 423) diſtinguiſhed. *Carlisle Banking Company v. Thompson*, 28 Ch. D. 398; 53 L. T. 115; 33 W. R. 119—North, J.

H. mortgaged leaseholds to building ſocieties eſtabliſhed under 6 & 7 Will. 4, c. 32, and executed a ſecond mortgage to the reſpondents. H. afterwards borrowed a ſum from the appellants, part of the loan being applied in paying off the building ſocieties, and the balance being paid directly to H., who executed a mortgage to the appellants to ſecure the loan. Upon being ſo paid off the building ſocieties indorſed on their reſpective mortgages receipts to the mortgagor in accordance with 6 & 7 Will. 4, c. 32, s. 5, and delivered the indorſed deeds with the title-deeds to the appellants. Neither the building ſocieties nor the appellants had any notice of the reſpondents' mortgage. The reſpondents having brought an action againſt the appellants for foreclosure and ſale:—Held, that the appellants' mortgage had priority over the reſpondents' mortgage, not only in reſpect of the moneys applied in paying off the building ſocieties, but

also in reſpect of the balance of the loan paid directly to H. *Peaſe v. Jackson* (3 L. R., Ch. 576) and *Robinson v. Trevor* (12 Q. B. D. 423) overruled upon this point. *Hosking v. Smith*, 13 App. Cas. 582; 58 L. J., Ch. 367; 59 L. T. 565; 37 W. R. 257—H. L. (E.)

Loan repayable by Instalments and Premiums—Interſt on Premiums.—Under the rules of a building ſociety which required that loans upon a mortgage ſhould be repaid by annual inſtalments and premiums ſpread over a certain number of years, it was held that the ſociety was juſtified in adding the whole of the annual premiums to the capital, and charging intereſt upon the combined amount; and upon the borrower redeeming before the end of the period he was not entitled to a rebate in reſpect of the premiums contracted to be paid. *Harvey v. Municipal Permanent Investment Building Society*, 26 Ch. D. 273; 53 L. J., Ch. 1126; 51 L. T. 408; 32 W. R. 557—C. A.

Payment off—Statutory Receipt.—Where a borrowing member of a building ſociety has mortgaged property to the ſociety to ſecure advances, and all payments due from him to the ſociety, and the ſociety on payment off of the mortgage indorſes a ſtatutory receipt under the 42nd ſection of the Building Societies Act, 1874, ſuch receipt precludes them from queſtioning the ſufficiency of the payment, and from making any further claim againſt the mortgagor in reſpect of the debt. *Sparrow v. Farmer* (28 L. J., Ch. 537), diſtinguiſhed. *Ib.*

Proof in Bankruptcy—Premiums.—Under a mortgage to a building ſociety the principal ſum advanced, together with a fixed ſum by way of premium for the advance and intereſt on the amount due, was payable by monthly inſtalments:—Held, that the premiums were not intereſt at all, and that in the liquidation of the mortgagor the ſociety were entitled to prove for the whole amount of the premiums, and were not reſtricted to the proportionate part which had accrued due at the date of the liquidation. *Bath, Ex parte, Phillips, In re*, 27 Ch. D. 509; 51 L. T. 520; 32 W. R. 808—C. A.

Assignment to Perſon other than Mortgagor.—A building ſociety is not precluded by the provisions of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), from exerciſing the ordinary right of a mortgagee to transfer his mortgage, by way of assignment, to any third perſon. *Ulster Permanent Building Society v. Glenton*, 21 L. R., Ir. 124—Monroe, J.

Diſputes as to.—See infra, IV.

III. SHARES, FINES, AND DEDUCTIONS.

Shares held on Trust—Payment to Registered Owner without Notice.—A. N. was the registered owner of ſhares in a building ſociety which he held on truſt for the plaintiff. The certificates for the ſhares were in the poſſeſſion of the plaintiff, but the ſociety never received any notice of her intereſt in the ſhares. By the rules of the ſociety, the certificates muſt be produced on withdrawal of the money inveſted. A. N. was allowed to withdraw the amount

invested without producing the certificates; he then absconded, and did not account to the plaintiff for the sums which he had received from the society:—Held, that the plaintiff could not compel the society to register her as the owner of the shares, and credit her with the money paid to A. N. *Noloth v. Simplified Permanent Building Society*, 53 L. T. 859; 34 W. R. 73—North, J.

Resolution to make Deduction from Amount at Credit of Members.]—The rules of a benefit building society under the Building Societies Act, 1874, provided that the unadvanced members might withdraw the sum at their credit in the society's books after certain notice. The society's property fell in value, and a majority of the members passed a resolution that 7s. 6d. per pound should be deducted from the amounts at the credit of the members and placed to a suspense account. No proceedings for winding up the society had been commenced; and there was no rule as to the manner in which losses were to be borne:—Held, that the resolution was ultra vires; and that the members who had given notice of withdrawal after the resolution were entitled to be paid the whole amount at their credit. *Auld v. Glasgow Working Men's Building Society*, 12 App. Cas. 197; 56 L. J., P. C. 57; 56 L. T. 776; 35 W. R. 632—H. L. (Sc.)

Interest on Shares withdrawn—Payment of, in Interval between last Dividend and Notice of Withdrawal.]—The plaintiff was a member and a shareholder of the defendant building society, and in March, 1887, was the holder of 250l. paid-up investment shares. On the 2nd March he gave notice of withdrawal of 125l., part thereof, at a month's date, and that sum was duly paid to him. On the 15th July, 1887, the directors apportioned to the paid-up investment shares then on the register an interim dividend at the rate of 5 per cent. per annum, for the half-year ending the 30th June, 1887; but they refused to pay any interest or dividend to the plaintiff on the 125l. withdrawn. Thereupon the plaintiff claimed 15s. as interest on that sum from the first of January, the date of the last dividend, to the 2nd March, 1887, the date of notice of withdrawal, at the rate allowed on deposits, namely 4 per cent., pursuant to rules 19 and 21 of the society. The directors had passed the following resolutions, on the 5th November, 1886, that "subject to the rules the interest allowed on moneys withdrawn do not for the present exceed 2½ per cent. per annum;" and on the 18th February, 1887, that "no interest be allowed upon interim withdrawals until further consideration." The plaintiff had no notice of the resolutions. By rule 9 of the society, "paid-up shares may be withdrawn or repaid upon the terms set forth in rule 21." By rule 19, "interest shall be allowed on investment shares at such rates as the board shall from time to time fix." By rule 21, "any member may withdraw the subscriptions in respect of investment shares, subject to the conditions specified below, after one month's notice in writing. . . . A member withdrawing a portion only of the amount at the credit of his share account, shall not be paid interest thereon at a rate exceeding that for the time being allowed on deposits. Interest on all shares shall cease

at the date of notice of withdrawal." For the defendants it was contended that, as there was no contract to pay interest, the only interest the plaintiff was entitled to was the interest fixed by the board, and here the board had fixed no interest, and that the resolution of the 18th February, 1887, was fatal to the plaintiff's claim:—Held, that the plaintiff was entitled to interest on the 125l. withdrawn, from the date of the last dividend up to the date of notice of withdrawal, and that such interest ought to be at the rate allowed on deposits, namely, 4 per cent. *Perratt v. London Scottish Permanent Benefit Building Society*, 59 L. T. 31—D.

Fine—Compound Interest—Advanced Member.]—One of the rules of a building society was as follows: "The fines incurred by all present or future mortgagors, by neglecting to make their monthly payments of principal, interest, fines, and other payments, will be at the rate of five per cent. per month on the total amount in arrear":—Held, that the monthly fine was to be calculated at the rate of five per cent. per month on the amount of the previous fines and other payments as well as of the principal and interest in arrear. Held also, that the amount of the fine was not unreasonable. *Middlesborough Building Society, In re*, 54 L. J., Ch. 592; 51 L. T. 743; 49 J. P. 278—Kay, J.

Right to deduct Income-tax from Repayments.]—W. borrowed from a building society moneys on mortgage, to be repaid by instalments, covering principal, interest, and charges for working expenses. These repayments were regularly made till W.'s death, in 1881. His executors claimed to deduct income-tax from the remaining instalments. The society was subsequently wound up, and the liquidators refused to allow deductions for income-tax. The executors, however, did in fact deduct, under protest from the liquidators, income-tax in respect of repayments since 1877. No mention of income-tax was contained in the rules, and the society had always refused to allow deductions in respect thereof. On summons by the liquidators calling upon the executors to pay the sums deducted for income-tax:—Held, that the executors were entitled to deduct income-tax in respect of the present repayment, and also from future repayments, but only upon so much as represented interest, but that they could not be allowed to deduct anything for income-tax in respect of past repayments. *Middlesborough Building Society, In re, Wythes, Ex parte*, 53 L. T. 492—Kay, J.

IV. ARBITRATION IN CASE OF DISPUTES.

Mortgages—Before Act of 1884.]—When the rules of a benefit building society governed by 37 & 38 Vict. c. 42, provide for the settlement by arbitration of disputes between the society and any of its members, the High Court has no jurisdiction to entertain an action by the society against a member for moneys due to it under covenants in mortgage deeds executed by the member, as such, to the society. *Wright v. Monarch Investment Building Society* (5 Ch. D. 726), and *Hack v. London Provident Building*

Society (23 Ch. D. 103), approved. *Municipal Permanent Investment Building Society v. Kent*, 9 App. Cas. 260; 53 L. J., Q. B. 290; 51 L. T. 6; 32 W. R. 681; 48 J. P. 352—H. L. (E.).

A building society registered under the Act of 1874, by whose rules it was provided that disputes between the society and any of its members should be settled by arbitration, sold to one of its members leaseholds mortgaged to it by others of its members. The mortgagors brought an action to set aside the sale on various grounds of fraud:—Held, that the questions raised on the action were not compulsorily referable to arbitration, as being a dispute between the society and some of its members. *Hack v. London Provident Building Society* (23 Ch. D. 103), and *Municipal Permanent Building Society v. Kent* (9 App. Cas. 260), distinguished. *French v. Municipal Permanent Building Society*, 53 L. J., Ch. 743; 50 L. T. 567—Pearson, J.

In 1867, the plaintiff, who was an advanced member of a building society, gave a mortgage to the defendants, the trustees of the society, to secure all such principal or interest moneys and other payments as he ought to pay according to the rules. The plaintiff made all the required payments, the term of which expired in 1884. The rules of the society provided that disputes were to be referred to arbitration, and that when any advanced member had made all his payments during the term they were to cease and the trustees were to return his title-deeds and indorse a receipt; and on completion of his term the member was entitled to share in surplus profits. The rules were silent as to losses. After the advance to the plaintiff the society suffered losses, and the defendants claimed to retain the mortgage as a security for the share of those losses to which they contended the plaintiff was liable to contribute. The society was not incorporated under the Building Societies Act, 1874. There were no outside creditors, and the society was solvent. In an action by the plaintiff for a discharge of his mortgage and delivery up of his title-deeds, and repayment of moneys alleged to have been paid by him in excess of the proper amount through mistake of fact:—Held, that the subject of the action was not within the arbitration clause, that the plaintiff could not be called on to contribute to losses, and was entitled to the relief claimed. *Buckle v. Lordonny*, 56 L. J., Ch. 437; 56 L. T. 273; 35 W. R. 360; 51 J. P. 422—Kay, J.

— **After Act of 1884.**—By s. 2 of the Building Societies Act, 1884, unless otherwise expressly provided, the word “disputes” in the Building Societies Acts, or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member in his capacity of member of the society, and shall not apply to any dispute between any such society and any member thereof as to the construction or effect of any mortgage deed, and shall not prevent any society, or any member thereof, from obtaining in the ordinary course of law any remedy in respect of any such mortgage, to which he or the society would otherwise be by law entitled. The rules of a building society provided that any dispute arising between the society and any member thereof should be referred to arbitration:—Held, in an action by the society to recover money due from a member under a covenant in a mortgage deed, that the

words “any such mortgage” in the latter part of the section referred to any mortgage between the society and one of its members, and not only to mortgages as to the construction or effect of which there was a dispute, and, therefore, whether the dispute was one between the society and a member in his capacity of member of the society, or not, and whether it was a dispute as to the construction or effect of the mortgage deed or not, the rule did not apply, and the plaintiffs were entitled to proceed with their action. *Western Suburban, &c., Permanent Benefit Building Society v. Martin*, 17 Q. B. D. 609; 55 L. J., Q. B. 382; 54 L. T. 822; 34 W. R. 630; 51 J. P. 36—C. A.

Notice of Withdrawal—Refusal to Repay.—A statement of claim alleged that the plaintiff was an unadvanced member of the defendant society, which was certified and enrolled pursuant to the statute 6 & 7 Will. 4, c. 32, and up to the 10th July, 1882, subscribed moneys to the society in respect of three paid-up shares amounting to 227l. 10s., which, according to the rules of the society, were of the value of 303l. 4s. 4d.; that the plaintiff gave notice to withdraw, and the defendants refused to repay the sum of 303l. 4s. 4d.:—Held, on demurrer, that the statement of claim was bad; that it disclosed a dispute between a building society and a member, and it must be assumed that a rule existed referring such a dispute to arbitration pursuant to 10 Geo. 4, c. 56, s. 27. *Johnson v. Altrincham Permanent Benefit Building Society*, 49 L. T. 568; 48 J. P. 24—D.

A member of a building society who had given notice to withdraw, brought an action to restrain the society from distributing any profits until the shares of the withdrawing members had been paid. The rules of the society contained the usual rule that all disputes between the society and any member should be referred to arbitration. On a motion by the plaintiff for an injunction, the court held, that a withdrawing member was still a member of the society within the meaning of the rule, and that the dispute not being as to the construction of any mortgage deed or any contract in any document other than the rules of the society, within the meaning of the Building Societies Act, 1884, the court had no jurisdiction to try the action; on appeal from this decision:—Held, that the plaintiff was either a member or a person claiming by or through a member within the meaning of the rule. *Walker v. General Mutual Investment Building Society*, 36 Ch. D. 777; 57 L. T. 574; 52 J. P. 278—C. A.

Action against Directors for Retaining Moneys.—An action was brought by a building society, registered under the Building Societies Acts, against former directors and the former secretary for an account of sums of money which, as alleged, they had received on behalf of, and had not accounted for to the society, but had appropriated them to their own use. The defendants were members of the society, the 49th rule of which stated that in case of dispute arising between the society and any members thereof it should be settled by arbitration. On a summons taken out by one of the defendants asking that the action should be stayed, and that the dispute should be referred

to arbitration, in accordance with the rule, and in pursuance of the Building Societies Act, 1884 (47 & 48 Vict. c. 41, s. 2):—Held, that a claim by a society against its officer for misappropriating and keeping in his hands moneys of the society, was not a dispute between the society and a member thereof “in his capacity of a member” within the meaning of the Building Societies Act, 1884, and that the action ought not to be stayed. *Municipal Permanent Investment Building Society v. Richards*, 39 Ch. D. 372; 58 L. J., Ch. 8; 59 L. T. 883; 37 W. R. 184—C. A.

V. ACCOUNTS.

Audited Accounts—Impeaching on Ground of Fraud.—One of the rules of a building society provided for an annual audit of accounts, and that after the auditing and signing of the accounts the treasurer should not be answerable for mistakes, omissions or errors afterwards proved in the accounts. In an action by members against the treasurer for accounts:—Held, that though the audited accounts must be received as *prima facie* evidence, the rule afforded no protection against the right of the members to impeach the accounts on the ground of fraud. *Holgate v. Shutt*, 27 Ch. D. 111; 53 L. J., Ch. 774; 51 L. T. 433; 32 W. R. 773—C. A.

— **Form of—Settled Accounts.**—By the rules of a benefit society it was provided that the accounts should be audited, and that after they had been audited and signed by the auditors, the secretary and treasurer should not be answerable for any mistakes, omissions, or errors that might afterwards be proved in them. By stat. 10 Geo. 4, c. 56, s. 33, it was directed that the accounts of a society of this description should be audited by two or more members of the society. In December, 1883, an order was made for an account of all moneys received by S., the late secretary. S. carried in audited accounts down to October, 1880, and claimed to have them treated as conclusive, while the plaintiffs claimed to have them disregarded. The Court of Appeal decided (27 Ch. D. 111) that accounts audited and signed according to the rules were *prima facie* evidence in favour of S., but that the plaintiffs, in taking the accounts directed by the order, might impeach such audited accounts for fraud. On examination of the audited accounts, it appeared that they had throughout been audited and signed by one person only, who was not a member of the society:—Held, that the accounts had not been duly audited in accordance with the statute and the rules, and that the original order must be discharged, but without prejudice to the right of the defendant to show that the accounts in question were to be treated as settled accounts on any other ground than that they were audited in accordance with the statute and the rules. *Holgate v. Shutt*, 28 Ch. D. 111; 54 L. J., Ch. 436; 51 L. T. 673; 49 J. P. 228—C. A.

VI. GUARANTEES.

Of prior Mortgage—Ultra Vires.—A building society advanced in 1876 to A., a member, 1,000*l.* A. disposed in security an *ex facie* absolute dis-

position of certain subjects, which were already burdened by a prior mortgage. In 1879 A.'s estates were sequestrated, and the directors of the society, in order to prevent a sale of the subjects at an alleged loss, granted B. a bond of corroboration guaranteeing the payment of his prior mortgage. In 1882 an order for the voluntary winding-up of the society was made, and the liquidators instituted this action concluding for reduction of the bond of corroboration granted to B. as being *ultra vires* of the directors, and in violation of the rules and constitution of the society:—Held, that the bond was *ultra vires*, being a transaction not authorized by the rules, and not incidental to the conduct of the society's business. *Small v. Smith*, 10 App. Cas. 119—H. L. (Sc.)

VII. WINDING-UP.

Under Companies Act—Claim against Debtor—Summons.—A building society established under the Building Societies Act, 1874, may be wound up voluntarily under the Companies Acts, 1862 and 1867. In such a winding-up a claim for the repayment of money lent to the defendant out of the funds of the society contrary to its rules may be made by summons. *Sunderland 32nd Universal Building Society, In re, Jackson, Ex parte*, 21 Q. B. D. 349; 37 W. R. 95—D.

Unincorporated Society—Dismissal—Appeal—Subsequent Incorporation.—A petition for a compulsory winding-up of a building society was presented in the Chancery Court of the County Palatine of Lancaster. The society was established under the Building Societies Act, 1836, and at the date of the presentation of the petition it had not become incorporated under the Building Societies Act, 1874. The winding-up petition was therefore presented in the Court of Chancery under the provisions of part 8 of the Companies Act, 1862. The petition was dismissed and notice of appeal was given. Between the date of the notice of appeal and the hearing the society obtained a certificate of incorporation under the Building Societies Act, 1874. On the hearing of the appeal the objection was taken that the Court of Appeal had no longer jurisdiction over the society:—Held, that the objection was fatal to the appeal, and that it must be dismissed. *Old Swan, &c., Benefit Building Society, In re, Evatt, Ex parte*, 57 L. T. 381—C. A.

Borrowing Members and Losses inter se.—The rules of a benefit building society provided that borrowing members who have given heritable securities for an advance could redeem their bonds either by (1) giving three months' notice that they renounce their shares, and paying the amount of the advance under deduction of instalments paid and interest thereon; or (2) by payment of the whole sum borrowed, retaining their shares; and that when the subscriptions with the share of profits of such members were equal to the amount advanced, then their payments and connexion with the society were to cease. In 1884, losses having occurred, the society was ordered by the court to be wound up. There were no outside creditors:—Held, that the case was governed by *Brownlie v. Russell* (8 App. Cas. 235), and that the borrowing

members were entitled to have their securities discharged in the terms of the rules and were not bound to remain members and bear a share of the losses incurred by the society. *Tosh v. North British Building Society*, 11 App. Cas. 489; 35 W. R. 413—H. L. (Sc.).

Priority — Preference Shares — Unadvanced Members.]—A benefit building society, enrolled under 6 & 7 Will. 4, c. 32, by its 31st rule authorized the board to issue deposit or paid-up shares for 30*l.* each at 5 per cent. interest, with the right of withdrawing the whole or part of the deposit upon notice in preference to all other shares. This rule was struck out by the certifying barrister, but the directors printed and acted upon it by issuing shares accordingly. Some years afterwards the rule was amended, by altering 30*l.* into 1*l.*, and the amendment was certified by the barrister; and those who had taken 30*l.* shares had them exchanged for 1*l.* shares, and other 1*l.* shares were issued to new shareholders. The moneys paid by these shareholders were applied for the purposes of the society:—Held, that such shareholders, whether they had become so before or after the amendment was certified, and whether they had given notice of the withdrawal or not, were entitled to be paid in the winding-up in preference to the unadvanced members. *Murray v. Scott*, 9 App. Cas. 519; 53 L. J., Ch. 745; 51 L. T. 462; 33 W. R. 173—H. L. (E.).

— Depositors — Outside Creditors — Notice of Withdrawal.]—A registered company, carrying on business in the nature of that of a building society, had power to receive money by way of deposit from any person or partnership. Deposits were withdrawable upon giving a certain notice, according to the amount thereof. In December, 1881, C. deposited 300*l.* with the company, upon which interest was duly paid until June, 1884. In December, 1884, C. gave notice that he required to withdraw his deposit, but the same was not repaid, nor was any date fixed for its repayment. In January, 1885, a petition was presented for the winding-up of the company, and it was accordingly ordered to be wound up. The question arose whether, in the distribution of the funds of the company, C. and all other unpaid depositors who had given notice of withdrawal of their deposits before the date of the presentation of the petition, were entitled to rank as creditors of the company in priority to those depositors who had not given such notice at that time:—Held, that there was no priority as between the depositors, or between them and the outside creditors, but that they must all rank *pari passu*. *Progressive Investment and Building Society, In re, Corbold, Ex parte*, 54 L. T. 45—Chitty, J.

The rules of a benefit building society allowed any investing member to withdraw "provided the funds permit," upon giving notice; and declared that "no further liabilities shall be incurred by the society till such member has been repaid." The society was ordered to be wound up and the assets were insufficient to pay everybody:—Held, that those investing members who had given notice of withdrawal, and whose notices had expired before the winding-up began, were entitled to be paid out of the assets (after the outside creditors) in priority to those members who had not given notice of withdrawal, not-

withstanding the fact that between the giving of the notices and the winding-up there never were any funds for payment. *Walton v. Edge*, 10 App. Cas. 33; 54 L. J., Ch. 362; 52 L. T. 666; 33 W. R. 417; 49 J. P. 468—H. L. (E.).

The rules of a building society provided that any member desirous of withdrawing should, by giving a month's notice in writing, be entitled to receive back his subscription money in the manner therein mentioned; that members withdrawing whose shares were fully paid up, should be entitled to 5 per cent. interest from the time such shares were so paid up, or from the time the previous dividend was paid; and that if more than one member should give notice to withdraw they should be paid in rotation according to the priority of their notices. The society was ordered to be wound up under the Companies Acts, and at the date of the winding-up the shareholders consisted of three classes, viz., (1) members who gave early notices of withdrawal of their shares, and who claimed to be paid out of the assets in priority to those who gave later notices; (2) members who gave later notices and who claimed that all the withdrawing members should be paid *pari passu*; and (3) members who gave no notices:—Held, that the principle of *Walton v. Edge* (*supra*) applied, and that the members who gave notice of withdrawal prior to the commencement of the winding-up were entitled to be repaid the amount of their shares in priority to the other members according to the respective dates of their notices:—Held, also, that such of the members whose shares were fully paid up at the dates of their respective notices were entitled to be paid interest on the amounts due to them in the same order of priority, from the times when such shares were fully paid up, or from the times of the payment of the last dividend until the times of the payment of the amounts due to them. *Middlesborough Building Society*, 53 L. T. 203—Kay, J.

— Rights of Lenders who were not Members.]—See cases ante, cols. 267, 268.

BUILDINGS.

In Metropolis.]—See METROPOLIS.

In Other Places.]—See HEALTH.

BURGESS.

See CORPORATION.

BURIAL.

See ECCLESIASTICAL LAW.

BYE-LAWS.

Unreasonableness—Ultra Vires.]—A bye-law is not ultra vires because in certain circumstances it may have the effect of taking away an enjoyment of property for which alone that property was acquired and used. A bye-law cannot be treated as unreasonable merely because it does not contain qualifications which commend themselves to the minds of judges. *Slattery v. Naylor*, 13 App. Cas. 446; 57 L. J., P. C. 73; 59 L. T. 41; 36 W. R. 897—P. C.

For Regulation of Markets.]—*See* MARKET.

As to Attendance at Board Schools.]—*See* SCHOOL.

For Navigation of River.]—*See* WATER.

Under Commons Act, 1876.]—*See* COMMONS.

For Preservation of Salmon.]—*See* FISH AND FISHERY.

Under Cemeteries Clauses Act.]—*See* ECCLESIASTICAL LAW (BURIAL).

Under Local Government Act.]—*See* HEALTH.

Under Metropolitan Building Act.]—*See* METROPOLIS (BUILDINGS).

Under Public Health Act.]—*See* HEALTH.

Under Municipal Corporations Act.]—*See* CORPORATION.

Under Tramways Act.]—*See* TRAMWAYS.

CALLS.

See COMPANY.

CAMPBELL'S (LORD) ACT.

See NEGLIGENCE.

CANADA.

See COLONY.

CANAL.

See WATER.

CAPE OF GOOD HOPE.

See COLONY.

CARGO.

See SHIPPING.

CARRIERS.

I. PASSENGERS.

II. PASSENGER'S LUGGAGE.

III. GOODS AND ANIMALS.

IV. REMUNERATION AND LIEN.

V. CARRIERS ACT.

VI. RAILWAY AND CANAL TRAFFIC ACT, 1854.

1. *Just and Reasonable Conditions.*
2. *Undue Preference.*

VII. RAILWAY COMMISSIONERS.—*See* RAILWAY.

I. PASSENGERS.

Duty of Carrier—Construction of Carriages.]

—The duty of a carrier who manufactures his own carriages towards passengers whom he carries is to use due skill and care in the manufacture. If injury occur through imperfect construction, the onus is on the carrier to show that such due skill and care has in fact been exercised. *Holton v. London and South-Western Railway*, 1 C. & E. 542—Lopes, J.

— Condition of Line—Latent Defect.]—

Where an accident happened on a railway company's line, owing to a latent defect in a foreign truck which could not have been detected by the ordinary examination:—Held, that as the facts proved were as consistent with the exercise of due and reasonable care as with negligence, the plaintiff must be nonsuited. *Gilbert v. North London Railway*, 1 C. & E. 31—Field, J.

Evidence of Negligence—Injury proximately caused by Passenger's own conduct.]—

K. was a passenger on the defendant's railway, when an accident happened to the engine by reason of the connexion-rod breaking. The compartment in which K. was travelling was filled with smoke, and some pebbles were dashed against the windows. A man, in the compartment with K., said that the train was on fire. K. jumped out and was injured. The learned judge, at the trial, directed a verdict for the defendants, on the ground that there was no evidence of negligence,

and that even if there was negligence, it was not the cause of the injury complained of. The plaintiff having obtained a conditional order for a new trial:—Held, that the injury to the plaintiff was not the result of any negligence by the defendants, and that the direction of the learned judge at the trial was right. *Kearney v. Great Southern and Western Railway*, 18 L. R., Ir. 303—Q. B. D.

Accidents at Level Crossings.]—See NEGLIGENCE.

Ticket—Liability for Injury—"Loss or Damage."]—The personal representatives of a deceased man cannot maintain an action under Lord Campbell's Act (9 & 10 Vict. c. 93), where the deceased, if he had survived, would not have been entitled to recover. The defendants, a steamship company, issued a passenger's ticket, which contained, amongst others, the following conditions:—"The company will not be responsible for any loss, damage or detention of luggage under any circumstances. . . . The company will not be responsible for the maintenance of passengers, or for their loss of time or any consequence arising therefrom. . . . nor for any delay arising out of accidents; nor for any loss or damage arising from the perils of the sea, or from machinery, boilers or steam, or from any act, neglect or default whatsoever of the pilot, master or mariner:—"Held, that the words "loss or damage arising from the perils of the sea," as contained in the above conditions, exempted the defendants from liability for injury or loss of life to a passenger occasioned on the voyage by the negligence of the defendants' servants. *Haigh v. Royal Mail Steam Packet Company*, 52 L. J., Q. B. 640; 49 L. T. 802; 48 J. P. 230; 5 Asp. M. C. 189—C. A.

— Failure to produce—Condition Incorporated—Forceable Removal from Carriage.]—

The plaintiff was a passenger by the defendants' railway. The ticket issued to him incorporated by reference certain conditions published in the defendants' time-tables, one of which was that every passenger should show and deliver up his ticket to any duly authorized servant of the company, when required to do so for any purpose, and any passenger travelling without a ticket, or failing, or refusing to show or deliver up such ticket as aforesaid, should be required to pay the fare from the station whence the train originally started. The plaintiff having lost the ticket was unable to produce it when required to do so during the journey by one of the defendants' servants. The plaintiff was thereupon required to pay the fare from the station whence the train had started, and, on his declining to do so, was forcibly removed by the defendants' servants from the carriage in which he was travelling, no more force, however, being used than was necessary for his removal. He thereupon sued the defendants for assault:—Held, that the contract between the plaintiff and the defendants did not by implication authorize the defendants to remove the plaintiff from the carriage on his failing to produce a ticket and refusing to pay the fare as provided by the condition; that the defendants were not justified in so removing him; and that the action was therefore maintainable. *Butler v. Manchester, Sheffield and Lincolnshire Railway*, 21 Q. B. D. 207; 57 L. J.,

Q. B. 564; 60 L. T. 89; 36 W. R. 726; 52 J. P. 611—C. A.

Unpunctuality—Effect of Conditions and Time Bills—Through Communication—Damages.]—

The plaintiff took four third-class tickets at the defendants' station at Durham by the 2.11 p.m. train for Belfast via Leeds and Barrow, which was printed on the tickets, and it was further stated that they were "issued subject to regulations in time-table." At the end of the time bills there were a number of pages entitled "Connexion with other railways," and one of such pages was printed "Through communication between the North-Eastern line and Ireland. Belfast via Leeds and Barrow," from which it appeared that the 2.11 p.m. train should arrive at Leeds at 4.45, and leave there at 5.10 by the Midland Company's line. The Midland Company's station at Leeds adjoins the North-Eastern station, but is a separate building. The train by which the plaintiff and his family travelled did not reach Leeds till 5.22, or thirty-seven minutes late, and the Midland Company's train having left at the proper time, the plaintiff's family were unable to proceed to Belfast that night, and were compelled to put up at an hotel at Leeds. The conditions in the defendant's time-tables comprised the following:—"The hours stated in these time-tables are appointed as those at which it is intended, as far as circumstances will permit, the passenger trains should arrive at and depart from the several stations; but their departure or arrival at the times stated, or the arrival of any train passing over any portion of the company's lines in time for any nominally corresponding train passing over any portion of their lines, is not guaranteed; nor will the company, under any circumstances, be held responsible for delay or detention, however occasioned, or any consequences arising therefrom. The issuing of tickets to passengers to places off this company's lines is an arrangement made for the greater convenience of the public; but the company will not be held responsible for the non-arrival of this company's own trains in time for any nominally corresponding train on the lines of other companies, nor for any delay, detention, or other loss or injury whatsoever which may arise therefrom, or off their lines." In an action brought in the county court to recover the expenses to which the plaintiff had been put by an alleged breach of contract on the part of the defendants:—Held, that inasmuch as the conditions formed part of the contract, and the true construction of such conditions was that the defendants refused to guarantee the punctuality of their trains according to the times mentioned in the tables, from whatever cause the irregularity or want of punctuality might arise, the plaintiff could not succeed. *McCartan v. North-Eastern Railway*, 54 L. J., Q. B. 441—D.

— Delay—Wilful Misconduct.]—Plaintiff took a return first-class ticket from Paddington to Bridgnorth, a station on a branch of the defendants' main line, intending to travel by a train advertised to run through without interruption. There were printed on the face of the return half of the ticket the words "See back," and on the back of each half the words "Issued subject to the conditions stated on the company's time bills." The time bills were published monthly

in a book of about one hundred pages, and on the first or outside page was a notice headed "Train bills," that the company would not be accountable for injury which might arise from delays, unless in consequence of the wilful misconduct of the company's servants. On the day of the plaintiff's journey, being Christmas Eve, there was an usually large number of persons travelling on the defendants' lines. The weather was foggy, and some five hours earlier there had been a collision between two trains on the main line. The advertised train was divided into two parts, and the plaintiff was put into the second part, which started thirteen minutes late; it was also delayed by the fog and the excessive traffic on the journey. In consequence the plaintiff missed the train which was advertised to run along the branch in connexion with the main line train. He was detained at the junction, where there was but little accommodation, and being refused a special train, proceeded at his own request in a carriage attached to a goods train. This carriage was second-class, the station-master at the junction having no first-class carriage available. The plaintiff's journey took about ten hours instead of six hours as advertised. In a county court action, on proof of these facts and the evidence of a letter from the defendants to another passenger by the same train, forwarding a sum of money demanded for compensation, the judge awarded the plaintiff 1*l.* damages for the delay and inconvenience he suffered:—Held, that the conditions on the time bills were incorporated in the plaintiff's contract with the company; that there was no evidence under the circumstances of the defendants' wilful misconduct, or of their liability; and that the county court judge was wrong. *Woodgate v. Great Western Railway*, 51 L. T. 826; 33 W. R. 428; 49 J. P. 196—D.

II. PASSENGER'S LUGGAGE.

Hand-Luggage—Delivery to Porter—Negligence.—The female respondent arrived at the Paddington station on the appellants' railway at 4.20 P.M. on Christmas Eve with a bag and two other articles of luggage, in order to travel by the 5 P.M. train. A porter labelled the two articles and took all the luggage to the platform, the train not then being at the platform. The female respondent told the porter she wished the bag to be put into a carriage with her and asked if it would be safe to leave it with him. He replied that it would be quite safe, and that he would take care of the luggage and put it into the train. She then went to meet her husband and get her ticket. Ten minutes after she had left the luggage she and her husband returned together to the platform and found that the two labelled articles had been put into the van of the train but that the porter and the bag had disappeared. In an action in the county court against the railway company for the loss of the bag the judge found that the time when the luggage was entrusted to the porter was a reasonable and proper time before the departure of the train, and that the porter was guilty of negligence in not being in readiness to put the bag into the carriage when the female respondent returned, and held the company liable:—Held (Lord Bramwell dissenting), that there was evidence upon which the county court judge

might reasonably find, first, that the bag was in the custody of the railway company for the purposes of present and not of future transit from the time when it was delivered to their porter until its disappearance, and secondly that its loss was due to their negligence. *Great Western Railway v. Bunch*, 13 App. Cas. 31; 57 L. J., Q. B. 361; 58 L. T. 128; 36 W. R. 785; 52 J. P. 147—H. L. (E.).

Semble (Lord Bramwell dissenting), that a railway company accepting passengers' luggage to be carried in a carriage with the passenger, enter into a contract as common carriers, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory. The reasoning in *Berghem v. Great Eastern Railway* (3 C. P. D. 221) disapproved. *Ib.*

Luggage in Van—Delivery to Passenger—Termination of Risk.—It is the duty of a railway company, with regard to the luggage of a passenger which travels by the same train with him, but not under his control, when it has reached its destination, to have it ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can receive it; but the liability of the company as carriers will cease after a reasonable time has been allowed to the owner to do so. *Firth v. North Eastern Railway*, 36 W. R. 467—D.

The plaintiff arrived at a station on the defendants' railway with her luggage contained in two boxes, which were taken from the luggage-van by a porter in the employ of the company. The porter asked the plaintiff if he should engage a cab for her. In reply she said she would walk to her destination, and would leave her luggage at the station for a short time, and send for it. The porter said: "All right; I'll put them on one side and take care of them;" whereupon the plaintiff quitted the station, leaving her boxes in the custody of the porter. One of them was lost:—Held, that the transaction amounted to a delivery of the luggage by the company to the plaintiff, and a re-delivery of it by her to the porter as her agent to take care of, and that consequently the company were not responsible for the loss. *Patscheider v. Great Western Railway* (3 Ex. D. 153) distinguished. *Hodkinson v. London and North-Western Railway*, 14 Q. B. D. 228; 32 W. R. 662—D.

Left in Porter's charge—Absence of Passenger from Station—Authority of Porter.—A passenger having missed his intended train, left his luggage on the platform in charge of a porter, saying that he would travel by the next train. This train was timed not to start for an hour. He left the station and went into the billiard-room of an hotel for that interval. His luggage was afterwards missed:—Held, that luggage so left was not taken charge of by the porter on behalf of the company for carriage, but was watched by the porter on his own responsibility. Semble, that the company would have been liable if the plaintiff had only gone to some other part of the same station for a purpose strictly necessary to travelling (such as to take

a ticket), and for a brief period. *Welch v. London and North Western Railway*, 34 W. R. 166—D.

Condition exempting from Liability — Non-delivery.—A passenger from Southampton to Colon, on board a steamship of the defendant's, had signed a ticket containing a condition that "the company will not be responsible for any loss or damage to luggage in any circumstances," and that the company should be at liberty to land any passenger suffering from infectious disease. Some days after sailing, the plaintiff fell ill of typhoid fever and was landed at Jamaica in an insensible condition. His box was also landed by the defendants, but the plaintiff never saw it again:—Held, in an action to recover damages for the loss, that the defendants were not liable. *Thompson v. Royal Mail Steam Packet Company*, 5 Asp. M. C. 190, n.—Exch.

"Just and Reasonable Conditions."—See *Cutler v. North London Railway*, post, col. 294.

Cloak Room—Condition—Misdelivery.—The owner of a bag exceeding the value of 5*l.* deposited it in a railway cloak-room and received a ticket with the following condition:—"The company are not to be answerable for loss of any article exceeding the value of 5*l.* unless at the time of delivery the true value be declared and a sum at the rate of 1*d.* for every 20*s.* of the declared value be paid for such article," above the ordinary charge. The bag was delivered by mistake to a wrong person and never recovered:—Held, that the word "loss" included misdellivery and that the defendants were not liable. *Shipwith v. Great Western Railway*, 59 L. T. 520—D.

III. GOODS AND ANIMALS.

Common Carriers—Who are.—The question whether the liability of a common carrier has been undertaken in a particular case is one of fact and not of law. *Tamvaco v. Timothy*, 1 C. & E. 1—Cave, J. And see *Cutler v. North London Railway*, post, col. 294.

Not forwarding Goods—Reasonable Facilities—Late Arrival of Goods.—An action was brought against a railway company for non-delivery of goods within a reasonable time. The goods, which consisted of poultry in four hampers, arrived at the station at one minute after 11 o'clock, the train by which they were to be forwarded being advertised to leave at 11, so that the goods arrived after the advertised time for starting the train. The porters had to attend to a passenger train which ought to have left at 10.56, but in point of fact did not leave until 11.3. After that passenger train had left, porters came and attended to the plaintiff's goods, which were then weighed and booked and taken to the platform to be placed in the train, but the train, which was eight minutes late in starting, went off before the goods could be placed in it. The goods were then forwarded by the next train at 1.25, and arrived at their destination in the afternoon. They had been ordered by the plaintiff's customers for use on that day, but no notice of that had been given to the defendants:—Held, that the railway company were not liable

as they had, under the circumstances, afforded the plaintiff all reasonable facilities for the forwarding of the goods. *Nicholls v. North-Eastern Railway*, 59 L. T. 137—D.

Refusal to Receive—Movement of Animals in Infected District—Contagious Diseases.—A regulation made under an Order in Council, with regard to the movement of "fat animals intended for immediate slaughter," in force in the county of G., required that a declaration under the Contagious Diseases (Animals) Act, 1878, should be delivered to the inspector of the local authority of the county of G. "before any movement into the county district, or removal from the railway truck in the county district takes place." . . . And the inspector was required thereupon to deliver to the owner, his agent, or the consignee, a licence specifying the conditions upon which such animals were admitted into the district. In an action against a railway company for damages sustained by reason of their refusal to receive certain fat animals at C., in the county of M., a district free from disease, for conveyance to B., in the county of G., because no declaration or licence was produced at C.:—Held, that "any movement into the county district" included the commencement of a railway journey, the result of which would be to bring the cattle into that district; and that, therefore, the railway company were justified in their refusal. *Williams v. Great Western Railway*, 52 L. T. 250; 49 J. P. 439—D.

Contract—Obligation to provide reasonably fit Ship.—The plaintiff shipped certain cattle on board the defendant's ship for carriage from London to New York under a bill of lading which provided as follows:—"These animals being in sole charge of shipper's servants, it is hereby expressly agreed that the shipowners, or their agents or servants, are, as respects these animals, in no way responsible either for their escape from the steamer or for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than 5*l.* for each of the animals." The ship had on her previous voyage carried cattle suffering from foot and mouth disease. Some of the cattle shipped under the bill of lading were during the voyage infected with that disease, owing to the negligence of the defendants' servants in not cleansing and disinfecting the ship before receiving the plaintiff's cattle on board and signing the bill of lading, and the plaintiff in consequence suffered damage amounting to more than 5*l.* for each of the said cattle:—Held, that the provision in the bill of lading limiting liability to 5*l.* for each of the cattle did not apply to damage occasioned by the defendants not providing a ship reasonably fit for the purposes of the carriage of the cattle which they had contracted to carry. *Tattersall v. National Steamship Company*, 12 Q. B. D. 297; 53 L. J., Q. B. 332; 50 L. T. 299; 32 W. R. 566; 5 Asp. M. C. 206—D.

—To carry by special Train and Boat—**"Wind, Weather, and Tide permitting"**—**Measure of Damages.**—Two consignments of fish for transport by special train and tidal boat from London via Folkestone to Boulogne were made to a railway company who advertised special trains and boats at special rates, subject to the conditions contained in their tables. One

of these conditions was that the company would not be answerable for loss occasioned by the trains or boats not starting or arriving at the time specified; and another that the boats started "wind, weather, and tide permitting." In each case, on arrival at Folkestone, it was found that it was not prudent to load the fish on the tidal boat owing to the state of the weather, and the fish had to be sent in the cargo boat, in consequence of which the Paris train at Boulogne was missed and the fish delayed for twenty-four hours, and deteriorated, besides losing the market:—Held, that there was no absolute guaranty that the fish would go by that particular train and boat, but that it was for the jury to say whether under the circumstances the defendants had been guilty of negligence, or whether they had substantially fulfilled their contract. Held also, that in estimating the damages, the loss of the market in Paris by the non-arrival of the fish at Boulogne in time to catch the train for Paris was not to be taken into account. *Hawes v. South-Eastern Railway*, 54 L. J., Q. B. 174; 52 L. T. 514—D.

— "Without Risk of Craft."]—Where a lighter was let out "without risk of craft," and the goods on board were damaged by sea-water:—Held, that the owner of the lighter was not liable for the loss. *Webster v. Bond*, 1 C. & E. 338—Mathew, J.

Duty of Consignor—Reasonable Precautions.]—Where goods are transmitted through a common carrier, it is incumbent upon the consignor to take reasonable precautions to insure their safe delivery to the consignee; and whether the precautions taken were reasonable or not depends upon whether they were such as to have rendered the carrier liable to the consignee in respect of the goods in case of their loss during the transit. *Pointin v. Porrier*, 49 J. P. 199—D.

Carrier, Agent for whom.]—Quære, whether the rule that delivery of goods to a common carrier by the consignor is a delivery to the consignee, applies to the delivery of goods to a railway company abroad for conveyance to a consignee resident in England. *Id.*

Advice Notes—Negligence—Two Notes—One Consignment—Estoppel.]—The defendants, having received a consignment of wheat, sent to the consignees an advice note, which described the consignment as "sacks wheat, four trucks," and did not contain any details as to weight, rates or charges, but across the printed form was written, "account to follow." The consignees gave B. a delivery order in respect of this wheat, and he obtained an advance from the plaintiffs upon it; the plaintiffs sent this delivery order to the defendants, and they accepted it. On the following day the defendants sent to B. another advice note on a printed form similar to the one already sent, but across the upper part were written the words, "charges only;" the invoice number was different; the consignment was described as 151 sacks of wheat; the weight, the rate, and the amount of charges were filled in. B. filled up the delivery order at the bottom in favour of the plaintiffs, produced it to them, and obtained a second advance from them, as they believed it to

relate to a second parcel of wheat. The plaintiffs delivered this order to the defendants, who accepted it, and who allowed the plaintiffs on both occasions to take samples of the wheat. There was, in fact, only one parcel of wheat, and the two advice notes related to the same parcel. B. went into liquidation, and the plaintiffs, having lost the amount of one of the advances so made by them, sued the defendants for the amount:—Held, that the plaintiffs were entitled to recover the amount claimed, for that the defendants had so dealt with the wheat and advice notes as to lead the plaintiffs to believe that there were in fact two consignments of wheat, and that they were in consequence estopped from afterwards alleging that there was in fact but one consignment of wheat. *Coventry v. Great Eastern Railway*, 11 Q. B. D. 776; 52 L. J., Q. B. 694; 49 L. T. 641—C. A.

Action for Negligence—Cattle, Injury to—Onus of Proof.]—Eight cows having been safely loaded in a truck at D. for conveyance to B., on the arrival of the train at B. it was found that of these one had a leg broken and that three others were injured about the hips and rump. The owner of the cows having brought an action for negligence against the railway company, and having proved the injuries, and given his opinion that they were caused by undue shunting and jerking of the train:—Held, that the onus of proof being on the plaintiff and no affirmative evidence having been given by him of negligence on the part of the railway company, the defendants were entitled to judgment. *Smith v. Midland Railway*, 57 L. T. 813; 52 J. P. 262—D.

— **Owner's Risk Rate—Wilful Misconduct—Misdelivery.]**—Goods consigned by the plaintiffs to B. & Co. were carried by a railway company at the owner's risk rate, the contract containing the condition that the company were not to be liable for loss, damage or delay, except upon proof that such loss, damage or delay arose from wilful misconduct on the part of the company's servants. The goods were misdelivered to another firm, and on being found were tendered to the consignees, who refused to accept them:—Held, that in the absence of evidence on the part of the plaintiffs as to the cause of the misdelivery, such misdelivery did not amount to wilful misconduct so as to render the defendants liable. *Stevens v. Great Western Railway*, 52 L. T. 324; 49 J. P. 310—D.

— **Measure of Damages—Late Delivery—Remoteness.]**—The plaintiff delivered a parcel at the receiving office of the defendant company in London addressed to "W. H. Moore & Co., Stand 23, Show-ground, Lichfield, Staffordshire, van train." Nothing was said by the person who delivered the parcel at the receiving-office as to the purpose for which it was being sent to Lichfield, or to draw attention to the label:—Held, that the label was sufficient notice to the defendants that the goods were being sent to a show, and that the plaintiffs were entitled to recover damages for loss of profits and expenses incurred by the goods being delayed and not delivered at Lichfield in time for the show. *Jameson v. Midland Railway*, 50 L. T. 426—D.

A parcel of samples was delivered to the defendants, a railway company, to be forwarded

to the plaintiffs. By the negligence of the defendants, who had notice that the parcel contained samples, it was delayed on the way until the season at which the samples could be used for procuring orders had elapsed, and they had in consequence become valueless. The plaintiffs could not have procured similar samples in the market. In an action for the non-delivery in a reasonable time :—Held, that the plaintiffs were entitled to recover as damages the value to them of the samples at the time when they should have been delivered. *Schulze v. Great Eastern Railway*, 19 Q. B. D. 30 ; 56 L. J., Q. B. 442 ; 57 L. T. 438 ; 35 W. R. 683—C. A. And see *Hawes v. South-Eastern Railway*, ante, col. 289.

Wrong Delivery by Carrier—Damages.]—A statement of claim alleged that the defendants were common carriers ; that C. and B. were in the habit of sending empty casks by defendants' railway to plaintiff, which plaintiff filled with ketchup and returned ; that defendants, by their agents and servants, knew the purpose for which the casks were delivered to plaintiff ; that defendants negligently and improperly delivered to plaintiff, as C. and B.'s casks, certain other casks not belonging to C. and B., and which had contained turpentine ; that plaintiff not knowing, or having reasonable means of knowing, that the empty casks delivered were not C. and B.'s, filled them with ketchup, which was spoiled :—Held, on demurrer, that the statement of claim showed no duty on the part of the defendants which could give rise to a cause of action, and therefore they were not liable. *Cunnington v. Great Northern Railway*, 49 L. T. 392 ; 48 J. P. 134—C. A.

IV. REMUNERATION AND LIEN.

Liability of Consignor for Freight—Delivery to Consignee.]—The defendants hired a trolley, and agreed with the owner to pay for the carriage both ways. The defendants delivered the trolley to the plaintiffs, to be returned to the owner, under a consignment note which stated that the defendants requested the plaintiffs to receive and forward the trolley as per address and particulars on the note, and on the conditions stated therein. The note gave the name of the owner as consignee, and in a column headed "who pays carriage" was inserted "consignee." The plaintiffs delivered the goods to the consignee, who declined to pay the freight on the ground that the defendants had agreed to pay it. In an action to recover the freight from the defendants :—Held, that under the circumstances the defendants could not be treated merely as agents of the consignee to make the contract for the carriage of the trolley, but were themselves contracting parties, and liable to pay the freight. *Great Western Railway v. Bagge*, 15 Q. B. D. 625 ; 54 L. J., Q. B. 599 ; 53 L. T. 225 ; 34 W. R. 45—D.

Agreement to Reduce Unequal Rates—"Lower Rates."]—A railway company agreed with A. & B., coal-owners, that they would carry their coal, subject to clause 11, at certain charges given in the schedule ; and they also agreed (clause 9) that in the event of their charging any other trader for the same description of traffic lower rates than those stipulated to

any station, then in that event A. & B. were to have a corresponding reduction in the rates payable by them to such station. Clause 11 was to the effect that notwithstanding the rates or charges before specified, they were entitled to charge A. & B. rates or charges similar to those charged and paid by the Eglinton Coal Company ; and in the event of any consideration being given to the Eglinton Company for raising them, a similar consideration shall be given to A. & B. The railway company charged D., another coal-owner, not a party to the agreement, a lower rate per ton, taking into account the greater distance the coal was carried. The agreement with the Eglinton Company was not in evidence. It was alleged the rate charged A. & B. was not higher than that charged to the Eglinton Company :—Held, that there was nothing in clause 11 to supersede the effect of clause 9, and that upon the true construction of the latter clause, A. & B. were entitled to a corresponding reduction with D., and repayment of over-charges ; "lower rates" meaning proportionately lower rates per ton per mile, and not a less sum per ton irrespective of the distance carried. *Glasgow and South Western Railway v. MacKinnon*, 11 App. Cas. 386—H. L. (Sc).

Action for Charges—Defence of Unreasonableness—Counter-claim.]—It is no defence to an action by a railway company to recover charges for the carriage of goods that the charges sued for are unreasonable, so as to give an undue preference to other persons, or to subject the defendant to undue prejudice or disadvantage, within the meaning of s. 2 of the Railway and Canal Traffic Act, 1854, nor can the defendant in such an action set off, or recover by counter-claim, over-payments in respect of previous charges which were unreasonable within that section. *Lancashire and Yorkshire Railway v. Greenwood*, 21 Q. B. D. 215 ; 58 L. J., Q. B. 16 ; 59 L. T. 930—Cave, J.

Terminal Charges—Services incidental to Business of a Carrier.]—By the London, Brighton, and South Coast Railway Act, 1863 (26 & 27 Vict. c. 218), s. 51, "The maximum rates of charges to be made by the company for the conveyance of animals and goods, including the tolls for the use of their railways and wagons or trucks, and for locomotive power, and every other expense incidental to such conveyance (except a reasonable sum for loading, covering, and unloading the goods at any terminal station) of such goods, and for delivery and collection, and any other services incidental to the duty or business of a carrier, where such services, or any of them, are or is performed by the company, shall not exceed" certain sums prescribed :—Held, that station accommodation, the use of sidings, weighing, checking, clerkage, watching, and labelling, provided and performed by the company in respect of goods traffic carried by them as carriers, may be, and *prima facie* are, "services incidental to the duty or business of a carrier" within s. 51 ; whether they are so in any particular case is a question of fact, for the Railway Commissioners to decide, and, if found by them to be so, such services may be the subject of a separate reasonable charge in addition to the rates prescribed. *Hall v. London, Brighton, and South Coast Railway*, 15

Q. B. D. 505; 53 L. T. 345; 5 Nev. & Mac. 28—D.

Lien—Right of Railway to Detain for non-payment.]—A railway company claimed under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 97, to detain waggons belonging to the respondents for tolls due from the B. Company for the carriage of goods in the waggons:—Held, that the claim could not be sustained under the earlier or the later part of s. 97: not under the later, because the waggons did not belong to the persons from whom the tolls were due; not under the earlier, because that part of the section does not entitle a railway company to detain waggons for tolls due only in respect of the goods carried in such waggons. *Manchester, Sheffield, and Lincolnshire Railway v. North Central Wagon Company*, 13 App. Cas. 554; 58 L. J., Ch. 219; 59 L. T. 730; 37 W. R. 305—H. L. (E.)

— Agreement for General Lien—Winding-up of Company.]—In 1876 an agreement was entered into between the L. Coal Company and the G. W. Railway Company, by which the charges for coals consigned by the coal company were carried to a "ledger account," one condition of which was, that the goods and waggons belonging to or sent by the person having a ledger account should be subject to a general lien in favour of the railway company for all moneys due to them, &c., from the person on any account, such lien to take effect immediately after the failure of payment on demand of any sums appearing to be due on the ledger account; "in case of bankruptcy, insolvency, or stoppage of payment, such lien to take effect immediately for any sum appearing due in the books of the company," with a right to sell such goods and waggons, and out of the proceeds to retain the sums due. The coal company became insolvent, and on the 16th December, 1886, a petition was presented for winding-up; on the 20th January, 1886, a provisional liquidator was appointed, and in February, 1886, an order to wind up was made. When the petition was presented the coal company was indebted to the railway company in respect of charges for freight. Of the fifteen waggons in use by the coal company, and employed in carrying coal over the railway company's line, nine had been received by the railway company prior to presentation of the winding-up petition, and had been detained by them ever since; four in the possession of the railway company when the petition was presented had travelled up and down the line since, but returned into the possession of the railway company before the date of the winding-up order; two did not come into the possession of the railway company until between the presentation of the petition and the winding-up order. The liquidator claimed delivery up by the railway company of the fifteen waggons which the company claimed to retain in satisfaction of the general lien under the agreement:—Held, that the lien given to the railway company by the agreement, which was made for the ordinary purposes of the coal company's business, was good and valid, and took effect upon the insolvency of that company, and had not been displaced by anything that had taken place in the winding-up proceedings. *Llangennech Coal Company, In re*. 56 L. T. 475—Chitty, J.

V. CARRIERS ACT.

Receiving Office—Loss of Goods—Felonious Act of Servant.]—A parcel of silk was delivered at the receiving office for transmission to a station on the defendants' railway. No declaration of value was made at the time of delivery. The place where the goods were delivered was stated in the published time-tables of the defendants to be a receiving office for parcels and goods intended for carriage by the defendants. The goods were collected in due course by the defendants, and taken to one of their stations; while there, they were obtained by a person in the employ of the proprietor of the receiving-office, by means of a forged order, and were stolen:—Held, that the defendants were not protected by the provisions of the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), as the loss had arisen from the felonious act of a person who was a servant of the defendants within the meaning of s. 8 of that Act. *Stephens v. London and South Western Railway*, 18 Q. B. D. 121; 56 L. J., Q. B. 171; 56 L. T. 226; 35 W. R. 161; 51 J. P. 324—C. A.

VI. RAILWAY AND CANAL TRAFFIC ACT, 1854.

1. JUST AND REASONABLE CONDITIONS.

Passenger's Luggage—Special Contract—Conditions of non-liability.]—The plaintiff was a season ticket holder on the defendants' line from B. to K. under a special contract, by which he undertook to abide by all the rules, regulations, and bye-laws of the defendants. One of such regulations was that the defendants would not be responsible for any passenger's luggage unless fully and properly addressed with the name and destination of the owner. The plaintiff having with him a bag which was not so addressed saw it labelled for K. by one of the defendants' servants; he left the train at C, an intermediate station, and proceeded to K. by a subsequent train; on his arrival at K. his bag was missing. There was no evidence that the bag ever reached K.:—Held, that the regulation of the defendants was not a just and reasonable condition within s. 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and could not be enforced against the plaintiff. *Cutler v. North London Railway*, 19 Q. B. D. 64; 56 L. J., Q. B. 648; 56 L. T. 639; 35 W. R. 575; 51 J. P. 774.—D.

Quære, whether the liability of the defendants in respect of the portion of the journey from C. to K. was that of common carriers or merely of gratuitous bailees. *Id.*

Alternative Rates—Limitation as to Value.]—Cattle were carried by a railway company under a special contract signed by the consignor which stated that the company had two rates for the conveyance of cattle: one the ordinary rate when they took the ordinary liability of the carrier; the other a reduced rate; that these cattle were to be carried at the reduced rate, the company to be relieved from all liability in case of damage or delay except upon proof that such loss, detention or injury arose from wilful misconduct on the part of the company's servants. A notice was posted up in the company's office which stated that the company had two rates,

namely the owner's risk rate on the terms above given, and the company's risk rate, which was ten per cent. above the owner's risk rate, at which the company undertook the ordinary risk of carriers in respect of rail transit, limited for neat cattle to 15l., for pigs and sheep to 2l., but did "not admit liability for any animals dying of disease or arriving at destination in such condition as to be able to walk from the truck." The consignor had never seen any rate but the owner's risk rate. After two trials cattle had ceased to go at the higher rate. The higher rate was less than the maximum allowed by the company's acts. No list of rates was exhibited. The cattle having been injured through the negligence (but not the wilful misconduct) of the company's servants:—Held, that the notice of the higher rate was not invalidated by the limitation as to value, nor by the fact that it did not mention the terms upon which cattle could be carried without limitation of value as provided by the Railway and Canal Traffic Act, 1854, s. 7; that the clause as to not admitting liability meant only that the liability must be established by proof; that so construed the condition was just and reasonable within s. 7; that the consignor might have known and must be taken to have known the terms of the higher rate, and had the offer of a just and reasonable alternative; and that the company were therefore protected by the special contract. *Great Western Railway v. McCarthy*, 12 App. Cas. 218; 56 L. J., P. C. 33; 56 L. T. 582; 35 W. R. 429; 51 J. P. 532—H. L. (Ir.).

Condition excluding all Liability.]—A fish merchant delivered fish to a railway company to carry upon a signed contract relieving the company as to all fish delivered by him "from all liability for loss or damage by delay in transit, or from whatever other cause arising," in consideration of the rates being one-fifth lower than where no such undertaking was granted; the contract to endure for five years. The servants of the company accepted the fish, although from pressure of business they could not carry it in time for the intended market, and the fish lost the market:—Held, that upon the facts the merchant had a *bonâ fide* option to send fish at a reasonable rate with liability on the company as common carriers, or at the lower rate upon the terms of the contract; that the contract was in point of fact just and reasonable within the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31). s. 7, and covered the delay; and that the company were not liable for the loss. *Manchester, Sheffield, and Lincolnshire Railway v. Brown*, 8 App. Cas. 703; 53 L. J., Q. B. 124; 50 L. T. 281; 32 W. R. 207; 48 J. P. 388—H. L. (E.).

— Wilful Misconduct of Servants.]—An action was brought against a railway company for injury to the plaintiff's cattle, on the way from Dublin to Market Harboro, via Liverpool, caused by the wilful misconduct and default of the defendants' servants on the voyage between Dublin and Liverpool. The defendants pleaded that the plaintiff having been informed that the defendants carried cattle at alternative rates, selected the reduced rate, and signed a special contract for the carriage of the cattle, upon which the defendants relied as exempting them from liability. One of the conditions of the

contract was as follows: "that the company in consideration of the reduced rate of freight charged, will not be accountable for any loss caused by delay or injury to live stock taking place before or at shipment, on the journey, or at or after landing; nor for any loss or injury to live stock, whether arising from or consequent upon the dangers or accidents of the seas, rivers, harbours or navigation, or from the act of God, the Queen's enemies, &c. . . . improper, careless or unskilful navigation, or from accidents connected with machinery or boilers, or from any fault, negligence, or mistake of the master, officers, seamen or crew of the vessels." The plaintiff replied that the injuries complained of were caused by the wilful misconduct of the seamen, or crew, or employés of the steam-vessels, in wilfully mutilating, disfiguring, and wounding the cattle. On demurrer to the reply:—Held, 1st, that the contract did not in its terms exempt the defendants from liability for acts of wilful misconduct on the part of the seamen and crew; 2ndly, that a contract exempting them from liability for such acts would be unreasonable. *Ronan v. Midland Railway*, 14 L. R., Ir. 157—C. P. D.

Carriage of Dogs—Limit of Value.]—A condition, contained in a ticket signed by a person delivering a dog for carriage to a railway company, stated that "the company are not and will not be common carriers of dogs, nor will they receive dogs for conveyance except on the terms that they shall not be responsible for any amount of damages for the loss thereof, or for injury thereto beyond the sum of 2l. unless a higher value be declared at the time of delivery to the company and a percentage of 5 per cent. paid upon the excess of value beyond the 2l. so declared."—Held, that, although the railway company were not bound to be common carriers of dogs, yet, being bound by the Railway and Canal Traffic Act, 1854, to afford reasonable facilities for the carriage of dogs, they could only limit their liability in respect thereof by reasonable conditions; and that the above-mentioned condition was not just and reasonable within the meaning of the 7th section of the Act, and therefore did not protect the railway company from liability to an amount exceeding 2l. in respect of damage done to the dog through the negligence of their servants. *Dickson v. Great Northern Railway*, 18 Q. B. D. 176; 56 L. J., Q. B. 111; 55 L. T. 868; 35 W. R. 202; 51 J. P. 388—C. A.

Terminal Charges—Demurrage.]—A charge by a railway company for demurrage for goods delivered, but not removed by the consignee after notice of arrival and of the conditions as to such charge, is not affected by any decision of the Railway Commissioners as to the reasonableness of such charges. *North Eastern Railway v. Cairns*, 32 W. R. 829—D.

2. UNDUE PREFERENCE.

"Passing only over the same portion of the Line"—"Under the same circumstances"—Whether action maintainable.]—The provision in s. 90 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), requiring equality of rates for carriage of goods "passing only over

the same portion of the line of railway under the same circumstances" applies only to goods passing between the same points of departure and arrival, and passing over no other part of the line. And mere inequality in the rate of charge when unequal distances are traversed does not constitute a preference inconsistent with the concluding words of that section. Therefore, where a railway company carried coals from a group of collieries situate at different points along their line, and charged all the collieries with one uniform set of rates in respect of such carriage, and the owners of the colliery lying nearest to the point of arrival brought an action for overcharges:—Held, that the railway company had not infringed the provisions of s. 90 of the Railways Clauses Consolidation Act, 1845. Held, also, that in this case an action did not lie for breach of s. 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), undue or unreasonable preference or prejudice not having been made out. Quære, whether under any circumstances an action lies for breach of that section. *Denaby Main Colliery Company v. Manchester, Sheffield, and Lincolnshire Railway*, 11 App. Cas. 97; 55 L. J., Q. B. 181; 54 L. T. 1; 50 J. P. 340; 6 Nev. & Mac. 133—H. L. (E.).

A trader complained that a railway company had for many years charged higher rates for the carriage of his goods than for that of a neighbour's, the distance being eight miles in the former case, and in the latter, twelve, starting from the same point:—Held, that no action would lie to recover overcharges. *Murray v. Glasgow and South-Western Railway*, 4 Nev. & Mac. 456—Ct. of Session.

The 83rd section of the Railway Clauses Consolidation (Scotland) Act, 1845, provided for the alteration or variation of such tolls as a railway company might by special act be entitled to charge, "provided that all such tolls be at all times charged equally to all persons, and after the same rate . . . in respect of all goods and carriages of the same description and conveyed . . . over the same portion of the same line of railway, under the same circumstances":—Held, that to justify proceedings under that section by a person complaining of an undue preference to another trader, the goods of the two traders must be carried on precisely the same journey. *Id.*

Where goods are carried for different customers "over the same portion of the line of railway," the fact that the goods carried for one customer are to be shipped to certain ports in order to develop a new trade, or open up new markets, and so to increase the tonnage carried, does not constitute a difference in the "circumstances" so as to justify inequality of rates. Therefore, where a railway company carried coals over the same portion only of the line to G., both for the appellants and also for B., and allowed B. 8*d.* per ton in respect of all coal carried to G., and there shipped for the West Indian market; and also allowed B. 6*d.* per ton in respect of all coal carried to G., and there shipped by him to certain ports, in consideration of a bonâ fide undertaking by B. to develop the trade to those ports, to provide the vessels, and to run the risks incidental to the working of such a traffic:—Held, that the coals were carried "under the same circumstances," and that the allowances were breaches of s. 90 of the Railways Clauses Consolidation Act, 1845. Held,

also, that the appellants were entitled to recover the overcharges by action against the company, the amount to be ascertained by finding what quantity of coal carried under the same circumstances, and over the same portion only of the line was charged at the higher rate to the appellants at the time the lower rate was charged to B. *Id.*

A railway company which carried coals for the appellants and also for B. and J. "over the same portion of their line of railway," and made allowances and a rebate to B. and J., proved that they carried for B. and J. at a less cost to the company, but did not show that the allowances and rebate were adequately represented by the saving to the company:—Held, that the difference in cost constituted a real difference in the "circumstances"; that there being nothing to show any want of good faith the company were not bound to prove that the allowances and rebate were adequately represented by the saving; that there was no breach of s. 90 of the Railways Clauses Consolidation Act, 1845; and that the appellants could not maintain an action for overcharges under that section. *Id.*

Equal Mileage Rate—Higher Charge for Shorter Distance—Action for Overcharges.]—

The plaintiff was one of the registered officers of a company who were the proprietors of iron and tinplate works, situate near the defendants' railway, and 12 miles distant from the seaport of Swansea on the defendants' railway to Liverpool. The defendants charged the said company 12*s.* 6*d.* per ton for the carriage of iron and tin plates over their line from the company's works to Liverpool, while other manufacturers of iron and tin plates, whose works were situate within a radius of 6 miles of the seaport of Swansea, and further, therefore, from Liverpool than the plaintiff's works, were charged by the defendants for the carriage of their plates from Swansea to Liverpool 11*s.* 4*d.* per ton only. There is communication by sea between Swansea and Liverpool, and the rate of 11*s.* 4*d.* was fixed by the defendants as the charge for the carriage of the goods of these manufacturers within the 6 miles radius in order to enable the defendants to compete with the sea carriage; and by reason of the lesser charge those manufacturers who were thus favoured were enabled to sell their plates at a lower price per ton proportionate to the difference in the tonnage delivered at Liverpool than the plaintiff's company:—Held, that the charging of a lower rate to the manufacturers within the 6 miles radius for the carriage of their goods a longer distance than the plaintiff's company was an undue and unreasonable preference and advantage granted to them by the defendants, and was in contravention of s. 2 of the Railway and Canal Traffic Act, 1854, and that the plaintiff was entitled to maintain an action to recover the amount paid by his company to the defendants in excess of the 11*s.* 4*d.* rate. *Evershed v. London and North-Western Railway* (2 Q. B. D. 254) followed. *Budd v. London and North-Western Railway*, 36 L. T. 802; 25 W. R. 752; 4 Nev. & Mac. 393—Ex. D.

Traffic Arrangements—Agreement for through Rates between two Railway Companies.]—

Sect. 90 of the Railways Clauses Consolidation Act, 1845,—which provides that all tolls charged by a railway company shall be at all times charged

equally to all persons, and after the same rate, in respect of all goods of the same description, passing only over the same portion of the line of railway under the same circumstances, and that no reduction or advance in any such tolls shall be made directly or indirectly in favour of or against any particular company or person travelling upon or using the railway,—does not prevent the company from making a special charge for goods carried over their railway, in pursuance of a traffic agreement with another company under s. 87 of the act. *Hull, Barnsley, and West Riding Junction Railway v. Yorkshire and Derbyshire Coal Company*, 18 Q. B. D. 761; 56 L. J., Q. B. 261; 35 W. R. 385—C. A.

CATTLE.

- I. WHEN IN ORDER AND DISPOSITION OF BANKRUPT.—*See* BANKRUPTCY, VIII., 1, b.
- II. DISEASED OR CONTAGIOUS.—*See* ANIMALS.
- III. INJURIES TO, BY DOGS.—*See* ANIMALS.
- IV. CARRIAGE OF.—*See* CARRIER.

CERTIFICATE.

- Of Architect.**—*See* BUILDING CONTRACTS.
Of Chief Clerk.—*See* PRACTICE.

CERTIORARI.

Who may apply.—Semble, a rival publican has no *locus standi* to apply for a certiorari to quash a publican's licence granted to another person. *Reg. v. Surrey JJ.*, 52 J. P. 423—D.

Action "fit to be tried" in Superior Court.—A party to an action in the Mayor's Court is not entitled as of right to remove the action by writ of certiorari into the High Court, but can only do so by leave of a judge of the High Court in a case where it shall appear to him that the action is one which is fit to be tried there. *Symonds v. Dimsdale* (2 Ex. 533) explained. *Cherry v. Endean*, 55 L. J., Q. B. 292; 54 L. T. 763; 34 W. R. 458—D.

Rule 12 of the Borough and Local Courts of Record Act, 1872, which is applicable to the Mayor's Court, provides that "no action entered in the court shall, before judgment, be removed or removable from the court into any superior court by any writ or process, except by leave of a judge of one of the superior courts in cases which shall appear to such judge fit to be tried in one of the superior courts," &c. The plaintiff brought an action in the Mayor's Court against the defendant, a stockbroker, for alleged misconduct in connexion with the purchase of certain shares, and claimed 110% as damages.—Held, that the action was one which was "fit to be

tried" in the superior courts, and that the defendant was accordingly entitled to a writ of certiorari. *Simpson v. Shaw*, 56 L. J., Q. B. 92; 56 L. T. 24—D.

— **Transfer from County Court—Employer's Liability.**—*See* COUNTY COURT.

Does not lie after Conviction and Judgment.—An application for a certiorari to the Queen's Bench Division does not lie after conviction and judgment. *Poole's Case* (14 L. R. 1, 14) explained. *Nally v. Reg.*, 16 L. R., Ir. 1; 15 Cox, C. C. 638—Q. B. D.

Rule nisi—Notice to Justices, a Condition precedent.—The six days' notice to the justices required by rule 33 of the Crown Office Rules, 1886, as a preliminary to the grant of a writ of certiorari must precede the motion for a rule nisi, and not merely the motion for the rule absolute. *Roberts, Ex parte*, 50 J. P. 567—D.

In action against Friendly Society.—*See* FRIENDLY SOCIETY.

Time for—Action in Mayor's Court.—*See* MAYOR'S COURT.

CEYLON.

See COLONY.

CHAMPERTY AND MAINTENANCE.

Grounds of Defence—Charity.—An action will lie to recover damages caused to the plaintiff by the defendant's "maintenance" of a third person in legal proceedings between him and the plaintiff. To such an action it is a good defence that the defendant assisted the third person from charitable motives, believing that he was a poor man oppressed by a rich man. It is not necessary that the defendant should have acted after full inquiry into the circumstances, but the defence will be equally available even if the defendant, had he made full inquiry, would have ascertained that there was no reasonable or probable ground for the proceedings which he assisted. *Harris v. Briscoe*, 17 Q. B. D. 504; 55 L. J., Q. B. 423; 55 L. T. 14; 34 W. R. 729—C. A.

Action by Bankrupt against Company.—A bankrupt cannot recover in an action for maintenance committed in relation to the proceedings for procuring his adjudication, since the cause of action must have arisen, if at all, before the bankruptcy, and the right to sue must therefore have passed to the trustee. *Metropolitan Bank v. Pooley*, 10 App. Cas. 210; 54 L. J., Q. B. 449; 53 L. T. 163; 33 W. R. 709; 49 J. P. 756—H. L. (E.)

Per Earl of Selborne, L.C.—A corporation in liquidation, as distinct from the liquidator thereof, is incapable of maintenance. *Id.*

CHAPEL.

See ECCLESIASTICAL LAW.

CHARGING ORDER.

A means of Execution.]—See EXECUTION.

On Property recovered or preserved.]—See SOLICITOR.

CHARITY.

I. BEQUESTS AND DEVISES.

1. *Interests in Land—Mortmain.*
2. *Validity of.*
3. *Payment of.*
4. *Application of Funds Cy près.*

II. USES AND TRUSTS.

III. PROPERTY.

IV. ENDOWED SCHOOLS.

V. ACTIONS BY AND AGAINST CHARITABLE BODIES.

I. BEQUESTS AND DEVISES.

1. INTERESTS IN LAND—MORTMAIN.

Mortgage.]—A testator gave the residue of such part of his personal estate as could by law be bequeathed for charitable purposes on trust for charities. At the time of his death his personal estate comprised a sum of 100*l.* due to him on the security of a mortgage of the life interest of a lady under the will of her father in the sum of 3,000*l.* The 3,000*l.* was invested in the names of the trustees of the father's will on a mortgage of real estate:—Held, that, under the mortgage to secure the 100*l.* the testator took no interest in land, and that the 100*l.* could be legally bequeathed by him to charitable purposes. *Watts, In re, Cornford v. Elliott*, 27 Ch. D. 318; 51 L. T. 85; 32 W. R. 900—Pearson, J.

A testator was entitled to 800*l.*, secured by mortgage of the life interest of a widow lady in the funds held on the trusts of her marriage settlement, and the reversionary interest of one of her children in the same funds. At the date of the mortgage and of the testator's death, part of these funds were pure personalty, and the rest was invested under a power in the settlement on mortgage of real estate. The testator bequeathed to charities such part of his residuary estate as could by law be so bequeathed:—Held, that the 800*l.* was an interest in land within the meaning of 9 Geo. 2, c. 36, s. 3, and could not be given by will to a charity, and that there could not be any apportionment so as to make a part of the sum available for charity. *Brook v. Badley*, (3 L. R., Ch. 672) approved and fol-

lowed. Observations of Jessel, M.R., in *Harris, In re*, (15 Ch. D. 561) explained. *Watts, In re, Cornford v. Elliott*, 29 Ch. D. 947; 55 L. J., Ch. 332; 53 L. T. 426; 33 W. R. 885—C. A.

Assignment of Harbour Duties.]—A bond by harbour commissioners in the form prescribed by their act assigning the duties which they were empowered to levy on ships entering and leaving the haven, or loading and unloading in the roads, and which were to be applied: 1, in payment of the expenses of obtaining the act; 2, in payment of the interest of moneys advanced for defraying such expenses; 3, in payment of the interest of moneys borrowed under the act; 4, in defraying working expenses; and, 5, in payment of principal moneys borrowed under the act, is not an interest in or affecting land within the Mortmain Act (9 Geo. 2, c. 36), and may be given by will for charitable purposes. *Knapp v. Williams* (4 Ves. 430, n.) questioned. *Ion v. Ashton* (28 Beav. 379) not followed. *Attorney-General v. Jones* (1 Mac. & G. 574) distinguished. *Christmas, In re, Martin v. Lacon*, 33 Ch. D. 332; 55 L. J., Ch. 878; 55 L. T. 197; 34 W. R. 779; 50 J. P. 759—C. A.

To Build Church—For Benefit of Choir Fund.]
—See two next cases.

2. VALIDITY OF.

Secret Trust of Land to Build Church.]—A testator by his will executed three months before his death, devised all his real estate, which included a piece of land of about one acre, with an unconsecrated building thereon licensed by the bishop for public worship, to his wife absolutely. The devise was in pursuance of a secret agreement between the testator and his wife, whereby the latter undertook to hold the land and building upon trust, after her husband's death, to convey the same as and for a parish or district church in perpetuity:—Held, that the devise was legal under the statute 43 Geo. 2, c. 108, and was not rendered illegal by any provisions of the Mortmain Act, 9 Geo. 2, c. 36. *O'Brien v. Tyssen*, 28 Ch. D. 372; 54 L. J., Ch. 284; 51 L. T. 814; 33 W. R. 428—V.-C. B.

Gift for Church Clock.]—A testator devised and bequeathed his real and personal estate to a trustee upon trusts for conversion, and to pay the residue of such moneys to the vicar and churchwardens of two churches, to be applied by them towards the choir fund or a new clock for the tower, according to the discretion of the trustees. It appeared that the clock of one of the churches mentioned was in good repair, but that of the other was an old and very inferior one, and that a sum of 200*l.* would be necessary for supplying a new clock in its place:—Held, that the gift for a new clock came within 43 Geo. 3, c. 108, and that the sum of 200*l.* might be lawfully applied for that purpose out of the impure personal estate, but that the gift for the choir fund was void under the Mortmain Acts as to so much of the residue of the testator's estate as consisted of impure personalty and the proceeds of sale of realty. *Hendry, In re, Watson v. Blakeney*, 56 L. T. 908; 35 W. R. 730—North, J.

Gift by Married Woman towards erection of Church.]—Under the statute 43 Geo. 3, c. 108, which contained a power to all persons having an interest in any land or in any goods or chattels, to give by deed enrolled, or will executed, three months before death, lands not exceeding five acres, or goods and chattels not exceeding in value 500*l.*, for or towards the erecting of any church, with a proviso that the act should not extend to any persons being within age, nor women covert without their husbands to make any such gift:—Held, that the proviso was not affected by the Married Women's Property Act, 1882, which by sect. 1, sub-sect. 1, gave power to married women to dispose by will of any real or personal property as her separate property in the same manner as if she were a feme sole. Consequently a gift by a married woman, by will executed three months before death, to the vicar and churchwardens of a church of a sum of 300*l.* to be applied by them in the erection of a new church, and to be paid out of personal estate which was legally applicable for the purpose, was held to be invalid. *Smith's Estate, In re, Clements v. Ward*, 35 Ch. D. 589; 56 L. J., Ch. 726; 56 L. T. 850; 35 W. R. 514; 51 J. P. 692—Stirling, J.

Repair of Tomb and Churchyard—Apportionment.]—A bequest of money, not exceeding 500*l.*, on trust to apply the income in repairing a churchyard, is good under the act 43 Geo. 3, c. 108, s. 1, and is a charitable legacy. *Vaughan, In re, Vaughan v. Thomas*, 33 Ch. D. 187; 55 L. T. 547; 35 W. R. 104; 51 J. P. 70—North, J.

A testator bequeathed 500*l.* on trust to invest, and to apply such part of the income as might be necessary in keeping a family vault in repair, and to apply the residue of the income in keeping in repair a tomb and the churchyard in which the vault and tomb were situated:—Held, that the trust to keep in repair the vault was void, and that the portion of the fund devoted to that purpose fell into the gift of the residue; that the residuary trust was void so far as it related to keeping in repair the tomb, and valid so far as it related to keeping in repair the churchyard; and that the void portion of the bequest was so much of the 500*l.*, the amount to be ascertained by affidavit, as when invested in Consols would produce sufficient income to keep in repair the tomb. *Id.*

Gifts to "charitable and deserving Objects."]
—Gift, by will, of money to "charitable and deserving objects":—Held, a good charitable bequest. *Sutton, In re, Stone v. Attorney-General*, 28 Ch. D. 464; 54 L. J., Ch. 613; 33 W. R. 519—Pearson, J.

Gift for Endowment of Museum.]—A testatrix by her will bequeathed a collection of pictures, plate, china, and books to trustees to form an art museum at Bath, and bequeathed to the trustees a sum of money to be held for the perpetual protection, maintenance, and endowment of the collection. It appeared that the testatrix intended the museum to be kept in Bath as a public institution for the benefit of the inhabitants of the city and the public generally:—Held, that the gift was a valid gift for charitable purposes. *Holburne, In re, Coates v. Mackillop*, 53 L. T. 212—Chitty, J.

Bequest of Fund for Hospitality or Charity—Uncertainty.]—A testator bequeathed a sum of money to the treasurer of the corporation of G., the interest to be paid annually to the mayor "to be expended by him in acts of hospitality or charity at such times and in such manner as he might think best":—Held, that the gift was not confined to charitable purposes only and was therefore void for uncertainty. *Jarman's Estate, In re, Leavers v. Clayton* (8 Ch. 584) followed. *Hewitt's Estate, In re, Gateshead (Mayor) v. Hudspeth*, 53 L. J., Ch. 132; 49 L. T. 587—Kay, J.

Trust for Charitable Institution purely Voluntary.]—Bequest of 1,000*l.* to R. W. B. in trust to invest it, and apply the interest, in the first place, in keeping up a family vault, and the balance to any charitable or religious purpose he may please, whether public or private, permanent or temporary subscription, provided, however, the same be not connected directly or indirectly with the poor law commissioners acting under the 1 & 2 Vict. c. 56, or any other act then or thereafter to be passed, for the compulsory support of the poor in Ireland; it being the wish and intention of the testatrix that the same should from time to time be applied by R. W. B. in charitable institutions, or charitable or religious subscriptions purely voluntary and spontaneous; the sum of 5*l.* per annum, at least, to be given thereout to the B. Lying-in Hospital, so long as the same should remain supported and managed as at present, or under the control, guidance and management of a self-elected body or committee unconnected with and deriving no assistance from the said poor law commissioners, and not longer or otherwise:—Held, a valid charitable bequest. *Sinclair's Trust, In re*, 13 L. R., Ir. 150—M. R.

Power of Trustees to select Charities—Charities empowered by Law to hold Land.]—A testator, after making various pecuniary bequests, some of which were to charities, gave all his personal estate and effects of which he should die possessed, and which should not consist of money or securities for money, to R. absolutely. And he gave and devised all the residue of his estates, both real and personal, to his trustees, upon trust thereout in the first place to pay two specified sums of 500*l.* and 100*l.*, and as to the residue thereof, or such part or parts thereof, as might be lawfully appropriated to the purpose, for such one or more or any hospital of a charitable nature, and in such proportions as they in their uncontrolled discretion should think fit. The personal estate proving insufficient for the payment of the legacies, it became necessary to resort to the real estate, which was sold for the purpose. There remained a surplus of the proceeds of sale after paying the legacies in full. The trustees, under the power in the will had appropriated this fund among certain hospitals entitled by law to hold real estate:—Held, that as between these hospitals and the heir-at-law, the former were entitled to the fund. *Owey, In re, Broadbent v. Barrow*, 31 Ch. D. 113; 55 L. J. Ch. 103; 53 L. T. 723; 34 W. R. 100—Pearson, J.

Gift to the Poor as Trustees shall think fit.]
—The testatrix gave the residue of her property,

which consisted of both pure and impure personality, to her executors and trustees, "to give it to the poor as they may think fit"—Held, that the gift could not be upheld as to the impure personality, on the ground that the trustees might in their discretion give it to charitable institutions by statute exempted from the operation of the Mortmain Act, inasmuch as the testatrix had not indicated charitable institutions as being amongst the objects which she wished to benefit. *Clark, In re, Husband v. Martin*, 54 L. J., Ch. 1080; 52 L. T. 406; 33 W. R. 516—Kay, J.

Power of Selection—Indefinite Gift—Inclusion of Objects not charitable—Society for the Benefit of Animals.]—A testatrix gave legacies to several charities and societies, among others to the Society for the Protection of Animals liable to Vivisection and the Home for Lost Dogs. And she directed the trustees to pay and distribute the residue of that portion of her personal estate which might by law be appropriated by will for such purpose among such charities, societies, and institutions (including or excluding those thereinbefore mentioned as might be preferred), and in such shares and proportions as Lord S. should by writing nominate. Lord S. survived the testatrix and divided the pure residuary personal estate among a number of charities, not including the two above-mentioned societies for the benefit of animals. The next of kin claimed the fund on the ground that the gift was void for uncertainty and for including objects which were not charitable.—Held, first, that the scope of the will showed that the testatrix referred only to charitable societies and institutions. Secondly, assuming that the two societies for the benefit of animals were not charities, the fact that Lord S. had power to include them in the distribution of the fund did not make the bequest void. But, semble, the Society for the Protection of Animals liable to Vivisection and the Home for Lost Dogs, were charities within the statute of 40 Eliz. c. 4. Quære, whether the Society for the Total Suppression of Vivisection is a charity within the same statute. *Douglas, In re, Obert v. Barrow*, 35 Ch. D. 472; 56 L. J., Ch. 913; 56 L. T. 786; 35 W. R. 740—C. A.

Rule against Perpetuities.]—See *Randell, In re, Randell v. Dixon*, post, col. 308.

Gift to Endow Private Chapel—General Charitable Intention.]—A settlor, by an indenture dated in 1867, granted to trustees a tithe rent-charge of 360*l.* a-year issuing out of certain lands in the parish of D. for the following trust, namely, as to 80*l.* upon trust for the payment of the salary of the priest in the private chapel built by the settlor adjoining his mansion and dwelling-house, provided that such priest should not have any other ecclesiastical or pastoral duty except such as might appertain to the visitation of the tenants and labourers of the owners of the L. estates; and as to the sum of 10*l.* upon trust to apply the same for the purpose of lighting and cleaning the said chapel; and as to 100*l.* upon trust for the teaching and maintenance of ten boys as choristers in the said chapel; and as to 80*l.* for the payment of the schoolmaster teaching and educating the poor boys at the school-house then building and intended to be built on the

L. estate; and as to 30*l.* for the payment of the schoolmistress teaching certain poor girls at the schoolhouse on the L. estate; and as to 10*l.* for the costs, charges, and expenses of keeping in order the said schools and four almshouses for the poor labourers on the L. estate; and as to 80*l.* for the support and maintenance of such poor labourers as should be dwelling in certain four almshouses on the L. estate. The trusts of this deed were not acted on during the lifetime of the settlor, except to a limited extent. The chapel on the L. estate was a private chapel, and had never been consecrated or dedicated to charity, and no strangers were allowed into it, except by special permission.—Held, that the court could not impute to the settlor any intention of charity independently of the L. estate, and that no charitable scheme could be sanctioned by the court, and that the trusts declared by the deed were void, and the property passed under the settlor's will. *Hoare v. Hoare*, 56 L. T. 147—Chitty, J.

3. PAYMENT OF.

Bequest of Capital Sum—Condition in Nature of a Trust.]—A bequest of a capital sum was made to the Royal National Lifeboat Institution on condition of its constructing and keeping up two lifeboats, and coupled with a gift over in the event of non-compliance with the condition.—Held, that the bequest was in the nature of a trust, and that the Lifeboat Institution having accepted the trust was entitled to an absolute transfer of the fund. *Richardson, In re, Shuldham v. Royal National Lifeboat Institution*, 56 L. J., Ch. 784; 57 L. T. 17; 35 W. R. 710—Chitty, J.

Charitable Bequest—Scheme.]—The property of a religious unincorporated society was under the absolute control of the general superintendent. A testator bequeathed legacies to "General W. B." (who was the general superintendent) "for the spread of the gospel".—Held, that the legacies should be paid to W. B. without a scheme. *Lea, In re, Lea v. Cooke*, 34 Ch. D. 528; 56 L. J., Ch. 671; 56 L. T. 482; 35 W. R. 572—North, J.

Marshalling—Direction in Will.]—A testator, after certain pecuniary bequests, gave the residue of his property to trustees upon trust for sale, and out of the proceeds of the sale and the money of which he should be possessed at the time of his death to pay his funeral expenses, debts, and testamentary expenses, and upon trust to pay and divide the net residue unto and equally between the treasurers of four charities, A, B, C, and D. The testator declared that his pure personal estate should, in the first place, be applied in payment of the shares of the charities C. and D. Charities A. and B. were empowered to take land or impure personality; C. and D. were not. The testator, at the time of his death, was entitled to pure and impure personality.—Held, that there was in the will a sufficient direction to marshal the estates so that the pure personality was first to be applied in payment of the shares of the charities C. and D. *Pitt's Estate, In re, Lucy v. Stone*, 53 L. T. 113; 33 W. R. 653—Chitty, J.

A testatrix gave all her real and personal estate to trustees upon trust to convert, and

out of the proceeds pay her debts, funeral and testamentary expenses, and certain legacies bequeathed to private individuals, and directed that all such legacies should in the first instance be payable out of the proceeds of sale of her "real and leasehold estate, if any." She directed her trustees to divide the residue of her estate into three parts and pay the same to certain charities. She then directed that "the foregoing charitable legacies" should be paid "exclusively" out of such part of her pure personal estate as was legally applicable for that purpose. The testatrix had no real or leasehold estates in this country, but was possessed of land in the colony of the Cape of Good Hope (the value of which was less than the amount of the general legacies) and of pure and impure personalty. —Held, that the direction as to payment of the charitable legacies was in effect equivalent to a direction that the residue should consist exclusively of pure personalty, and therefore operated as a direction to marshal for the benefit of the charities; that the general legacies were primarily payable out of the proceeds of sale of the land in the colony; and that the debts and funeral and testamentary expenses and costs of action and the unpaid portion of the general legacies must be paid in the first instance out of the impure personalty, so as to leave the pure personalty, so far as possible, to constitute the ultimate residue. *Arnold, In re, Ravenscroft v. Workman*, 37 Ch. D. 637; 57 L. J., Ch. 682; 58 L. T. 469; 36 W. R. 424—Kay, J.

4. APPLICATION OF FUNDS CY-PRÈS.

Scheme of Settlement—Friendly Society.]—

In 1862, on the occasion of an accident at the Hartley Colliery, in Northumberland, a fund was raised by voluntary subscriptions and vested in trustees for the relief of the sufferers and their families. There being an ultimate surplus, the managers of the fund proposed to apportion it among several mining districts, including South Durham, for the relief of suffering occasioned by colliery accidents in those districts, and in aid of relief funds already in operation there. By the rules of a Miners' Relief Fund Friendly Society established in 1862 for certain counties, including the county of Durham, provision was made for raising funds by voluntary subscriptions among the members (required to be persons employed in coal or other mines), and by donations, for defraying the funeral expenses of members, supporting their families, assisting members disabled by accident, old age, or infirmity, and for payment of a sum at the death of a member. —Held, in an action by the surviving trustee of the Hartley Colliery Fund, that the friendly society was a "charity," and that that portion of the fund intended for the South Durham district might be applied cy-près by payment to four of the trustees of the friendly society, to be applied by them, according to the rules of the society, for the relief of suffering occasioned by colliery accidents in the South Durham district, and for no other purpose. —Held, also, that the Hartley Colliery Fund, being a fund arising wholly from "voluntary contributions," was exempted by s. 62 of the Charitable Trusts Act, 1853, from the operation of the act, and that, therefore, the consent of the Charity Commissioners to the action, under s. 17, was

unnecessary. *Clark's Trust, In re* (1 Ch. D. 497), considered. *Pease v. Pattinson*, 32 Ch. D. 154; 55 L. J., Ch. 617; 54 L. T. 209; 34 W. R. 361—V.-C. B.

Legacy to Incumbent of Church on Conditions.]

—A testatrix bequeathed 14,000*l.* on trust to pay the income to the incumbent of the church at H. for the time being so long as he permitted the sittings to be occupied free: in case payment for sittings was ever demanded, she directed the 14,000*l.* to fall into her residue. —Held, first, that the testatrix had not expressed a general intention to devote the 14,000*l.* to charitable purposes, so that in case of failure of the trust for the benefit of the incumbent the fund would be applied cy-près; secondly, that the direction that the fund should fall into the residue, being a direction that the fund should go as the law would otherwise carry it, did not offend the rule against perpetuities. *Randell, In re, Randell v. Diaon*, 38 Ch. D. 213; 57 L. J., Ch. 899; 58 L. T. 626; 36 W. R. 543—North, J.

Lifeboat—Place.]—A capital sum was bequeathed to the trustees of the Royal National Lifeboat Institution on condition that the institution should construct and keep up two tubular lifeboats according to a pattern named, to be stationed at Deal and Pwllheli respectively. There was a gift over in case the institution should decline to construct the lifeboats. The lifeboat institution, having accepted the trust, were held to be entitled to an absolute transfer of the fund. It appeared, however, that at Deal the coast was sufficiently furnished with lifeboats, and moreover, that a "self-righting" and not a tubular boat was required for that particular station. It was, therefore, proposed by the lifeboat institution to place a tubular lifeboat at New Brighton instead of at Deal; and they applied to the court for permission so to do. —Held, that the cy-près doctrine was applicable, and that the application ought to be acceded to. *Richardson's Will, In re*, 58 L. T. 45—Chitty, J.

Soup Kitchen and Cottage Hospital.]—A testator directed his trustees to set apart a sum of money out of such part of his personal estate as might by law be applied for charitable purposes, and to apply it in the establishment of a soup kitchen and cottage hospital for the parish of S. in such manner as not to violate the Mortmain Acts. A suit having been instituted to administer the trusts of the will, the Chief Clerk reported that it was impossible to apply the fund in accordance with the directions in the will. —Held, that the will showed a general charitable intention to benefit the poor of the parish of S., and that although the particular purpose of the bequest had failed, the court would execute the trust cy-près; and a scheme was directed accordingly. *Biscoe v. Jackson*, 35 Ch. D. 460; 56 L. J., Ch. 540; 56 L. T. 753; 35 W. R. 554—C. A. Affirming 51 J. P. 391—Kay, J.

Bequest to build Hospital—Gift of Land Void.]

—A testator by deed poll duly enrolled in Chancery, conveyed to trustees a piece of land and cottages for the purpose of an hospital for ten aged poor persons, preference being given to particular parishes. By his will made in 1882, he charged his copyhold and freehold estates

with his debts, funeral expenses, and legacies, and gave the residue of his personal property to the trustees of the deed poll upon trust to build an hospital on the site of the premises conveyed by the deed poll, and to employ the income of the remainder in insurance and repairs, and paying 18*l.* or more to each of the ten poor inmates. The testator died within twelve months from the execution of the deed poll, which therefore became void under the Statute of Mortmain:—Held, that the paramount intention of the testator was to found an hospital and benefit ten aged poor people, and that the bequest was one that could not be carried out independently of the hospital; the gift of the hospital wholly failed and could not be carried out *cy-près*. *Taylor, In re, Martin v. Freeman*, 58 L. T. 538—Kay, J.

Hospital not existing.]—A legacy to an ophthalmic hospital which had ceased to exist at the date of the testator's will failed:—Held to have lapsed and not to be administered *cy-près*. *Ovey, In re, Broadbent v. Barrow*, 29 Ch. D. 560; 54 L. J., Ch. 752; 52 L. T. 849; 33 W. R. 821—Pearson, J.

Almshouses—Site not obtainable.]—A testator, a tinsmith, bequeathed 1,000*l.* Consols to the master, wardens, &c., of the Tinsmith Workers' Company, upon trust with the proceeds when a proper site could be obtained to build in such part of England as they should think fit, almshouses for the use, first, of poor liverymen of the company, then of poor freemen of the company, and, lastly, of any poor men of the trade of a tinsmith; and he declared that he had made the bequest in the hope that some other person, actuated by the same charitable feelings, would thereafter sufficiently endow the almshouses; and he bequeathed the residue of his estate to various persons. After the testator's death the company unsuccessfully endeavoured to obtain a site for the almshouses, and it appeared that there was no reasonable prospect of a site being obtained, and that, even if it could be, the company had no income available for the endowment and maintenance of the almshouses:—Held, that as the object of the gift had failed, the fund fell into the residue as a lapsed legacy, and was not applicable *cy-près*. *White's Trusts, In re*, 33 Ch. D. 449; 55 L. J., Ch. 701; 55 L. T. 162; 34 W. R. 771; 50 J. P. 695—V.-C. B.

II. USES AND TRUSTS.

"Reparations, Ornaments, and other necessary Occasions of Church"—Erection of Spire—Salaries of Vergers.]—By a decree of charitable uses, made in 1638, the rents of a piece of land were directed to be applied "for and towards the reparations, ornaments, and other necessary occasions" of a parish church. In 1859 a new church was substituted for the old parish church, and the charity transferred to it; the new church was originally intended to have a spire, but owing to lack of funds this had never been built. The rents of the charity largely increased, and the question arose how they were to be spent:—Held, that the erection of the spire was a "necessary occasion," and that a part of the funds might be devoted to the purpose, but that

the salaries of persons employed in or about the church did not fall within the scope of the original charity. *Palatine Estate Charity, In re*, 39 Ch. D. 54; 57 L. J., Ch. 751; 58 L. T. 925; 36 W. R. 732—Stirling, J.

Lease of Site for Workhouse—Relief of Poor—Non-enrolment.]—By a lease dated in 1747—after reciting that the inhabitants of the parish of G. had resolved to build a workhouse for the better reception and employment of the poor of the parish, and had applied to the lessor for a lease of the land demised, and that the lessor, "in order to encourage so good a work," had consented to grant the lease—a piece of land was demised for a term of 150 years, to commence from a day fifteen days later than the date of the lease, at the yearly rent of 1*s.*, to several persons, one of whom was the vicar of G., in trust that the lessees might build a workhouse upon the land "for the better reception and employment, and for the lodging and entertainment only of all the poor people of the parish of G. for the time being during the said term, in such manner as they, or the major part of them, shall think fit, at the proper costs and charges of the inhabitants of the said parish of G., or otherwise, and not to be let, mortgaged for money, or assigned, to any other use, intent, or purpose whatsoever." And it was agreed that, if the inhabitants should discontinue the prescribed use of the building so to be erected, and should be willing to deliver it to the landlord, it should be lawful for them to do so, he paying to the churchwardens or overseers of the parish the then value of the building. The deed was not enrolled under the Mortmain Act, 1736 (9 Geo. 2, c. 36). A workhouse was duly erected on the demised land pursuant to the lease. In 1862, the workhouse, being no longer required, was pulled down, and no rent having been paid under the lease since 1776, the site was conveyed to a purchaser in fee under the Act of 5 & 6 Will. 4, c. 69, enabling the parish authorities to sell the sites of disused workhouses. An action having been brought by a person claiming to be the reversioner against persons—as alleged assigns of the lease—claiming under the purchase of 1862, to recover the arrears of rent:—Held, that the lease was a lease for "charitable uses:" that it failed to comply with the requirements of the Mortmain Act in that, besides non-enrolment, it did not take effect in possession and contained reservations in favour of the grantor in the shape of rent and something in the nature of a right of pre-emption; that these defects were not cured by s. 73 of the Poor Law Act, 1844 (7 & 8 Vict. c. 101), that act curing only one defect, namely, want of enrolment; and that the lease was accordingly void ab initio, and that the Statute of Limitations began to run against the grantor, if not from the execution of the lease, at all events from the time the rent ceased to be paid. *Webster v. Southey*, 36 Ch. D. 9; 56 L. J., Ch. 785; 56 L. T. 879; 35 W. R. 622; 52 J. P. 36—Kay, J.

Seemingly, land acquired by parish officers to enable them to perform their statutory obligations, as, for instance, by providing a workhouse, is land acquired for a "charitable use." *Burnaby v. Barsby* (4 H. & N. 690) questioned. *Id.*

Manor—Grant of Woods to Copyholders by Crown as Lord—Reparation of Sea Dykes.]—By

a return to a commission issued by Queen Elizabeth, who was lord of a certain manor near the sea, the commissioners, in consideration of the copyhold tenants undertaking the repair of a sea-dyke which had up to that time been chargeable to the lord, granted to the tenants "that they shall have the woods growing in W. Wood for and towards the reparation of" a particular portion of the sea-dykes within the manor. The surplus proceeds of the wood cut from time to time by the tenants were invested by them, and about the year 1765 they cut down the whole of W. Wood (allowing the lord to take possession of the soil), and invested the proceeds. The sea having receded from the part of the manor protected by the sea-dyke, the copyhold tenants for the time being brought an action in 1882 for a declaration that, subject to the reparation of the sea-wall, they were absolutely entitled to the property representing the invested proceeds of the wood:—Held, that, upon the true construction of the return, the grant of the wood made by Queen Elizabeth constituted a charity or gift for charitable purposes; and a scheme was directed for the management and application of the trust property. *Wilson v. Barnes*, 38 Ch. D. 507—C. A.

Common Lands—Enclosure—Trust for Occupiers of a class of Houses—Rights of Lord—Rights of Owners.—By a local enclosure act commissioners were required to allot to the lords of the manors, "in trust for the occupiers for the time being of all such cottages and tenements containing less than one acre each as were erected on ancient sites or have now been erected more than fourteen years, in lieu of their rights or pretended rights of cutting turves," so much of the waste grounds as the commissioners should think proper for a turf common, which should be managed and the turf arising therefrom taken and used, by the occupiers of such cottages in such manner as the lords of the manors and the churchwardens and overseers of the poor acting within each manor should appoint. In pursuance of the act the commissioners allotted lands for a turf common. A portion of these lands was taken by a railway company, and the purchase-money was paid into court. A question was then raised as to who was entitled to the fund:—Held, (1) that the lord was entitled to so much of the fund in court as represented the value of the soil of the land taken by the railway company; (2) that the trust was for the benefit of the occupiers for the time being of the cottages, and not a trust for the owners, who were only entitled to benefit by the addition to the value of the occupation caused by the gift of the right to the occupiers; (3) that the trust in favour of the occupiers was a charitable and not a private trust. *Christchurch Inclosure Act, In re*, 38 Ch. D. 520; 57 L. J., Ch. 564; 58 L. T. 827—C. A.

Charitable Trusts Act, 1853—Jurisdiction.—On a summons issued under the Charitable Trusts Act, 1853, the court has jurisdiction to entertain the question whether a trust is or is not charitable under which the property, which is the subject of the summons, is held. *Norwich Town Close Estate, In re*, 40 Ch. D. 298; 60 L. T. 202; 37 W. R. 362—C. A. Reversing 57 L. J., Ch. 958—Kekewich, J.

Duty of Trustees when main purpose of Trust impossible.—If the trustees of a public charitable trust cannot carry out the main purpose of the trust in the mode the donor has expressed, it is their duty to apply to the court for directions. *Andrews v. McGuffog*, 11 App. Cas. 313—H. L. (Sc.).

Fund—Conflicting Claims—Romilly's Act—Jurisdiction.—The court has jurisdiction under Romilly's Act (52 Geo. 3, c. 101), to adjudicate between the conflicting claims of different charities where the claims depend on the construction of the same deed. *Upton Warren, In re*, (1 My. & K. 410), followed. *Hospital for Incurables, In re*, 13 L. R., Ir. 361—M. R.

Trust Deed of Chapel.—See ECCLESIASTICAL LAW.

III. PROPERTY.

Rating—Exemption from General District Rate.—The objects of the Railway Servants' Orphanage at Derby are restricted to children of railway servants throughout the kingdom. Its income is almost altogether derived from voluntary contributions of the public. In 1883 it was rated under the Public Health Act, 1875. Exemption was claimed on the ground that the orphanage was a public charity within s. 103 of a local act of 6 Geo. 4, c. cxxxii. The borough justices, to whom application had been made by the corporation to enforce the rate, considered that the orphanage was in the nature of a self-supporting benevolent institution, and was not entitled to exemption, but stated a case under 20 & 21 Vict. c. 43:—Held, that this was a public charity within the local act, and accordingly entitled to exemption. *Hall v. Derby Sanitary Authority*, 16 Q. B. D. 163; 55 L. J., M. C. 21; 54 L. T. 175; 50 J. P. 278—D.

London Parochial Charities—Jurisdiction of Charity Commissioners.—Under the provisions of the Act 35 Geo. 3, c. 61, passed in 1795, a piece of land was vested in trustees for the purpose of building a workhouse for the poor of a parish in the city of London, and power was given to raise 10,000*l.*, to pay for the land and the building, by the grant of annuities for lives or years, which were to be charged on rates which the act authorized to be levied on the parishioners. The act provided that the land should be held "for the use and benefit of the parish." The workhouse was built, and was used for many years for the poor of the parish. In 1837 a poor law union was formed, and, the workhouse being no longer required, the income of the property was thenceforth applied in aid of the poor-rates of the parish:—Held, that the property was "charity property" within the meaning of the City of London Parochial Charities Act, 1883, and was subject to the jurisdiction of the Charity Commissioners under that act. *St. Botolph Estates, In re*, 35 Ch. D. 142; 56 L. J., Ch. 691; 56 L. T. 884; 35 W. R. 688—North, J.

—Advowson—Vicarage House.—An inappropriate rectory was granted to trustees in trust for the benefit of a parish in the city of London, and the choice of the vicar was made by the parishioners. A vicarage-house was also

held on like trusts for the benefit of the parish, and used by the vicar for the time being:—*Held*, that the advowson, as well as the vicarage-house, was charity property within the City of London Parochial Charities Act, 1883. *St. Stephen's, Coleman Street, In re; St. Mary's, Aldermanbury, In re*, 39 Ch. D. 492; 57 L. J., Ch. 917; 59 L. T. 393; 36 W. R. 837—Kay, J.

An advowson is no exception from the general law as to charitable trusts. The dicta in *Att.-Gen. v. Parker* (1 Ves. sen. 43; 3 Atk. 576), *Att.-Gen. v. Forster* (10 Ves. 335), *Att.-Gen. v. Newcombe* (14 Ves. 1), and *Att.-Gen. v. Webster* (20 L. R., Eq. 483) considered. *Id.*

— **Consecrated Ground—User for Secular Purposes.**—Part of certain property consisted of three houses on the site of a church, which church was vested, by an Act of 1536, in the parson, churchwardens, parishioners, and their successors, “in free alms for ever.” The remainder of the property was held by the parson, churchwardens, and parishioners, under a lease granted in 1587, “for the relief, and maintenance of the poor, aged, impotent, and diseased persons of the said parish, and for the necessary reparations of the said parish church of St. Alphege.” The rents of all the properties had been applied for general parish purposes:—*Held*, that, assuming the houses were built on consecrated ground, a user of the rents for three hundred years for general parish purposes made them charity property within s. 5 of the City of London Parochial Charities Act, 1883; that the parson, churchwardens, and parishioners did not constitute a corporation except for the purpose of taking the church granted by the Act of 1536; and that “vested interests” meant interests such as those of persons who received a remuneration out of charity property, and that the parson, churchwardens, and parishioners had no vested interest within the meaning of the Act. *St. Alphege, London Wall, In re*, 59 L. T. 614—Kay, J.

— **“Vested Interests”—What are.**—A vested interest under the City of London Parochial Charities Act, 1883, means an emolument received by some person in respect of some office which he holds, an emolument which that person receives for his own benefit. The word “person” includes any body of persons, whether corporate or unincorporate. Where the petitioners had no vested interest in the property the subject of the petition, the court has no jurisdiction under the above statute. *St. John the Evangelist, In re*, 59 L. T. 617—Kay, J. See also preceding case.

Sale of Lands—Charity Commissioners.—Where a railway company under its compulsory powers had taken a certain house belonging to a city ward:—Declared, on adjourned summons, that neither the consent of the Charity Commissioners nor of the Lords of the Treasury was necessary, and that it was not necessary for the sale to be completed under the provisions of the Lands Clauses Consolidation Acts, 1845, 1860, and 1869. *Finnis to Forbes, Finnis, Ex parte*, 24 Ch. D. 587; 53 L. J., Ch. 140; 48 L. T. 813; 32 W. R. 55—V.-C. B.

Where a railway company under its compulsory powers took a certain house belonging to a charity school:—*Held*, that, being supported by voluntary contributions, the school came within

the exemptions of s. 62 of the Charitable Trusts Act, 1853, and s. 48 of the Act of 1855; that the consent of the Charity Commissioners was not necessary, and that it was not necessary that the sale should be completed under the provisions of the Lands Clauses Consolidation Acts, 1845, 1860, and 1869. *Finnis to Forbes, Tower Ward Schools Trustees, Ex parte*, 24 Ch. D. 591; 53 L. J., Ch. 141; 48 L. T. 814; 32 W. R. 55—V.-C. B.

— **Allotments.**—The Allotments Extension Act, 1882, has not taken away from the Charity Commissioners the power of authorising a sale of charity lands vested in them under the Charitable Trusts Act, 1853, and the Charitable Trusts Amendment Act, 1855. *Sutton (Parish of) to Church*, 26 Ch. D. 173; 53 L. J., Ch. 599; 50 L. T. 387; 32 W. R. 485—Chitty, J.

IV. ENDOWED SCHOOLS.

Scheme—Applications of Funds—Denominational School.—Where the commissioners by their scheme provided that certain endowments which had heretofore been applied in carrying on the schools of a particular parish, should thenceforth be applied in exhibitions for the benefit of a larger area of schools:—*Held*, that this was within their powers under s. 9 of the Endowed Schools Act, 1869, and that being so the way in which those powers had been exercised was not the proper subject of appeal. *Held*, that a charity which has no instrument of foundation, or statutes, or duly authorised regulations impressing upon it a denominational character, does not fall within the 19th clause of the act of 1869, or the 7th clause of the act of 1873. Its trustees cannot impress upon it that character, nor is any practice for the time being as to the application of its funds, sufficient evidence of there ever having been regulations in existence which prescribed it. Where a charity is established by subscriptions, the original subscribers alone are the founders, the later benefactors are on the footing of the original foundation. If its regulations are relied upon as impressing upon it a denominational character, they must be shown to have been authorised by all the founders, and to have been issued before fifty years from their deaths. *St. Leonard, Shoreditch, Schools, In re*, 10 App. Cas. 304; 56 L. J., P. C. 30; 51 L. T. 305; 33 W. R. 756—P. C.

Removal of Site—Vested Interests—“Due regard.”—The removal of the site of a school is within the scope of the Endowed Schools Act, 1869, and the powers conferred on the Commissioners by s. 9. An annual sum temporarily applied to the purposes of the school is an endowment within the meaning of s. 5. *Hemsworth Free Grammar School, In re*, 12 App. Cas. 444; 56 L. J., P. C. 52; 56 L. T. 212; 35 W. R. 418—P. C.

Section 19 does not relate to an endowment which has been (whatever its original foundation) subjected to a scheme providing that religious instruction in the liturgy, catechism, and articles of the Church of England shall be given, not to all boys, but to the boys of parents in that communion and the boys of other parents who do not object thereto in writing. “Due regard” (see *Hodgson's School, In re*, 3 App. Cas. 869) had under the circumstances been paid to

the educational interests contemplated by s. 11. "Entitled," in s. 11, means legally entitled. *Sutton Coldfield Grammar School, In re* (7 App. Cas. 91), followed. The interest of a boy on the foundation of a school is not saved or directed to be compensated by the Act of 1869, unless he was there at the date of the passing thereof. *Id.*

V. ACTIONS BY AND AGAINST CHARITABLE BODIES.

Resident Medical Officer—Hospital—Consent of Charity Commissioners.—The plaintiff had been appointed, in pursuance of certain rules framed by the committee of a hospital established by a trust deed of March, 1879, under the powers conferred by the deed, resident medical superintendent of the institution for life, subject to his removal on three months' notice by the committee on proof to them of neglect of duty; and he was let into possession of a house which was annexed to the office. The funds of the hospital not being sufficient to maintain a resident medical officer, the committee gave the plaintiff three months' notice of removal, no charge of neglect of duty being brought against him. The committee gave the notice with the intention of applying for a new scheme which would render the office unnecessary. The plaintiff commenced an action against the committee for a declaration that he was entitled to hold his office during good behaviour, and for an injunction to restrain them from ejecting him from his residence and from otherwise interfering with the tenure of his office:—Held, by Chitty, J., on motion for an injunction, that the plaintiff before issuing his writ ought to have obtained the certificate of the Charity Commissioners as required by s. 17 of the Charitable Trusts Act, 1853, and the motion was refused with costs:—Held, by the Court of Appeal, that if the object of the action was anything beyond preventing the defendants from excluding the plaintiff, it required the sanction of the commissioners. And the defendants at the bar expressing their intention not to exclude the plaintiff unless and until a new scheme should be sanctioned, or until the trial of the action, the order of the court below was affirmed. *Benthall v. Kilmorey (Earl)*, 25 Ch. D. 39; 53 L. J., Ch. 298; 50 L. T. 137; 32 W. R. 69—C. A.

S. P., *Brittain v. Overton*, 25 Ch. D. 41, n.; 53 L. J., Ch. 299, n.; 49 L. T. 128, n.; 32 W. R. 27, n.—Jessel, M. R.

Members of Committee of Church Fund—Attorney-General—Consent of Commissioners.]

—An action was brought by five of the members of a church building committee on behalf of themselves and the other members of the committee, against a former member, claiming an account of all moneys received and paid by him in respect of the church building fund during the period of his membership. The fund was raised by voluntary contributions; seventeen persons having constituted themselves into a committee to receive subscriptions for the purpose of improving the parish church and to apply the moneys thus collected:—Held, that the members of the committee being mere agents of the subscribers, the action could not be maintained by some of the agents against the

others, but that even if all the subscribers were suing the action could not be maintained in the absence of the attorney-general. Whether the action could be maintained without the certificate of the Charity Commissioners, *quære*. *Strickland v. Weldon*, 28 Ch. D. 426; 54 L. J., Ch. 452; 52 L. T. 247; 33 W. R. 545—Pearson, J.

Consent of Charity Commissioners—"Voluntary Contributions."]—See *Pease v. Pattinson*, ante, col. 308.

CHARTER-PARTY.

See SHIPPING.

CHEQUES.

See BILLS OF EXCHANGE.

CHILDREN.

1. *Abduction*.—See CRIMINAL LAW.
2. *Bastard*.—See BASTARDY.
3. *Gifts to, by Will*.—See WILL.
4. *In other Cases*.—See INFANT.

CHINA SETTLEMENTS.

See COLONY.

CHOSE-IN-ACTION.

See ACTION.

CHURCH AND CHURCH-WARDENS.

See ECCLESIASTICAL LAW.

CLERGY.

See ECCLESIASTICAL LAW.

CODICIL.

See WILL.

COLLIERY.

See MINES AND MINERALS.

COLLISION.

1. *On Roads or Railways.*—See NEGLIGENCE.
2. *On High Seas or Rivers.*—See SHIPPING.

COLONY.

I. PARTICULAR COLONIES.

1. *Australia.*
 - a. New South Wales.
 - b. Queensland.
 - c. South Australia.
 - d. Victoria.
 - e. West Australia.
2. *British North America.*
3. *Cape of Good Hope.*
4. *Ceylon.*
5. *China Settlements.*
6. *Jersey.*
7. *Malta.*
8. *Mauritius.*
9. *Newfoundland.*
10. *New Zealand.*
11. *Straits Settlements.*
12. *Trinidad.*

II. APPEALS TO THE PRIVY COUNCIL.

I. PARTICULAR COLONIES.

1. AUSTRALIA.

a. New South Wales.

Crown Lands—Conditional Purchase forfeited.]

—The defendant having applied for a grant, partly on conditional purchase, and partly on conditional lease, of land within the external boundaries of the plaintiff's leasehold area, as determined by the Minister of Lands, under the Crown Lands Act of 1884, it appeared that the said portions had prior to that act been conditionally sold by the Government, and subsequent to the act forfeited by the purchaser:—Held, that the said portions of land did not on such forfeiture become part of the pastoral leasehold, but became Crown lands within s. 4 of the act, and could be validly regranted by the Crown on conditional purchase or conditional lease. *Tearle v. Edols*, 13 App. Cas. 183; 57 L. J., P. C. 58; 58 L. T. 360—P. C.

Government—Liability to be sued in Tort.]—Under New South Wales Act, 39 Vict. No. 38, the government of the colony is liable to be sued in an action of tort. *Hettihewaye Siman Appu v. Queen's Advocate* (9 App. Cas. 571), relates exclusively to the law of Ceylon, and does not lay down as a universal principle that actions ex delicto cannot be brought against the Crown. *Farnell v. Bowman*, 12 App. Cas. 643; 56 L. J., P. C. 72; 57 L. T. 318—P. C.

Intestacy—Devolution of Real Estate.]—The intention of the New South Wales Real Estate of Intestates Distribution Act, 1862, was to introduce a new rule of succession to real estate, and to enact that in cases of intestacy it should be administered and should devolve precisely as chattels real did before:—Held, that such rule applies to all cases, and not merely to those cases in which the dead owner has actually left an heir. *Wentworth v. Humphrey*, 11 App. Cas. 619; 55 L. J., P. C. 66; 55 L. T. 532—P. C.

Legislature—Powers of—Duties levied under Order in Council.]—A colonial legislature is not a delegate of the Imperial legislature. It is restricted in the area of its powers, but within that area it is unrestricted. Therefore the Customs Regulation Act of 1879, s. 133, is within the plenary powers of legislation conferred upon the New South Wales Legislature by the Constitution Act (scheduled to 18 & 19 Vict. c. 54), ss. 1 and 45. Further, duties levied by an Order in Council issued under s. 133, are really levied by authority of the legislature and not of the executive. Under s. 133 "the opinion of the collector," whether right or wrong, authorises the action of the governor. *Powell v. Apollo Candle Company*, 10 App. Cas. 282; 54 L. J., P. C. 7; 53 L. T. 638—P. C.

Legislative Assembly—Member—Power of Suspension.]—The respondent having entered the chamber of the New South Wales Assembly, of which he was a member, within a week after it had passed a resolution that he be "suspended from the service of the House," he was removed therefrom and prevented from re-entering it:—Held, in an action of trespass, that the resolution must not be construed as operating beyond the sitting during which the resolution was passed. *Barton v. Taylor*, 11 App. Cas. 197; 55 L. J., P. C. 1; 55 L. T. 158—P. C.

Held, further, that the standing order of the Legislative Assembly adopting so far as is applicable to its proceedings the rules, forms, and usages in force in the British House of Commons, and assented to by the Governor, was valid, but must be construed to relate only to such rules, forms, and usages as were in existence at the date of the order. The powers incident to or inherent in a Colonial Legislative Assembly are "such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute," and do not extend to justify punitive action, or unconditional suspension of a member during the pleasure of the Assembly. *Doyle v. Falconer* (1 L. R., P. C. 328) approved. *Id.*

Lunatic—Payment out of fund in English court to Master in Lunacy.]—In October, 1860, F. B., having become of unsound mind, was

admitted as an insane patient into the public hospital at P., in the colony of New South Wales, where she still remained. There had been no judicial declaration as to her unsoundness of mind. In December, 1886, a fund to which the lunatic was entitled under the will of her father was paid into court under the provisions of the Trustee Relief Act. On a petition presented by the Master in Lunacy of New South Wales, and by the lunatic by her next friend, asking that the whole of the fund might be paid out to the master:—Held, that although by 42 Vict. No. 7 (the New South Wales statute relating to the insane) the master was empowered to collect the assets of the lunatic in the colony, no such power was given to him with reference to assets in England: that although the court had jurisdiction to direct payment to the master of the corpus, where such payment was shown to be necessary for the protection and maintenance of the lunatic, no such necessity had been shown in the present case:—Held, therefore, that the dividends only to arise from the fund should be paid to the master during the life of the lunatic, and so long as she should remain an insane patient in New South Wales. *Barlow, In re, Barton v. Spencer*, 36 Ch. D. 287; 56 L. J., Ch. 795; 57 L. T. 95; 35 W. R. 737—C. A.

Mortgage—Foreclosure—Banking Company.]

—There is nothing in the acts incorporating the Bank of New South Wales which takes away from them the power of foreclosing, the mortgage in suit having been legally and properly taken by the bank, and in terms involving foreclosure. The statutory provision that the bank should hold any security which it had taken "for the purpose of reimbursement only and not for profit," could not take away the power of foreclosure expressly attached by statute to the mortgage. *Bank of New South Wales v. Campbell*, 11 App. Cas. 192; 55 L. J., P. C. 31; 54 L. T. 340—P. C.

Municipality—Validity of Bye-law.]—A bye-law made in pursuance of s. 153 of the Municipalities Act, 1867, empowering municipal councils to make bye-laws for regulating the interment of the dead is not ultra vires, by reason of its prohibiting interment altogether in a particular cemetery, and thereby destroying the private property of the owners of burial places therein. *Slattery v. Naylor*, 13 App. Cas. 446; 57 L. J., P. C. 73; 59 L. T. 41; 36 W. R. 897—P. C.

Railway rates—"Colonial" wine.]—By the merchandise rates for the railways of a colony, issued under the sanction of the government, "colonial" wine was to be carried at a lower rate than other wine:—Held, that the word "colonial" could not be restricted to the produce of the colony in which the regulations were in force but included the produce of any colony. *Commissioners for Railways v. Hyland*, 56 L. J., P. C. 76; 56 L. T. 896—P. C.

Tramways—Right to run Steam Motors on.]—The commissioner for railways in New South Wales has, according to the true construction of the act 43 Vict. No. 25, s. 3, a legal right to

run steam motors upon the tramway lines mentioned in the 2nd schedule thereto. *Semble*, s. 5 is sufficient to legalise the use of steam motors upon the other tramways governed by the said act. *Commissioner for Railways v. Toohey*, 9 App. Cas. 720; 53 L. J., P. C. 91; 51 L. T. 582—P. C.

b. Queensland.

Gold Fields—Holders of Miners' Rights—Rights of Crown Lessees.]—In an action by the holders of "miners' rights" issued to them under the Gold Fields Act, 1874, and regulations made thereunder, to set aside the defendants' mining leases, also thereunder granted, on the grounds—(1) that they had been granted contrary to s. 11 within two years from the proclamation of the goldfield within which the leased areas were contained; (2) that the formalities prescribed by the regulations had not been observed by the defendants when applying therefor:—Held, that neither under the act nor otherwise had the plaintiffs any right to interfere with the lessees' possession. Sect. 9 gave them no rights whatever as against lands let by the Crown, and no title to try the validity of Crown leases relating thereto; and the whole tenor of the regulations is opposed to such contention. *Osborne v. Morgan*, 13 App. Cas. 227; 57 L. J., P. C. 52; 58 L. T. 597—P. C.

In an action for substantially the same purpose as in the last preceding case, but with the additional allegation that the plaintiff had before action with the view of fortifying his title gone to the leasehold area for the purpose of taking possession of parcels of ground within it, and of working them as claims, but was prevented by the defendants:—Held, that this made no difference, as such proceedings were unauthorized by the act, and could not set up a defective title. *Williams v. Morgan*, 13 App. Cas. 238; 58 L. T. 597—P. C.

Member of Legislative Council—Non-attendance—Seat vacated.]—Where a statute provided that "if any legislative councillor shall for two successive sessions fail to give his attendance, without permission, his seat shall thereby become vacated;" and a councillor absented himself during the whole of three sessions, having previously obtained a permission for a year, which period of time in the event covered the whole of the first and part of the second session:—Held, that his seat was vacated. The permission did not cover two successive sessions. *Attorney-General (Queensland) v. Gibbon*, 12 App. Cas. 442; 56 L. J., P. C. 64; 56 L. T. 239—P. C.

c. South Australia.

Registration Act—Priorities.]—Under Registration Act, 5 Vict. No. 8, s. 3, a prior document of a registrable nature unregistered cannot convey a good title against a subsequent document of a registrable nature registered; but there is nothing in the act to exclude a claim upon an unwritten equity, of which the subsequent registered purchaser has notice. *White v. Neaylon*, 11 App. Cas. 171; 55 L. J., P. C. 25; 54 L. T. 688—P. C.

d. Victoria.

Action, Notice of.]—An action against the Melbourne Harbour Trust Commissioners is an action brought against a "person" within the meaning of s. 46 of the Melbourne Harbour Trust Act; and notice in writing thereof complying in form or in substance with the requirements of the section is necessary. *Union Steamship Company of New Zealand v. Melbourne Harbour Commissioners*, 9 App. Cas. 365; 53 L. J., P. C. 59; 50 L. T. 337; 5 Asp. M. C. 222—P. C.

Acts, Interpretation of.]—Remarks as to the effect upon interpretation of dividing an act into parts with appropriate headings. *Eastern Counties and London and Blackwall Railway Companies v. Marriage* (9 H. L. C. 32) distinguished. *Ib.*

Compensation—Lands taken Compulsorily—Set-off.]—According to the true construction of the 35th section of the "Victorian Lands Compensation Statute, 1869," in assessing under the act compensation for land compulsorily taken for a railway, the enhancement in value of the owner's adjoining lands may be set off against the amount allowed for damage thereto arising from such compulsory taking or severance; but may not be allowed against the compensation for the land actually taken. Such "enhancement in value" includes that which arises from the use as well as the construction of the railway. *Harding v. Board of Land and Works*, 11 App. Cas. 208; 55 L. J., P. C. 11; 55 L. T. 225—P. C.

Crown—Binding Character of Statute on.]—The Victorian Statute, Crown Liability and Remedies Act, 1865 (28 Vict. No. 241), s. 17, does not affect the prerogative of the Crown when suing in this country. *Oriental Bank Corporation, In re, The Crown, Ex parte*, 28 Ch. D. 643; 54 L. J., Ch. 327; 52 L. T. 172—Chitty, J.

Powers of Legislature—Costs of Action of Slander.]—The legislature of New South Wales has power to repeal the Statute of James (21 Jac. 1, c. 16), s. 6, and has impliedly done so by 11 Vict., No. 13, s. 1, which, according to its true construction, places an action for words spoken upon the same footing as regards costs and other matters as an action for written slander. *Harris v. Davies*, 10 App. Cas. 279; 54 L. J., P. C. 15; 53 L. T. 601—P. C.

Delivery of Solicitor's Bill.]—The Common Law Procedure Act of Victoria, by s. 389, provides that it shall be lawful for the court in any case to make an order for the delivery by any attorney of his bill of costs, and s. 396 provides that payment of such bill shall in no case preclude the court from referring such bill for taxation, provided the application for taxation be made within twelve months of payment:—Held, that the court may order a bill to be delivered under s. 389, though such bill may not be liable to taxation by reason of such application not having been made within twelve months of payment. *Duffett v. McEvoy*, 10 App. Cas. 300; 54 L. J., P. C. 25; 52 L. T. 633—P. C.

e. West Australia.

Notice—Right of Resumption—Compensation.]—Where the crown has a power of resumption under the terms of its grant, and has given lawful notice in exercise of such power, such notice must not be deemed to be under s. 12 of the Railways Act of 1878 (entitling the parties affected to compensation under s. 14); secus where notice could not have been lawfully given except under this act. *Thomas v. Sherwood*, 9 App. Cas. 142; 53 L. J., P. C. 15; 50 L. T. 101—P. C.

2. BRITISH NORTH AMERICA.

Adverse Possession—Adjacent Owners—Acts of Ownership.]—The Civil Code of Lower Canada by s. 2251, provides that a person who in good faith acquires land by purchase prescribes the ownership thereof by effective possession for ten years in virtue of his title. The appellant and respondent were purchasers of adjacent lots of land. The appellant marked off his boundary, and the respondent took possession of his lot and occupied it without challenge for more than ten years:—Held, in a suit to settle the respective boundaries, that the marking out of the lot by the appellant did not constitute possession, and that possession by the respondent for more than ten years in good faith and in virtue of his title perfected his right in competition with the appellant. *Dunn v. Larcrau*, 57 L. J., P. C. 108—P. C.

Arbitration—Duties of Amiables Compositeurs.]—Arbitrators who are also appointed amiables compositeurs may, under art. 1346 of the Civil Code of Procedure, dispense with the strict observance of those rules of law the non-observance of which as applied to awards results in no more than irregularity; they cannot be arbitrary in their dealings with the parties or disregard all law. Where such arbitrators in good faith obtained from one of the parties in the absence but to the knowledge of the other correct information as to the law bearing upon the case before them:—Held, that that was not an irregularity which vitiated the award. *Rolland v. Cassidy*, 13 App. Cas. 770; 57 L. J., P. C. 99; 59 L. T. 873—P. C.

Barristers—Rights and Remedies of.]—According to the law of Quebec, a member of the bar is entitled, in the absence of special stipulation, to sue for and recover on a quantum meruit in respect of professional services rendered by him, and may lawfully contract for any rate of remuneration which is not contra bonos mores, or in violation of the rules of the bar. Where a member of the bar of Lower Canada (Quebec) was retained by the Government as one of their counsel before the Fisheries Commission sitting in Nova Scotia:—Held, that in absence of stipulation to the contrary, express or implied, he must be deemed to have been employed on the usual terms according to which such services are rendered, and that his status in respect both of right and remedy was not affected either by the *lex loci contractus* or the *lex loci solutionis*. *Kennedy v. Brown* (13 C. B., N. S. 677) commented upon. And further, that the Petition of Right (Canada) Act, 1876, s. 19, sub-s. 3, does not in such case bar the remedy against the

Crown by petition. *Reg. v. Doutre*, 9 App. Cas. 745; 53 L. J., P. C. 84; 51 L. T. 669—P. C.

Contract—Consideration—Sale of Alleged Claim.]—There is no difference between the French law, which prevails in Lower Canada, and the English law, on the subject of the necessity that there should be valuable consideration for a contract. Any benefit to the assignee, or any loss to the assignor, is such a consideration; and therefore the sale of an alleged claim against a railway company for services rendered, which, though not admitted, was not rejected by them, was held a sufficient consideration to support an action for the purchase money. *McGreavy v. Russell*, 56 L. T. 501—P. C.

Quasi Contract—Commencement de Preuve.]—Where a landowner has empowered his agent to alienate, and such agent has without a completed contract to sell allowed an intending purchaser to take possession of a plot, effect substantial improvements in the reasonable expectation of obtaining a transfer on paying a proper price, and then transferred to the defendant, who in turn effected improvements:—Held, that such landowner has thereby laid himself under an obligation, such as in Civil Code, art. 1041, is called a quasi contract, to confirm the defendant's possession and title upon payment of the price thereof according to the rate ruling at the time of commencing the improvements with interest from that date. Commencement de preuve must be some written evidence which lends probability to that which is sought to be proved by oral evidence. *Price v. Neault*, 12 App. Cas. 110; 56 L. J., P. C. 29—P. C.

Criminal Law—Leave to Appeal.]—The rule of the Judicial Committee is not to grant leave to appeal in criminal cases except where some clear departure from the requirements of justice is alleged to have taken place:—Held, that 34 & 35 Vict. c. 28, which authorises the Parliament of Canada to provide for "the administration, peace, order, and good government of any territory not for the time being included in any province," vests in that parliament the utmost discretion of enactment for the attainment of those objects. Accordingly, the Canadian Act, 43 Vict. c. 25, is intra vires the legislature. *Riel v. Reg.*, or *Reg. v. Riel*, 10 App. Cas. 675; 55 L. J., P. C. 28; 54 L. T. 339; 16 Cox, C. C. 48—P. C.

Practice.]—S. 76, sub-s. 7, of 43 Vict. c. 25 (Canada), which prescribes that full notes of evidence be taken, is literally complied with when those notes are taken in shorthand. *Id.*

Crown, Rights of—Priority of Payment.]—The Crown is bound by the two Codes of Lower Canada, and can claim no priority except what is allowed by them. Being an ordinary creditor of a bank in liquidation, the Crown is not entitled to priority of payment over the other ordinary creditors of the bank. *Exchange Bank of Canada v. Reg.*, 11 App. Cas. 157; 55 L. J., P. C. 5; 54 L. T. 802—P. C.

Prior to the Codes, the law relating to property in the province of Quebec was, except in special cases, the French law, which only gave the King priority in respect of debts due from

"comptables," that is, officers who received and were accountable for the King's revenues. Art. 1994 of the Civil Code must be construed according to the technical sense of "comptables." And Art. 611 of the Civil Procedure Code, giving to the Crown priority for all its claims, must be modified so as to be in harmony therewith. Accordingly, by its true construction, the intention of the Legislature was that "in the absence of any special privilege the Crown has a preference over unprivileged chirographic creditors for sums due to it by the defendant being a person accountable for its money." *Id.*

Highways, what are.]—By Canadian as by Scotch law when a street or road becomes a public highway, the soil of the road is vested in the Crown or other public trustee in trust for public use. *De la Chevrotière v. Montreal*, 12 App. Cas. 149; 56 L. J., P. C. 1; 56 L. T. 3—P. C.

Where a road or place in Montreal has been registered as a public place of the city under 23 Vict. c. 72, s. 10, sub-s. 6, and had been enjoyed by the public as a public way more than ten years before registration, and more than ten years after registration, and before suit:—Held, that independently of the public right by common law (which had been established in the case) such place had become a public highway, and a private right to resume possession thereof could not be entertained. *Id.*

Legislature, Powers of.]—The Canadian Act, 37 Vict. c. 103, which created a corporation with power to carry on certain definite kinds of business within the dominion, is within the legislative competence of the Dominion Parliament. The fact that the corporation chooses to confine the exercise of its powers to one province and to local and provincial objects does not affect its status as a corporation, or operate to render its original incorporation illegal, as ultra vires of the said parliament. *Colonial Building and Investment Association v. Attorney-General of Quebec*, 9 App. Cas. 157; 53 L. J., P. C. 27; 49 L. T. 789—P. C.

Held, further, that the corporation could not be prohibited generally from acting as such within the province; nor could it be restrained from doing specified acts in violation of the provincial law upon a petition not directed and adapted to that purpose. *Id.*

The Quebec Act, 45 Vict. c. 22, which imposes certain direct taxes on certain commercial corporations carrying on business in the province, is intra vires of the provincial legislature. *Bank of Toronto v. Lambe*, 12 App. Cas. 575; 56 L. J., P. C. 87; 57 L. T. 377—P. C.

A tax imposed upon banks which carry on business within the province, varying in amount with the paid-up capital and with the number of its offices, whether or not their principal place of business is within the province, is direct taxation within clause 2 of s. 92 of the British North America Act, 1867, the meaning of which is not restricted in this respect by either clause 2, 3, or 15, of s. 91. Similarly, with regard to insurance companies taxed in a sum specified by the Act. *Id.*

Subjects which in one aspect and for one purpose fall within s. 92 of the British North America Act, 1867, may, in another aspect and for another purpose, fall within s. 91:—Held,

that the Liquor Licence Act of 1877, c. 181, Revised Statutes of Ontario, which, in respect of ss. 4 and 5, makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., does not, in respect of those sections, interfere with "the general regulation of trade or commerce," but comes within Nos. 8, 15 and 16 of s. 92 of the Act of 1867, and is within the powers of the provincial legislature. *Russell v. Reg.* (7 App. Cas. 829) explained and approved. *Hodge v. Reg.*, 9 App. Cas. 117; 53 L. J., P. C. 1; 50 L. T. 301—P. C.

Held, further, that the local legislature had power by the said Act of 1867 to entrust to a board of commissioners authority to enact regulations of the above character, and thereby to create offences and annex penalties thereto. *Id.*

"Imprisonment," in No. 15 of s. 92 of the Act of 1867, means imprisonment with or without hard labour. *Id.*

The Quebec Act (43 & 44 Vict. c. 9), which imposes a duty of ten cents upon every exhibit filed in court in any action depending therein, is ultra vires of the provincial legislature. *Attorney-General for Quebec v. Read*, 10 App. Cas. 141; 54 L. J., P. C. 12; 52 L. T. 393; 33 W. R. 618—P. C. See also *Reg. v. Riel*, ante, col. 323.

Mortgagor and Mortgagee—Notice—Right of Intervention.—Where a registered deed referred to and by reference incorporated certain other transfers and agreements whereby it appeared that the deed, though professedly one of sale, was in substance and reality the transfer to the ostensible purchaser of an estate which had been specifically allotted to him as part of his share of the residue under his father's will.—Held, that a mortgagee from the said purchaser must be treated as having full knowledge that the property was by the will *grévé de substitutions* in favour of the mortgagor's wife and family, his usufruct being not arrestable for his debts, especially as the mortgagee's agent was personally cognizant of the transfers and agreements of which the deed gave notice. Certain rents and dividends of the said mortgagor having been attached.—Held, that under s. 154 of the Civil Procedure Code, those who were only entitled under the will to the corpus of the property and the shares, had no right to intervene in a proceeding between the mortgagor and mortgagee to declare such rents and dividends in-saisissables during the mortgagor's life. *Carter v. Molson*, 10 App. Cas. 664—P. C.

Partnership—Act of one Partner—Liability of Firm.—The Civil Code of Canada by s. 1855, provides that a stipulation that an obligation is contracted for the partnership binds only the partner contracting when he acts without the authority of his co-partners, unless the partnership is benefited by his act. One of three partners lent money on terms that the borrower, besides paying interest, should make over one-half his profits to the firm to which the lender belonged.—Held, that this agreement did not constitute a partnership between the firm and the borrower. One partner has no authority from the other partners to enter into a partnership with other persons in another business. *Singleton v. Knight*, 13 App. Cas. 788; 57 L. J., P. C. 106; 59 L. T. 738—P. C.

Promissory Notes—Indorsement as Co-sureties.—When the directors of a company mutually agreed with each other to become sureties to the bank for the same debts of the company, and in pursuance of that agreement successively indorsed three promissory notes of the company:—Held, that they were entitled and liable to contribution inter se, and were not liable to indemnify each other successively according to the priority of their indorsements. *Reynolds v. Wheeler* (10 C. B., N. S. 561) approved; *Steele v. McKinlay* (5 App. Cas. 754) distinguished. According to the Civil Code of Lower Canada (Arts. 2340 and 2346) the law of England in force on the 30th May, 1849, is applicable to this question. *Macdonald v. Whitfield*, 8 App. Cas. 733; 52 L. J., P. C. 70; 49 L. T. 446; 32 W. R. 730—P. C.

Railways—Effect of Order of Railway Committee.—An order of the railway committee under s. 4 of the Dominion Act, 46 Vict. c. 24, does not of itself, and apart from the provisions of law thereby made applicable to the case of land required for the proper carrying out of the requirements of the railway committee, authorize or empower the railway company on whom the order is made to take any person's land or to interfere with any person's right. Such provisions of law include all the provisions contained in the Consolidated Railway Act, 1879, under the headings of "Plans and surveys" and "Lands and their valuation," which are applicable to the case; the taking of land and the interference with rights over land being placed on the same footing in that Act. *Parkdale Corporation v. West*, 12 App. Cas. 602; 56 L. J., P. C. 66; 57 L. T. 602—P. C.

Where a railway company, acting under an order of the railway committee, did not deposit a plan or book of reference relating to the alterations required by such order:—Held, that it was not entitled to commence operations, and further, that under the Act of 1879 the payment of compensation by the railway company is a condition precedent to its right of interfering with the possession of land or the rights of individuals. *Jones v. Stanstead Rail. Co.* (4 L. R., P. C. 98) distinguished. *Id.*

—Incorporation—Validity of Municipal Bye-law.—Under Ontario Act, 34 Vict. c. 48, the Grand Junction Railway Company is recognised as an incorporated company; otherwise that it was actually incorporated by Act 37 Vict. c. 43; the effect of the two acts being to give to the company so incorporated the benefit of a bye-law of the respondent corporation, which, under certain conditions, provided a bonus for the railway. Under the Act of 1871 the said bye-law is legal, valid, and binding on the corporation, but the railway company had not on the evidence complied with the conditions precedent. The stipulated certificate of the chief engineer had not been produced, and although under par. 8 of the bye-law debentures might be delivered to trustees without a certificate, that applied to a time when the debentures or their proceeds were to be held in suspense, not to a time when the trusts were spent and the payment, if made at all, should be made direct to the company. *Grand Junction Railway of Canada v. Peterborough (Corporation)*, 13 App. Cas. 136—P. C.

Liability of Railway to Seizure and Sale.—[Section 11 of Quebec Act, 43 & 44 Vict. c. 49, which provides that nothing in the act shall affect suits then pending, applies also to proceedings in execution, and therefore the property of a railway company governed by that act is not precluded thereby from being attached in execution of the respondents' judgment against the company. The railway undertaking in suit, which had become a Dominion railway before the respondents' writ of *fi. fa.* issued, and was governed by Dominion Act, 46 Vict. c. 24, could be seized and sold, subject to its mortgages, for the debts of the company to which it belonged. *Redfield v. Wickham (Corporation)*, 13 App. Cas. 467; 57 L. J., P. C. 94; 58 L. T. 455—P. C.

Rivers—Riparian Proprietors—Servitudes.—By s. 501 of the Civil Code of Quebec the proprietor of the higher land can do nothing to aggravate the servitude of the lower land. Where the plaintiffs, being entitled to a flow of water from their land, executed certain works which had the effect of accumulating the volume of water, and probably of increasing the depth of its channel:—Held, that to the extent of such accumulation and consequent increase of flow, they had aggravated the servitude of the lower land, and to that extent had no right to demand a free course for the water sent down by them. Having insisted on their right to the existing flow, and refused to allege and prove a case for relief *pro tanto*, their suit was dismissed with costs. *Frechette v. La Compagnie Manufacturière de St. Hyacinthe*, 9 App. Cas. 170; 53 L. J., P. C. 20; 50 L. T. 62—P. C.

Right to Float Timber—Using Improvements without Compensation.—[The right conferred to float timber and logs down streams by Canadian statute, 12 Vict. c. 87, s. 5, is not limited to such streams as in their natural state, without improvements, during freshets, permit said logs, timber, &c., to be floated down them, but extends to the user without compensation of all improvements upon such streams, even when such streams have been rendered floatable thereby. Such right is only conferred by the statute during freshets; quære, as to the rights at other seasons of the year of the parties, that is, of the lumberers, on the one side, and the owners of the improvements and the bed of the stream whereon they have been effected, on the other. *Caldwell v. McLaren*, 9 App. Cas. 392; 53 L. J., P. C. 33; 51 L. T. 370—P. C.

Shares—Transfer—Liability of Transferee.—[A holder of shares "in trust" is not a mandataire prête-nom, and holds subject to a prior title on the part of some person undisclosed. Such holding not being forbidden by the law of the colony, a transferee from such holder is bound to inquire whether the transfer is authorised by the nature of the trust. *Bank of Montreal v. Sweeney*, 12 App. Cas. 617; 56 L. J., P. C. 79; 56 L. T. 897—P. C.

Sheriff's Sale—Duty of Vendor to give Possession—Rights of Purchaser.—[A sheriff's sale of a sugar factory with the fixed machinery therein, as of an immeuble, having taken place on the distinct footing that the property was

sold free of all charges, the customs authorities on the next day, acting under a *bref d'assistance*, seized the whole machinery and refused to give or allow delivery until the whole export duties chargeable in respect of the machinery were paid:—Held, that whether the claim of the Crown was well founded or not, the seizing and detaining the machinery was in virtue of a warrant *ex facie* regular, and effectually prevented the seller from giving possession, and consequently relieved the purchaser from his obligation to pay the price. There is nothing either in the Civil or Procedure Code of Lower Canada which casts upon such a purchaser the obligation to pay the price and thereafter get possession from a third party as he may. S. 712 of the Procedure Code of Lower Canada relates to dispossessing the judgment debtor only. *Prévost v. Compagnie de Fives-Lille*, 10 App. Cas. 643; 54 L. J., P. C. 30; 54 L. T. 97—P. C.

Timber Limits—Warranty on Sale—Priority of Licences.—[On a sale of "timber limits," held under licences in pursuance of the Consolidated Statutes of Canada, c. 23, a clause of simple warranty (*garantie de tous troubles généralement quelconques*) does not operate to protect the purchaser against eviction by a person claiming to be entitled under a prior licence to a portion of the limits sold. *Ducondu v. Dupuy*, 9 App. Cas. 150; 53 L. J., P. C. 12; 50 L. T. 129—P. C.

Trustees—Right of Suit.—[Article 19 of the Civil Code of Procedure is applicable to mere agents or mandataries. It is not applicable to trustees in whom the subject of the trust has been vested in property and in possession for the benefit of third parties, and who have duties to perform in the protection or realisation of the trust estate. Where trustees sold property over which they had possession and title:—Held, that they were entitled to sue the purchaser to whom they had delivered possession, upon his covenant to pay the balance of the purchase-money. *Porteous v. Reynar*, 13 App. Cas. 120; 57 L. J., P. C. 28; 57 L. T. 891—P. C.

Will—Construction—Testamentary Appointment.—[Where a testator domiciled in Lower Canada bequeathed a portion of his residuary estate to his executors upon trust to "pay upon the death of his son, the capital thereof to such son's children in such proportion as my said son shall decide by his last will and testament, but in default of such decision then share and share alike as their absolute property for ever":—Held, that the son had not only the right to apportion the capital between all his children, as well those of his then existing marriage as those of any future marriage, but also the right to dispose of the property in favour of one or more of his children to the exclusion of the others. The English doctrine as to illusory and unsubstantial appointments under a power is not and never was any part of the old French law or of the law of Lower Canada. An English will by a testator domiciled in Lower Canada must be interpreted with regard to the law of Lower Canada, and not that of England. *Martin v. Lee* (14 Moore, P. C. 142) explained. *McGibbon v. Abbott*, 10 App. Cas. 653; 54 L. J., P. C. 39; 54 L. T. 138—P. C.

3. CAPE OF GOOD HOPE.

Administration of Estates—Liability of Association.]—An association for the administration of estates carrying on business under the Cape of Good Hope Act, No. 17, 1875, failed to realize certain shares of a testator within six months, although requested to do so by beneficiaries. The association having power by bye-law to take over property and to guarantee it, took over certain securities of a testator as absolute owners and charged commission, by way of guarantee, on the value of such securities:—Held, first, that the association was liable to make good any loss arising from failure to realize the shares; secondly, that the association could not treat the securities as its own; thirdly, that as no actual guarantee was given no commission could be charged. *Hiddingh v. De Villiers*, 12 App. Cas. 624; 56 L. J., P. C. 107; 57 L. T. 885—P. C.

Bank Notes in Circulation or Outstanding.]—Where a bank consisted of a head office and several branches, some of which as well as the head office issued notes:—Held, that by the true construction of Act 6 of 1864 a return of notes in circulation or outstanding need not include bank notes, whether issued by the head or branch offices, which at the date of such return are in possession of any office of the bank. Section 9 merely directs the mode of making the returns. It does not enlarge the basis of returns, nor treat every office of issue as, for the purposes of the act, a separate and independent bank. *Bank of Africa v. Colonial Government*, 13 App. Cas. 215; 57 L. J., P. C. 66; 58 L. T. 427—P. C.

Compromise—Heir subject to a Fidei-Commissum.]—Where testator's daughter, on attaining the age of twenty-five, took the residue of his estate burdened with a conditional fidei-commissum, there being no bequest to the executors, who were only appointed administrators, she will not debarring the daughter from the inheritance as heir by birth, and at twenty-five as heir burdened with a fidei-commissum, and the daughter entered into an agreement of compromise with the executors of all her claims arising out of their administration of the testator's estate, which compromise did not involve any alienation of property:—Held, in a suit by her infant children for substantially the same relief as had been the subject of the said compromise, that they were bound thereby. The daughter, under the law of the Cape of Good Hope, fully represented the estate, and her children had the same interest as herself. *De Montfort v. Broers*, 13 App. Cas. 149; 57 L. J., P. C. 47; 58 L. T. 198—P. C.

Divorce—Disability—Remarriage in England.]

—A. and B. were married in Ireland, the domicile of origin of each of them being Irish. A. afterwards abandoned his Irish domicile, and for several years lived with his wife at various places in the Cape Colony and Natal, where he engaged in various business enterprises, occasionally making short visits to England. He subsequently went to Australia with the intention of settling there, but soon after his arrival there he entered into an agreement with S. to carry on the business of ostrich-farming in

the Cape Colony in partnership for life. A., B., and S. then went together to Natal, where B. left her husband and went with S. to Cape Colony, where they lived together as man and wife. A. afterwards obtained in the court of the Eastern District of the Cape of Good Hope a decree dissolving his marriage on the ground of his wife's adultery with S.; S. and B. were married in the Cape Colony, and they shortly afterwards returned to England, where they intended to remain, and they were again married at a registrar's office in London. A. was believed to be still in South Africa, but there was no evidence as to whether he was still unmarried. By the Roman-Dutch law, which prevails in the Cape Colony and Natal, parties who have been guilty of adultery are incapable of contracting a valid marriage unless the injured party has married again, but a decree of divorce is an absolute dissolution of the marriage, and the Colonial Courts have no power to dissolve a marriage between parties who are not domiciled within their jurisdiction:—Held, that B.'s disability to contract a valid marriage so long as A. remained unmarried, ceased when she left the Cape Colony, and that therefore her marriage with S. in England was valid. *Scott v. Attorney-General*, 11 P. D. 128; 55 L. J., P. 57; 56 L. T. 924; 50 J. P. 824—Hannen, P.

Encroachment—Remedy—Jurisdiction.]—In an action brought by the appellant corporation under ss. 60 and 64 of the Municipal Corporations Act, 1872, to compel the respondent company to remove portions of certain buildings which by virtue of a survey authorised by a private act relating to the corporation and dated the 3rd of August, 1866, must be deemed an encroachment on the street:—Held, that the right of resort to the ordinary Courts of Justice was according to the manifest intention of the law of 1866, excluded in reference to all questions resulting from such survey being made binding and conclusive. All such questions must by the terms of the private act be referred to a Court of Arbitration established thereby. The act, however, did not apply to future encroachments, nor to encroachments already existing independently of such survey, on the face lines of streets as laid down by the corporation under an earlier Act of 1862. *Pietermaritzburg (Mayor) v. Natal Land Company*, 13 App. Cas. 478; 57 L. J., P. C. 82; 58 L. T. 895—P. C.

Executor, Purchase by.]—The law of Natal as to purchases by persons in a fiduciary position does not differ from the law of England. *Beningfield v. Baarster*, 12 App. Cas. 167; 56 L. J., P. C. 13; 56 L. T. 127—P. C.

Prescription—Rights of Owner of Springs.]—The respondent's predecessor in title, in 1820 constructed a watercourse on Crown lands, by means of which he diverted the water of two springs which rose thereon, so that they mingled with the waters of a private stream admittedly belonging to the farm, of which the respondent owned a portion. He did so with the licence of those who acted as agents for the Government, in order to have the permanent use of the water for his farm, and continued his user for the period of prescription, after which the respondent applied for and obtained from the Colonial Government a renewal of the

licence originally granted to his predecessor :—Held, that the user of the diverted water by the respondent's predecessor was not precarious, and that the act of the respondent had not deprived him of the prescriptive right acquired by his predecessor so as to enable the Crown to give to the plaintiffs in 1881 a title to the said water. It is very doubtful whether, by Dutch-Roman law, the owner of the sources of streams has exclusive dominion over their waters. They are at least subject to rights of user acquired by prescription, and probably also to the rights which English law recognises in riparian proprietors to water flowing in a known or definite channel. *Miner v. Gilmour* (12 Moore's Ind. App. Cas. 331); and *Van Breda v. Silberbauer* (3 L. R., P. C. 84) approved. *French Hoek Commissioners v. Hugo*, 10 App. Cas. 336; 54 L. J., P. C. 17; 54 L. T. 92; 34 W. R. 18—P. C.

Sale of Shares—Unreasonable Delay in Delivery.—Where a contract for the sale of shares did not fix the time for the delivery of them :—Held, that the time for delivery could not depend upon circumstances which were unknown to the buyer, and that delay in tendering the shares arising from the seller having sent his certificate to England for sub-division, as this circumstance was unknown to the buyer, was unreasonable and justified the buyer in refusing to accept the shares. Such delay was *mora*, assuming the law of *mora* to be applicable. *De Waal v. Adler*, 12 App. Cas. 141; 56 L. J., P. C. 25—P. C.

Surety—Bond by a Woman.—By the law which prevails in Natal a woman cannot be effectually bound as a surety, unless she specially renounces the privileges secured to her by the *Senatus Consultum Velleianum* and other rules of law. Where a husband under a general power of attorney from his wife professed to bind her personally as surety under a mortgage bond duly executed :—Held, that, there being no authority to renounce as aforesaid, express or implied, given by the power of attorney, such deed was void. *Macellar v. Bond*, 9 App. Cas. 715; 53 L. J., P. C. 97; 51 L. T. 479—P. C.

Will—Codicil—Devise—Construction.—A testator and testatrix who had been married in community of property devised by codicil certain real estate to their two sons, with provisos, first, in restraint of alienation; second, "the eldest son among our grandchildren shall always have the same right thereto, and after the decease of their parents remain in possession thereof, with this understanding, however, that the other heirs who may still be born shall enjoy equal share and right thereto . . . to be for the convenience and benefit of our two children and grandchildren, so that always the eldest son of the grandchildren has the privilege . . . and the grandchildren can in our opinion earn their living thereon." No other son was born, the younger entered into possession of half the property and died, leaving ten children :—Held, that the respondent, who was the eldest of these ten children, was entitled to the whole of his father's moiety. Quære, as to the true construction of the codicil if there were any attempt to create a perpetuity or entail. *De Jager v. De Jager*, 11 App. Cas. 411; 55 L. J., P. C. 22; 54 L. T. 806—P. C.

—Testamentary Power—Husband and Wife.]

—The clearly expressed intention of Natal Ordinance No. 1 of 1856 was to give to any subject of the Queen resident in Natal the power of disposing by will, according to English law of property both real and personal, which otherwise would devolve according to Natal law. Sect. 1 was operative for that purpose, except that it concluded with the provision "as if such subject resided in England," the effect of which is to leave both the *lex situs* and the *lex domicilii* in operation, thus reducing the section to a nullity :—Held, that these words ought not to be so construed as to destroy all that has gone before, and therefore should be treated as immaterial, the powers conferred not being affected by the question of residence in England. *Salmon v. Duncombe*, 11 App. Cas. 627; 55 L. J., P. C. 69; 55 L. T. 446—P. C.

4. CEYLON.

Right to sue Crown—Set-off.—There is no authority for saying that the Roman-Dutch law of Holland, which was in force in Ceylon at the date of its conquest by the British, and has not since been abrogated, empowered the subject to sue the government. But since the conquest a very extensive practice of suing the Crown has sprung up and has been recognized by the legislature. See the 117th section of Ordinance No. 11 of 1868, which re-enacted an Ordinance of 1856 :—Held, therefore, that such suits are now incorporated into the law of the land. Held, further, that where the Crown is plaintiff and the defendants sue in reconvention, the court is not bound to give separate judgments, but may set off the amount awarded to the defendants against that awarded to the Crown, and give judgment for the balance. *Hettihewage v. Queen's Advocate*, 9 App. Cas. 571; 53 L. J., P. C. 72; 51 L. T. 401—P. C.

5. CHINA SETTLEMENTS.

Land and Municipal Regulations—Rights of Renters.—According to the true construction of Art. 5 of the Regulations of 1854 (1) the public uses to which beach grounds of the rivers are thereby dedicated are the uses to which such grounds in the district are ordinarily held subject; (2) such dedication does not deprive the renter of his property in the grounds, but obliges him to respect the uses; (3) every renter takes with the condition, express or implied, that his holding is subject to such uses; (4) jurisdiction is conferred to prevent anything (e.g., building thereon) being done inconsistent with or destructive to the rights of the public having uses on the beach ground. *Ince v. Thorburn*, 11 App. Cas. 180; 55 L. J., P. C. 19; 54 L. T. 849—P. C.

6. JERSEY.

Foreign Judgment—Debtors' Trustees joined as Co-defendants—Interest.—A judgment creditor, suing in Jersey to enforce a judgment of an English court, joined as co-defendants the attorney of his judgment debtor, and the attorney of the trustees of the debtor's property :—Held, that the Jersey court was wrong in decreeing payment personally against the trustees. The

foreign judgment being no more than evidence of a debt, it was incompetent for the plaintiff to sue other persons jointly with the debtor, on the allegation that they held as trustees property of which the debtor was beneficial owner. *Hawkeford v. Giffard*, 12 App. Cas. 122; 56 L. J., P. C. 10; 56 L. T. 32—P. C.

As regards interest on the English judgment it should not be altered by the Jersey court except from the date of the Jersey judgment; the costs, moreover, occasioned by joining the trustees should not be given. *Ib.*

Right of Way—Creation of Title—Dedication followed by User.—By the law of Jersey a public right of way in the nature of an easement over the soil of another cannot be created by a mere dedication by the owner of the fee simple at any time followed by user of the way so dedicated.—Quære, whether an easement or servitude can be created by any enjoyment, even from time immemorial, without proof of title; and whether forty years' possession by a parish of a way as a public way accompanied by acts of ownership would prove title in the parish to either the soil or the servitude. *De Carteret v. Baudains*, 11 App. Cas. 214; 55 L. J., P. C. 33—P. C.

Set-off.—According to the law of Jersey a claim by way of compensation or set-off is admissible, when it is for a liquid demand. Such claims having been dismissed by the court below the case was remanded to ascertain whether they were in whole or in part liquid debts or debts "incontestées ou du moins incontestables" as alleged by the appellants. *Dyson v. Godfray*, 9 App. Cas. 726; 53 L. J., P. C. 94; 51 L. T. 580—P. C.

7. MALTA.

Legitimation—Children ex nefario coitu—Jurisdiction.—By Justinian's Novel 89 legitimation per rescriptum principis was introduced. Children ex nefario coitu though thereby declared incapable, were occasionally legitimated by an exercise of imperial grace. By the later civil law children of parents free to marry at the time of their conception and birth could be legitimated as a matter of right; children ex nefario coitu only at the discretion of the ruling power, and subject to its conditions. In Malta since it became a British possession the power of legitimation was exercised by the governor until by an Ordinance of the 25th May, 1814, it passed to the Third Hall of the Civil Court:—Held, that the law of Malta as to legitimation is to be found in the Code Rohan and Maltese precedents; and only where its provisions fail, in the civil law:—Held, further, that by the Code and precedents the respondent natus ex uxorato et solutâ, and therefore ex nefario coitu, had been duly legitimated by a decree of the Third Hall, and thereby acquired the character and rights of a child legitimus et naturalis so far as permitted by municipal law; entitling him to take under limitations in favour of legitimate and natural children unless a plain intention was expressed to the contrary. *Gera v. Ciantar*, 12 App. Cas. 557; 56 L. J., P. C. 93; 57 L. T. 818—P. C.

Under the Ordinance of 1814 the court has jurisdiction in the case of every petition for

legitimation which, according to previous practice, would have been referred by the governor to a judge for inquiry and report. Its exercise should be governed by considerations derived from the state of the parent's family, and the interests of the child; other persons whose interests may be affected need not be cited, and the court has no power to attach conditions for their protection. *Ib.*

Primogenitura—Descent in exclusively Male Line derived from a Female.—Where the founders of a Maltese primogenitura limited the succession by a deed of settlement in 1695 to the eldest and other sons of F., the original donee, and their respective male lines; then on failure of all those lines to his female issue and their respective descendants after them in a prescribed order, derived from repeated indications in the deed that the line of descent was to be exclusively male though traced from a female head of line; and, lastly, on failure of all his male and female issue, to the younger brothers of the original donee and their respective issue; and it appeared that the original donee had daughters only:—Held, that according to the true construction of such prescribed order of succession, notwithstanding the general presumption of Maltese law in favour of the "regular" course of succession, which admits females descended from the last holder in preference to all collaterals, the succession from females was effectively declared to be in lines of "artificial agnation," that is the male line of descendants from a female ancestress through males were intended to take exclusively of females till that male line was exhausted; and consequently that the respondent, the half-brother of the last holder, succeeded in preference to the daughter. *D'Amico v. Trigona*, 13 App. Cas. 806; 58 L. J., P. C. 20—P. C.

Descent of Barony established as Hereditary Feud.—F. also held a barony (established under the Frank Princess in Naples and Sicily as a hereditary feud, alienable with the Royal assent), under a settlement of 1674, which limited the same to his descendants generally. By his will he purported to annex the same to his said primogenitura, thereby purporting to impress upon it the character of a majorat descendible to males to the exclusion of females:—Held, that assuming that a former settlement of the barony in 1613 did not establish the succession unalterably in favour of the "regular" lineal descent, F. could so annex it to the extent permitted by the Pragmatic of Philip IV., No. 34. Case remitted to the court below to investigate whether the succession to the barony was still prescribed by the settlement of 1613, notwithstanding the settlement of 1674, and, if not, within what limits the will of F. was operative in regard thereto according to the natural construction of the Pragmatic; unless there be any settled usage or interpretation thereof at variance with its natural construction and so entitled to prevail. *Ib.*

Trade Mark—Right to exclusive User.—In Malta there is no law or statute establishing the registration of trade-marks, and no authority exists from which an exclusive right to a particular trade-mark can be obtained. But by the

general principles of the commercial law, as soon as a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the property of the firm. *Somerville v. Schembri*, 12 App. Cas. 453; 56 L. J., P. C. 61; 56 L. T. 454—P. C.

Where cigarettes made by the appellant's firm became favourably known under the trade-mark "Kaisar-i-Hind":—Held, that the use of that trade-mark by others for hats, soap, pickles, &c., could not impede the acquisition of an exclusive right to it as a trade-mark for cigarettes; that the respondents should be restrained from using for cigarettes a copy of the said mark with colourable variations, such copy being likely, even if not intended, to deceive purchasers into the belief that such cigarettes were manufactured by the appellant's firm. *Ib.*

8. MAURITIUS.

Validity of Adjudication of Bankruptcy.—The Court of Bankruptcy of the Mauritius has jurisdiction to order adjudication against a firm on the petition of the sole member of that firm. Such order is valid against the petitioner personally. Under ss. 40, 43, and 50 of Ordinance No. 33 of 1853, a creditor cannot challenge the validity of such order on the ground that the bankrupt has not made it appear to the satisfaction of the court that his estate is sufficient to pay his creditors at least five shillings in the pound clear of all bankruptcy charges. Such qualified solvency is not a fact to be put in issue and proved, but provisionally to appear to the satisfaction of the court, the propriety of whose conclusion cannot by any process be contested. *Oriental Bank Corporation v. Richer*, 9 App. Cas. 413; 53 L. J., P. C. 62; 51 L. T. 273—P. C.

9. NEWFOUNDLAND.

Contract—Apportionment—Counterclaim for Unliquidated Damages—Set-off against Assignees.—By contract in 1881 embodied in a statute the plaintiff company covenanted to complete a railway in five years, and thereafter to maintain and continuously operate the same. In consideration thereof the government covenanted: (a) to pay the company upon the construction and continuous operation of the line an annual subsidy for thirty-five years, such subsidy "to attach in proportionate parts and form part of the assets of the company as and when each five-mile section is completed and operated;" (b) to grant to the company in fee simple 5,000 acres of land for each one mile of railway completed, on completion of each section of five miles. It appeared that the company completed a portion of the line, and received from the government on the completion of each five-mile section the specified grant of land, and certain half-yearly payments in respect of the proportionate part of the subsidy which was deemed by the parties to attach thereto; thereafter the contract was broken by the company, and the government refused further payments. In a suit by the company and its assignees of a division of the railway and of the rights relating thereto:—Held (1), that on the true construction

of the contract (a) each claim to a grant of land was complete from the time when the section which had earned it was complete; (b) on the completion of each section a proportionate part of the subsidy became payable for the specified term, but subject to the condition of continuous efficient operation; (2), that by the law of the colony the government were entitled to set off a counterclaim for unliquidated damages for the company's breach of contract in not completing the line; (3), that the set-off availed against the assignees of the company, the claim and counterclaim having their origin in the same portion of the same contract, the obligations which gave rise to them being closely intertwined. *Young v. Kitchin* (3 Ex. D. 127), approved. *Newfoundland Government v. Newfoundland Railway*, 13 App. Cas. 199; 57 L. J., P. C. 35; 58 L. T. 285—P. C.

10. NEW ZEALAND.

Compensation—"Estate or Interest in Land."]

—Land having become vested in the respondents under the Wellington Harbour Board and Corporation Land Act, 1880, the appellants claimed compensation under the Public Works Act, 1882, on the ground of their having some estate or interest therein within the meaning of the latter act. It appeared that the appellants' lessor (or his predecessor in title) had in 1848 erected a wharf on the said land, with the permission of the government, and in 1855 a jetty; that in 1856, at the request and for the benefit of the government, he incurred large expenditure for the extension of his jetty and for the erection of a warehouse; that in subsequent years the government used, paid for, and with the consent of the said lessor, improved the said land and works:—Held, that the lessor must be deemed to have occupied the ground from 1848 under a revocable licence to use it for the purposes of a wharfinger; that by virtue of the transactions of 1856 such licence ceased to be revocable at the will of the government whereby the lessor acquired an indefinite, that is, practically, a perpetual, right to the jetty for the purposes aforesaid. The equitable right so acquired is an "estate or interest in, to, or out of land" within the wide meaning of the Act of 1882, which directs that in ascertaining title to compensation the court should not be bound to regard strict legal rights only, but should do what is reasonable and just. *Plimmer v. Wellington (Mayor)*, 9 App. Cas. 699; 53 L. J., P. C. 104; 51 L. T. 475; 49 J. P. 116—P. C.

Executive Government—Liability for Negligence—Reasonable Care.]—Where the executive government possessed the control and management of a tidal harbour, with authority to remove obstructions in it, and the public had a right to navigate therein, subject to the harbour regulations and without payment of harbour dues; the staiths and wharves belonging to the executive government which received wharfage and tonnage dues in respect of vessels using them:—

Held, that there was a duty imposed by law upon the executive government to take reasonable care that vessels using the staiths in the ordinary manner may do so without damage to the vessel. Reasonable care is not shown when, after notice of danger at a particular spot, no inquiry is made as to its existence and extent, and no

warning is given. *Reg. v. Williams*, 9 App. Cas. 418; 53 L. J., P. C. 64; 51 L. T. 546—P. C.

The principle of liability for negligence established by *Parnaby v. Lancaster Canal Company* (11 Ad. & E. 223), and *Mersey Docks Trustees v. Gibbs* (1 L. R., H. L. 93), approved of, and applied to the executive government in the above circumstances, which were distinguishable in respect of non-receipt of harbour dues, notwithstanding the Crown Suits Act, 1881, s. 37. *Ib.*

11. STRAITS SETTLEMENTS.

Crown Suits—Tort.—The Crown Suits Ordinance, 1876, s. 18, sub-s. ii., provides that "any claim against the Crown for damages or compensation arising in the Colony shall be a claim cognisable under the Ordinance":—Held, that the expression "claim" includes claims arising out of tort. *Attorney-General of Straits Settlements v. Wemyss*, 13 App. Cas. 192; 57 L. J., P. C. 62; 58 L. T. 358—P. C.

Lessor and Lessee—Covenant for Renewal—Derogation from Grant.—A lessee of land with covenant for renewal obtained a renewal of the lease. The new lease did not contain the whole of the land demised by the former lease. Prior to renewal the lessor had given the Government a licence to execute certain work by which the land demised was injuriously affected:—Held, that the new lease was a fulfilment of the covenant for renewal, though the subject-matter was not identical, and that the right of the lessee to compensation was not affected by the licence given by the lessor. *Ib.*

12. TRINIDAD.

Bill of Sale of Growing Crops—Registration.—A bill of sale of crops actually growing at the date of execution is void for want of registration under Trinidad Ordinance, No. 15 of 1884. The words in s. 10 "nothing contained in this Ordinance" mean "nothing contained in the two next preceding sections of this Ordinance." *Tenant v. Howatson*, 13 App. Cas. 489; 57 L. J., P. C. 110; 58 L. T. 646—P. C.

Status of Children born before Marriage—Law of Inheritance.—According to the Spanish laws originally in force in Trinidad, children born before marriage (contracted before the 12th of March, 1846), have the same rights of inheritance from their father and mother as children born after marriage. Section 13 of Ordinance No. 24 of 1845, while preventing marriage after that date from legitimating the ante-nati children, does not take away the status of legitimacy previously acquired. Where a mother married before that date, died intestate in 1862, leaving seven children, three of whom were ante-nati and four post-nati, held, that each by inheritance took one-seventh of the estate which she had acquired by purchase under s. 5 of No. 24 of 1845:—Held, with regard to the shares of two ante-nati who had died thereafter intestate without issue, that under s. 5 above cited and s. 7 of No. 7 of 1858, they were divisible equally amongst the four surviving children whether ante-nati or post-nati, and the issue of a deceased daughter. *Escallier v. Escallier*, 10 App. Cas. 312; 54 L. J., P. C. 1; 53 L. T. 884—P. C.

II. APPEALS TO THE PRIVY COUNCIL.

Criminal Proceedings—Order striking off the Roll reversed.—In an appeal by a barrister and solicitor against a verdict convicting him of perjury, and against a consequential order of court directing him to be struck off the roll of practitioners:—Held, that the conviction having been obtained by directions of the judge, which were improper and grievously unjust to the appellant, could not be allowed to stand, and that the consequential order must be reversed. *Dillett, In re*, 12 App. Cas. 459; 56 L. T. 615; 36 W. R. 81; 16 Cox, C. C. 241—P. C.

Her Majesty will not review criminal proceedings unless it be shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. *Falkland Islands Company v. Reg.* (1 Moore, P. C. (N. S.) 312) approved. *Ib.* See *Riel v. Reg.*, ante, col. 323.

Special Leave—When granted.—Special leave was granted to appeal against the conviction limited to show that being the sole foundation for the subsequent order, it had been obtained so unfairly as not to be conclusive for that purpose. *Dillett, In re*, supra.

Canadian Election Petition.—Whether the prerogative of the Crown has or has not been taken away by the general prohibition of appeals under the Canadian Controverted Elections Acts, it ought not to be exercised in the case of an appeal from a decision of the Supreme Court of Canada upon an election petition, considering the narrow range of such cases, and the desirability of their being decided speedily and locally. Leave to appeal refused. *Kennedy v. Purcell*, 59 L. T. 279—P. C.

Improper Concealment of Material Facts.—Where an order granting special leave to appeal had been made upon a petition which improperly concealed from their lordships the ground upon which the appeal had been refused by the court below:—Held, that a subsequent petition that further evidence be taken must be refused, as nothing will be done to assist an appeal so instituted. *Baradains v. Jersey Banking Company*, 13 App. Cas. 832—P. C.

Special Reference of Matters in Dispute.—Where by special agreement sanctioned by the court the petitioner had come in and consented to be made a party to the cause in appeal, and to be bound by the order of the Supreme Court to be made therein, but by the terms of the agreement the powers of the Supreme Court were defined and restricted, and its order to be "considered a final disposition of all contentions, whether now in litigation or not":—Held, that the Supreme Court in deciding the case was acting under the terms of a special reference, and not in its ordinary jurisdiction as a court of appeal, and special leave to appeal refused. *Nova Scotia (Attorney-General) v. Gregory*, 11 App. Cas. 229; 55 L. J., P. C. 40; 55 L. T. 270—P. C.

No General Principle—Unanimous Judgment.—Where the determination of a case will not be decisive of any general principle of

law, the judicial committee will not give leave to appeal from a unanimous judgment of the court below, on the ground that the questions involved are either of great importance to the parties, or calculated to attract public attention. *Dumoulin v. Langtry*, 57 L. T. 317—P. C.

— **Appealable Amount.**—The measure of value for determining a defendant's right of appeal is the amount which the plaintiff has recovered; where this falls short of the appealable amount the court below cannot give leave to appeal. Where such leave has been erroneously given, the appeal will be dismissed, and an opportunity to apply for special leave will not be granted unless the circumstances are such as to render it desirable. *Allan v. Pratt*, 13 App. Cas. 780; 57 L. J., P. C. 104; 59 L. T. 674—P. C.

Consolidation of Appeals.—Their lordships will consolidate appeals at any stage if it appears convenient that they should be heard altogether. An appeal was struck out and ordered to be consolidated with two other appeals arising out of the same will, but in a suit which had not been instituted till a year after the first appeal had been admitted. *Hiddings v. Denysen*, 12 App. Cas. 107; 57 L. T. 885—P. C.

New Trial—Evidence—Question for Jury.—Where there is evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand:—So held, reversing an order of the court below which had set aside a verdict as against the weight of evidence though it was neither unreasonable nor unfair, nor dissented from by the judge who tried the case. *Commissioner for Railways v. Brown*, 13 App. Cas. 133; 57 L. J., P. C. 72; 57 L. T. 895—P. C.

Concurrent Findings of Facts.—Where there have been concurrent findings of fact by the courts below, the question in appeal is not what conclusion their lordships would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgments of the courts below were clearly wrong. *Allen v. Quebec Warehouse Company*, 12 App. Cas. 101; 56 L. J., P. C. 6; 56 L. T. 30—P. C.

Judgments of Judges—Reasons.—It is most desirable that judges in the colonies should comply with the rule of the 10th of February, 1845, as to giving reasons for their judgments. *Colonial Insurance Company of New Zealand v. Adelaide Marine Insurance Company*, 12 App. Cas. 128—P. C.

Judge's Notes of Evidence.—Where judge's notes of evidence are mere private memoranda and are not taken in pursuance of any law or practice requiring them:—Held, that it would be improper to have them before a Court of Appeal. *Baudains v. Jersey Banking Company*, 13 App. Cas. 832—P. C.

Appellant not having pursued Remedy in Court below.—Where a defendant objected to a verdict on the ground that it was not warranted by the evidence, but neglected to move the court for a new trial in the manner directed

by the rules and practice of the court:—Held, that her Majesty in Council could not alter the verdict, or set it aside, and could not be advised to direct a new trial, the appellant not having applied in that behalf to the court in the regular course. *Dagnino v. Bellotti*, 11 App. Cas. 604; 55 L. T. 497—P. C.

Petition for Rehearing.—In a petition for rehearing of two appeals which had been fully heard upon their merits, and in which judgment had been given and reported to her Majesty, and confirmed by regular orders in Council:—Held, that assuming that a relevant case of new matter had been made out, the decision was final, and the petition must be refused. There may be exceptional circumstances which will warrant this Board, even after an order of her Majesty in Council has been made, in allowing a rehearing at the instance of one of the parties; but this is an indulgence with a view mainly to doing justice when, by some accident, without blame, the party has not been heard, and an order has been made inadvertently as if the party had been heard. *Venkata Narasimha Row v. Court of Wards*, 11 App. Cas. 660—P. C.

Point not raised in Court below.—On the argument of an appeal to the judicial committee in an action of trespass for interrupting the flow of a stream to the respondent's land, the appellants contended that the action was not maintainable, because it was not brought within three months of the trespass complained of, and because no notice of action had been given as required by a colonial statute:—Held, that, as the points had not been raised in the court below, the appellants could not be allowed to take them on appeal. *Adelaide Corporation v. White*, 55 L. T. 3—P. C.

COMMISSION.

For Examination of Witnesses.—See EVIDENCE.

Of Agents.—See PRINCIPAL AND AGENT.

COMMISSIONERS.

Charity Commissioners.—See CHARITY.

Ecclesiastical Commissioners.—See ECCLESIASTICAL LAW.

Wreck Commissioners.—See SHIPPING.

COMMITMENT.

By Magistrates.—See JUSTICE OF THE PEACE.

Under Debtors Act.—See DEBTORS ACT.

For Contempt of Court.—See CONTEMPT OF COURT.

COMMONS.

Power of Sale—Allotments.—Where by virtue of the Charitable Trusts Act, 1853, s. 24, and the Charitable Trusts Amendment Act, 1855, s. 38, a power of sale existed at the date of the passing of the Allotments Extension Act, 1882, over lands within the scope of the last-mentioned act, that act did not take away the power of sale. *Sutton (Parish of) to Church*, 26 Ch. D. 173; 53 L. J., Ch. 599; 50 L. T. 387; 32 W. R. 485—Chitty, J.

Inclosure—Damage by working Mines.—See *Bell v. Love*, post, MINES AND MINERALS.

Commonable Lands purchased by Railway—Rights of Lord, Owners and Occupiers.—Prior to 1802 the occupiers of certain cottages were accustomed to cut turf on large tracts of commonable and waste lands of a manor. In that year an Inclosure Act was passed by which commissioners were empowered to allot lands in severalty to the lord and other persons interested, and to allot to the lord in trust for the occupiers of the cottages portions of the waste for a turf common, to be managed as the lord and the churchwardens and overseers should order and not to be depastured. The commissioners by their award, made in 1806, allotted to the lord of the manor, in trust for the occupiers for the time being of the cottages, 425 acres of waste for a turf common for the use of the cottagers. The commissioners also allotted to the lord and other persons interested portions of the inclosed lands in severalty in lieu of their rights and interests. A railway company took for the purposes of their undertaking part of the land allotted as a turf common, and the purchase-money was paid into court. On a petition by the freeholders of the cottages for the distribution of the fund :—Held, that the owners of the cottages had no claim on the fund; that the lord of the manor was entitled to such part of the fund as represented the value of the soil in the land taken by the company; and that the remainder of the fund was to be held as a charitable trust for the benefit of the occupiers of the cottages. *Goodman v. Saltash (Mayor)* (7 App. Cas. 633) discussed. *Christchurch Inclosure Act, In re*, 38 Ch. D. 520; 57 L. J., Ch. 564; 58 L. T. 827.—C. A.

Power to stop up Highway—Old Inclosures.—By s. 62 of the Inclosure Act, 1845, power is given to the valuer acting in the matter of any inclosure to set out and make public roads and ways, and widen public roads and ways, in or over the land to be inclosed, and to stop up, divert or alter any of the roads or ways passing through the land to be inclosed, or "through any old inclosures in the parish or respective parishes in which the land to be inclosed shall be situate" :—Held, that the power of stopping up roads so given is not confined to roads passing through old inclosures or intakes from the waste or common, the subject of inclosure, but extends to roads passing through any old inclosures within the parish. *Hornby v. Silvester*, 20 Q. B. D. 797; 57 L. J., Q. B. 558; 59 L. T. 666; 36 W. R. 679; 52 J. P. 468.—C. A.

—Certificate of Commissioners—Validity of Charge—Borrowing Powers.—The River Dee Company was by act of parliament empowered to borrow upon mortgage of the lands of the company any sums not exceeding 25,000*l.* The company, however, borrowed more. After this the Lands Improvement Company, having by its acts power to advance to landowners money for the improvement of land, advanced to the River Dee Company 6,405*l.*, and by an order the Inclosure Commissioners purported to charge the lands of the River Dee Company with the repayment of that sum and interest by annual instalments :—Held, that the powers given by the Lands Improvement Company's Acts did not override the restriction on the borrowing powers of the River Dee Company, and that the charge on the lands of the River Dee Company was consequently invalid; and that a clause in one of the Lands Improvement Company's Acts making the certificate of the Inclosure Commissioners conclusive evidence of the validity of a charge under the act did not render the charge valid in such a case. *Wenlock (Baroness) v. River Dee Company* (No. 2), 38 Ch. D. 534; 57 L. J., Ch. 946; 59 L. T. 485.—C. A.

Grant of Woods to Copyholders—Charitable Purpose—Repair of Sea Dykes.—See *Wilson v. Barnes*, ante, col. 311.

Bye-laws—Letting for Hire on Common.—M. had premises adjoining a common regulated under the bye-laws made under the Commons Act, 1876, where she let ponies for hire. M. at her premises let ponies to be used by two persons on the common, and they used them there :—Held, this was no offence within the meaning of the words "letting for hire on the common any pony," &c. *Marcey v. Morris*, 52 J. P. 168—D.

COMPANY.

I. FORMATION, CONSTITUTION AND INCORPORATION.

1. *Prospectus*.

- a. General Principles, 344.
- b. Misstatements when Material, 346.
- c. Disclosure of Contracts, 347.
- d. Proceedings for Misrepresentation, 348.

2. *Memorandum and Articles of Association*, 350.3. *Registration*.

- a. Of Companies, 351.
- b. List of Members and Summary, 354.
- c. Inspection of Registers, 354.
- d. Of Mortgages—See post, IV., 2, b.
- e. Of Shares—See post, VI., 7.

II. PROMOTERS AND DIRECTORS.

1. *Promoters*, 355.2. *Directors*.

- a. Appointment, 357.
- b. Powers and Liabilities generally, 357.
- c. Liability for Misfeasance, 359.

III. AUDITORS, 364.

IV. BORROWING POWERS, MORTGAGES AND DEBENTURES.

1. *Borrowing Powers*, 364.
2. *Mortgages*.
 - a. Validity, 366.
 - b. Registration, 366.
3. *Debentures and Debenture Stock*.
 - a. What are—Bills of Sale Act, 368.
 - b. Validity and Effect of, 370.
 - c. Priorities, 371.
 - d. Issue, 372.
 - e. Rights of Holders, 373.

V. CAPITAL, 375.

1. *Payment of Dividends out of*—See ante, cols. 360, 361, 362.
2. *Reduction of*.
 - a. In what Cases, 375.
 - b. Petition for, 378.

VI. SHARES AND STOCK.

1. *Sale on Stock Exchange*, 380.
2. *Application and Allotment*, 381.
3. *Issue*, 382.
4. *Provisions in Articles of Association*, 384.
5. *Transfer*, 385.
6. *Registration of Contract under s. 25 of Companies Act, 1867*—See infra, XI., 15, b.
7. *Registration of Shares*, 389.
8. *Calls*, 392.
9. *Certificates*, 394.
10. *Other Points*, 397.

VII. DIVIDENDS, 398.

VIII. CONTRACTS, 400.

IX. MEETINGS OF SHAREHOLDERS, 403.

X. ACTIONS BY AND AGAINST COMPANIES, 408.

XI. WINDING UP.

1. *What Companies*, 409.
2. *Orders for*, 412.
3. *Petitions*.
 - a. By whom presented, 413.
 - b. Practice, 414.
 - c. Costs, 416.
4. *Staying and Restraining Proceedings*, 417.
5. *Liquidators and Receivers*, 419.
6. *Rent and Rates*, 423.
7. *Set-off*, 425.
8. *Assets*.
 - a. Sale of, 428.
 - b. Distribution of, 428.
9. *Invalid and Protected Transactions*, 433.
10. *Scheme of Arrangement*, 437.
11. *Reconstruction*, 438.
12. *Examination of Witnesses and Books*, 438.
13. *Practice*, 440.
14. *Balance Order*, 443.
15. *Contributories*.
 - a. Qualification Shares, 444.
 - b. Fully paid Shares, 446.
 - c. Subscribers to Memorandum, 450.
 - d. Allottees and Applicants, 451.
 - e. Transferees and Nominees, 453.
 - f. Trustees, 454.
 - g. Company limited by Guarantee, 455.

I. FORMATION, CONSTITUTION, AND INCORPORATION.

1. PROSPECTUS.

a. General Principles.

False Representation—Contributory Mistake of Plaintiff.—Where a plaintiff has been induced both by his own mistake and by a material misstatement by the defendant to do an act by which he receives injury, the defendant may be made liable in an action for deceit. *Edgington v. Fitzmaurice*, 29 Ch. D. 459; 53 L. T. 369; 33 W. R. 911; 55 L. J., Ch. 650; 50 J. P. 52—C. A.

— **Not only Inducement.**—Where a misstatement of fact by the defendant materially tended to induce the plaintiff to do an act by which he has incurred damage, the defendant may be made liable in an action of deceit, although the misstatement was not the only inducement to the act. *Peek v. Derry*, 37 Ch. D. 541; 57 L. J., Ch. 347; 59 L. T. 78; 36 W. R. 899—C. A. See *S. C.* in H. L. 33 S. J. 589.

Where a person seeks to rescind a contract to take shares on the ground of misrepresentation, it is not necessary that he should prove that if the misrepresentation had not been made he would not have taken the shares. It is sufficient if there is evidence to show that he was materially influenced by the misrepresentation. *Carling v. London and Leeds Bank*, 56 L. J., Ch. 321; 56 L. T. 115; 35 W. R. 344—Stirling, J.

Reference to Vendor's Report—No Guarantee by Promoter.

—The prospectus of a mining company, registered under the Companies Acts, contained statements which were based upon a report appended to the prospectus, and made by the vendor to the company, concerning the mining property sold by him to it, which was situate in British Burmah. Upon an engineer being subsequently sent out by the company to work the mine, the vendor's report was found to be absolutely untrue, and the mine was shown to be an entire failure and utterly worthless. Relying upon this information as to the property afforded by the company's mining engineer, a shareholder applied to have his name removed from the register of members of the company on the ground of misrepresentations in and suppression of material facts from its prospectus:—Held, that the promoters of the company had not guaranteed the truth of the vendor's report, nor were they the persons by whom the shareholder had been deceived; that the shareholder was aware of all the circumstances from the first, and knew as much as the promoter did, and he had no right to be put in a better position than the other shareholders; and that therefore his application must be refused. *Vickers, Ex parte, British Burmah Lead Company, In re*, 56 L. T. 815—Kay, J.

No reasonable Ground for Statement.—The act incorporating a tramway company provided that the carriages might be moved by animal power, and, with the consent of the Board of Trade, by steam or other mechanical power. The directors, who expected that they would without difficulty obtain the consent of the Board of

Trade, issued a prospectus in which they stated that by their special act the company had a right to use steam power instead of horses. The plaintiff took shares on the faith of this prospectus, and stated in his evidence that he was induced to take them by the statement that the company had the right to use steam power, and also by his knowledge of, and interest in, the locality, and his confidence in the character of the directors. The Board of Trade refused their sanction to the use of steam power, and the company was wound up. The plaintiff brought an action against the directors claiming damages for their misstatement in the prospectus:—Held, that the directors were liable for the misstatement, as it was made without reasonable ground for their believing it. *Peck v. Derry*, supra.

Adoption by Director.—One of the defendants was not present at the meeting which issued the prospectus, but a few days afterwards he received some copies of it and circulated them:—Held, that he had adopted the prospectus, and was liable to the plaintiff, although the copy seen by the plaintiff had not been supplied to him by the defendant. *Ib.*

b. Misstatements when Material.

Misstatement of Object or Intention.—A misstatement of the intention of the defendant in doing a particular act may be a misstatement of fact, and if the plaintiff was misled by it an action of deceit may be founded on it. *Edgington v. Fitzmaurice*, 29 Ch. D. 459; 55 L. J., Ch. 650; 53 L. T. 369; 33 W. R. 911; 50 J. P. 52—C. A.

The directors of a company issued a prospectus inviting subscriptions for debentures, and stating that the objects of the issue of debentures were to complete alterations in the buildings of the company, to purchase horses and vans, and to develop the trade of the company. The real object of the loan was to enable the directors to pay off pressing liabilities. The plaintiff advanced money on some of the debentures under the erroneous belief that the prospectus afforded a charge upon the property of the company, and stated in his evidence that he would not have advanced his money but for such belief, but that he also relied upon the statements contained in the prospectus. The company became insolvent:—Held, that the misstatement of the objects for which the debentures were issued was a material misstatement of fact, influencing the conduct of the plaintiff, and rendered the directors liable to an action for deceit, although the plaintiff was also influenced by his own mistake. *Ib.*

"Capital already subscribed."—The prospectus of a company contained a statement that the share capital was 300,000*l.*, of which 200,000*l.* had been already subscribed. At the date of the prospectus only 35*l.* had been actually subscribed, but there were two contracts between the company and A. under which A. had agreed to take 200,000*l.* in fully paid-up shares as the consideration for the sale of a concession, and as part payment for the construction of certain works:—Held, that this statement was material and untrue. *Arnison v. Smith*, 59 L. T. 627—Kekewich, J. Affirmed, 41 Ch. D. 348—C. A.

Confident belief in Sufficiency of "Profits."—The defendants were shareholders in the Date-Coffee Company, a company whose objects were declared to be the acquisition of licences to use an invention for manufacturing from dates a substitute for coffee, for which a patent had been granted to H. (one of the defendants), and to sell, &c., the patent-rights when acquired by the company. Of this company the other defendants were the chairman and the solicitor; H. was the consulting engineer. H. was also possessed of a patent for the manufacture and sale of date-coffee in France; and a company was formed for that purpose, called the French Date-Coffee Company, with a capital of 100,000*l.* in 100,000 shares of 1*l.* each, by whom H.'s patent for France was purchased for 50,000*l.*, which sum it was agreed should be divided as a bonus amongst the shareholders in the English company. The defendants prepared and issued a prospectus of the French company, containing the following passage:—"From the success attending the company formed for the working of Henley's English patent, when a duty of 2*d.* per lb. is payable, and the coffee sold at 1*s.* per lb., the directors feel justified in stating they confidently believe the profits of this company will be more than sufficient to pay dividends of at least 50 per cent. on the nominal capital, and will exceed those of the company working the English patent, which, having only been formed a little over twelve months, has entered into a contract which will yield the return, by way of annual dividends, of a sum equal to the whole paid-up capital of the company of 34,000*l.*" At the time at which this prospectus was issued the period had not arrived at which "profits" in a commercial sense could have been acquired by the English company; but the article had been sold in the English market and received with some favour, and an agreement had been entered into by the company with a merchant or broker in London to take all they could make. The plaintiff, influenced partly by the above statement in the prospectus, partly from information derived from another source, and partly by the favourable opinion he had formed of the article to be manufactured, purchased 100 shares in the French company, and paid the deposit. He had no connexion with the English company. Owing to various circumstances, the hopes held out in the prospectus were not realised, and the French Date-Coffee Company was ultimately wound up; and the plaintiff sought to recover from the defendants the sum he had paid as deposit-money and the amount of calls for which he had become and would become liable, as damages:—Held, that the statements complained of, though expressing the strongest confidence that the company referred to would be successful and would make large profits by the sale of the article to be manufactured, could not fairly be read as alleging that profits in a commercial sense had actually been made, and consequently that there was no evidence which could be properly left to a jury. *Bellairs v. Tucker*, 13 Q. B. D. 562—Denman, J.

Amount of Purchase-money paid to Vendors.—The plaintiffs, by one of their directors, who was also their stockbroker, were induced to take shares in the defendant company by means of a prospectus issued by the directors of the defendant company, also defendants to the action,

whereby it was stated that the purchase-money paid to the vendors for the company's business was 36,000*l.*, whereas, in fact, of that sum 6,000*l.* was paid to a promoter who was in no sense a vendor. Such promotion money was paid under a parol agreement between the true vendor and the promoter, to which no reference was made by the prospectus:—Held, that the statement as to the purchase-money was a material misrepresentation, and that, the plaintiffs' agent having relied upon it, the plaintiffs were entitled to rescission as against the company, and to damages as against the directors who issued the fraudulent prospectus. *Capel v. Sim's Ships Compositions Company*, 57 L. J., Ch. 713; 58 L. T. 807; 36 W. R. 689—Kekewich, J.

Paragraph and Marginal Note—Construction.—In one of the paragraphs of a prospectus issued by the directors of a company there was a statement that "the completion of the works will enable the company to increase their present capacity for manufacture from 400 to 1,000 tons per annum"; and in the margin there was this note: "Increase of present manufacture." Each paragraph of the prospectus had a marginal note indicating its contents. The jury found that the marginal note, coupled with the statement against which it was written, amounted to a statement that the present manufacture of the works was 400 tons per annum, and that this was a fraudulent misrepresentation:—Held, by the Court of Appeal, that the paragraph and the marginal note could only be construed in one way as referring to the capacity of the works for manufacture, and that therefore the question whether the two taken together could be construed so as to imply that the present manufacture was 400 tons per annum ought not to have been left to the jury:—Held, by the Queen's Bench Division, that the construction of the prospectus was for the judge and not for the jury. *Moore v. Explosives Co.*, 56 L. J., Q. B. 235—C. A.

c. Disclosure of Contracts.

Companies Act, 1867, s. 38—Parol Agreement.—The plaintiffs, by one of their directors, who was also their stockbroker, were induced to take shares in the defendant company by means of a prospectus issued by the directors of the defendant company, also defendants to the action, whereby it was stated that the purchase-money paid to the vendors for the company's business was 36,000*l.*, whereas, in fact, of that sum 6,000*l.* was paid to a promoter who was in no sense a vendor. Such promotion money was paid under a parol agreement between the true vendor and the promoter, to which no reference was made by the prospectus:—Held, that the agreement was such a contract as ought to have been disclosed by the prospectus, as provided by s. 38 of the Companies Act, 1867. *Capel v. Sim's Ships Compositions Company*, 57 L. J., Ch. 713; 58 L. T. 807; 36 W. R. 689—Kekewich, J.

—Abridged Prospectus.—An "abridged prospectus" not containing the date of, nor the names of the parties to, a contract for the sale of a patent to be worked by the company, to trustees on behalf of the company:—Held to be fraudulent within s. 38 of the Companies Act,

1867, although it stated where full prospectuses could be obtained. *White v. Haymen*, 1 C. & E. 101—Mathew, J.

d. Proceedings for Misrepresentation.

Burden of Proof—Ambiguous Meaning.—The prospectus of a company which was being formed to take over ironworks, contained a statement that "the present value of the turnover or output of the entire works is over 1,000,000*l.* sterling per annum." If that statement meant that the works had actually in one year turned out produce worth at present prices more than a million, or at that rate per year, it was untrue. If it meant only that the works were capable of turning out that amount of produce it was true. In an action of deceit for fraudulent misrepresentation whereby the plaintiff was induced to take shares, he swore in answer to interrogatories that he "understood the meaning" of the statement "to be that which the words obviously conveyed," and at the trial was not asked either in examination or cross-examination what interpretation he had put upon the words:—Held that the statement taken in connexion with the context was ambiguous and capable of the two meanings; that it lay on the plaintiff to prove that he had interpreted the words in the sense in which they were false, and had in fact been deceived by them into taking the shares, and that as he had as a matter of fact failed to prove this, the action could not be maintained. *Smith v. Chadwick*, 9 App. Cas. 187; 50 L. T. 697; 32 W. R. 687; 48 J. P. 644—H. L. (E).

Held, by Lord Bramwell, that the statement was capable only of the meaning in which it was untrue, and that the plaintiff had proved that he had understood it in that sense, but that there was not sufficient evidence that the statement was fraudulent on the part of the defendants. *Id.*

Company Insolvent when Proceedings commenced.—Where a person has been induced to take shares in a company by misrepresentation contained in the prospectus, the mere circumstance that the company is insolvent at the time when he takes proceedings to rescind his contract to take shares does not, in the absence of countervailing equities, deprive him of his right to rescind. *Carling v. London and Leeds Bank*, 56 L. J., Ch. 321; 56 L. T. 115; 35 W. R. 344—Stirling, J.

On the 6th of September, C. applied for shares in a company, being induced so to do by misrepresentations in the company's prospectus. On the 7th of September he received notice of allotment. On the 22nd of September he wrote repudiating his contract on the ground of the misrepresentation, and on the same day commenced an action for rescission. On the 24th of September he moved to have the register of members rectified by removing his name therefrom, and on the same day a petition for the winding-up of the company was presented, upon which an order was afterwards made. The company was insolvent, and had been so previously to the 22nd of September, but had not stopped payment, and was issuing advertisements for applications for shares. Nearly all the debts of the company had been contracted before the 6th of September:—Held, that C.

was entitled to have his name removed from the register. *Ib.*

Delay — Waiver — Distinct Misrepresentations.]—H. desired to repudiate his shares in a company, and relied on two distinct misrepresentations contained in the prospectus. The company was in course of being wound up, and the liquidator opposed H.'s application. The court held that, as to the first misrepresentation complained, H. had applied too late. The liquidator, on the authority of *Whitehouse's case* (3 L. R., Eq. 790), then contended that H. was therefore precluded from raising a case on the second misrepresentation:—Held, that the fact of H. failing on the first misrepresentation did not preclude him from raising a case on the second misrepresentation, there being no allegation of delay in proceeding after discovery by H. of the second misrepresentation, and no allegation that the two misrepresentations were in anywise connected with each other. Held, also, that *Whitehouse's case* (ubi sup.) did not decide that the waiver of one point was a waiver of all; but that the waiver of an objection that there was a discrepancy between a company's prospectus and its memorandum and articles of association amounted to a waiver of any other discrepancy. Held, therefore, that H. was entitled to have his name removed from the register of shareholders. *Hale, Ex parte, London and Provincial Electric Lighting Company, In re, 55 L. T. 670—Chitty, J.*

Discontinuance of Proceedings.]—An action was brought to avoid a contract to take shares on the ground of misrepresentation in the prospectus. The plaintiff informed the company he should discontinue proceedings:—Held, that by so doing and taking no further steps for nine months, he had elected to adopt the contract, and could not avoid it. *Reid v. London and Staffordshire Fire Insurance Company, 53 L. J., Ch. 351; 49 L. T. 468; 32 W. R. 94—Mathew, J.*

Anterior Sale by Shareholder of some of Shares taken.]—Where a shareholder in a company has sold some of the shares originally taken by him, he is not thereby deprived of his right to have the contract (which is a severable one) rescinded as to the remainder on the ground of fraudulent misrepresentations in the company's prospectus, provided that the shares sold were parted with before the fraud was discovered by the shareholder. *West, Ex parte, Mount Morgan (West) Gold Mine, In re, 56 L. T. 622—Kay, J.*

Voting at Subsequent Meeting.]—Where after issue joined and notice of trial given in an action by a shareholder to have his name removed from the register of shareholders on the ground of fraud, the plaintiff attended and voted at a meeting of shareholders held in the liquidation of the company:—Held, that the issue of the writ was a definitive election to rescind, and that this election was not qualified by the subsequent voting at the meeting. *Foulkes v. Quartz Hill Consolidated Gold Mining Company, 1 C. & E. 156—C. A.*

Notice—Delay.]—The provisions of articles 95, 97, of table A to the Companies Act, 1862,

for the service of notices by a company on its members, apply only to notices relating to the ordinary business of the company, and service in the way there pointed out is not sufficient for the purpose of fixing a shareholder with knowledge of a misrepresentation which would entitle him to repudiate his shares, unless he had been guilty of laches after notice of the misrepresentation. *London and Staffordshire Fire Insurance Company, In re, Wallace's case, 24 Ch. D. 149; 53 L. J., Ch. 78; 48 L. T. 955; 31 W. R. 781—Pearson, J.*

Measure of Damages.]—The amount of damages to be recovered by a plaintiff is the difference between the price paid by him for the shares and the real value of the shares at the time of allotment; such value must be ascertained not by the market value of the shares at the time, but by the light of subsequent events, including the result of the winding-up of the company. *Peek v. Derry, ante, col. 344.*

Persons who had taken stock upon the faith of misrepresentations in a prospectus are entitled to damages to be measured by the difference between the actual value of the stock purchased and the price paid for it. *Arnison v. Smith, 59 L. T. 627—Kekewich, J. Affirmed, 41 Ch. D. 348—C. A.*

2. MEMORANDUM AND ARTICLES OF ASSOCIATION.

Signature to Memorandum by Agent.]—C. verbally authorized O. to sign on his behalf the memorandum of association of a company. O. accordingly signed the name of C. to the memorandum without his own name appearing. The company being in course of winding up, C. was put on the list, and applied to have his name removed, on the ground that he had never signed the memorandum nor agreed to take shares:—Held, that there being nothing in the Companies Act, 1862, to show that the Legislature intended anything special as to the mode of signature of the memorandum, the ordinary rule applied that signature by an agent is sufficient; that although by s. 11 of the act a subscriber is bound in the same way as if he had signed and sealed the memorandum, still the memorandum is not a deed, and it is not necessary that the authority to sign it should be given by deed; that though it was irregular for O. to sign C.'s name without denoting that it was signed by O. as his attorney, the signature was not on that ground invalid; and therefore that C. was not entitled to have his name removed from the list. *Whitley & Co., In re, Callan, Ex parte, 32 Ch. D. 337; 55 L. J., Ch. 540; 54 L. T. 912; 34 W. R. 505—C. A.*

Appointment of Directors.]—See *infra*, II., 2, a.

Borrowing Powers and Mortgages.]—See *infra*, IV., 1; IV., 2, a.

In relation to Shares and Calls.]—See *infra*, VI., 4; VI., 8.

In relation to Dividends.]—See *infra*, VII.

In relation to Contracts.]—See *infra*, VIII.

Alteration of Articles by Resolution.]—See infra, IX.

Mode of taking Poll.]—See infra, IX.

Effect of, on Distribution of Assets.]—See infra, XI., 8, b.

Qualification Shares.]—See infra, XI., 15, a.

Subscribers to Memorandum.]—See infra, XI., 15, c.

Company limited by Guarantee.]—See infra, XI., 15, g.

3. REGISTRATION.

a. Of Companies.

Friendly Society.]—A society which has been registered under s. 8, sub-s. 5, of the Friendly Societies Act, 1875, pursuant to the special authority of the Treasury, is excepted from the provisions of s. 4 of the Companies Act, 1862. *Peat v. Fowler*, 55 L. J., Q. B. 271; 34 W. R. 366—D.

Association having for its Object the Acquisition of Gain—Gain by Individual Members.]—T. was the president of a loan society. The objects of the society were to form a fund, from which money might be advanced to enable shareholders to build or purchase a dwelling-house or other buildings, or to lend money to each other on approved personal security; five per cent. interest was to be charged on all moneys advanced by the society. The society consisted of more than twenty members, and was not registered under any statute. The society advanced a sum of money to the defendants who signed promissory notes by way of security for the loan; and when T. went out of office, he indorsed the promissory notes to the plaintiff, who succeeded him. The plaintiff having sued upon the notes for the benefit of the society:—Held, that the society, not having been registered, was rendered illegal by the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4, it being an association having "for its object the acquisition of gain," within the meaning of that enactment; that the plaintiff could not be in a better position than the society, and therefore could not recover upon the promissory notes. *Padstow Total Loss and Collision Assurance Association, In re* (20 Ch. D. 137), followed. *Jennings v. Hammond* (9 Q. B. D. 225) approved. *Shaw v. Benson*, 11 Q. B. D. 563; 52 L. J., Q. B. 575; 49 L. T. 651—C. A.

— Formation before the Companies Act, 1862—Change of Members.]—An association, consisting of more than twenty persons, was formed before the commencement of the Companies Act, 1862, to receive contributions from the members, and sell the money in hand, from time to time, in shares varying from 20l. to 100l., to the highest bidder among them. The premiums paid by the purchasers were divided as profits among all the members. When the amount of the contributions and profits of a member who had purchased a share equalled the amount of such share, or, in the case of a member who did not borrow, when the amount of his con-

tributions and profits equalled the amount of the share in respect of which he had joined, and he was paid off, membership ceased in respect of such share. New members, however, were continually joining, and the existence of the society was continuous:—Held, that the association was not "formed" within the meaning of s. 4 of the act on each occasion of a change of membership, and did not require to be registered under the act. *Shaw v. Simmons*, 12 Q. B. D. 117; 53 L. J., Q. B. 29; 32 W. R. 292—D.

— Freehold Land Society—Trustees.]—The Eastwood View Freehold Land Society, consisting of more than twenty persons, was constituted by a deed of trust, made between the trustees and the members, incorporating the rules of the society. By the rules of the society, its object was stated to be to purchase a freehold estate, and to divide it into lots, and to apportion them among the members; but the right to get, win, sell, lease, or dispose of the coal or minerals was not to be conveyed, but to "remain vested in the trustees, who shall have full power to sell, lease, get or win the coals, at such price or prices, and in such manner as they may think best, the profits or proceeds of which shall be divided amongst the shareholders in the proportion," &c. The trustees of the society were three in number. In an action by the trustees of the society against a member to recover arrears of contributions and fines payable by him in respect of his lots:—Held, that the society carried on no business other than the business of mining; and that the business of mining was carried on by the trustees of the society as trustees only, and not as agents or directors, and that, as they were fewer than twenty, the society was not within the terms of the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4, so as to require registration. *Crowther v. Thorley*, 50 L. T. 43; 32 W. R. 330; 48 J. P. 292—C. A.

In 1873 an association of more than twenty persons was formed for the object, as stated in its deed of settlement, of purchasing a freehold estate and reselling it in allotments to the members of the association. The deed was executed by all the members, the name of each, the number of his allotment, the total amount he was to pay, and the amount of his monthly payment to be made in respect of it, being specified in a schedule to the deed. The property was vested in trustees, and its management was vested in a president, vice-president, treasurer, secretary, and a committee. The deed contained provisions for the conveyance to the members of their allotments when they had paid up the whole amount payable in respect of them, and for forfeiture and sale of the allotments of defaulting members. Powers were given to the committee to make roads, drains, &c., on the land, and powers were given to the trustees of borrowing money on mortgage with the consent of a general meeting. When all mortgages had been paid off and all the allotments had been conveyed the society was to come to an end. The society was not registered under the Companies Act, 1862:—Held, that the society was not an association formed for the purpose of carrying on any business that had for its object the acquisition of gain, and was not made illegal by the Companies Act, 1862, s. 4. *Crowther v. Thorley* (32 W. R. 330) followed; *Wigfield v. Potter* (45 L. T. 612) approved. *Siddall, In re*,

29 Ch. D. 1; 54 L. J., Ch. 682; 52 L. T. 114; 33 W. R. 509—C. A.

Unregistered Loan Society of less than Twenty Members—Subsequent Increase of Members.]—An unregistered money club, which in its inception comprises less than twenty members, becomes an illegal association within s. 4 of the Companies Act, 1862, so soon as it comprises upwards of twenty members. Such a society is none the less within the mischief of the act because its business is carried on and managed by a committee of seven members as the agents of the society, although they may have full powers as to management and may make bye-laws. *Crowther v. Thorley* (32 W. R. 330) distinguished. *Poppleton, Ex parte, Thomas, In re*, 14 Q. B. D. 379; 54 L. J., Q. B. 336; 51 L. T. 602; 33 W. R. 583—Cave, J.

In 1881 seven persons formed a loan society, and when business was commenced their members had increased to twenty. In June, 1883, the society was registered under the Companies Act, 1862, with the knowledge and consent of all the members. In 1881 the society advanced 100% to a borrowing member, repayable by monthly instalments, and he duly paid the instalments as they fell due until December, 1883, when he became bankrupt :—Held, that under the circumstances the inference was, that all the members had, either expressly or by acquiescence, mutually agreed that all the transactions of the society previous to its registration should continue to be binding on the registered society; and, consequently that the registered society could prove for the balance of the loan. *Id.*

Company Valid till Registration held Void.]—T. as trustee on behalf of a company about to be formed, purchased from the trustee, in liquidation of H.'s affairs, the business carried on by the latter; and by an agreement made between T., H., and the trustee, H. agreed with T., both personally and on behalf of the proposed company, that so long as the company carried on the business, H. would not engage in any similar business within ten miles of the Exchange. The company subsequently formed was alleged to consist only of T. and his six nominees. While the company was still carrying on its business, H. became an employé of B. & Co., carrying on a similar business in London :—Held, that H. had broken his covenant, and that a company, duly certified, is a valid company under the Companies Act, till the certificate is held void. *Hill & Co. v. Hill*, 55 L. T. 769; 35 W. R. 137; 51 J. P. 246—Kekewich, J.

Name struck off—Restoration.]—The power given to the court by sub-s. 5 of s. 7 of the Companies Act, 1880, to restore to the register of joint stock companies the name of a company which has been struck off by the registrar under the provisions of that section, if the court is "satisfied that the company was at time of the striking off carrying on business or in operation," applies to the case of a company which at the time of the striking off was carrying on business only for the purpose of winding up voluntarily and realizing its assets. *Outlay Assurance Society, In re*, 34 Ch. D. 479; 56 L. J., Ch. 448; 56 L. T. 477; 35 W. R. 343—North, J.

The winding-up of a company began in 1880, and a call was made in May, 1883. The registrar

of joint-stock companies sent notice to the office of the company as required by s. 7 of the Companies Act, 1880, but by an accident the notice could not be delivered and it was returned. In April, 1887, he struck the name of the company off the register. Nothing appeared to have been done by the company between 1883 and 1888, but on petition by the liquidator to have the name restored, and on production of evidence that some debts were still unpaid as also some calls, the court directed the company's name to be restored to the register. *Carpenter's Patent Davit Company, In re*, 1 Meg. 26—North, J.

b. List of Members and Summary.

Forwarding to Registrar—Power of Magistrate to Inquire into Accuracy.]—According to the true construction of s. 26 of the Companies Act, 1862, the forwarding to the registrar of joint-stock companies of a list of members and summary which upon the face of them purport to satisfy the requirements of the act, is not a sufficient compliance with that section unless such list and summary are in accordance with the facts; and a metropolitan police magistrate has jurisdiction upon a summons for penalties under s. 27 to inquire into the truth or falsehood of the statements contained in the list and summary so forwarded, and is not precluded from hearing evidence on the complaint brought before him merely by the circumstance that the list and summary are in accordance with the company's register. *Briton Medical and General Life Association, In re*, 39 Ch. D. 61; 57 L. J., Ch. 874; 59 L. T. 134; 37 W. R. 52—Stirling, J.

Such register is only *prima facie* evidence of certain matters, and upon evidence that it contained fictitious entries the magistrate would be justified in disregarding such entries, and in treating a summary based upon them as false and misleading. But questions of nicety as to the title to shares and the right to be on the register cannot properly be determined by a magistrate upon such a summons, and with reference to such questions he ought to accept the company's register as practically conclusive. *Grosvenor Bank and Discount Company v. Boaler* (49 J. P. 774) followed. *Id.*

The G. company bought the business of another company, taking over all the assets, the agreement stating that 10,000 shares, the nominal capital of the old company, were to be treated as paid up. In the return to the registrar the summary stated that there were 10,635 shares, a call of 10s. made on each share; total calls paid 4,481l.; calls unpaid 836l. On a summons under 25 & 26 Vict. c. 89, s. 27, for default in not forwarding a summary :—Held, that the company were rightly convicted, though the misrepresentation was not fraudulent, as the return was misleading, and purported that calls had been made on each of the 10,000 shares. *Grosvenor Bank v. Boaler*, 49 J. P. 774—D.

c. Inspection of Registers.

Taking Copies—Shareholder Interested in Rival Company.]—The right of inspection and perusal of the register of debenture stockholders, which by s. 28 of the Companies Clauses Act, 1863, is given to mortgagees, bondholders, debenture

ture stockholders, shareholders, and stockholders of the company, includes a right to take copies. The fact that a person has taken his stock in a company at the instance of a rival company, and for the purpose of serving the interests of the rival company, does not disentitle him to the assistance of the court in enforcing this statutory right:—*Forrest v. Manchester, Sheffield and Lincolnshire Railway* (4 D. F. & J. 126) held not to apply, inasmuch as that case proceeded on the ground that the plaintiff there purported to sue on behalf of himself and the other shareholders. *Mutter v. Eastern and Midlands Railway*, 38 Ch. D. 92; 57 L. J., Ch. 615; 59 L. T. 117; 36 W. R. 401—C. A.

Grounds for Inspection—Injunction.—[The right given to holders of stock and debentures by the Companies Clauses Act, 1845, ss. 45, 63, and by the Companies Clauses Act, 1863, s. 28, of inspecting the registers of a company, is not confined to an inspection of the names and addresses only of the holders of stock and debentures, may be exercised without assigning any reason for requiring inspection, and can be enforced by an injunction restraining interference by the company with the stockholder in the exercise at all reasonable times of his statutory right, without his being compelled to apply for a mandamus calling upon the directors to allow inspection. *Holland v. Dickson*, or *Crystal Palace Company*, 37 Ch. D. 669; 57 L. J., Ch. 502; 58 L. T. 845; 36 W. R. 320—Chitty, J.

II. PROMOTERS AND DIRECTORS.

1. PROMOTERS.

Who are—Solicitor.—[A summons was taken out by the liquidator of a company under s. 165 of the Companies Act, 1862, for a declaration that the solicitor of the company was a promoter, and guilty of breach of trust and misfeasance as such promoter, and also as solicitor of the company; that he was, therefore, not entitled to payment for his professional services, or that his bill of costs might be taxed, with a direction that all improper charges and disbursements should be disallowed, and that he might be ordered to repay certain sums received by him. The company had been fraudulently started, and had been ordered to be wound up:—Held, that the solicitor was not a promoter, and that there was no evidence to shew that he had been guilty of fraud or misfeasance within s. 165, and that he was entitled to his costs on accounting for the sums already received by him. *Great Wheel Poliooth, In re*, 53 L. J., Ch. 42; 49 L. T. 20; 32 W. R. 107; 47 J. P. 710—V.-C. B.

Purchase of Mine by Syndicate—Resale to Company—Rescission impossible.—[On the 1st of February, 1873, five persons (one of whom was a solicitor and conducted the negotiations) purchased a leasehold mine for 5,000*l.* with the view of reselling it to a company to be formed; but they had at that time taken no steps to form any company. They completed their purchase on the 17th of March, 1873, the purchase-money being paid out of their own moneys, and on the 4th of April they entered into a provisional contract with a trustee for an intended company for

the sale of the mine to the company for 18,000*l.* On the 8th of April the company was registered under the Companies Acts, its principal object being, as stated in the memorandum of association, the purchase of the mine, and in its articles the contract of the 4th of April, 1873, was adopted and confirmed, and four of the vendors were named as directors: but the contract of the 1st of February, 1873, was not disclosed to the company. The whole of the shares were placed by the vendors, and the share capital (30,000*l.*) paid by them. At the same time they received 18,000*l.* from the company as the purchase-money for the mine. In 1882 the company was wound up voluntarily, and in the course of the winding-up the facts relating to the purchase of the mine by the vendors became known to the company. In 1883 the company allowed judgment by default to go against them in an action by the lessor to recover possession of the mine. In 1884 the company commenced two actions against the executors of three deceased vendors and the two surviving vendors to recover the secret profits made by the vendors on their sale to the company, on the ground that they stood in a fiduciary position to the company:—Held, first, that the evidence did not prove that the vendors when they purchased the mine were promoters of, or in a fiduciary position towards, the company which was ultimately formed; secondly, that assuming that the vendors committed a breach of duty in not informing the company after it was formed that the mine was their own property, and consequently that the company might have rescinded the contract, yet as rescission was now impossible the company could not recover from them the profit which they had made. *Ladywell Mining Company v. Brookes or Huggons*, 35 Ch. D. 400; 56 L. J., Ch. 681; 56 L. T. 677; 35 W. R. 785—C. A.

Secret Commission—Agents for Vendor—Right to Recover.—[Although the promoter of a company cannot be considered an agent or trustee for the company, the company not being in existence at the time, yet the principles of the law of agency and trusteeship are applicable to his case, and he is accountable for all moneys obtained by him from the funds of the company without the knowledge of the company. *Lydney and Wigpool Iron Ore Co. v. Bird*, 33 Ch. D. 85; 55 L. J., Ch. 875; 55 L. T. 558; 34 W. R. 749—C. A.

The fact that a promoter is acting as agent for the vendors in getting up a company for the purchase of their property does not exonerate him from accounting to the company, when formed, for any secret profit made by him. In estimating the amount of the secret profit for which a promoter was accountable to the company, he was held entitled to be allowed the legitimate expenses incurred by him in forming and bringing out the company, such as the reports of surveyors, the charges of solicitors and brokers, and the costs of advertisements; but not a sum of money which he had expended in obtaining from another person a guarantee for the taking of shares. *Ib.*

Whether Partner liable to Repay.—[J., a member of a firm of iron-merchants, was a promoter of a company for the purchase of mines, and was held accountable for a secret profit which he had made in the course of such promo-

tion. W., his partner, received from him a sum of money out of the profit made by him in consideration of his guaranteeing the taking of certain shares. There was no evidence that W. knew of the profit that B. made, or knew that the sum received by him came out of the moneys of the company:—Held, that the promotion of companies not being within the scope of the partnership, W. was not accountable for the profits made by J., or for the money received by himself as the consideration for the guarantee. *Id.*

2. DIRECTORS.

a. Appointment.

Subscribers of Memorandum of Association.]—The articles of association of a company followed Table A of the Companies Act, 1862; clauses 52 and 53 of that table being to the effect that the number of directors shall be determined by the subscribers of the memorandum of association, and that until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors. There was also a special article that the number of directors should not be less than three nor more than ten, and that two should form a quorum. Directors were appointed at a meeting attended by two only of the subscribers of the memorandum of association:—Held, that the special article only applied when the directors had been duly appointed, and that, the directors having been appointed at a meeting consisting of a minority of the subscribers of the memorandum of association, the appointment was invalid. *Hovebeach Coal Company v. Teague* (5 H. & N. 151) held not to have been impugned by *York Tramways Company v. Willows* (8 Q. B. D. 685). *London and Southern Counties Freehold Land Company, In re*, 31 Ch. D. 223; 55 L. J., Ch. 224; 54 L. T. 44; 34 W. R. 163—Chitty, J.

b. Powers and Liabilities Generally.

Powers as to Expenditure of Funds—Costs of Unsuccessful Petition to Wind up.]—A committee of directors presented a petition to wind up a company, which was dismissed with costs. They then passed a resolution to pay the costs of the petition out of the assets of the company:—Held, that petition to wind up the company was not “a legal proceeding on behalf of the company within article 100 of the articles of association of the company,” and that the resolution to pay the costs of the petition out of the company was ultra vires. *Smith v. Manchester (Duke)*, 24 Ch. D. 611; 53 L. J., Ch. 96; 49 L. T. 96; 32 W. R. 83—V.-C. B.

—Proxies—Stamping for Revenue and Postage.]—The funds of a company ought not to be used for printing or sending out proxy-papers which tend in any way to influence the votes of the shareholders receiving them (e.g., proxy-papers with the names of the proposed proxies therein), or for stamping or paying the return postage on proxy-papers of any kind:—Semble, it is within the powers of a company to print and send out proper proxy-papers—that is, such as will not tend to influence the votes of the shareholders. *Studdert v. Grosvenor*, 33 Ch.

D. 528; 55 L. J., Ch. 689; 55 L. T. 171; 34 W. R. 754; 50 J. P. 710—Kay, J.

—Costs of Prosecutions for Libels on Directors and Company.]—The cost of actions for libel affecting the private characters of directors, and only incidentally injuring a company, ought not to be paid out of the funds of the company; but the costs of proceedings for libel directly affecting the company may be rightly paid out of the company's funds. *Id.*

Power to Lend on Security of Society's own Shares.]—See *Grimwade v. Mutual Society*, post, col. 360.

Power to Transfer Qualification Shares.]—See *South London Fish Market Company, In re*, post, col. 411.

Injunction restraining Exclusion by Co-directors.]—An injunction will be granted in an action by a director of a company against his co-directors to restrain them from excluding him from acting as director, although, in the opinion of the directors, he is unfit to be a director of the company by reason of alleged misconduct. *Kyshe v. Alturas Gold Company*, 36 W. R. 496—North, J.

Directors of Newspaper—Liability for Criminal Libel.]—See DEFAMATION.

Liability for Bills accepted ultra vires.]—A bill of exchange payable to order and addressed to the B. & I. Co., which was incorporated under local acts and had no power to accept bills, was accepted by the defendants, who were two of the directors of the company, and also by the secretary, as follows:—“Accepted for and on behalf of the B. & I. Co., G. K., F. S. P., directors—B. W., secretary.” The bill was so accepted and given by the defendants to the drawer, the engineer of the company, on account of the company's debt to him for professional services, and although he was told by the defendants that they gave him the bill on the understanding that he should not negotiate it, but merely as a recognition of the company's debt to him, as the company had no power to accept bills, yet the defendants knew that he would get it discounted, and they meant that he should have the power of doing so. The bill was indorsed by the drawer to the plaintiffs for value, and without notice of the understanding between him and the defendants:—Held, that the defendants were personally liable, as by their acceptance they represented that they had authority to accept on behalf of the company, which being a false representation of a matter of fact and not of law, gave a cause of action to the plaintiffs, who had acted upon it. *West London Commercial Bank v. Kitson*, 13 Q. B. D. 360; 53 L. J., Q. B. 345; 50 L. T. 656; 32 W. R. 757—C. A. Affirming 47 J. P. 824—D.

Liability for Over-issue of Debentures.]—See post, col. 373.

Prosecution of, Petition for.]—See *Denham, In re*, post, col. 442.

Sale by, to Company—Ratification at General Meeting—Vendor's Right to Vote.]—Where a

voidable contract, fair in its terms and within the powers of the company, had been entered into by its directors with one of their number as sole vendor :—Held, that such vendor was entitled to exercise his voting power as a shareholder in general meeting to ratify such contract ; his doing so could not be deemed oppressive by reason of his individually possessing a majority of votes, acquired in a manner authorised by the constitution of the company. *North-West Transportation Company v. Beatty*, 12 App. Cas. 598 ; 56 L. J., P. C. 102 ; 57 L. T. 426 ; 36 W. R. 647—P. C.

c. Liability for Misfeasance.

Non-disclosure of Director's Interest in Property Sold.—In 1871, a partnership, consisting of the respondent and five other persons, purchased certain coal areas for 5,500*l*. In 1873 a company was formed for the purchase of these coal areas at a price, as fixed in the articles of association, not exceeding 42,000*l*.—that is, 12,000*l*. in cash and 30,000*l*. in shares. The directors, of whom the respondent was one, effected the purchase at the above maximum price. The company was ordered to be wound up in 1875, and in 1878 the coal areas were sold with other property for 14,500*l*. The appellant, a contributory, as holder of paid-up shares, applied under s. 165 of the Companies Act, 1862, to make the respondent liable for misfeasance or breach of trust, on the ground that he had joined in purchasing the coal areas for the company at an overvalue, and without disclosing his interest to the other directors :—Held, upon the evidence, that it had not been proved that the price paid by the company was excessive, nor that the respondent had concealed his interest ; and that the onus of proof lay upon the appellant. *Cavendish-Bentinck v. Fenn*, 12 App. Cas. 652 ; 57 L. J., Ch. 552 ; 57 L. T. 773 ; 36 W. R. 641—H. L. (E.)

— Rescission Impossible—Proceedings by Contributory.—Semble, that if misfeasance had been made out, relief could have been obtained against the respondent, notwithstanding that rescission of the purchase by the company had become impossible, and that proceedings under s. 165 cannot be maintained by a contributory who has no pecuniary interest in any increase to the assets of the company which may result from the proceedings. 1*b*.

Breaches of Trust—Indirect Sanction.—A director of a company from the time that he becomes aware of breaches of trust by his co-directors incurs liability, even though he did not directly sanction them, and may be held personally answerable for any losses sustained thereby, if he remains passive and omits to take proper steps to prevent such misconduct, and to institute, if necessary, proceedings against his colleagues in default. *Jackson v. Munster Bank*, 15 L. R., Ir. 356—V.-C.

False Balance-sheets.—The official liquidator of a loan society, which was being wound up, moved to make its directors and officers liable for losses arising from 100 loan transactions. He submitted (1) that, as they had advanced large sums by way of loans on the security of the society's own certificates, they had acted ultra

vires, because by the memorandum of association, and the articles, they were expressly forbidden to accept as security for re-payment of advances "personal securities, either by bonds, bills of exchange, or promissory notes ;" (2) that, if this were intra vires, the other securities which they had accepted were not bona fide ones ; (3) that, if their loans were not fraudulent, they had been guilty of such gross negligence and imprudence as to make them liable ; (4) that they had concealed the true state of the affairs of the society from the members by means of false balance-sheets :—Held, that the charges of fraud and gross negligence had not been sustained ; that the directors could in no sense be held responsible for the faulty basis on which the society had been formed, or for the errors of the actuaries and accountants ; that the members had been cognisant of and ratified all that had been done ; that the society's own certificates were not such personal security for advances as was forbidden by the articles, and that it was not ultra vires the directors to advance money on such security (as it was security of personal estate as distinguished from personal security) ; and that the motion must be dismissed with costs. *Grimwade v. Mutual Society*, 52 L. T. 409—Chitty, J.

— Acts of Co-Directors—Payment of Dividend out of Capital—Constructive Notice.—An innocent director of a company is not liable for the fraud of his co-directors in issuing to the shareholders false and fraudulent reports and balance-sheets, if the books and accounts of the company have been kept and audited by duly appointed and responsible officers, and he has no ground for suspecting fraud. Consequently, if such a director has received, together with the other shareholders, dividends declared and paid in pursuance of such reports and balance-sheets, such dividends having been, in fact, payments out of capital, he cannot be called upon, under s. 165 of the Companies Act, 1862, to repay the dividends so paid, nor even the dividends received by himself. A director is not bound to examine entries in any of the company's books ; nor is the doctrine of constructive notice to be so extended as to impute to him a knowledge of the contents of the books. *Denham, In re*, 25 Ch. D. 752 ; 50 L. T. 523 ; 32 W. R. 487—Chitty, J.

By the articles of the plaintiff company, the directors were empowered to declare a dividend upon such estimates of account as they might see proper to recommend, so that no dividend should be payable except out of profits, and they were required annually to lay before the company a statement of the income and expenditure of the past year, and also a balance-sheet containing a summary of the property and liabilities of the company ; and it was provided that the auditor should make a report to the members on the balance-sheet and accounts, stating whether in his opinion the balance-sheet was a full and fair balance-sheet containing the particulars required by the articles, and properly drawn so as to exhibit a true view of the state of the company's affairs. The remuneration of the directors and the manager was regulated by the rate of dividend. From its commencement in 1870 until its winding up in 1882, the company earned no profits available for dividend. The directors annually submitted to the company a balance-sheet purporting to

show a profit on the faith of which a dividend was declared. No statement of income and expenditure was ever submitted to the company. The balance-sheets were prepared by the manager, and contained false items. The directors had no knowledge that the balance-sheets were false, but they relied exclusively upon the statements of the manager. In auditing the accounts, the auditor, without referring to the articles, merely certified that the accounts were a true copy of those shown in the books of the company. The balance-sheets were literally copied from balance-sheets in the ledger of the company, but the false items did not appear elsewhere in the books of the company:—Held, following *Oxford Building Society, In re* (35 Ch. D. 502), that the directors, and the estate of a deceased director, were jointly and severally liable to make good sums improperly paid out of capital for dividends, for directors' fees and for bonuses to the manager, and that the manager and auditor were liable for damages on the same footing. *Leeds Estate Building Company v. Shepherd*, 36 Ch. D. 787; 57 L. J., Ch. 46; 57 L. T. 684; 36 W. R. 322—Stirling, J.

Repayment of Fees.—It was provided by one of the articles of association of a company that the directors should not receive any remuneration for their services in any year until the members should have received a dividend for that year of 5 per cent. on the amount paid on their shares, and that then the directors should be paid for that year such sum as the company should in general meeting determine. The articles also provided that the directors should be indemnified out of the funds of the company all expenses incurred by them as directors. The company never paid any dividend, and was on the 17th April, 1886, ordered to be wound up. Before the order for winding-up, at a general meeting held on the 9th Feb., 1885, at which some of the directors were present, a resolution was passed allotting a sum of 1,000l. to the directors for their services for the year ending the 31st Dec., 1884. On the 17th Feb., 1885, four of the seven directors held a meeting and passed a resolution dividing the 1,000l. among the body of directors in certain proportions. At another meeting in March the directors passed a resolution sanctioning certain bills for their expenses "as settled by the resolution of Feb. 17th." On summons by the official liquidator asking that the seven directors might be held jointly and severally liable to refund the 1,000l. and for an order of payment:—Held, that the article of association, saying that the directors were to receive no remuneration until a dividend had been paid, had been broken, and the directors were jointly and severally liable to repay the money with interest at 4 per cent. *Whitehall Court, In re*, 56 L. T. 280—Kay, J. And see preceding and next case.

Payment of Dividends out of Capital—“Realised Profits.”—The articles of association of a limited company provided that no dividends should be payable except out of "realised profits," and that no remuneration should be paid to the directors until a dividend of 7 per cent. had been paid to the shareholders. The business of the company consisted chiefly in lending money to builders on mortgages payable by instalments, and the directors treated, as

part of the profits available for dividends, the value for the time being (upon an estimate made by their surveyor who was also their secretary) of the instalments of principal and interest remaining unpaid by each mortgagor. Upon this footing the directors paid for several years, out of the floating capital from time to time in their hands, (1) dividends of 7½ per cent. and upwards; (2) remuneration to themselves. Upon a summons taken out in the winding-up of the company by a creditor:—Held, that "realised profits" must be taken in its ordinary commercial sense as meaning at least "profits tangible for the purpose of division," and that the directors having treated estimated profits as realised profits, and having in fact paid dividends out of capital, on the chance that sufficient profits might be made, were jointly and severally liable, as upon a breach of trust, to repay, and must repay, the sums improperly paid as dividends, and also the remuneration they had respectively received, with interest in each case at 4 per cent. *Oxford Benefit Building Society, In re*, 35 Ch. D. 502; 56 L. J., Ch. 98; 55 L. T. 598; 35 W. R. 116—Kay, J. See *Leeds Estate Building Co. v. Shepherd*, supra.

Repayment of Commission.—The directors also, without the knowledge of the shareholders, voted and paid themselves out of the funds of the company a commission on certain purchases and sales, and entered such payment in the books of the company, but made no mention of it in their reports or balance-sheets:—Held, that they were jointly and severally liable to repay, and must repay this amount with interest at 5 per cent. *Id.*

Payments made after Commencement of Winding-up—Course of Business.—After the presentation of a petition for the winding-up of a company on the ground that it had not commenced business within a year from its incorporation, the directors issued new shares, and made payments for the purpose of presenting the appearance of business being carried on. The company was ordered to be wound up, and in the winding-up the official liquidator applied for payment by the directors of all moneys of the company expended by them since the presentation of the petition:—Held, that the combined effect of ss. 153 and 165 was to make the directors *prima facie* liable for all moneys of the company expended by them, not in the ordinary course of business since the commencement of the winding-up, and that an account of moneys so expended must be taken. *Neath Harbour Smelting and Rolling Works, In re*, 56 L. T. 727; 35 W. R. 827—Chitty, J.

Approval of Transferee of Shares.—Directors permitted a transfer of 19,528 shares from a substantial holder to P., a director and shareholder of the company. They had previously refused to allot these shares to him, and at the time of the transfer they had notice of a charge, an injunction, and two charging orders against other shares held by him. They alleged that they believed that he was again in possession of considerable funds, and that they examined into the matter and approved him as transferee within the terms of their articles, which provided that every transferee must be approved by the directors. P. subsequently became insolvent

and all his shares were forfeited:—Held, that directors are not in the same position as ordinary trustees; that the directors had, in fact, approved P. as transferee; and that, even if they had made a mistake, they could not be made personally liable for the consequences. *Fauve Electric Accumulator Company, In re*, 40 Ch. D. 141; 58 L. J., Ch. 48; 59 L. T. 918; 37 W. R. 116; 1 Meg. 99—Kay, J.

Repayment of Brokerage for placing Capital.]

—The directors paid a brokerage of 2s. 6d. per share to a broker for placing a large number of shares. The allottee was a substantial person, and paid the amount then called up on the shares—nearly 40,000*l.*—to the company. There was no evidence that he received any part of the brokerage, but he wrote a letter to the directors stipulating that it should be paid to the broker. The articles provided for payment of preliminary expenses, and the memorandum authorised things conducive to the attainment of the objects of the company:—Held, that payment of brokerage was not payment for work and labour done; that it was not conducive to the objects of the company; that it was an unauthorised use of capital and ultra vires, and that the directors must repay it. *Id.*

Present for placing Shares—Statute of Limitations.]—S., a promoter, and subsequently a director, of the company, made an arrangement with the syndicate of vendors by which he was to receive 1,000 B shares in the company in consideration of his taking or placing 500 A shares. He subsequently received his 1,000 B shares. Notice of this transaction was, after the formation of the company, given to the directors, but the board which received the notice consisted of persons more or less implicated in the transaction, and no action was taken in the matter. The company was afterwards wound up, and the liquidator took out a summons to recover from S. the value of 1,000 B shares, on the ground that his having received them was, under the circumstances, a misfeasance as against the company. It was contended that he was barred by the Statute of Limitations from making his claim, the company having, through its directors, received notice of the transaction more than six years previously:—Held, that S. was guilty of a misfeasance against the company, having received the B shares under these circumstances, and that he must, the shares being now valueless, pay to the liquidator the amount of the value of the shares when he received them, but, as no dividend had ever been paid on the shares, he would not be required to pay any interest; that, though notice to the directors of a company was *prima facie* notice to the company, yet when, as in this case, it was certain that the directors would not communicate the information to the shareholders it was not, and this claim therefore was not barred by the Statute of Limitations. *Fitzroy Bessemer Steel Company, In re*, 50 L. T. 144; 32 W. R. 475—Kay, J. Com. promised on appeal 33 W. R. 312.

Gift of Qualification Shares.]—A director of a company received from the promoters a present of the sum of 1,000*l.* to buy 100 shares in the company, which was the qualification of a director, the present being expressed to be given as part commission, in respect of certain contracts

he was about to enter into at the request of the promoters, in relation to the proposed company. The director afterwards took part in making an agreement for the purchase by the company of a quarry of which the promoters were part owners, the carrying out of which was stated in the memorandum and articles of association of the company to be the first object of the company. The company was subsequently wound up:—Held, that the director was liable to account to the liquidator for the value of the shares, at the value at which they stood at the date he received the present, together with interest at 5 per cent. from the date of such gift. *Drum Slate Quarry Company, In re*, 55 L. J., Ch. 36; 53 L. T. 250—Kay, J.

Practice as to.]—See *infra*, XI., 5.

III. AUDITORS.

Duty of.]—It is the duty of an auditor in auditing the accounts of a company to inquire into the substantial accuracy of the balance-sheet, to ascertain that it contains the particulars specified in the articles of association and properly represents the state of the company's affairs, and he is liable in damages for the breach of such duty. *Leeds Estate Building Company v. Shepherd*, 36 Ch. D. 787; 57 L. J., Ch. 46; 57 L. T. 684; 36 W. R. 322—Stirling, J.

Right to appoint Accountant.]—An auditor appointed under the Companies Clauses Act, 1845, is entitled to appoint an accountant under s. 108 of that act, without the consent of his co-auditor. *Steele v. Sutton Gas Company*, 12 Q. B. D. 68; 53 L. J., Q. B. 207; 49 L. T. 682; 32 W. R. 289—D.

Remuneration.]—Sect. 91 of the Companies Clauses Act, 1845, prevents auditors from recovering any other remuneration than that fixed upon at a general meeting of the company. *Page v. Eastern and Midlands Railway*, 1 C. & E. 280—Grove, J.

IV. BORROWING POWERS, MORTGAGES AND DEBENTURES.

1. BORROWING POWERS.

Hypothecation of Freight—Charge on Particular Asset.]—The directors of a shipping company passed a resolution authorising its brokers to hypothecate the freight of two ships during their present voyages, to secure a present advance of sums not exceeding 5,000*l.* Shortly afterwards the brokers transferred the freight of one of the ships to H. & Co. to secure an advance of 3,000*l.* The transfer was signed by the brokers as managers of the company, who also gave an undertaking to collect the freight as agents to H. & Co. An action having been brought by the debenture-holders of the company for the enforcement of their securities, and the company having gone into liquidation, H. & Co. applied for an order that the liquidator of the company should pay to the applicants out of moneys representing the freight of the ship in question the sum of 3,000*l.*:—Held, that the company had power under its articles of association, and the

resolutions passed pursuant thereto, notwithstanding the debenture debt, to specifically charge a particular asset for the purpose of carrying on the company's business; and that, therefore, H. & Co.'s security was prior to that of the debenture-holders. *Ward v. Royal Exchange Shipping Company*, 58 L. T. 174; 6 Asp. M. C. 239—Chitty, J.

Statutory Prohibition—Ultra Vires.]—The respondents were constituted a company by an act of Geo. 2, for the purpose of recovering and preserving the navigation of the River Dee. This act was amended by subsequent acts, but none of them expressly authorised or forbade the company to borrow, till the act of 14 & 15 Vict. c. lxxxvii, which, by s. 24, empowered the company to borrow at interest for the purposes of their acts upon bond or mortgage of the lands recovered and inclosed by them, or partly upon bond, and partly upon such mortgage, a sum not exceeding 25,000*l.*, and also a further sum, not exceeding 25,000*l.*, upon mortgage of their tolls, rates and duties:—Held, that whether the earlier acts gave an implied power to borrow or not, the company was prohibited by the 14 & 15 Vict. c. lxxxvii. from borrowing except in accordance with the provisions of that act. *Wenlock (Baroness) v. River Dee Company*, 10 App. Cas. 354; 54 L. J., Q. B. 577; 53 L. T. 62; 49 J. P. 773—H. L. (E.).

By Lord Blackburn:—The law laid down by the House of Lords in *Ashbury Company v. Riche* (7 L. R., H. L. 653) applies to all companies created by any statute for a particular purpose, and not only to companies created under the Companies Act, 1862 (25 & 26 Vict. c. 89). *Ib.*

—Improvement Loan—Charge by Inclosure Commissioners.]—The Lands Improvement Company's Acts, 1853, 1855, and 1859, which empower the company to make improvement loans to landowners, including corporations holding lands, to be secured by a charge on the fee of lands to be improved under the hand and seal of the Inclosure Commissioners, do not enable a corporation, bound by a prior statutory prohibition against borrowing on land beyond a certain limit, to exceed the limit for the purpose of effecting improvements on their lands. *Wenlock (Baroness) v. River Dee Company*, 38 Ch. D. 534; 57 L. J., Ch. 946; 59 L. T. 485—C. A.

The Act of 1853 provided that the execution by the commissioners of any charge in pursuance of the Act should be conclusive evidence of such charge having been duly made and executed, and being a valid charge under the Act:—Held, that the section was conclusive as to the observance of the formalities required by the Act, but was not conclusive as to the capacity of the landowner to contract. *Ib.*

Equity of Lender to Payment out of Money borrowed subject to Creditor's Rights.]—The equitable doctrine by which the lender of money borrowed by a company *ultra vires* is entitled to be subrogated to the rights of creditors of the company paid out of such money, and to recover from the company the amount of their debts or liabilities so paid off, is not confined to the amount of debts and liabilities existing at the

time of the advance and so paid off, but extends to debts and liabilities accruing subsequently to and paid out of such advance. *Blackburn Benefit Building Society v. Cunliffe, Brooks & Co.* (22 Ch. D. 61) discussed. *Wenlock (Baroness) v. River Dee Company*, 19 Q. B. D. 155; 56 L. J., Q. B. 589; 57 L. T. 320; 35 W. R. 822—C. A.

2. MORTGAGES.

a. Validity.

Amount Sanctioned—Ultra Vires.]—By the memorandum of association of a limited company the company were empowered to borrow or raise money by the issue of or upon bonds, debentures, bills of exchange, promissory notes, or other obligations or securities of the company, or by mortgage or charges on all or any part of the property of the company or its unpaid capital, or in such manner as the company should think fit. By a clause in the articles of association, it was provided that "the directors may, from time to time, at their discretion, borrow from the directors, members, or other persons, any sum or sums of money for the purposes of the company, but so that the moneys at one time owing shall not, without the sanction of a general meeting, exceed one-fifth of the nominal amount of the capital, or, with such sanction, one-third of such nominal amount." The directors issued debentures to the amount of 3,050*l.*, of which A. held 1,650*l.*, the nominal capital of the company being 10,000*l.*, and mortgaged to A., for moneys advanced, lands and other property of the company for 3,950*l.*, and the mortgage was sanctioned at a general meeting of the company:—Held, that the restriction in the clause of the articles of association was imposed on the company itself, and not merely on the directors; that the sanction by the company of the mortgage was *ultra vires*, and the security void as to the excess over one-third of the nominal capital. *Bansha Woollen Mills Company, In re*, 21 L. R., Ir. 181—M. R.

Powers of Directors—Mortgage of Unpaid Capital.]—The directors of a company were authorised to mortgage all or any part of the company's "properties or rights":—Held, that the directors had power to mortgage the capital of the company for the time being uncalled. *Bank of South Australia v. Abrahams* (6 L. R., P. C. 265) distinguished. *Howard v. Patent Ivory Manufacturing Company*, 38 Ch. D. 156; 57 L. J., Ch. 878; 58 L. T. 395; 36 W. R. 801—Kay, J.

b. Registration.

Duty and Liability of Directors, etc.]—Directors, managers and other persons, standing in a fiduciary relation to a company, holding securities affecting its property, are bound to see that their securities are properly registered, as required by the Companies Act, 1862, s. 43; and if they knowingly and wilfully omit to do so, they not only subject themselves to the penalty imposed by that section, but they forfeit their unregistered securities as against the general creditors of the company. *Dublin Drapery Company, In re, Cow, Ex parte*, 13 L. R., Ir. 174—M. R.

Duty of Solicitors.]—Solicitors of a company who had, in the performance of their duty, procured a proper register to be made out, but who had no power or authority to make or compel entries in it:—Held, not liable to the personal equity arising from the non-registration of securities in their hands. *Dublin Drapery Company, In re, Cor, Ex parte, supra.*

Director and Creditors—Omission to Register without Concealment.]—Debentures in a company incorporated under the Companies Act, 1862, were issued to a director of the company. They were not registered in accordance with the requirements of s. 43 of the act. The company having gone into liquidation and the validity of these debentures being contested by unsecured creditors, and also by debenture-holders, as to whom it was not shown that they had made any inquiry as to the charges on the company's property or the existence of a register:—Held, that the mere omission to register, without concealment, did not invalidate the debentures; at all events as between the director and such creditors. The rule of construction laid down by *Native Iron Ore Company, In re* (2 Ch. D. 345), and the decisions prior to it, disapproved. The reasoning of Jessel, M. R., in *Globe New Patent Iron and Steel Company, In re* (48 L. J., Ch. 295), approved. *Wright v. Horton*, 12 App. Cas. 371; 56 L. J., Ch. 873; 56 L. T. 782; 36 W. R. 17; 52 J. P. 179—H. L. (E.).

— Sufficiency of Registration — Assignment.]—In 1874 a limited company mortgaged their property to a partnership consisting of three persons, of whom two were directors of the company. The mortgage was made for a term of seven years. It was not registered as required by s. 43 of the Companies Act, 1862. In 1876 the partner who was not a director assigned his interest in the mortgage to the other two. In 1881 it was arranged that the mortgage should be continued for another seven years. The directors having been then informed that the mortgage ought to be registered, the secretary entered the particulars required by s. 43 on a blank page in the company's register of transfers, altering the headings accordingly. The book in which the entries were made was marked on the outside "Register of Transfers." No other mortgage was ever made by the company, and the secretary deposed that no one had ever inquired for the register of mortgages. The company being in liquidation:—Held, that there had been a sufficient registration of the mortgage in compliance with s. 43, and that the mortgagees were entitled to enforce their mortgage; that debts contracted by the company during the seven years between the execution and the registration of the mortgage were not entitled to priority over the mortgage debt:—Held also, that, even if the registration was ineffectual, inasmuch as one of the original mortgagees was not a director of the company, the mortgage was not invalidated, and that it remained valid in the hands of the two directors after the assignment to them of the interest of the third mortgagee. *Underbank Mills Cotton Spinning and Manufacturing Company, In re*, 31 Ch. D. 226; 55 L. J., Ch. 255; 53 L. T. 957; 34 W. R. 181—Pearson, J.

Mortgage not created by Company—Equitable

Charge.]—An equitable charge over certain leasehold property had been given in 1879 to Whitehouse by Wills. On the 18th March, 1880, Wills formed a company, of which Whitehouse acted as the solicitor. On the 17th March, 1880, Wills agreed to sell to a trustee for the company the property in question, free from incumbrances. The purchase-money, if paid, would have been sufficient to have paid off all the then incumbrances in full. The agreement was adopted by the company, but it was unable to carry out the same, and in January, 1881, Wills agreed to waive his vendor's lien until the company should pay a certain dividend. Before it was able to do so it had been wound up. No register of mortgages had ever been kept by the company. Whitehouse claimed the property in question under his equitable charge. It was now contended by the official liquidator that Whitehouse was an officer of the company; that by s. 43 of the Companies Act, 1862, the equitable charge "specifically affected" property of the company, and ought to have been registered; and that in default of registration it was void:—Held, that the words "if any property is mortgaged," in s. 43, had a future meaning, and referred to any mortgages and charges created by the company itself; that the equitable charge in question, therefore, did not require registration, and was a valid one which could be enforced; and that the contention of the official liquidator failed. *General Horticultural Company, In re, Whitehouse's Claim*, 53 L. T. 699—Chitty, J.

Transfer of Security.]—If securities, transferable by delivery, have been properly registered in the names of the persons to whom they were originally issued, subsequent transfers of them need not be registered; and, semble, the same rule applies to all securities, whether transferable by delivery or otherwise. Debentures payable to bearer taken in trust for directors, held, properly registered in the names of the persons to whom they were issued. *Dublin Drapery Co., In re, Cor, Ex parte, supra.*

3. DEBENTURES AND DEBENTURE STOCK.

a. What are—Bills of Sale Act.

Description of Documents.]—A debenture may consist of one document. It is not necessary that there should be a serial issue of documents to constitute them debentures. *Edmonds v. Blaina Furnaces Company*, 36 Ch. D. 215; 56 L. J., Ch. 815; 57 L. T. 139; 35 W. R. 798—Chitty, J.

Any document which either creates a debt or acknowledges it, is a "debenture." *Levy v. Abercrombie Slate Company, infra.*

Whether Registration required.]—A memorandum of agreement between a company of the one part and the several persons named in the schedule thereto, called the lenders, of the other part, whereby the company covenanted to pay, on a day named, to each of the lenders (nine in number) the sum advanced by him, with interest, and as security for the payment thereof charged therewith all its undertaking, property, estate and effects of every kind:—Held, to be a debenture in the ordinary acceptance of the

term, and within s. 17 of the Bills of Sale Act, 1882. *Edmonds v. Blaina Furnaces Company*, supra.

A limited company issued twenty debenture bonds payable to bearer, each of which consisted of a statement that the company would pay 100*l.* on a certain day, and that the payment of the said money was secured by an indenture of mortgage made between the company and certain trustees for the benefit of the debenture-holders. Neither the debenture bonds nor the covering deed were registered under the Bills of Sale Act, 1882. All the debenture bonds came into the possession of the claimant:—Held, on a sheriff's interpleader summons, that the claimant was not entitled to defeat the claim of an execution creditor to the goods of the company. *Jenkinson v. Brandley Mining Company*, 19 Q. B. D. 568; 35 W. R. 834—D. Sed quare.

A brick-making company deposited their title-deeds to certain beds of coal and fire-clay with their bankers, together with a memorandum which stated that the deposit was made to secure to the bankers "payment of all sums of money which we are now, or at any time hereafter may be indebted to you, whether on current account for principal, interest, commission and charges, or on any other account whatsoever. And, in consideration of the advances now made to us, and of our account being continued, we undertake to execute, when thereunto requested, a proper mortgage, with immediate power of sale, or such further security as may be necessary for the purpose of effectually transferring to any person or persons whom you may designate for that purpose, the legal estate in the property to which this security relates." The memorandum did not contain any acknowledgment of any specific debt, nor any covenant or agreement by the company for payment, except so far as the same was implied in the agreement to execute a legal mortgage of the property. The company were not the owners of the surface of the land under which the beds of coal and fire-clay lay, but they had the right to use the surface for the purpose of working the minerals, and they had erected on the surface certain trade machinery of the kind excluded by sect. 5:—Semble, that the memorandum was not a "debenture" within the meaning of sect. 17 of the Bills of Sale Act of 1882. *Edmonds v. Blaina Furnaces Company* (36 Ch. D. 215) observed upon. *Topham v. Greenside Glazed Fire-Brick Company*, 37 Ch. D. 281; 57 L. J., Ch. 583; 58 L. T. 274; 36 W. R. 464—North, J.

An agreement between a company of the one part and a lender of the other part, whereby the company agreed to pay the lender the sum of 600*l.* with interest, and charged certain hereditaments with the repayment of the said sum of 600*l.* and interest, and further agreed with the lender that they would at any time during the continuance of the security at the request of the lender execute a legal mortgage, and further agreed to issue debentures of the company to the extent of 600*l.* secured over all the capital stock, goods, chattels, and effects of the company, including uncalled capital, both present and future:—Held, to be in effect a debenture, and within the saving of s. 17 of the Bills of Sale Act, 1882. *Edmonds v. Blaina Furnaces Company* (36 Ch. D. 215) followed and discussed. *Levy v. Abercorris Slate Company*, 37 Ch. D.

260; 57 L. J., Ch. 202; 58 L. T. 218; 36 W. R. 411—Chitty, J.

—Secured on Goods of Company—"Covering Deed."—Debentures were issued by a company under its common seal with a condition annexed that the holders of debenture bonds of that issue were entitled *pari passu* "to the benefit of an indenture dated the 24th of November, 1883, whereby—subject to a sum of *l.* and interest secured on mortgage—the freehold buildings and premises of the company and all the machinery, fittings, fixtures, and furniture of the company in and about the said premises, and any other machinery, fittings, fixtures and furniture that may be substituted therefor during the continuance of the security effected by the said indenture are expressed to be vested in trustees to secure the payment of all moneys payable on such debenture bonds." The "covering deed" of November, 1883, purported to be a conveyance and assignment of the hereditaments, fixtures and chattels in terms rather larger than those used in the condition; the future chattels being not only those substituted for existing chattels, but also any brought upon the premises in addition thereto. This deed was not registered under the Bills of Sale Act, 1882. Some months later the directors, in consequence of the decision in *Brocklehurst v. Railway Printing and Publishing Company* (W. N. 1884, p. 70), caused a new debenture to be issued, which was stated to be supplemental to the original bond of the holder to whom it was given, and purported to charge, in favour of the holder, the amount due on the debenture upon "the undertaking (of the company) and all its property, both real and personal, present and future, subject as to any part thereof to any subsisting mortgages":—Held, 1. That, assuming the covering deed to be void for want of registration under the Bills of Sale Acts, the intention to give the debenture-holders a valid charge, within the meaning of the Bills of Sale Act, 1882, s. 17, on the property comprised in that deed, was manifest on the face of the debentures, read in conjunction with the annexed condition, and amounted to an equitable contract which would be carried into effect to give a charge upon all the property of the company; and, accordingly, that the chattels intended to be charged with the money due on the original debentures were subject to an equitable charge in favour of the holders of those debentures: and 2. That the supplemental debentures which were issued as part of, and in order to cure a supposed defect in the original issue, did not create a charge upon any property of the company which was not comprised in the original debentures. *Ross v. Army and Navy Hotel Company*, 34 Ch. D. 43; 55 L. T. 472; 35 W. R. 40—C. A. Affirming 55 L. J., Ch. 697—Kay, J.

b. Validity and Effect of.

Charge on After-acquired Property.—A company may charge its after-acquired property, if it be sufficiently specified in the contract to charge it, and the rule is not affected by s. 28, sub-s. 1, of the Irish Judicature Act (corresponding with the English Judicature Act, 1875, s. 10). Debentures issued by a joint stock company charging the undertaking, stock-in-trade, land,

premises, and plant, and the property and effects, present and future, of the company :—Held, to charge the after-acquired stock-in-trade and other property of the company in priority to its general creditors. *Dublin Drapery Company, In re, Cow, Ex parte, ante*, col. 366.

Whether other Debenture-holders estopped from denying Validity.—*See Mowatt v. Castle Steel and Iron Works Company, infra.*

Floating Security—Power to deal with Property—Sale.—A company, which carried on the business of ironmasters and manufacturers, issued debentures for a total sum of 500,000*l.*, by which they charged their undertaking, works, stock-in-trade, plant, moneys, and other real and personal property, both present and future, with the payment of the sums secured by the debentures “to the intent that the same charge shall, until default in payment of the principal or interest, to accrue due or become payable in respect of the said sum of 500,000*l.*, or some part thereof, be a floating security upon the undertaking, works, and property of the company, not hindering sales or leases of, or other dealings with, any of the property or assets of the company in the course of its business as a going concern.” The company afterwards contracted to sell some of their land :—Held, that the purchaser was entitled to reasonable evidence that there had been no default in the payment of the principal or interest of the debentures. *Florence Land and Public Works Company, In re* (10 Ch. D. 530), and *Colonial Trusts Corporation, In re* (15 Ch. D. 465), distinguished. *Horne and Holland, In re*, 29 Ch. D. 736; 54 L. J., Ch. 919; 53 L. T. 562—Pearson, J.

c. Priorities.

Debenture Stock—Mortgages—Bonds.—S. 30 of the Companies Clauses Act, 1863, saves the priority of mortgages and bonds granted before the “creation” of debenture stock. *Burry Port and Gwendreath Valley Railway, In re*, 54 L. J., Ch. 710; 52 L. T. 842; 33 W. R. 741—Kay, J.

A railway company, having unexhausted powers of borrowing, obtained a special act giving them further powers to borrow on mortgage, and “in lieu thereof” to create and issue debenture stock; and provided for the priority of existing mortgages or bonds. The company exercised such borrowing powers by the creation of debenture stock. Subsequently to such creation the company alternately issued debenture stock and bonds. The income was insufficient to pay the interest on the debenture stock and bonds :—Held, that the special act in effect substituted the time of the passing of that act for the creation of the debenture stock (the time specified in s. 24 of the Companies Clauses Act, 1863) as the period for determining in what order the stock was to rank, and also that the interest on all mortgages or bonds subsisting at the time of the passing of the special act had priority over the interest on debenture stock granted by virtue of that act, and that the interest on bonds granted after the passing of that act ranked *pari passu* with the interest on the debenture stock. *Ib.*

The directors of a company with power to borrow, or create mortgages, or issue debentures,

issued debentures purporting to charge the undertaking and the hereditaments and effects of the company with the payment of the sums mentioned in the debentures respectively, to the intent that the debentures might rank equally as a first charge on the undertaking, hereditaments, and effects of the company. They afterwards, in consideration of 4,000*l.* advanced and applied to the purposes of the company, deposited with the plaintiff the title-deeds of the colliery the property of the company, and by a written agreement charged the property comprised in the deeds with the payment to the plaintiff of 4,000*l.* and interest :—Held, that the mortgage to the plaintiff had priority over the debentures. *Wheatley v. Silkstone and Haigh Moor Coal Company*, 29 Ch. D. 715; 54 L. J., Ch. 778; 52 L. T. 798; 33 W. R. 797—North, J.

Hypothecation of Freight—Debenture-holders.—*See Ward v. Royal Exchange Shipping Company, ante*, col. 365.

d. Issue.

Sealed but not Delivered—Payable to Bearer.]

—The directors of a company directed their secretary to make arrangements for the issue of debentures, for payment of advances to the company. The debentures were accordingly prepared, being made payable to bearer, and sealed and stamped; and were placed in a box, the key of which was kept by the secretary. The box was deposited in the office of the company, which was also the office of T., one of the directors, who had made large advances to the company. Some of the debentures were given out by the secretary to an agent, for him to issue them to the public, which he did not succeed in doing. The company was wound up by order of the court. After the commencement of the winding-up the agent returned the debentures to T., who gave some of them to R. & Co., his own creditors. They took them, believing that they had been regularly issued, and that T. had power to dispose of them :—Held, that the debentures had not been issued before the commencement of the winding-up :—Held, also, that the other debenture-holders of the company were not estopped from disputing the validity of the debentures held by R. & Co. Whether the company would have been estopped, *quære*. *Mowatt v. Castle Steel and Iron Works Company*, 34 Ch. D. 58; 55 L. T. 645—C. A.

Over-issue—Warranty of Authority by Directors—Measure of Damages.]

—The plaintiff contracted to make a railway, and did work for which he was entitled to be paid in cash. The company not being in a position to pay, an agreement was made during the progress of the works by which the plaintiff agreed to accept debenture stock in lieu of cash. The defendants, who were directors of the company, thereupon issued to the plaintiff certificates for the agreed amount of debenture stock, such certificates being signed by two of the defendants. At that time, although the fact was not known to the defendants, all the debenture stock which the company were entitled to issue had been issued, and consequently that which the plaintiff received was an over-issue and valueless. The company subsequently went into liquidation,

but valid debenture stock retained its par value. In an action to make the defendants personally liable for the amount of the debenture stock which should have been issued to the plaintiff under the agreement:—Held, that the defendants were liable on their implied representation that they had authority to issue valid debenture stock which would be a good security, and that under the circumstances the damages were the nominal amount of the stock which the plaintiff ought to have received under his agreement. *Firbank v. Humphreys*, 18 Q. B. D. 54; 56 L. J., Q. B. 57; 56 L. T. 36; 35 W. R. 92—C. A.

The M. Docks Company were empowered by their special acts to issue debenture stock to a fixed amount. Between April, 1881 and 1883, various transactions took place between the secretary of the Docks Company and the London agents of the plaintiffs, in respect of advances by the plaintiffs to the company, the usual arrangement being that the plaintiffs should take a bill of exchange drawn upon the company by the contractors of the company, and also certificates of debenture stock, accompanied by a letter from the secretary to the effect that the certificates were a collateral security. The advances were renewed from time to time, and finally consolidated by an agreement of the 20th October, 1882, made in consideration of a further advance. Some of these certificates were indorsed by G., one of the directors of the Docks Company, to the effect that the stock represented thereby was within the statutory limit. In January, 1883, it came to the knowledge of the Docks Company that there had been an over-issue of debenture stock since January, 1881, and that the company was insolvent. A special act was obtained under which an arbitrator was appointed to settle the claims arising out of the condition of the company. Under that act, certain classes of debenture stock were authorised to be issued. Stock under one of these classes was awarded and issued to the plaintiffs in respect of their loan and interest. The stock was admitted to be worthless, and the plaintiffs brought an action for damages against the directors and the secretary:—Held, that the plaintiffs advanced their money on the faith of the warranty contained in the indorsements on the certificates by G., and were, therefore, entitled to damages against him. Held, also, that the measure of such damages was the difference between the values of the certificates as delivered, and those which ought to have been delivered, which in this case was the whole amount advanced by the plaintiffs. Held, further, that the issue of debenture stock by way of collateral security was not ultra vires the Companies Clauses Act, 1863, s. 22. *Whitehaven Joint Stock Banking Company v. Reed*, 54 L. T. 360—C. A.

e. Rights of Holders.

Receiver — Company Parting with Whole Undertaking.—The right of the holder of a debenture which is a charge on the undertaking of a company, to enforce his security, attaches if the company parts with the whole, or substantially the whole of its undertaking and assets otherwise than in the ordinary course of business, and ceases to be a going concern. The proper remedy of the debenture-holder in such a case is by the

appointment of a receiver of the property comprised in his debenture. *Hubbuck v. Helms*, 56 L. J., Ch. 536; 56 L. T. 232; 35 W. R. 574—Stirling, J.

Where in such a case the debenture-holder, suing on behalf of himself and the other debenture-holders, merely claimed a declaration that the transaction was void, and an injunction to restrain the person who had affected to purchase the undertaking and assets from dealing therewith, the court, on an interlocutory application for an injunction, being satisfied that under the circumstances no injustice would be thereby done, gave leave to amend by claiming a receiver and the realisation of the security of the debenture-holders. Injunction granted until the trial restraining the purchaser from dealing with the property comprised in the assignment to him otherwise than in the ordinary course of the business carried on by the company, or in the exercise of rights previously acquired by him as mortgagee. *Ib.*

— Winding-up — Liquidator.—A motion for a receiver in an action by a debenture-holder came on for hearing on the same day as a creditor's winding-up petition. The court made the winding-up order, but declined to appoint a receiver, on the ground that the appointment of a liquidator would be a sufficient protection to the debenture-holders:—Held, on appeal, that the debenture-holders were entitled to special protection, and the official liquidator was appointed receiver. *Wilmott v. London Celluloid Company*, 52 L. T. 642—C. A.

— Judgment Creditors.—In an action by a debenture-holder on behalf of himself and the other holders of an issue of 15,000*l.* debentures, the court declared that the holders of that issue were entitled to stand in the position of judgment creditors for 15,000*l.*, and appointed a receiver of the property of the company subject to be seized by a judgment creditor. *Hope v. Croydon and Norwood Tramways Company*, 34 Ch. D. 730; 56 L. J., Ch. 760; 56 L. T. 822; 35 W. R. 594—North, J.

— Continuation of Receiver and Manager after Judgment.—Upon default being made by a company in the payment of interest on the debentures issued by it a debenture-holder commenced an action on behalf of himself and all other debenture-holders against the company, for the enforcement of their security, and for the appointment of a receiver and manager. A receiver and manager was duly appointed, and, on the company subsequently going into voluntary liquidation, he was continued as liquidator. The action came on as a short cause upon motion for judgment. The minutes provided for an account to be taken of what was due under and by virtue of the plaintiff's security, and for sale; also for the continuation of the receiver and manager until further order:—Held, that the minutes ought to contain a provision, not only for the continuation of the receiver and manager, but also for his discharge:—Held, therefore, that a direction should be inserted in the minutes that the business of the company was not to be carried on by the receiver and manager for a longer period than six months without the leave of the judge in chambers; and that, if any further time should be required, an

application for further time must be made before the expiration of the six months. *Day v. Sykes*, 55 L. T. 763—Chitty, J.

Right of Debenture-holders to Surplus Lands.]—*See Hull, Barnsley and West Riding Railway, In re*, post, RAILWAY.

V. CAPITAL.

1. PAYMENT OF DIVIDENDS OUT OF.

Liability of Directors.]—*See cases*, ante, cols. 360, 361, 362.

2. REDUCTION OF.

a. In what Cases.

Resolutions passed at same Meeting to alter Articles and reduce Capital.]—A company, the regulations of which did not authorise a reduction of capital, passed on the 30th of October—

(1) A resolution inserting in the articles a power to reduce its capital; and (2) a resolution for reducing the capital. Both these resolutions were confirmed at a meeting on the 16th of November:—Held, that the court could not confirm the resolution for the reduction of capital, for that a special resolution for that purpose could not be passed until after the regulations of the company had been altered so as to make them authorise a reduction of capital. *Patent Invert Sugar Company, In re*, 31 Ch. D. 166; 55 L. J., Ch. 924; 53 L. T. 698, 737; 34 W. R. 169—C. A.

Resolutions for Reduction of.]—*See Taylor v. Pilsen Electric Light Company*, post, col. 406.

Sanction of Court—General Principles.]—Semble, on an application to sanction a reduction of capital the judge, though satisfied that the rights of creditors are not interfered with by the reduction, is not bound to sanction it if he sees that it would work unfairly as against any shareholders who do not consent to it. *Bannatyne v. Direct Spanish Telegraph Co.*, infra.—Per Cotton, L. J.

The power given to the court by s. 11 of the Companies Act, 1867, to confirm a resolution to reduce capital is a discretionary power—that is to say, the court may exercise it either by confirming with or without conditions, or by declining to confirm on a full consideration of all the circumstances. One matter to be taken into account is, whether the proposed scheme would work injustice between the different classes of shareholders; if, in the opinion of the court, such would be its effect, it is not the function of the court to impose conditions amounting to an alteration of the scheme; but the proper course to take, if such an alteration is requisite, is simply to refuse to confirm the resolution, leaving it to the company to prepare a new scheme if they should think fit. *Direct Spanish Telegraph Company, In re*, 34 Ch. D. 307; 56 L. J., Ch. 353; 55 L. T. 804; 35 W. R. 209—Kay, J.

— **Ordinary and Preference Shareholders.]**—The capital of a company consisted of ordinary shares of 10*l.* each, part issued with 9*l.* per share paid up and the remainder unissued, and of preference shares of 10*l.* each, all fully paid up, bearing a fixed preferential dividend of 10 per cent. per

annum, the deficiency in any year to be made up out of the profits of the next or subsequent years. No dividend had been paid on the ordinary shares, and there were some preference dividends in arrear, they having been retained towards replacing the company's reserve fund which had become exhausted. The company having lost part of its assets, passed a special resolution for reducing its capital by a corresponding amount. This they did by writing off 5*l.* per share from the amount paid up on each issued share and 5*l.* per share from the nominal amount of each unissued share; the effect of which, it appeared, would be to place the company at once in a dividend-paying condition, and set free for the preference shareholders the preference dividends which had been retained. The resolution was passed by large majorities of both classes of shareholders. Upon a petition presented by the company under the Companies Acts, 1867 and 1877, the court confirmed the resolution for reduction. *Id.*

The articles of a submarine telegraph company, limited by shares, and formed in 1872, with a capital of 130,000*l.* in 10*l.* shares, gave power to increase the capital by the issue of new shares, with power to give preferential rights to any shares so created. It was provided that such new capital should be considered part of the original capital, and should be subject to the same provisions, except so far as the resolutions authorising the raising of it might otherwise direct. The articles also empowered the company by special resolution to reduce its capital, and alter the amount and denomination of its shares. In 1874 a special resolution was passed for raising 60,000*l.* by the issue of 6,000 shares of 10*l.* each, which were to be paid up in full on allotment, and to be entitled to a fixed preferential dividend of 10*l.* per cent. These shares were all taken and paid up. In 1884 one of the submarine cables of the company broke down, and was lost, diminishing the assets by about one half. The company passed a special resolution for reducing the capital to one half by reducing to one half the nominal amount of each share, ordinary or preferential. A preferential shareholder brought an action on behalf of himself and the other preferential shareholders to restrain the company from acting on that resolution and from applying to the court to sanction it. Bacon, V.-C., granted an injunction, being of opinion that what was proposed to be done was a breach of the company's contract with the preferential shareholders:—Held, on appeal, that the preference shareholders took their shares subject to the provisions of the articles which contained a power to the company to reduce its capital and alter the amount and denomination of its shares; that there was no bargain with the preference shareholders that they should receive 6,000*l.* a year on the whole of their shares, the resolution being satisfied by their receiving 10*l.* per cent. on the nominal amount of their shares, and that what was proposed to be done was no breach of the contract with them. *Bannatyne v. Direct Spanish Telegraph Company*, 34 Ch. D. 287; 56 L. J., Ch. 107; 55 L. T. 716; 35 W. R. 125—C. A.

If what it was proposed to do had been a breach of the contract with the preference shareholders, the preference shareholders would have had a right to prevent the company from exercising in a manner inconsistent with the

contract, the powers for reduction of capital given by 30 & 31 Vict. c. 131, and 40 & 41 Vict. c. 26. *Ib.* Per Cotton, L.J.

The articles of a company provided that by a special resolution its capital might be increased by the creation of new shares which should have priority in respect of dividends if it should be deemed expedient. The original articles contained no power to reduce capital. In 1872 the company issued preference shares at 8 per cent., and in 1876 further preference shares at 6 per cent.; but it was provided that the holders of all preference shares should have no power of voting. In 1885 special resolutions were passed giving the company power to reduce its capital. After this, special resolutions reducing the preference shares by a quarter of the nominal value were passed. The petition for confirmation of the proposed reduction was opposed by the preference shareholders on the ground that the reduction was a breach of contract, and was unfair, but the majority of the preference shareholders assented to the reduction.—Held, that the preference shareholders must be deemed to have taken their shares subject to the power given by the Companies Act, 1867, to alter the articles and reduce the capital; that the company had not contracted and could not contract that the preference shares should never be reduced; and that, though the court had a discretionary power to refuse to sanction any unfair reduction, there was no reason for refusal in the present case. *Barrow Hæmatite Steel Company, In re*, 39 Ch. D. 582; 58 L. J., Ch. 148; 59 L. T. 500; 37 W. R. 249—North, J.

— **Shares issued at Discount.**—*See New Chile Gold Mining Company, In re*, post, col. 384.

— **Capital partly Repaid.**—A company was incorporated on the 24th March, 1864, with a nominal capital of 600,000*l.* divided into 30,000 shares of 20*l.* each. The whole of the 30,000 shares were issued, and the sum of 14*l.* per share was paid up thereon. By special resolution duly passed and confirmed at extraordinary general meetings of the company, duly convened and held on the 20th December, 1887, and the 4th January, 1888, respectively, the company resolved as follows: "That in respect of each of the shares in the capital of the company, upon all of which the sum of 14*l.* per share has been paid up, capital be paid off or returned to the extent of 3*l.* per share, so as to reduce the capital paid upon all such shares to the sum of 11*l.* per share upon the footing that the amount paid off or returned on each share, or any part of it, may be called up again in the same manner as if it had never been paid." The nominal capital of the company was not altered by the proposed reduction. On petition that the resolution might be confirmed by the court:—Held, that the court had power to make the order. *Fore Street Warehouse Company, In re*, 59 L. T. 214; 1 Meg. 67—Kay, J.

— **Writing off—Unpaid Calls.**—The nominal capital of a company consisted of 1,000,000*l.* in 20,000 shares of 50*l.* each. Only 6,044 shares were issued—1,359 as preference shares, and the remaining 4,685 as ordinary shares. All the preference shares and 4,360 of the ordinary shares were fully paid up. On the remaining 325

ordinary shares only 38*l.* per share had been called up, and that sum had been paid on all of these shares except 37, on which only 30*l.* per share had been paid. Part of their capital having been lost, the company passed a resolution for the reduction of its nominal amount by writing off 35*l.* from each preference share and 38*l.* from each ordinary share. It was proposed to state in the minute, which was to be registered, that on 325 of the ordinary shares (specified by their numbers) nothing was to be deemed to have been paid up, all the other issued shares being deemed to have been fully paid up. A petition was presented under the Companies Acts, 1867 and 1877, to obtain the sanction of the court to the resolution, the petition being supported by evidence that the holders of the 37 shares on which the 8*l.* call had not been paid were persons of no means, and that it would be impossible to recover anything from them:—Held, that the order should be made as prayed, but without prejudice to any claim which might be made on the holders of the 37 shares in respect of the 8*l.* call. *Great Western Steamship Company, In re*, 56 L. J., Ch. 3; 35 W. R. 154—North, J.

Company Purchasing its own Shares.—*See Trevor v. Whitworth*, post, col. 384.

b. Petition for.

Advertisement—Before List settled.—A petition to reduce the capital of a company, where the rights of creditors are not affected, may be advertised at once, without waiting until a list of creditors has been settled by the chief clerk. *People's Café Company, In re*, 55 L. J., Ch. 312; 34 W. R. 229—Pearson, J.

— **Company with Numerous Agencies.**—In the case of a petition for reduction of capital presented by a fire insurance company having numerous agencies in Ireland, the provinces, and abroad, the court directed that notice of the presentation of the petition and the day fixed for hearing should be inserted not only in the *London and Dublin Gazettes*, but also in newspapers circulated in each of ten other places at which the company had agencies. *London and Provincial Fire Insurance Company, In re*, 55 L. J., Ch. 630; 55 L. T. 55—Chitty, J.

— **When dispensed with.**—On petition to confirm a resolution for reduction of capital of a company, where capital had been lost, and it had been resolved that the lost capital should be wiped off, as the resolution did not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital, and it was not necessary to cite any creditors:—Held, that the preliminary advertisement of the petition might be dispensed with. *British Land and Mortgage Company of America, In re*, 53 L. T. 753—V.-C. B.

In cases of petitions for the reduction of the capital of a company by writing off paid-up capital which has been lost, the court does not, as a matter of course, dispense with advertisement of the petition, even although it be stated that there are no creditors. *E. C. Powder Co., In re*, 56 L. J., Ch. 783; 56 L. T. 610—Chitty, J.

Where a company presented a petition for the

reduction of capital by cancelling lost capital, and notice of the presentation of the petition had been sent to each shareholder individually, and the only creditor of the company was the company's solicitor, the court declined to dispense with the usual advertisement between the date of the presentation and the hearing of the petition. *Municipal Trust Company, In re*, 55 L. T. 632; 35 W. R. 120—Chitty, J.

Notice of the presentation of a petition under the Companies Acts, 1867 and 1877, for the reduction of capital must, in ordinary cases, be advertised before the hearing. *Consolidated Telephone Company, In re*, 54 L. J., Ch. 795; 52 L. T. 575; 33 W. R. 408—Chitty, J.

— Court of Appeal not interfering with Order of Court below.—A limited company, whose shares were all fully paid up, having lost part of its capital, presented a petition to reduce the nominal capital by the amount of the loss, reducing the nominal amount of each share from 1*l.* to 12*s.* 6*d.* The court refused to hear the petition until its presentation had been advertised as prescribed by the 5th rule of the General Order of 1868, made under the Companies Act, 1867:—Held, on appeal, that a petition for reduction of capital authorized by the Companies Act, 1877, ought *prima facie* to be advertised as directed by the General Order of 1868, though the judge has a discretion to dispense with advertisements if he is satisfied that the interests of creditors cannot be affected by what is proposed, and that as in the present case the judge in his discretion thought that the petition ought to be advertised, the Court of Appeal would not interfere. *Tambracherry Estates Company, In re*, 29 Ch. D. 683; 54 L. J., Ch. 792; 52 L. T. 712—C. A.

List.—Chief Clerk's Certificate.—On a petition for reduction of capital by cancelling capital which was lost, or was unrepresented by available assets, the court dispensed with the list or chief clerk's certificate of creditors, but ordered the petition to be advertised in the Form No. 8, to the schedule to the General Order of March, 1868. *London and County Plate Glass Insurance Co., In re*, 53 L. T. 486—Kay, J.

Order made without Reference to Chambers.—A limited company, which had issued only a small portion of its shares on which nothing had been paid, presented a petition for the confirmation by the court of a special resolution passed by the company reducing its capital from 1,000,000*l.* to 400,000*l.*, and for liberty to dispense with the words "and reduced" as part of the name of the company. No prospectus had been issued. There was only one creditor of the company, and he consented to the application. The presentation of the petition had been advertised:—Held, that the order confirming the reduction might be made at once without any inquiry at chambers, and without any further advertisement; and that the use of the words "and reduced" might be dispensed with on the production of an affidavit that no prospectus had been issued. *West African Telegraph Company, In re, Vivian & Company, In re*, 55 L. J., Ch. 436; 54 L. T. 384; 34 W. R. 411—Pearson, J.

"And reduced" dispensed with.—Pending the hearing of a petition about to be presented

to obtain the sanction of the court to a resolution for the reduction of capital, the court gave the company permission to dispense with the words "and reduced." *River Plate Fresh Meat Company, In re*, 52 L. T. 39; 33 W. R. 319—V.-C. B., and see preceding case.

Where a company presented a petition for the reduction of capital by cancelling lost capital, and notice of the presentation of the petition had been sent to each shareholder individually, and the only creditor of the company was the company's solicitor, the court declined to dispense with the use of the words "and reduced." *Municipal Trust Company, In re*, 55 L. T. 632; 35 W. R. 120—Chitty, J.

— Abandonment of Resolution.—Where a special resolution for reduction of capital has been abandoned before its confirmation by the court, the court will give leave to discontinue forthwith the use of the words "and reduced" as part of the company's name. *Morley & Co., In re*, 53 L. T. 736—C. A.

Form of Minute.—On the 20th February, 1888, a petition was presented by a company asking the court to confirm a special resolution passed on the 25th November, 1887, and confirmed on the 16th December, for the reduction of capital. On the 21st February, 1888, on motion, Kay, J., being satisfied that the reduction of capital proposed did not involve any diminution of liability in respect of unpaid capital, or the payment to any shareholders of any paid-up capital, and the creditors, therefore, not being entitled to object, made this order: "Let the petition be in the paper for hearing on Saturday week, without any advertisement of the notice, and without any certificate as to creditors." On the hearing of the petition:—Held, that the minute proposed to be registered should have on the face of it the amount of the original, as well as of the reduced capital. Order: "The court, not requiring notice of the day appointed for hearing, confirm the special resolution. Liberty to discontinue the words 'and reduced' forthwith, and approve of the minute in the copy petition. Advertise as required by the act, in the London Gazette, the Times, and principal Whitehaven paper." *West Cumberland Iron and Steel Company, In re*, 58 L. T. 152—Kay, J.

VI. SHARES AND STOCK.

1. SALE ON STOCK EXCHANGE.

Refusal of Company to register Transfer.—Action to recover Price.—A contract for the sale of shares in a registered company was made through brokers upon and subject to the rules of the Stock Exchange. In accordance with the practice of the Stock Exchange, the transferee of the shares paid the price of them to the vendor upon delivery to him of a duly executed transfer. An application for registration of the transfer being subsequently made to the directors of the company, who were empowered by the articles of association in their discretion to decline to register a person claiming by transfer of shares, they refused to register the transferee as a member of the company. The transferee thereupon brought an action to recover back the price of the shares from the vendor as

money had and received to his use:—Held, following *Stray v. Russell* (1 E. & E. 888, 917), that the contract for the sale of shares on the Stock Exchange did not import an undertaking by the vendor that the company would register the transferee, and that the action was not maintainable. *London Founders Association v. Clarke*, 20 Q. B. D. 576; 57 L. J., Q. B. 291; 59 L. T. 93; 36 W. R. 489—C. A.

Rights and Liabilities of Broker.—See PRINCIPAL AND AGENT.

2. APPLICATION AND ALLOTMENT.

Exchange of Shares—Executors—Personal Liability.—Upon the amalgamation in 1882 between the S. and C. banking companies, A., a holder of 100 shares in the S. Bank, received a circular asking whether he would exchange his shares in the S. Bank for shares in the C. Bank, which took over the business of the other. A. died shortly afterwards without having sent any reply to the circular. On the 27th of February, 1883, a letter was sent on behalf of A.'s executors to the C. Bank, "enclosing certificate for 100 shares of the S. Bank in the name of" A., "and will thank you to let us have shares in your bank in exchange." On the 28th of February, the manager replied that when probate had been exhibited to the London agents of the bank he would send share certificates in the bank "in the name of the executors individually." A certificate was made out to the executors of 100 shares in the C. Bank, and an entry made in the share register with the description "executors of A." The executors wrote that they objected to have the certificate in their names, and requested the bank to forward them one in the name of A. The directors accordingly ordered the certificate to be cancelled, and one made out in the name of A. for 100 shares. On summons by the liquidator for rectification of the register by striking out the name of A., and putting in place of it the names of the executors as holders of the 100 shares:—Held, that the letters of the 27th and 28th of February constituted by application and acceptance a completed contract between the executors and the bank that 100 shares should be taken in the names of the executors individually, and further, that such completed contract was not, and could not have been, afterwards rescinded by the company, and that therefore the register must be rectified. *Cheshire Banking Company, In re, Druff's Executors' case*, 32 Ch. D. 301; 54 L. T. 558—C. A.

Application by Agent—Measure of Damages.

—P. authorized his agents to apply for shares in company A., but by mistake they applied for shares in company B., the names of the two companies being very similar. The shares were duly allotted to P. Within a few days the mistake was discovered, but company B. refused to cancel the allotment, and a few months afterwards was ordered to be wound up. P. having succeeded in removing his name from the list of contributories, on the ground that he had never authorized his agents to apply for shares in company B., the liquidator claimed damages from the agents for their breach of warranty. It was admitted that P. could have paid for the shares at the time they were applied for:—Held, that the measure of damages was the full nominal

value of the shares, as that would have been what they would have obtained from P. as a solvent contributory. *National Coffee Palace Company, In re, Panmure, Ex parte*, 24 Ch. D. 367; 53 L. J., Ch. 57; 50 L. T. 38; 32 W. R. 236—C. A.

Allotment—Directors—Quorum—Improperly constituted Board.—R. applied for and was allotted shares in a company, the prospectus of which stated that there were three directors, of whom F. was one. The articles of association of the company provided that the number of directors should not be less than three, nor more than seven; and three names (including that of F.) were given as the first directors. It was also provided that two directors should form a quorum. The company having been subsequently ordered to be wound up, R.'s name was placed on the list of contributories. It came to R.'s knowledge that F. never authorised his name to be used as a director of the company, nor ever acted in that capacity. Accordingly R. objected that there had been no duly constituted board of directors; that two directors could not consider themselves a quorum; and that no acts by them were valid. He therefore claimed that the allotment to him of shares was void; and that he was entitled to have his name removed from the list of contributories, and the money paid by him refunded:—Held, that the want of a properly constituted board of directors when the shares were allotted to R. rendered the allotment invalid; and that the defect was not cured by the provision of the company's articles of association that two directors might form a quorum. Held, therefore, that R.'s name must be struck off the list of contributories. *British Empire Match Company, In re, Ross, Ex parte*, 59 L. T. 291—Kay, J.

Application was invited by a company for 106,000 preference shares. At a meeting of all the directors, five in number, it was resolved not to allot till 14,000 shares were applied for; at a meeting of two (a quorum of) directors held shortly afterwards it was resolved that the previous resolution was cancelled, and that the shares then applied for, about 3,000, should be allotted. The meeting was held at two o'clock, on a few hours' notice to two of the directors who did not attend, of whom one did not receive his notice till the next day, and the other gave notice he could not attend till three; the fifth director was abroad and no notice was sent to him:—Held, that the allotments made under the later resolution were void against the allottees. *Homer District Consolidated Gold Mines, In re, Smith, Ex parte*, 39 Ch. D. 546; 58 L. J., Ch. 134; 60 L. T. 97—North, J.

See also post, XL, 15, d.

3. ISSUE.

Preference Shares—Memorandum of Association—Articles of Association.—A company, with power by its memorandum of association to increase the capital, thereby stated to be "10,000L. divided into 1,000 shares of 10L. each," and with power by the contemporaneous articles of association "by special resolution from time to time to increase the capital of the company by the creation of new shares of such an amount as the company may by such special

resolution determine, and any such new shares may be issued either with or without special privileges and priorities over the original shares,"—having gone into liquidation, a scheme for the reconstruction of the company was proposed with the sanction of the liquidator; and special resolutions were passed and confirmed for an increase of capital by the creation of new shares to be called preference shares, giving to the holders the right to a preferential dividend of 5 per cent. :—Held, that the proposed scheme was not ultra vires, and might be sanctioned by the court. *Harrison v. Mexican Railway Company* (19 L. R., Eq. 358) followed; *Hutton v. Scarborough Cliff Hotel Company* (2 Dr. & Sm. 514); *Guinness v. Land Corporation of Ireland* (22 Ch. D. 349); and *Ashbury v. Watson* (30 Ch. D. 376), distinguished. *South Durham Brewery Company, In re*, 31 Ch. D. 261; 55 L. J., Ch. 179; 53 L. T. 928; 34 W. R. 126—C. A.

The memorandum of association of a company provided that the capital of the company should consist of 500 1,000l. shares. Article 4 of the articles of association gave power to create additional share capital, which might be issued as preference shares. By special resolution under a power in the articles it was resolved that the 500 1,000l. shares should be divided into 50,000 10l. shares, and that the capital should be increased by the creation of 80,000 new 10l. shares. The company by special resolution repealed the original articles and substituted others, one of which was to the same effect as the original article 4. When 100,000 10l. ordinary shares had been issued, the company resolved that the balance of the unissued capital, namely, 300,000l., should be issued as 30,000 new 10l. shares with a preferential dividend :—Held, that the issue of such preferential shares by the directors was intra vires. *Bridgewater Navigation Company, In re*, 39 Ch. D. 1; 57 L. J., Ch. 809; 58 L. T. 476; 36 W. R. 769—North, J.

Issue of Shares at a Discount.—A company limited by shares under the act of 1862 has no power to issue shares at a discount so as to render the shareholder liable for a smaller sum than that fixed for the value of the shares by the memorandum of association; and such issue will be invalid although the contract with the shareholder under which the shares were issued has been registered under s. 25 of the Companies Act, 1867. *Plaskynaston Tube Company, In re* (23 Ch. D. 542), and *Ince Hall Rolling Mills Company, In re* (23 Ch. D. 505, n.), overruled. *Almada and Tinto Company, In re, Allen's case*, 38 Ch. D. 415; 57 L. J., Ch. 706; 59 L. T. 159; 36 W. R. 593; 1 Meg. 28—C. A. S. P. *London Celluloid Company, In re*, 39 Ch. D. 190—Kay, J.

The liquidator of a company in voluntary liquidation entered into an agreement, under s. 161 of the Companies Act, 1862, for the sale of its property to a new company, part of the consideration being the issue to each shareholder of the old company of one share of 1l. in the new company, with 15s. credited as paid up thereon, in exchange for each fully paid-up share of 1l. in the old company held by such shareholder, and that the remaining 5s. per share should be payable by the allottee at the times mentioned in the agreement. The whole

of the shares in the new company, 500,000 in number, were issued to the shareholders in the old company in the manner mentioned in the agreement. Prior to their issue a contract providing for their being issued in that way was filed with the registrar of joint-stock companies, under s. 25 of the Companies Act, 1867. The company afterwards increased its capital by the creation of 500,000 more shares of 1l. each, of which 50,000 were issued as fully paid up as the consideration for the purchase of other property by the company, and 240,000 were issued at a discount of 15s. per share, a contract being in each case filed, prior to the issue, with the registrar of joint-stock companies. After this had been done the company passed a special resolution for the reduction of the capital by cancelling paid-up capital to the extent of 15s. per share, as having been lost or being unrepresented by available assets. The company petitioned for the confirmation of the resolution by the court. There was no evidence of any loss of capital otherwise than by reason of the issue of the shares at a discount :—Held, that the issue of the shares at a discount was illegal, and that the shareholders were still liable to the extent of 15s. per share, and therefore, that the proposed reduction of capital could not be confirmed by the court. *New Chile Gold Mining Company, In re*, 38 Ch. D. 475; 57 L. J., Ch. 1042; 59 L. T. 506; 36 W. R. 909—North, J.

4. PROVISIONS IN ARTICLES OF ASSOCIATION.

Power to Issue Preference Shares.—*See Cases, supra.*

Power of Company to Purchase its own Shares.—A limited company was incorporated under the Joint Stock Companies Acts with the objects (as stated in its memorandum) of acquiring and carrying on a manufacturing business, and any other businesses and transactions which the company might consider to be in any way conducive or auxiliary thereto or in any way connected therewith. The articles authorised the company to purchase its own shares. The company having gone into liquidation a former shareholder made a claim against the company for the balance of the price of his shares sold by him to the company before the liquidation and not wholly paid for :—Held, that such a company has no power under the Companies Acts to purchase its own shares, that the purchase was therefore ultra vires, and that the claim must fail. The reasoning of the Court of Appeal in *Dronfield Silkstone Coal Company, In re* (17 Ch. D. 76), disapproved. *Trevor v. Whitworth*, 12 App. Cas. 409; 57 L. J., Ch. 28; 57 L. T. 457; 36 W. R. 145—H. L. (E.).

Lien of Company on Shares—Deposit of Certificate of Shares—Notice of Trust.—The articles of association of a company registered under the Companies Act, 1862, provided that the company should have "a first and permanent lien and charge, available at law and in equity, upon every share for all debts due from the holder thereof." A shareholder deposited his share certificates with a bank as security for the balance due and to become due on his current account, and the bank gave the company

notice of the deposit. The certificates stated that the shares were held subject to the articles of association:—Held, that the company could not in respect of moneys which became due from the shareholder to the company after notice of the deposit with the bank claim priority over advances by the bank made after such notice, but that the principle of *Hopkinson v. Rolt* (9 H. L. C. 514) applied, and also, that the notice to the company of the deposit with the bank was not a notice of a trust within the meaning of the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 30, and the bank by giving notice of the deposit did not seek to affect the company with notice of a trust, but only to affect the company in their capacity as traders with notice of the interest of the bank. *Bradford Banking Company v. Briggs*, 12 App. Cas. 29; 56 L. J., Ch. 364; 56 L. T. 62; 35 W. R. 521—H. L. (E.).

The articles of association of a limited company provided that the company should have "a first and paramount lien" upon the shares of every member for his debts, liabilities, and engagements to the company. A shareholder made an equitable mortgage of his shares in favour of the plaintiff as security for an advance, and the plaintiff gave the company notice of his charge. After the date of the notice the shareholder gave a written guarantee to the company:—Held, in accordance with *Bradford Banking Company v. Briggs* (31 Ch. D. 19, in C. A. reversed in H. L.), that, supposing the guarantee to have been given for valuable consideration, the company were by virtue of their articles entitled to priority for their claims over the charge in favour of the plaintiff. *Miles v. New Zealand Alford Estate Company*, 32 Ch. D. 266; 55 L. J., Ch. 801; 54 L. T. 582; 34 W. R. 669—C. A.

Surrender to Company of Shares held by Servants.]—The articles of association of a company provided that all employes of the company other than the managing directors should, on the termination of their service, surrender their shares to the company. The company was now being wound up, and a cashier who was discharged in 1882 applied for the removal of his name from the list of contributories, and for repayment to him of the value as in 1882 of his shares, and for indemnity against subsequent calls:—Held, that no such relief could be granted. *Walker and Hacking, In re*, 57 L. T. 763—Stirling, J.

Provisions against Alienation by Officer.]—A provision in articles of association that fully paid-up shares issued to an officer of the company should be retained by him and not dealt with by him for a period of seven years:—Held, to be a provision for the protection of the company, and not to entitle a shareholder to invalidate a call made at a meeting of directors, at which a transferee of such shares was necessarily present to form a quorum, such transfer having been made by the consent of the company within the seven years. *London and Westminster Supply Association v. Griffiths*, 1 C. & E. 15—Stephen, J.

5. TRANSFER.

Delivery of Transfer Deed to Secretary.]—Under the provisions of the Companies Clauses Consolidation Act, 1845, a deed of transfer of

shares or stock does not pass the legal interest to the transferee until it has been delivered to the secretary of the company. If he returns it because it does not comply with the requisitions of the act it is to be considered as not delivered to him. *Nanney v. Morgan*, 37 Ch. D. 346; 57 L. J., Ch. 311; 58 L. T. 238; 36 W. R. 677—C. A.

Trustees who held railway stock in trust for H. B. absolutely, executed a deed of transfer to him, and delivered it to the secretary of the company, who returned it because it was not properly stamped and dated. After this H. B. made a voluntary settlement purporting to include this stock. Several years afterwards the defects in the deed of transfer were supplied, and it was delivered to the secretary, who received it and registered the stock in H. B.'s name:—Held, that at the time of the execution of the voluntary settlement the stock was not legally vested in H. B., but that he was only equitable owner. That the voluntary settlement of it therefore was effectual, and that H. B.'s representative was bound to transfer the stock to the trustees of the voluntary settlement. *Id.*

Non-registration—Inchoate Legal Title—Pre-existing Equitable Title.]—The deed of settlement under which a company was formed provided (a) that no person claiming to be the proprietor of any share by transfer should be treated as such unless and until he should have been registered in the register of shareholders as the proprietor of such share; (b) that no person should be entitled to be registered as the proprietor of any share unless and until by execution of the deed of settlement, or some deed referring thereto, he should have undertaken all the obligations of the shareholder; and (c) that every transfer should be effected by deed which, when executed, should be deposited or left at the office of the company. The plaintiff, a married woman, living apart from her husband, purchased shares in the company with moneys forming part of her separate estate, and such shares were transferred to and registered in the name of W., who held them as trustee for her for her separate use. W., being indebted to the defendants, as a security for his debt, deposited with them the certificates, and executed to them a transfer of the shares. The deed of transfer did not refer to the deed of settlement, and the defendants sent it (along with the certificates) to the office of the company, for registration; but did not execute or offer to execute the deed of settlement. The company having received notice that the plaintiff claimed the beneficial ownership of the shares, did not proceed to register the transfer. In an action by the plaintiff to establish her title to the shares:—Held, that the defendants had neither a complete legal title to the shares, nor as between themselves and the company an unconditional right to be registered as shareholders in the place of W., and that their title being inchoate only was insufficient to defeat the pre-existing equitable title of the plaintiff. *Dodds v. Hills* (2 H. & M. 424), observed upon and distinguished. *Roots v. Williamson*, 38 Ch. D. 485; 57 L. J., Ch. 995; 58 L. T. 802; 36 W. R. 758—Stirling, J.

Approval of Board—Proof.]—Where a company's articles of association provided that "no

share shall be transferred without the approval of the board," it is not necessary to show a direct approval by the board, but such approval may be inferred from the way the shares have been dealt with in the company's books. *Branksea Island Company, In re, Bentinck, Ex parte*, 1 Meg. 23—C. A.

See, also, post, XI. 15, e.

Shareholder indebted to Company—Liquidation of Shareholder—Refusal of Company to register Trustee.—By the articles of association of a company it was provided that the directors might refuse to register a transfer of shares while the shareholder making the same was indebted to the company, or if they should consider the transferee an irresponsible person. It was also provided that persons becoming entitled to shares in consequence of the death, insolvency, or bankruptcy of a shareholder might be registered on the production of such evidence as might from time to time be required by the directors, and that any transfer or pretended transfer of shares not being approved by the directors should be absolutely void. A holder of shares in the company executed transfers of such shares to the nominees of a bank as a security for advances. The company refused to register these transfers, on the ground that the transferor was indebted to the company. Subsequently, the transferor having filed a liquidation petition, a trustee in liquidation was duly appointed. Such trustee, with the consent of the bank and their nominees, applied to the directors of the company to be registered as the owner of the shares, but they refused the application. The bank, though consenting to the trustee's registration, had never waived their security.—Held, that the declining to register the transfers by the directors was not a disapproval of them so as to render them void within the meaning of the articles, that the trustee was not entitled to the shares within the meaning of the articles so long as the transfers remained in force, and that the trustee was not entitled to be registered, notwithstanding the consent of the transferees. *Harrison, Ex parte, Cannock and Rugeley Colliery Company, In re*, 28 Ch. D. 363; 54 L. J., Ch. 554; 53 L. T. 189—C. A.

Blank Transfer—Rights of Holder.—F., the registered holder of shares in a company, deposited the certificates with C. as security for 150*l.*, and gave him a transfer signed by F., with the consideration, the date, and the name of the transferee left in blank. C. deposited the certificates and the blank transfer with Q. as security for 250*l.* C. died insolvent, after which Q. filled in his own name as transferee, and sent in the transfer for registration. The shares were accordingly registered in Q.'s name, but whether this was done before notice given by F. to the company and to Q. that F. denied the validity of the transfer, was doubtful on the evidence.—Held, that Q. had no title against F. except to the extent of what was due from F. to C. *France v. Clark*, 26 Ch. D. 257; 53 L. J., Ch. 585; 50 L. T. 1; 32 W. R. 466—C. A.

A person who without inquiry takes from another an instrument signed in blank by a third party, and fills up the blanks, cannot, even in the case of a negotiable instrument, claim the benefit of being a purchaser for value without

notice, so as to acquire a greater right than the person from whom he himself received the instrument. If a debtor delivers to his creditor a blank transfer by way of security, that does not enable the creditor to delegate to another person authority to fill it up for purposes foreign to the original contract. *Sargent, Ex parte* (17 L. R., Eq. 273), observed upon. *Id.*

Want of Seal—Evidence of Sealing and Delivery.—A. deposited with B., his stockbroker, the certificates of shares in the Balkis Consolidated Company, and executed a blank transfer to secure the balance of his current account. The articles of the company required that transfers of shares should be made by deed. Shortly afterwards B. filled up the blank transfer with the name of L. as transferee, and deposited the shares with L. as security for money borrowed, as he alleged, in pursuance of the general directions of A. Later on B. closed A.'s account and sold the shares. L., who was willing that the purchase should be completed, applied to the company to register the transfer to himself. In the meanwhile A., who had disputed B.'s account, had given the company notice not to register. L. now moved, under the Companies Act, 1862, s. 65, to rectify the register by inserting his name. On production of the transfer, it appeared that it contained no seal or wafer in the place of a seal, but only a mark on the paper of the place where the seal ought to be. The transfer was witnessed by B.'s clerk as having been signed, sealed, and delivered by A., but the attesting witness did not make any affidavit, and the evidence of A. and B. as to whether A. put his finger on the seal or not was contradictory.—Held, that no order could be made on the motion; that L. could have no right to be registered unless A. were estopped from denying that the transfer to L. was good, and this estoppel could only arise if the document delivered to L. were *prima facie* complete; that it was not complete in the absence of a seal unless it was shown that it had been sealed, and for this the evidence was insufficient. *Balkis Consolidated Company, In re*, 58 L. T. 300; 36 W. R. 392—North, J.

Transfer of Stock into Joint Names—Resulting Trust—Intention to Benefit.—The plaintiff, a widow, in the year of 1880, caused 6,000*l.* Consols to be transferred into the joint names of herself and the defendant, who was her godson. She did so with the express intention that the defendant, in the event of his surviving her, should have the Consols for his own benefit, but that she should have the dividends during her life; and she had previously been warned that if she made the transfer she could not revoke it. The first notice the defendant had of the transaction was a letter from the plaintiff's solicitors about the end of 1882, claiming to have the fund re-transferred to the plaintiff.—Held, that the legal title of the defendant as a joint tenant of the stock was complete, although he had not assented to the transfer until he was requested to join in re-transferring the stock, for that the legal title of a transferee of stock is complete without acceptance. A transfer of property to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of the transfer. *Standing v. Bourne*, 31 Ch. D.

282; 55 L. J., Ch. 218; 54 L. T. 191; 34 W. R. 204—C. A.

Held, further, that the plaintiff could not claim a re-transfer on equitable grounds, the evidence clearly showing that she did not, when she made the transfer, intend to make the defendant a mere trustee for her except as to the dividends. *Id.*

Forged Transfer by one Executor—Right of other to sue.]—One of two executors, at various periods, some of which were more than six years before the commencement of the action, forged his co-executor's signature to transfers of stock, which were duly registered. He applied the proceeds of the transfers to his own purposes, but continued to pay the amounts of the dividends to the persons entitled. The other executor, on discovery of the fraud, informed the railway company that the transfers were invalid, and demanded that the stock should be registered in the names of herself and another who had been appointed trustees of the will. The railway company declined to accede to this request, and the present action was brought that the company might be ordered to register the plaintiffs as owners of the stock:—Held, that one of the co-executors could not transfer stock registered in the names of both; that the transfers were not good as to one moiety of the stock, and that the innocent executor had in equity a sufficient interest in the stock to enable her to sue her fraudulent co-executor and the railway company. *Barton v. North Staffordshire Railway*, 33 Ch. D. 458; 57 L. J., Ch. 800; 58 L. T. 549; 36 W. R. 754—Kay, J.

Estoppel—Negligence—Custody of Seal—Proximate Cause of Loss.]—The plaintiffs, a corporate body, left their seal in the custody of their clerk, who, without authority, affixed it to powers of attorney, under which certain stock in the public funds, the property of the plaintiffs, was sold. The clerk appropriated the proceeds. In an action in which the plaintiffs claimed that they were entitled to the stock on the ground that it had been transferred without their authority by the defendants:—Held, on the authority of *Bank of Ireland v. Evans' Trustees* (5 H. L. C. 389), that assuming the plaintiffs had been negligent their negligence was not the proximate cause of the loss, and did not disentitle them from recovering in the action. *Merchants of the Staple v. Bank of England*, 21 Q. B. D. 160; 57 L. J., Q. B. 418; 36 W. R. 880; 52 J. P. 580—C. A.

6. REGISTRATION OF CONTRACT UNDER S. 25 OF COMPANIES ACT, 1867.—See post, col. 446, et seq.

7. REGISTRATION OF SHARES.

Mandamus to Company.]—A prerogative writ of mandamus will not lie to compel a company to register as a holder of shares therein, a person to whom they have issued certificates in respect of such shares where the company have issued prior certificates in respect of such shares to someone else, without clear proof that the person to whom the last certificates were issued has a

better title than the person to whom the earlier ones were issued, even though the person holding the earlier certificates has not been entered in the company's register as the holder of such shares. When such a writ is asked for, the company are not estopped from relying upon the actual facts. *Reg. v. Charnwood Forest Railway*, 1 C. & E. 419—Denman, J. Affirmed in C. A.

Action against Company for Refusal to Register—Damages.]—The plaintiff transferred shares of his in a registered company to A. B. on an agreement between them that if A. B. was accepted as shareholder by the company the shares should be taken by him at their market value in reduction of a debt due to him from the plaintiff. The consideration was stated in the transfer to be only the sum of 5s., and the transfer was brought to the company for registration without any notice of the said agreement between the plaintiff and A. B. The company refused to register on the ground that the plaintiff was indebted to them, but on its being established after an interval of eighteen months that the plaintiff was not so indebted, the company registered the transfer. In an action against the company for wrongfully refusing to register, the plaintiff sought to recover as damages the loss in the market value of the shares between the time when the transfer was brought to the company to be registered and the time when it was in fact registered:—Held, that the plaintiff was entitled to recover only nominal damages, as the contract between the plaintiff and A. B. was a special one, of which the company had had no notice, and the ordinary contract on the sale of registered shares was only that the seller should give to the purchaser a valid transfer, and do all required to enable the purchaser to be registered as member in respect of such shares; the duty of the purchaser, which has not been altered by s. 26 of the Companies Act, 1867, being to get himself registered as such member. *Skinner v. City of London Marine Insurance Corporation*, 14 Q. B. D. 882; 54 L. J., Q. B. 437; 53 L. T. 191; 33 W. R. 628—C. A.

List of Members—Inspection of Register.]—See ante, I., 3, b. and c.

Rectifying Register—Jurisdiction.]—On the 4th May, 1887, A. deposited with B., his broker, certain shares in the K. company, registered under the Companies Act, 1862, and signed a blank transfer. B. signed a receipt stating that the shares were deposited to secure the balance of A.'s account, and that he would not realise them without A.'s sanction. On the 23rd July, A. wrote authorising a sale of the K. shares at a given price. On the 5th of August, A. wrote to B. that the shares in his hands would be sold by another broker, but at the same time directed him to sell certain shares other than the K. shares. On the 27th August B. sold the K. shares on the Stock Exchange to W., at a price above the limit fixed by A. on the 23rd July. B. filled in the transfer with W.'s name, and W. sent the transfer to the company's office for registration. The company, having been warned by A. not to register the transfer, refused registration. W. moved under s. 25 of the Companies Act, 1862, to have the register rectified by enter-

ing his name as a member in the place of A. :—Held, (1) on the construction of the correspondence between the parties, that B. was an equitable mortgagee, with a power of sale not to be exercised without A.'s sanction, but that that sanction had been given and not withdrawn; (2) that in that state of facts the court had jurisdiction to decide the question of title between A. and the purchaser from B. upon motion to rectify the register under s. 35, and that W.'s name must be put on the register. *Kimberley North Block Diamond Mining Company, In re, Wernher, Ex parte*, 59 L. T. 579—C. A.

— **Lapse of Time—Paid-up Shares.**—The members of a firm sold their assets to a company formed for the purpose under a verbal contract. All the shares in the company were issued to the partners or their nominees. The shares were issued as paid up to the extent of the purchase-money. After the lapse of fourteen years the court, on being satisfied that all debts were provided for, rectified the register of members, by striking out the names of all the shareholders; and directing the issue of new shares, after a proper agreement had been executed and filed under the Companies Act, 1867, s. 25. *Darlington Forge Company, In re*, 34 Ch. D. 522; 56 L. J., Ch. 730; 56 L. T. 627; 35 W. R. 537—North, J.

— **Contract to take Shares—Cancellation of Shares—Rescission of Contract.**—W., T. and P. applied for shares in a limited company established for the purpose of purchasing and working a concession from a foreign Government. T. and P. were directors of the company. The directors sent letters of allotment to the applicants, in which they called on them to pay the allotment money by a certain day. But their names were never entered on the register, nor was any allotment money paid nor certificates of shares issued. Three years afterwards the directors made a fresh arrangement with the owners of the concession, under which they purported to cancel the old allotments and to allot all the shares, except a few reserved for the directors and other persons, to the vendor of the concession and his nominees. The shares were accordingly entered in the register in their names. Soon afterwards the company was ordered to be wound up, and the liquidator applied to the court to rectify the register by placing on it the names of W., T. and P. for the number of shares allotted to them, and to diminish the number of shares for which the vendor of the concession was entered on the register to a like amount :—Held, that whether the effect of the application and allotment was that W., T. and P. became actual members of the company in respect of the shares allotted to them or only agreed to become such members, it was now too late, under the circumstances which had occurred, for the company to insist on placing their names on the register. Held, also, that the fact that T. and P. were directors whose duty it was to place the allottees on the register did not affect the question. *Florence Land and Public Works Company, In re Nicol's case, Tufnell & Ponsonby's case*, 29 Ch. D. 421; 52 L. T. 933—C. A.

Entry, Condition Precedent to Membership.—But, semble, according to the true construction

of the 23rd section of the Companies Act, 1862, they did not become members in respect of the allotted shares, the entry on the register being a condition precedent to such membership. *Id.*

Summons to Remove Names from List of Contributors—Attendance and Appearance of Parties—Costs.—Where summonses were taken out by A. and B. to have their names respectively removed from the list of contributors of a company, counsel appeared for creditors in A.'s case and asked for costs :—Held, that only one set of costs could be allowed—namely, the liquidator's. In B.'s case, counsel for creditors, though admitting that he must appear at his own expense, contended that under rule 60 of the General Order, 1862, he was entitled to be heard :—Held, that the judge had a discretion. His lordship, in the exercise of that discretion, declined to hear anyone in opposition to the summons except the liquidator. *Anglo-Indian Industrial Institution, In re, Montagu's case; Grey's case*, 59 L. T. 208—Kay, J. Affirmed, 86 L. T. Journ. 6; 33 S. J. 11.

8. CALLS.

Board of Directors—Minimum Number—Forfeiture of Shares for Non-payment—Estoppel—Call when "Owing"—Interest on Calls.—By the articles of association of the plaintiff limited company (in liquidation), it was provided that the board of directors should consist of not less than three nor more than seven directors. Calls were to be made by the board of directors. If any casual vacancy occurred in the office of directors, it might be filled up by the board of directors. Any member whose shares had been declared forfeited was notwithstanding to be liable to pay all calls owing upon such shares at the time of the forfeiture, and the interest (if any) thereon. If any member did not pay the amount of any call for which he was liable, it was provided that he should pay interest for the same from the day appointed for the payment thereof to the time of actual payment, at the rate of 10 per cent. per annum. The defendant was a director of the plaintiff company, and a shareholder in it to a large extent. At a meeting of directors held on the 7th November, 1882, a call of 1*l.* per share was made payable on the 6th December. Before the 19th December, 1882, by the resignation of some of the directors, their number was reduced to two, of whom the defendant was one. At a meeting held on the 19th December, 1882, these two, the defendant being in the chair, elected three other directors, and the board thus constituted passed a resolution that notice be sent the shareholders who had not paid the call, that, in default of its payment by the 30th December, their shares would be liable to forfeiture. They also made a second call of 1*l.* per share, payable on the 20th January, 1883. At a meeting of the same directors held on the 3rd January, 1883, the defendant in the chair, it was resolved that the shares on which the first call had not been paid should be forfeited. Amongst the names of the shareholders in arrear that of the defendant was included. Upon an action to recover the amount of the said two calls and interest upon them from the day on which they respectively became payable, at the rate of 10 per

cent. per annum, till payment or judgment:—Held, that the two directors who were alone in office at the commencement of the meeting held on the 12th December, 1882, not being sufficient in number to form a properly constituted board, although sufficient to form a quorum of a properly constituted board, had no power to act so as to increase the number of directors, or to make a call, as between the company and the ordinary shareholders. But held, that, as the defendant was a director, in the chair, and assisted in passing the resolutions for the second call and for the forfeiture of the shares on the non-payment of the first call, the defendant was estopped from disputing the validity of such resolutions, and was liable to pay the amount of the calls. Hence, also, that, the second call was "owing" immediately after it was made, and therefore the defendant was liable to pay it, although in fact his shares had been forfeited before the day appointed for the payment of such second call. Held, also, that the defendant was liable to pay interest at the rate of 10 per cent. per annum upon the first call from the day upon which it became payable up to the date of forfeiture (the 3rd January, 1883), but that he was not liable to pay any interest on the second call, because his shares had been forfeited before the day for payment of such second call had arrived. *Fauve Electric Accumulator Company v. Phillipart*, 58 L. T. 525—Hawkins, J.

Action for—Issue of Fully paid shares.]—When a company issues shares to directors as fully paid up shares, and afterwards endeavours to recover a call on such shares:—Held, that the company was prevented by estoppel from recovering the amount of such calls. *Christchurch Gas Co. v. Kelly*, 51 J. P. 374—Mathew, J.

Acting as Member of Company—Estoppel.]—Where a member of a mutual insurance company, afterwards converted into a limited company, has vessels on its books as insured, and pays calls, and otherwise acts as if he were a member of the company, he is, in any action brought against him by the limited company for calls on losses, estopped from denying his liability, and from setting up either any irregularity in the transfer from the one company to the other, or that the losses were paid without any stamped policies being entered in contravention of 30 Vict. c. 23, s. 7. *Barrow Mutual Ship Insurance Company v. Ashburner*, 54 L. J., Q. B. 377; 54 L. T. 58; 5 Asp. M. C. 527—C. A.

Call after Death of Intestate—Grant of Administration to Company.]—An intestate was the holder of shares in a company on which a call was made after his death. The court made a grant of administration to the nominee of the company as a creditor of the estate of the deceased. *Tomlinson v. Gilby*, 54 L. J., P. 80; 33 W. R. 800; 49 J. P. 632—Butt, J.

Liquidation of Member—Order of Discharge—Subsequent Call.]—The liability in respect of calls of a liquidating member of a company where the liquidation proceedings commenced prior to the winding-up of the company, and are pending at the time of the winding-up, is a debt or liability which is not "incapable of being fairly

estimated," and which is therefore provable in the liquidation. When, therefore, under these circumstances, a company winding-up has failed to carry in a proof in the liquidation proceedings of a member of the company for calls, and the liquidating member obtains his discharge, he cannot afterwards be placed on the list of contributories. *Furdoonjee's case* (3 Ch. D. 264) discussed and not followed. *Mercantile Mutual Marine Insurance Association, In re, Jenkins' case*, 25 Ch. D. 415; 53 L. J., Ch. 593; 50 L. T. 150; 32 W. R. 360—Chitty, J.

Affidavit by Liquidator in Support—Winding-up.]—In the winding-up of an unlimited company the court has power to make a call under s. 102 of the Companies Act, 1862, on a proper case shown by the official liquidator; and the debts of the company not having been paid, an affidavit by the liquidator that the call was required for "the adjustment of the rights and liabilities of the members amongst themselves" was held to imply that the call was necessary for the payment of debts, and to be a sufficient compliance with form 33 of the General Order of 1862, rule 33. *Norwich Equitable Fire Assurance Company, In re, Miller's Case*, 54 L. J., Ch. 141; 51 L. T. 619; 33 W. R. 271—V.-C.B.

9. CERTIFICATES.

Estoppel of Company.]—It was the duty of the secretary of a company to procure the execution of certificates of shares in the company with all requisite and prescribed formalities, and to issue them to the persons entitled to receive the same. By a resolution of the directors of the company it was provided that certificates of shares should be signed by one director, the secretary, and the accountant. The secretary of the company, having executed a deed purporting to transfer certain shares in the company to one G., a purchaser of such shares, issued to G. a certificate stating that he had been registered as the owner of the shares. Such certificate was in the usual and authorized form, and sealed with the company's seal, but the signature of the director appended thereto was a forgery, and the seal of the company was, in fact, affixed thereto without the authority of the directors. G. deposited the certificate with the plaintiff as a security for advances, and subsequently executed a transfer of the shares to the plaintiff. Neither G. nor the plaintiff had any knowledge or reason to suspect that the certificate was otherwise than a genuine document, or that the matters stated therein were untrue. The company refused to register the plaintiff as owner of the shares, stating that there were no such shares standing in G.'s name in their books:—Held, that the company were estopped by the certificate issued by their secretary from disputing the plaintiff's title to the shares. *Shaw v. Port Philip Gold Mining Company*, 13 Q. B. D. 103; 53 L. J., Q. B. 369; 50 L. T. 685; 32 W. R. 771—D.

Pledge—Blank Indorsement—Brokers—American Law—Mercantile Usage—Defective Title.]—The English executors of an English holder of shares in an American railroad, in order that the shares might be registered in their names so as to enable them to receive the divi-

dends, and if necessary to sell, signed blank transfers with powers of attorney indorsed on the share certificates and gave them to their brokers in London. The brokers fraudulently deposited them with a London bank as security for advances made to themselves, and afterwards became bankrupt. According to American law the certificates were not negotiable instruments, but the rightful holder of them with the indorsed transfers signed was entitled to be registered as holder. By the practice of the railway company it was required that the signatures of executors to an indorsement should be attested by a consul, which had not been done, and without this they were not regarded on the Stock Exchange as duly indorsed, though the want of this attestation would not prevent registration if the company were satisfied otherwise of the genuineness of the signatures. There was some evidence that under the circumstances of the present case the bank would in America have been held entitled to be registered, on the ground that the executors had estopped themselves from disputing the titles of the holders of the certificates:—Held, that the executors when they signed the certificates and gave them to the brokers enabled, and must be taken to have intended to enable, them to represent to any one whom it concerned that the executors had given the brokers authority to dispose of the shares in whatever manner was required, and that the executors were estopped from disputing the authority of the brokers to pledge the shares: but held, on appeal, that as the certificates did not represent on the face of them that the person in possession of them would be entitled to the shares, and the absence of attestation by a consul made the transfer not in order, and was sufficient to put a party dealing with the brokers on inquiry, the executors were not estopped, and must be held entitled to the shares as part of their testator's estate. *Williams v. Colonial Bank*, 38 Ch. D. 388; 57 L. J., Ch. 826; 59 L. T. 643; 36 W. R. 625—C. A.

Held, also, that as the question whether the bank was to be deemed rightfully in possession of the certificates turned upon transactions in England it was to be decided by English and not by American law, though the consequences of being rightfully in possession of them depended on American law. *Ib.*

—**Blank Transfer—Blank Power of Attorney—Deposit of Certificates—Estoppel.**—The New York Central Railroad Company issue to the registered shareholders share certificates; each certificate is for ten shares, and on the back there is a blank form of transfer, and a blank form of power of attorney to execute a surrender and cancellation of the certificate. The mode of transfer is as follows:—The transfer and power of attorney are signed by the registered shareholder. When this blank transfer reaches the hand of some holder who desires to be registered, his name is filled in by himself or on his behalf, and the certificate is left with the company; it is then cancelled, the transferee is registered, and a new certificate in his name is issued. In August, 1883, T. & Co., as the brokers of the defendant, purchased for him on the market certain shares of the New York Central Railroad Company. The certificates were permitted by the defendant to remain with T. & Co. In November, 1883, T. & Co. deposited with

the plaintiffs (with other securities) the certificates for the shares so purchased by them for the defendant as security for a large sum borrowed by them from the bank. On the 11th of December following, the bank re-delivered to T. & Co. the certificates for the shares on the ground that they were desirous of sending them in for registration; and on the same day, T. & Co. filled in the name and address of the defendant on the blank transfers and forms of surrender of the same certificates as the person in whose name the shares were to be registered. The new certificates were made out in the defendant's name, and were ready for issue on the 20th of December. The blank transfers on the back of these certificates were never signed by the defendant. On the 11th December, when T. & Co. handed the certificates to the agents of the company for registration, they received from them a receipt, which they then sent to the plaintiffs, which receipt the plaintiffs kept till the beginning of February, 1884, when, having learnt that a member of the firm of T. & Co. had absconded, they sent a clerk to the agents with the receipt, and obtained from them the new certificates for the shares which, up to the commencement of the action, remained in their possession. The plaintiffs claimed a declaration that they were entitled to the shares:—Held, that the case did not fall within the principle of estoppel, and that the defendant was the legal owner of the shares, and entitled to have the new certificates handed to him. No estoppel can be raised on a document inconsistent with the document itself. *Colonial Bank v. Hepworth*, 36 Ch. D. 36; 56 L. J., Ch. 1089; 57 L. T. 148; 36 W. R. 259—Chitty, J.

The right principle to adopt with reference to documents, such as the certificates with blank transfers duly signed by the registered holders, is that each prior holder confers on the bona fide holders for value of the certificates for the time being an authority to fill in the name of the transferee, and is estopped from denying such authority, and to this extent, but no further, is estopped from denying the title of such holder for the time being. By delivery an inchoate legal title passes, but a title by unregistered transfer is not equivalent to the legal estate in the shares or to the complete dominion over them. *Ib.*

Transfer in Blank—Delivery of Transfer by Transferor as his Deed—Equitable Mortgage of Shares—Notice.—M., the holder of shares in a company, deposited with S. certificates of the shares and a blank transfer, as security for a debt. Afterwards he fraudulently executed a blank transfer in respect of the shares, and deposited it with the appellants, as security for a debt. On being applied to by the appellants for the share certificate he stated that it was lost or mislaid. The appellants stamped their transfer, filled up the blanks, had it executed by their manager as the transferee, and sent it to the company's office with a request that the company would "certify it," and with an indemnity against any claim in respect of the missing certificates. The company did not accept the indemnity and declined to certify. Shortly after the executors of S. (who had died) gave notice to the company of their charge upon the shares. The company was incorporated under the Companies Act, 1862. The articles of

association provided that the shares should be transferable only by deed; that lost certificates might be renewed upon satisfactory proof of the loss, or in default of proof upon a satisfactory indemnity being given; and that the company should not be bound by or recognize any equitable interest in shares. Each certificate stated, under the company's seal, that no transfer of any portion of the shares represented by the certificate would be registered until the certificate had been delivered at the company's office. The appellants having brought an action against the executors for a declaration of their title to the shares and to restrain the executors from dealing with the shares:—Held, that the transfer to the appellants not having been re-delivered by the transferor after the blanks were filled up was not his deed, and that the appellants had no legal title to the shares; that as between themselves and the company they never had an absolute and unconditional right to be registered as the shareholders; that nothing that had happened gave them a right on equitable grounds to displace the original priority of the equitable claim of the executors; and that the action could not be maintained. *Hibblewhite v. McMorine* (6 M. & W. 200) approved. *Société Générale de Paris v. Walker*, 11 App. Cas. 20; 55 L. J., Q. B. 169; 54 L. T. 359; 34 W. R. 662—H. L. (E).

The principle of *Dearle v. Hall* (3 Russ. 1), as to the effect of notice in determining the priorities of equitable rights, is inapplicable to shares in such a company. Per Selborne, Earl—Ib.

10. OTHER POINTS.

Choses in Action—Bankruptcy—Order and Disposition.]—Shares in a railway company are "choses in action" such as to be excepted from the doctrine of reputed ownership by s. 44 (iii.) of the Bankruptcy Act, 1883. *Colonial Bank v. Whinney*, 11 App. Cas. 426; 56 L. J., Ch. 43; 55 L. T. 362; 34 W. R. 705; 3 M. B. R. 207—H. L. (E).

B. and J. were in partnership as stockbrokers. Some shares in a railway company were bought with partnership money, and equitably mortgaged by B. by deposit with the appellant bank to secure the firm's banking account. Before notice of deposit had been given to the company B. and J. separately, and as members of the firm, were made bankrupts:—Held, that the circumstances were such as to prove that the bankrupts were not reputed owners of the interest of the appellant bank in the shares. *Ib.*

Indemnity to Trustees.]—See TRUST AND TRUSTEE.

Charging Order on Shares.]—See EXECUTION.

Action for Rescission of Contract to Take—Payment into Court of Unpaid Calls—Injunction Restraining Forfeiture.]—A shareholder of a company having commenced an action against the company for rescission of his share contract, on the ground of misrepresentation, paid into court the sum demanded by the company for unpaid calls, and moved to restrain the company from declaring the shares forfeited. The court, however, dismissed the motion with costs, holding that the proper course was for the

plaintiff to have paid the money to the company without prejudice to any question. *Ripley v. Paper Bottle Company*, 57 L. J., Ch. 327—Chitty, J.

Issue of New Stock to Original Shareholders—Profit arising from Sale—Capital or Income.]

—A testator, who died in 1843, by his will, dated in 1841, bequeathed (inter alia) thirty-five shares in a gas company to trustees upon trust for his wife for life, and subject thereto he directed that the same should form part of his residuary estate. After the death of the testator the gas company resolved to increase its capital by the issue of fresh stock, which it offered to its shareholders. J. K., acting under a power of attorney on behalf of the surviving trustee of the will, who was resident abroad, availed himself of the offer, and took up with his own moneys and in his own name some of the new stock. An action for administration of the testator's estate having been instituted, an order was made on the executrix of J. K., who had died, under which the new stock was sold, and the balance of the proceeds of sale, after repayment of the amount paid for the stock and interest, and deducting therefrom the dividends received by J. K., was paid into court to the credit of the action. On the further consideration of the action, a question arose whether the testator's widow, as tenant for life of the thirty-five original shares, was entitled to this balance, or whether the same formed part of his residuary estate:—Held, that the trust relating to the thirty-five shares must be treated as if it stood alone, it being in respect of that particular trust that J. K. had obtained the power of which he had availed himself: and that the benefit arising therefrom must be treated as belonging to that trust alone:—Held, therefore, that the balance in court represented capital, and that the widow was entitled to the income thereof for life. *Bromley, In re, Sanders v. Bromley*, 55 L. T. 145—Kay, J.

VII. DIVIDENDS.

Alteration of Memorandum by Special Resolution.]—By the memorandum of association of a company the rights of the preference and ordinary shareholders in respect of dividends were expressly defined. By special resolutions passed in 1872 it was resolved that the application of the revenue as between the preference and ordinary shareholders should be altered in a manner beneficial to the preference shareholders. These resolutions were acted on for more than ten years without any objection being raised on the part of any shareholder. Subsequently other special resolutions were passed restoring the original appropriation of the revenue prescribed by the memorandum of association:—Held, that even if the resolutions passed in 1872 had been ratified by all the shareholders (as to which there was no evidence), yet the resolutions altered a condition contained in the memorandum within the meaning of s. 12 of the Companies Act, 1862, and were therefore invalid, and that the net revenue ought to be applied in the manner prescribed by the memorandum of association. *Ashbury v. Watson*, 30 Ch. D. 376; 54 L. J., Ch. 985; 54 L. T. 27; 33 W. R. 882—O. A.

Receipt of, by Agent—Whether Trust

Created.]—A foreign government issued a public loan under a decree and an agreement providing for a mortgage to the defendants of certain estates on behalf of bondholders. The defendants received instructions to pay coupons for interest falling due on the 1st of June, less five per cent. tax, pursuant to a decree of the government which was to take effect subject to the promulgation of a decree modifying the Law of Liquidation. The defendants having received from the government a sum of money to meet the half-yearly interest less five per cent., advertised that they would make such payments. Subsequently the defendants received 10,000*l.*, being the amount of the five per cent., from the commissioners of the government who managed the mortgaged estates, but it did not appear that such commissioners were authorised to remit such sum. The defendants, however, issued a further advertisement that the coupons would be paid in full. Finally, they issued an advertisement that in accordance with directions of the government the coupons would be paid less five per cent., notwithstanding that the amount required to pay the same in full had been duly remitted to them by the commissioners. After such last advertisement the decree modifying the Law of Liquidation was passed. The plaintiff, a bondholder, brought this action, claiming payment of his coupon in full by the agents pursuant to the second advertisement :—Held, that the 10,000*l.* was not remitted to the agents by persons who had authority to do so on behalf of the government, and that therefore it was not impressed with a trust in favour of the bondholders. *Henderson v. Rothschild*, 56 L. J., Ch. 471; 56 L. T. 98; 35 W. R. 485—C. A.

Bonus Dividend—Capital or Income.]—A testator bequeathed his residuary personal estate to his executor T. B. in trust for the testator's wife for her life and after her death to T. B. Part of the residuary estate consisted of shares in a company whose directors had power, before recommending a dividend, to set apart out of the profits such sum as they thought proper as a reserved fund, for meeting contingencies, equalising dividends, or repairing or maintaining the works. After the testator's death the directors of the company proposed to distribute certain accumulated profits (which had been temporarily capitalised) as a bonus dividend, to allot new shares (partly paid up) to each shareholder, and to apply the bonus dividend in part payment of the new shares. This proposal was carried out, and with T. B.'s consent new shares were allotted to him and registered in his name, the bonus dividend on the testator's old shares being applied in part payment of the new shares :—Held, that looking at all the circumstances the real nature of the transaction was that the company did not pay or intend to pay any sum as dividend, but intended to and did appropriate the undivided profits as an increase of the capital stock; that the bonus dividend was therefore capital of the testator's estate, and that the life tenant was not entitled to the bonus or the new shares. *Bouch v. Sproule*, 12 App. Cas. 385; 56 L. J., Ch. 1037; 57 L. T. 345; 36 W. R. 193—H. L. (E.)

Payment out of Capital—Property of a Wasting Nature—Depreciation.]—In 1873 the defendant company was formed for the purpose of purchasing a concession and sub-concessions

from several companies, and also all the assets and businesses of the selling companies. The concession conferred the right to work asphalt mines within a defined area in S. for twenty years. In 1879, in consideration of the payment of 8,000*l.* by the company, this concession was modified by extending the term for twenty years, enlarging the area, and reducing the royalties. It appeared from the annual accounts that the company had made a profit in every year except 1874, but in many years no dividend was declared. These accounts contained no item on the debit side representing the prime cost of the asphalt. The accounts for 1884 showed a profit of 39,000*l.*, of which 1,000*l.* was written off the price paid for the modification of the concession, and the balance was written off the original cost of the concession. The accounts for 1885 showed a profit of 17,000*l.*, out of which, after deducting 1,000*l.* as before, it was resolved to pay a dividend of 9*s.* per share on the preferred shares. The concession as modified was not less valuable at the end of 1885 than the original concession in 1873. The plaintiff, on behalf of the ordinary shareholders, brought an action against the company and the directors to restrain the payment of this dividend, on the ground that the accounts made no allowance for depreciation, and that a previous loss of 32,000*l.* arising on the realisation of the assets of the selling companies had not been made good :—Held, that, in the absence of any diminution of the capital of the company, the court had no power to interfere with the resolution of the shareholders to divide the whole of the profits; and, further, that the company was entitled to set off against the loss occurring on the realisation of the assets the amount reserved in 1884; and that the plaintiff was not entitled to an injunction. *Lee v. Neuchatel Asphalt Company*, 57 L. J., Ch. 622; 58 L. T. 553—Stirling, J. Affirmed 41 Ch. D. 1; 58 L. J., Ch. 408; 37 W. R. 321—C. A.

The payment, by the directors of a company, of a dividend to the shareholders out of capital is illegal and ultra vires, and the rolling stock of a railway company is part of its capital. But where the directors have been, for several years, replacing, out of revenue, rolling-stock which has been worn out, and the rolling-stock appeared to be improved, and to be greater in money value than it was five years before, and although there were some deficiencies in it which the directors were gradually supplying, it did not appear that the traffic had been thereby interfered with or inconvenience suffered, the court refused to restrain the payment of a dividend to the preference shareholders, which had been declared at a general meeting, until the deficiencies in the rolling-stock had been supplied. The court will not restrain acts done by the directors in the exercise of their discretion in managing the affairs of their company, unless the acts complained of are illegal, as ultra vires. *Kehoe v. Waterford and Limerick Railway*, 21 L. R., Ir. 221—M. R.

—Liability of Directors.]—See ante, cols. 361, 362.

VIII. CONTRACTS.

Contract whether ultra vires—Liability of Directors.]—The objects of a company were stated by the memorandum of association to be

"the carrying on for profit or gain the trades or businesses of discounters, lenders of, and dealers in money the advancing and lending money on real, personal, or mixed securities on stocks and shares of railway, canal, dock, and other joint stock companies, corporations, associations, and other undertakings of whatever nature or description on ships, goods, merchandize, materials, produce, works, plant, chattels, debts, choses in action, articles and effects, or on any other property of whatever kind and description in the making of purchases, investments, sales, or any other dealings of or in any of the above-named articles or securities and the entering into and carrying on of any monetary and financial arrangements or operations, and the doing of all matters and things which may appear to the company to be incident or conducive to the objects aforesaid, or any of them :"—Held, that the entering into an agreement to purchase "on joint account" with two other parties, for 310,000*l.*, an estate, on which one of the other parties (K. and L.) undertook to finish a building (the Alexandra Palace), grounds, race-course and stands, lodges, roads, terraces, and drainage, for a sum not exceeding 200,000*l.*, the company undertaking to float another (the Alexandra Palace) company for the purpose of acquiring materials and building the palace, was a transaction within the powers of the company. *London Financial Association v. Kelh*, 26 Ch. D. 107; 53 L. J., Ch. 1025; 50 L. T. 492—V.-C. B.

Held further, that such an agreement did not constitute a partnership between the three parties to it. *Ib.*

— **Acquiescence.**—Observations on the effect of acquiescence by shareholders in the contracts and acts of their directors. *Ib.*

— **Exchange of Paid-up Shares for Goods.**—A joint-stock company, registered under the Companies Acts, 1862 and 1867, whose business, as defined by memorandum and articles of association, was the manufacture and sale of whiskey, and not authorised by its memorandum or articles of association to deal in its own shares, having accumulated a large stock of whiskey, which it was unable to sell, the directors agreed to sell this whiskey to one of themselves in exchange for a number of his paid-up shares in the company, and this transaction was carried out, and subsequently ratified by the company, and the shares were duly assigned to the company, and some time afterwards cancelled. The company being subsequently wound up, an application was made by the liquidator that the directors who had been parties to the transaction in question should pay to the liquidator the price of the whiskey, on the ground that the transaction was ultra vires of the company, and void:—Held, that the impeached transaction was not ultra vires of the company, and that it having been ratified by the company, was valid as against the liquidator. *Balgooley Distillery Company, In re, Weekes's Case*, 17 L. R. Ir. 239—C. A.

Separate Undertaking—Separate Capital—Liability of Solicitor.—Where the solicitors of the promoters of an Act of Parliament, whereby a company is created and empowered to raise capital and carry out works, and, if they so

resolve, to raise separate capital for and carry out separately certain portions of such works as a separate undertaking, agree to pay certain claims out of the first capital raised by the company, and the company duly raise capital for the separate undertaking and none other, neither the company nor the solicitors are liable under the agreement. *Allan v. Regent's Canal, City and Docks Railway*, 54 L. J., Q. B. 201—Mathew, J. Reversed in C. A.

On behalf of Intended Company with Trustee—Embodied in Articles.—A contract between A. and a trustee for an intended company, by virtue of which A. is to be director irremovable for a certain period, although that contract be embodied in the memorandum and articles of association, is not, having regard to section 16 of the Act of 1862, enforceable against the company either at law or in equity, notwithstanding that by allotment of shares A. has become a member, unless it has been made binding by a new contract between A. and the company. *Browne v. La Trinidad*, post, col. 404.

— **Evidence—Ratification—New Contract.**—J. entered into an agreement with W., who purported to act on behalf of a company about to be formed, to sell certain property to the company. The company was formed shortly afterwards with a memorandum and articles of association containing provisions for the adoption of the agreement by the directors on behalf of the company with or without modification. At meetings of the directors at which J. was present, resolutions were passed adopting the agreement, accepting an offer of J. to take payment of part of the purchase-money in debentures instead of in cash, and directing that the seal of the company should be affixed to an assignment by J. to the company of leasehold property comprised in the agreement, and to debentures to be issued to J. The assignment was executed by J. and sealed by the company; the debentures were issued to him, and the company took possession of the leaseholds and carried on their business thereon. The company was afterwards wound up, and the liquidator took from J. an assignment of other property comprised in the agreement:—Held, that there was evidence that a contract was entered into by the company with J. to the effect of the previous agreement as subsequently modified by the acceptance of debentures instead of cash, and that there was, therefore, at the time when the debentures were issued, an existing debt due from the company. *Northumberland Avenue Hotel Company, In re* (33 Ch. D. 16), considered and distinguished. *Howard v. Patent Ivory Manufacturing Company*, 38 Ch. D. 156; 57 L. J., Ch. 878; 58 L. T. 395; 36 W. R. 801—Kay, J.

A written agreement was entered into between W. of the one part and D., as trustee for an intended company, to be called the N. Company, of the other part, that W., who was entitled to an agreement for a building lease from the Metropolitan Board of Works, should grant an underlease to the company, and that the company should erect the buildings. The company was registered on the following day. The memorandum did not mention the agreement, but the articles adopted it, and provided that the company should carry it into effect. No fresh agreement with W. was signed or sealed on

behalf of the company, but the company took possession of the land, expended money in building, and acted on the agreement, which they considered to be binding on them. The company failed to complete the buildings, and the Metropolitan Board re-entered. The company being in course of winding-up, the trustee in bankruptcy of W. took out a summons to be allowed to prove for damages against the company for their breach of the agreement:—Held, that the agreement having been entered into before the company was in existence, was incapable of confirmation, and that the acts of the company, having evidently been done under the erroneous belief that the agreement between W. and D. was binding on the company, were not evidence of a fresh agreement having been entered into between W. and the company on the same terms as the written agreement, that there was therefore no agreement between W. and the company, and that the summons must be dismissed. *Northumberland Avenue Hotel Company, In re, Sully's case*, 33 Ch. D. 16; 54 L. T. 777—C. A.

Claim by Solicitor of Promoter against the Company.—M. employed P. as solicitor in the formation of a limited company for the purpose of taking over M.'s business. The company was formed, and the articles provided that all expenses incurred about the formation of the company should be paid by the company. After the company was formed P. acted as its solicitor, and M. was one of the directors. At a meeting of the directors, at which M. was present, P. asked for payment of his costs incurred about the formation of the company, and a conversation took place tending to show that the company would undertake to pay them, but nothing appeared on the minutes. At a subsequent meeting a resolution was passed on the proposal of M. that a cheque for 39l. should be given to P. in discharge of a certain part of these costs. The company having been ordered to be wound up, P. carried in a claim for his bill of costs:—Held, that P. could not maintain his claim on the ground that the company having had the benefit of his services was bound to pay for them, as his services had been rendered on the retainer of M. *Hereford and South Wales Waggon and Engineering Company, In re* (2 Ch. D. 621), considered. *Rotherham Alum and Chemical Company, In re*, 25 Ch. D. 103; 53 L. J., Ch. 290; 50 L. T. 219; 31 W. R. 131—C. A.

Held, further, that P. could not maintain his claim on the ground of novation, the conversation at the first meeting not being supported by anything in the minutes, and the subsequent giving of the cheque being capable of being referred to the obligation of the company to indemnify M. against the costs incurred in its formation, and so not being sufficient evidence of an agreement by the company with P. to pay him. *Id.*

Disclosure of, In Prospectus.—*See ante*, col. 347.

IX. MEETINGS OF SHAREHOLDERS.

When Court Interferes.—The court refuses to interfere where an irregularity has been com-

mitted, if it is in the power of the persons who have been guilty of it to correct it by taking de novo the necessary steps with all due formalities. *Browne v. La Trinidad*, 37 Ch. D. 1; 57 L. J., Ch. 292; 58 L. T. 137; 36 W. R. 289—C. A.

Summoning Extraordinary Meeting—Length of Notice—Removal of Directors.—A meeting of directors passed a resolution to summon an extraordinary general meeting at which special resolutions were to be proposed for removing B. from the office of director, and for increasing the capital. The articles gave power to remove directors by special resolution. The only notice B. had of the board meeting was a notice given less than ten minutes before the time of holding it, and not stating the nature of the business. The notices for the general meeting were issued, and four days before the time for the meeting B., who up to that time had made no complaint of the short notice, brought his action to restrain the company from holding the meeting, on the ground that the board which summoned it was not duly constituted, as B. had not received proper notice and could not attend. The general meeting was held and passed the resolutions:—Held, that assuming the board meeting to be so far irregular that the plaintiff might have objected and required another to be summoned, the general meeting, having been summoned, in all other respects regularly, by directors acting as a board, was competent to act. *Harben v. Phillips* (23 Ch. D. 14) distinguished. *Id.*

Proposal of Resolutions to vary Articles of Association—Proxies—Misleading Circular—Injunction.—By the articles of association of a banking company, formed under the Companies Act, 1862, it was provided, inter alia, that the remuneration of the directors should be determined by the company in general meeting; and that the company should not make any advance or allow any credit to a director, or to any firm of which a director should be partner, on his or their personal guarantee or security only, or otherwise than on adequate security. On the 24th January, 1884, a circular was issued convening an extraordinary general meeting of the company for the 31st January, 1884, at which resolutions were to be proposed altering the articles of association, by authorizing advances to directors on their personal security, subject to certain restrictions, and by increasing the remuneration of directors, and leaving to the discretion of the directors the future remuneration of the chairman and vice-chairman, as well as the remuneration of the former for past services. Proxy forms, drawn in favour of two of the directors, accompanied the circular. An action was commenced by certain shareholders asking for an inquiry whether any sums had been misappropriated by the directors out of the funds of the company by way of remuneration over and above what they would be respectively entitled to under the regulations of the company and an injunction to restrain the defendants from holding the meeting convened by the circular, or from proposing the resolutions mentioned in the circular; and the plaintiffs having moved for an interlocutory injunction:—The court, being of opinion that the circular was one by which the great body of the shareholders might be misled, and that the shareholders had not been fully and fairly informed and instructed upon what

was proposed to be done, granted an interlocutory injunction against proposing the resolutions objected to at the extraordinary general meeting. *Jackson v. Munster Bank*, 13 L. R., Ir. 118—V.-C.

Form of Requisition to call a Meeting—Power to remove Directors.—[A sufficient number of shareholders required the directors of a railway company to call a meeting of the company for the following objects: 1. To appoint a committee to inquire into the working and general management of the company, and the means of reducing the working expenses, to empower such committee to consolidate offices, to remove any of the officers and appoint others, and to authorize and require the directors to carry out the recommendations of the committee; 2. To remove, if deemed necessary or expedient, any of the present directors, and to elect directors to fill any vacancy in the board. The directors issued a notice for a meeting "for the purpose of considering and determining upon a demand of the requisitionists for the appointment of a committee to inquire into the working and general management of the company and the means of reducing the working expenses." The requisitionists gave notice that they should not attend the meeting, as the notice did not provide for all their objects; they did not attend, and they then themselves issued a notice under s. 70 of the Companies Clauses Act, calling a meeting for the purposes mentioned in their requisition. The directors brought an action in the name of the company to restrain the requisitionists from holding the meeting:—Held, by Kay, J., that everything in the first part of the requisition beyond the appointment of a committee was illegal, for that it proposed to transfer the powers of the directors to a committee, and that the directors were therefore justified in not entertaining the latter part of the first head of the requisition; that the second head of the requisition was too vague and did not "fully express the object of the meeting," and that the directors had no power to call a meeting for that purpose, whether a general meeting had power to remove directors or not; and, therefore, that the directors had not failed to call a meeting within the meaning of the Companies Clauses Act, 1845, s. 70; that the power of the shareholders to call it had therefore not arisen, and that an injunction must be granted. But held, on appeal, that all the objects of the first part of the requisition were objects that could be carried out in a legal way; that the court will not restrain the holding of a meeting because the notice calling it is so expressed that consistently with its terms resolutions might be passed which would be ultra vires, and that the directors were not justified in excluding from their notice the objects in the first part of the requisition other than the appointment of a committee; that under s. 91 of the Companies Clauses Act, a general meeting has power to remove directors; that a notice of a proposal to remove "any of the directors" was sufficiently distinct; that the general meeting could at all events fill up vacancies in the board if all the directors were removed or if the directors declined to exercise the power given by s. 89, and that the directors were therefore bound to include in their notice the objects mentioned in the second part of the requisition:—Held, therefore, that the requisitionists were entitled to call a meeting, and that

the injunction must be discharged. *Isle of Wight Railway v. Tahourdin*, 25 Ch. D. 320: 53 L. J., Ch. 353; 50 L. T. 132; 32 W. R. 297—C. A.

Right of Vendor-Director to Vote.—[See *North-West Transportation Co. v. Beatty*, ante, col. 359.

Resolution to Subscribe Funds to Public Objects—Ultra Vires.—[At a meeting of the stockholders or proprietors of a railway company a resolution was passed authorizing the directors to subscribe a sum out of the company's funds towards the erection of the Imperial Institute:—Held, that the proposed subscription was not prevented from being ultra vires by the fact that the establishment of the Institute might benefit the company by an increase of passenger traffic over their line. *Tomkinson v. South-Eastern Railway*, 35 Ch. D. 675; 56 L. J., Ch. 932; 56 L. T. 812; 35 W. R. 758—Kay, J.

Resolution effecting two Objects—Purchase by Company of its own Shares—Reduction of Capital.—[A company having formed a scheme for reducing their capital by the purchase of fully-paid shares, and this being in violation of their articles of association, passed a resolution at a general meeting: "That notwithstanding anything contained in the articles, the directors be authorized to carry out the following compromise or modification of the agreement with the vendors," which was in effect to cancel 12,000 fully-paid vendors' 5*l.* shares upon payment of 1*l.* 3*s.* 4*d.* per share:—Held, that this resolution was valid, notwithstanding that the effect of it was to carry out two distinct objects, viz., to set aside for the purpose of this transaction the article forbidding the purchase of shares, and to authorize the directors to carry out the proposed scheme. *Imperial Hydropathic Hotel Company v. Hampson* (23 Ch. D. 1) discussed and explained. *Taylor v. Pilsen Joel and General Electric Light Company*, 27 Ch. D. 268; 53 L. J., Ch., 856; 50 L. T. 480; 33 W. R. 134—Pearson, J.

Authority of Chairman.—[The chairman of a general meeting has *prima facie* authority to decide all incidental questions which arise at such meeting, and necessarily require decision at the time, and the entry by him in the minute book of the result of a poll, or of his decision of all such questions, although not conclusive, is *prima facie* evidence of that result, or of the correctness of that decision, and the onus of displacing that evidence is thrown on those who impeach the entry. *Indian Zoedone Co., In re*, infra.

Where the chairman at a confirmation meeting disallowed certain votes which had been given against the confirmation of a resolution passed at the first meeting appointing a liquidator, the effect of such disallowance being to confirm such resolution, and he made an entry in the minute book that such resolution had been confirmed, the court, in the absence of evidence that the votes were improperly disallowed, declined to question the decision of the chairman. But, having regard to the unsatisfactory state of the evidence, the Court of Appeal, in the interest of all parties, by its own order confirmed the appointment of the liquidator. *Id.*

Poll—Mode of Taking—Direction of Chairman.—The articles of association of a company provided (in the terms of art. 43 of Table A to the Companies Act, 1862) that if at any general meeting of the company a poll should be demanded it should be taken "in such manner as the chairman shall direct." A poll having been demanded at a meeting summoned to consider a resolution for a voluntary winding-up, the chairman directed the poll be taken then and there. It was so taken, and the resolution was carried:—Held, that the poll had been rightly taken. *Reg. v. D'Oyly* (12 Ad. & E. 139), followed. Observations on the dicta of Jessel, M.R., and Brett, L.J., in *Horbury Bridge Coal, Iron, and Waggon Company, In re*, (11 Ch. D. 109, 114). *Challington Iron Company, In re, Mansell, Ex parte*, 29 Ch. D. 159; 54 L. J., Ch. 624; 52 L. T. 504; 33 W. R. 442—Kay, J.

Proxies.—At a general meeting of a company, where by its articles of association voting by proxy is allowed, proxies cannot be used upon a show of hands, but a poll must first be taken. *Caloric Engine and Siren Fog Signals Company, In re*, 52 L. T. 846—Kay, J.

Confirmation of Special Resolution—"Not less than 14 days."—The interval of not less than 14 days which under s. 51 of the Companies Act, 1862, is to elapse between the meetings passing and confirming a special resolution of a company is an interval of 14 clear days, exclusive of the respective days of meeting, and therefore a special resolution for reduction of capital passed at a meeting held on the 25th of February, 1885, and confirmed at a meeting held on the 11th of March, 1885, was held to be bad. *Railway Sleepers Supply Company, In re*, 29 Ch. D. 204; 54 L. J., Ch. 720; 52 L. T. 731; 33 W. R. 595—Chitty, J.

If the interval is less than fourteen clear days, the statutory defect in the resolution only affects the position of the company and its shareholders, inter se, and does not concern the creditors. Thus, where a director of a company took shares in new capital raised under a resolution passed and confirmed at meetings the interval between which was thirteen days only, and the company afterwards went into liquidation, he was held to be precluded from objecting to the validity of the resolution as a ground for his removal from the list of contributories. *Railway Sleepers Supply Company, In re* (29 Ch. D. 204), distinguished. *Miller's Dale and Ashwood Dale Lime Company, In re*, 31 Ch. D. 211; 55 L. J., Ch. 203; 53 L. T. 692; 34 W. R. 192—V.-C. B.

Special Resolution requiring Confirmation—Resolution appointing a Liquidator—Notice.—A resolution appointing a liquidator is operative only when there is an effective resolution to wind up. Where therefore a special resolution to wind up voluntarily, which requires confirmation, has been passed at the first meeting, although it is unobjectionable to pass at the same meeting a resolution appointing a liquidator, the latter resolution by itself can have no effect; and if at the subsequent meeting the latter is rejected it is immaterial, and the principal resolution, i.e., to wind up, has been confirmed—nor is it possible to fall back upon the resolution appointing a

liquidator which was passed at the first meeting and treat it as binding. *Indian Zoedone Company, In re*, 26 Ch. D. 70; 53 L. J., Ch. 468; 50 L. T. 547; 32 W. R. 481—C. A.

X. ACTIONS BY AND AGAINST COMPANIES.

Liability for Maintenance.—A corporation in liquidation, as distinct from the liquidator thereof, is incapable of maintenance. *Metropolitan Bank v. Pooley*, 10 App. Cas. 210; 54 L. J., Q. B. 449; 53 L. T. 163; 33 W. R. 709; 49 J. P. 756—H. L. (E.).

Contract induced by Fraud—Authority of Secretary.—The secretary of a company has no general authority to make representations to induce persons to take shares in a company; so that a person who is induced to take shares in a company by a fraudulent misrepresentation, not authorised by or known to the officers of the company entitled to make representations, of the secretary of a company, is not entitled to maintain an action against the company for the rescission of the contract, or for damages for such misrepresentation. *Newlands v. National Employers' Accident Association*, 54 L. J., Q. B. 428; 53 L. T. 242; 49 J. P. 628—C. A.

Action for Maliciously presenting Petition.—*See MALICIOUS PROSECUTION.*

Defence that Action not required for beneficial Winding-up.—By s. 131 of the Companies Act, 1862, a company which is being wound up voluntarily shall, from the date of the commencement of such winding-up, cease to carry on its business except in so far as may be required for the beneficial winding-up thereof. The plaintiff company sued the defendants for breach of contract. The contract was of a kind which it was the business of the company to make, but it was entered into after the company had commenced proceedings for a voluntary winding-up. The contract and the breach of it were proved:—Held, that it lay on the defendants to show that the contract was not required for the beneficial winding-up of the company, and that in the absence of such evidence the plaintiffs were entitled to succeed. *Hire Purchase Furnishing Company v. Richens*, 20 Q. B. D. 387; 58 L. T. 460; 36 W. R. 365—C. A.

In an action by a company in voluntary liquidation for goods sold and delivered in pursuance of a contract entered into by the defendant with the liquidator:—Held, that the fact that the contract was not required for the beneficial winding-up of the company within the meaning of s. 131 of the Companies Act, 1862, did not constitute a defence to the action. *Bateman v. Ball*, 56 L. J., Q. B. 291—Pollock, B.

Liability of Liquidator for Costs.—*See infra*, col. 420.

Scire facias—Director named in Special Act—Resignation—Debt contracted by Company before Resignation.—A railway company was incorporated by a special act of parliament, passed on the 18th August, 1882. In s. 4 of the act the defendant was described as a promoter of the undertaking, and in s. 30 as one of the first

directors of the company, who should continue in office until the first ordinary meeting held after the passing of the act. S. 28 required that the qualification of a director should be the possession in his own right of not less than one hundred shares in the company. The defendant attended one meeting, and on the 23rd December, 1882, sent in his resignation as director to the board, which was accepted by them in the following week. The defendant took no other part in the affairs of the company. The defendant never had any shares allotted to him, nor was any register of shares kept. No shares were ever taken up by the public, and, the objects of the company failing, an abandonment act was obtained and passed in August, 1885. The claim of the plaintiff was for services rendered by him as a surveyor and engineer in relation to and before the formation of the company. The plaintiff brought his action against the company, and obtained judgment by default for 95*l.* 7*s.*, and 5*l.* 6*s.* costs, and issued a writ of *fi. fa.* against the company's goods for the purpose of obtaining satisfaction of the judgment. The sheriff's return to the writ was *nulla bona*. The plaintiff then applied to the High Court for leave to issue execution against the defendant personally under 8 Vict. c. 16, s. 36:—Held, that, as the resignation by the defendant was *bonâ fide*, it was a surrender of his inchoate right to take shares, and operated to divest him of any liability attaching to the holding of shares; and leave to issue the execution against him must be refused. *Mammatt v. Brett*, 54 L. T. 165—D.

XI. WINDING-UP.

1. WHAT COMPANIES.

Foreign Company.—There is no jurisdiction under the Companies Act, 1862, to wind up a foreign company which has carried on business in England by means of agents, but which has no branch office of its own here. *Lloyd Generale Italiano, In re*, 29 Ch. D. 219; 54 L. J., Ch. 748; 33 W. R. 728—Pearson, J.

— **Branch in England—Foreign Liquidation.**—A banking company, incorporated and carrying on business in Australia, had a branch office in London, but was not registered in England. The company had English creditors, and assets in England. Two petitions were presented to wind up the company, which had stopped payment, and on the hearing of the petitions an order was made appointing a provisional liquidator, and the further hearing was ordered to stand over for a time. The powers of the provisional liquidator were limited to the taking possession of, collecting and protecting the assets of the company in England, with liberty to apply in chambers. When the petitions came on again to be heard it appeared that a petition to wind up the company had been meanwhile presented in Australia, and a provisional liquidator had been appointed there, but it was not proved that a winding-up order had been made:—Held, that there was jurisdiction at the time when the petitions were presented to make an order to wind up the company, and that the jurisdiction could not be affected by subsequent proceedings in Australia.

A winding-up order was accordingly made, the order appointing the provisional liquidator being continued, with the same restrictions on his powers, the judge expressing an opinion that the winding-up in this court would be ancillary to a winding-up in Australia, and that, if the circumstances remained the same, the powers of the official liquidator when appointed ought to be restricted in the same way. *Commercial Bank of South Australia, In re*, 33 Ch. D. 174; 55 L. J., Ch. 670; 55 L. T. 609—North, J.

The court has jurisdiction under s. 199 of the Companies Act, 1862, to wind up an unregistered joint stock company, formed, and having its principal place of business in New Zealand, but having a branch office, agent, assets, and liabilities in England. The pendency of a foreign liquidation does not affect the jurisdiction of the court to make a winding-up order in respect of the company under such liquidation, although the court will, as a matter of international comity, have regard to the order of the foreign court. *Matheson, In re*, 27 Ch. D. 225; 51 L. T. 111; 32 W. R. 846—Kay, J.

It being alleged that proceedings to wind up the company were pending in New Zealand, the court, in order to secure the English assets until proceedings should be taken by the New Zealand liquidators to make them available for the English creditors *pari passu* with those in New Zealand, sanctioned the acceptance of an undertaking by the solicitor for the English agent of the company, that the English assets should remain in *statu quo* until the further order of the court. *Commercial Bank of India, In re* (6 L. R., Eq. 517), approved. *Id.*

Trade Union.—See TRADE.

Incorporated by Royal Charter—Statutory Power to Wind up.—A company incorporated by royal charter can be wound up under the Companies Act, 1862. *Oriental Bank Corporation, In re*, 54 L. J., Ch. 481; 52 L. T. 556—C. A.

In the charter of a company incorporated by royal charter in 1851 there was a provision that, "on the winding-up of the affairs of the corporation, all and every the proprietors for the time being of any interest or shares in the capital thereof shall be liable to contribute to the payment of the debts and liabilities of the corporation" to the extent therein mentioned. The charter also contained provisions for winding the corporation up in the event of a loss of a certain amount of the capital, or in the event of the charter being revoked. At the date of the grant of the charter, companies incorporated by royal charter could be wound up under statutory powers:—Held, that the expression "winding-up of the affairs of the corporation" applied to a winding-up under the statutory powers for the time being in force. *Id.*

Prescriptive Corporation—Trust for Benefit of Individual Members—Fishery.—A company or fraternity of free fishermen existed from time immemorial within the manor of F., all the members of which were admitted tenants of the manor, and took an oath of homage to the lord. No grant to the company as a corporation was in existence, but from numerous ancient documents it appeared that the company had the exclusive

right of dredging for oysters and taking other kinds of fish within the manor, for which it paid a rent of £1 3s. 4d. to the lord. By an act passed in 1840 it was recognised as a company in the nature of a prescriptive corporation, and it was recited that the members had time out of mind dredged oysters exclusive of all other persons, and that the fishery was of great benefit to the public; it was thereby enacted that the company might exercise all the powers then vested in it, and fresh powers of raising money and charging the profits of the fishery by way of mortgage were given it, the form of mortgage containing no power of sale. Rules were laid down for the management of the company, but it was provided that nothing in the act should be construed to incorporate the company. The company made bye-laws for the regulation of the dredging of oysters, and, subject to these bye-laws the privilege of dredging and fishing was enjoyed by the members for their own benefit. A petition having been brought by a creditor for winding up the company:—Held, that the company was a corporation in which the exclusive right of fishing within the manor was vested; but that the corporation held the right on a condition or trust for the individual members; and that if the company was wound up this right of fishing could not be sold by the liquidator, and therefore the winding-up order would be useless. The court accordingly refused to make any order for winding up. *Free Fishermen of Raversham, In re*, 36 Ch. D. 329; 57 L. J., Ch. 187; 57 L. T. 577—C. A.

Unregistered Tramway Company.—An unregistered tramway company incorporated by a special act does not fall within the exception of "railway companies incorporated by act of parliament" in s. 199 of the Companies Act, 1862, and it may therefore be wound up under that section. *Brentford and Isleworth Tramways Company, In re*, 26 Ch. D. 527; 53 L. J., Ch. 624; 50 L. T. 580; 32 W. R. 895—V.-C. B.

Unregistered Company—More than Seven "Members."—Though an unregistered company within the meaning of s. 199 of the Companies Act, 1862, must consist of more than seven "members," the expression "members" as used in that section does not necessarily mean "shareholders." *South London Fish Market Company, In re*, 39 Ch. D. 324; 60 L. T. 68; 37 W. R. 3; 1 Meg. 92—C. A.

Statutory Members—Directors' qualification shares—Transfer.—A company was incorporated by a special act of parliament in 1882, eight persons being the first members. These eight persons were appointed the first directors of the company "to continue in office until the first ordinary meeting held after the passing of the act," each director holding forty shares as a qualification. The petitioners were the Vestry of St. Mary, Newington, who had recovered judgment in an action for penalties against the company in consequence of the company not having completed certain works by a stipulated time. No "first ordinary meeting" was ever held, but after action brought, at a meeting of the directors, the directors allotted to themselves the forty qualification shares to be held by each. The shares were of the value of 25l. each, and

a call of 5l. per share was paid on the 20th July, 1887, and that sum was expended in paying the costs, charges, and expenses preliminary to, and of and incidental to, the passing of the special act. On the 21st July, 1887, five of the directors transferred their shares to a nominee. No other shares in the company beyond the directors' qualification shares were ever subscribed for. The vestry having obtained judgment against the company presented a petition for winding up:—Held, that the transfers by the directors of their qualification shares were invalid, and, therefore, that there were eight members of the company, and the company came within the 199th section of the Companies Act, 1862. On appeal, the court held that on the construction of the special act, the eight persons were constituted statutory members as well as statutory directors, with an obligation to continue to hold both characters until the first general meeting; that, therefore, as no first meeting had been held, these eight persons, whether they continued to be holders of shares or not, at all events still continued to be members of the company, and, therefore, there was jurisdiction under section 199 of the Companies Act, 1862, to make the winding-up order. *Ib.*

Suspension of Business—Majority of Shareholders.—Although there may be a suspension of the business of a company for the space of a whole year, the court will not make an order, under sub-s. 2 of s. 79 of the Companies Act, 1862, to wind up the company, unless it is satisfied that there has been an intention on the part of the company to abandon its business, or inability to carry it on; and upon the question of such intention the court will have regard to the opinion and wishes of the majority of the shareholders whose names are on the register. *Tomlin Patent Horse Shoe Co., In re*, 55 L. T. 314—Chitty, J.

2. ORDERS FOR.

Supervision Order or Compulsory Order—Wishes of Creditors.—A petition for the compulsory winding up of a company having been presented by a creditor, if, at the hearing of the petition, the petitioner asks only for a supervision order:—Semble, that s. 149 of the Companies Act, 1862, does not authorize the court, even at the request of a majority of the creditors, to order a compulsory winding-up against the wish of the petitioner. *Chepstow Bobbin Mills Company, In re*, 36 Ch. D. 563; 57 L. J., Ch. 168; 57 L. T. 752; 36 W. R. 180—North, J.

—Right of Creditor to Compulsory Order.—Section 145 of the Companies Act, 1862, which provides that the voluntary winding-up of a company shall be no bar to the right of a creditor to have it wound up by the court if the court is of opinion that his rights will be prejudiced by a voluntary winding-up, applies whether the voluntary winding-up commenced before or after the presentation of the petition. *New York Exchange, In re*, 39 Ch. D. 415; 58 L. J., Ch. 111; 60 L. T. 66; 1 Meg. 78—C. A.

A creditor presented a winding-up petition on the 17th of December, 1887. Three days before this the company had sent him an account showing assets 2,500l., and liabilities 5,000l. On the

26th of January, 1888, the company passed an extraordinary resolution for winding-up. On the 28th of January the petition was ordered to stand over with liberty to the petitioner to bring an action, which he did. On the 30th of April the voluntary liquidator withdrew his defence in the action on the ground that there were no assets. When the petition came on again, the court refused to make a winding-up order, but directed the voluntary winding-up to be continued under supervision. The petitioner appealed:—Held, on appeal, that this order must be affirmed, for that the only possible advantage of a compulsory order would be its relation back to the 17th of December, and that therefore the voluntary winding-up could not prejudice the rights of the creditor unless assets had been misapplied between the 17th of December, 1887, and the 26th of January, 1888, and that if the creditor relied on this, he ought to have made out at the hearing in the court below a *prima facie* case of misapplication of assets during that period. *Ib.*

Although as a general rule an unpaid creditor of a company which cannot pay its debts is entitled to a winding-up order, that order will not be made when it is shown that the petitioning creditor cannot gain anything by a winding-up order, and, *a fortiori*, it will not be made under those circumstances if the other creditors oppose it. *Uruguay Central and Hygueritas Railway Company of Monte Video, In re* (11 Ch. D. 372), approved. The 91st section of the Companies Act, 1862, is not confined to cases where a winding-up order has been made, but applies also where a petition for winding-up is before the court. *Chapel House Colliery Company, In re*, 24 Ch. D. 259; 52 L. J. Ch. 935; 49 L. T. 575; 31 W. R. 993—C. A.

The colliery belonging to a colliery company was subject to a large mortgage payable by instalments, and all its assets had been assigned to trustees upon trust for its debenture holders, who had no present right of action against the company for the principal of their debts, which was not payable till 1885, but only for the arrears of interest, which were considerable. The colliery was not worth so much as the mortgage money, but it was worked at a profit, and the instalments of the mortgage debt were being paid, but nothing was left to pay interest to the debenture holders. There appeared, however, to be reason to think that if the business were continued, and the coal trade improved, there would be something for the debenture holders. The colliery was leasehold and liable to forfeiture if the company was wound up. A holder of debentures to a small amount presented a petition to wind up the company, the debt on the footing of which he petitioned being the arrears of interest on his debentures. A vast majority of the other debenture holders opposed the petition, and none of them supported it. Kay, J., thought the case not a proper one for making a winding-up order, but directed the petition to stand over for six months:—Held, on appeal, that the petition ought to be dismissed at once. *Ib.*

3. PETITIONS.

a. By whom Presented.

Executor—Probate obtained after Presentation.—The executor of a creditor of a com-

pany is entitled to present a winding-up petition before he has obtained probate; it is sufficient if he has obtained probate before the hearing of the petition. *Masonic and General Life Assurance Company, In re*, 32 Ch. D. 373; 55 L. J., Ch. 666; 34 W. R. 739—Pearson, J.

Debenture-holder.—A company issued debentures payable to bearer, the payment of which was secured by a deed by which the company purported to assign all their present and future property to trustees, on trust for the benefit of the debenture-holders, and covenanted with the trustees for payment of the principal and interest of the debentures. By the debentures the company agreed to pay the amount thereby secured to the bearer:—Held, that the holder of some of the debentures, the interest on which was overdue (the debentures having been deposited with him by the original holder as security for a debt) was entitled to petition for the winding-up of the company. *Uruguay Central and Hygueritas Railway Company of Monte Video, In re* (11 Ch. D. 372) distinguished. *Olathe Silver Mining Company, In re*, 27 Ch. D. 278; 33 W. R. 12—Pearson, J.

b. Practice.

Title — Mistake — Amendment — Advertisement.—A winding-up order had been pronounced on a petition intitled, "In the matter of the A. and N. Hotel Company, Limited." Subsequently, before the order was drawn up, the petitioners discovered that the word "company" did not form part of the registered title of the company, though the company had themselves, while carrying on business, usually adopted the word. Thereupon, on an *ex parte* application by the petitioners, the court made an order giving leave to amend and re-advertise the petition, and directing the winding-up order to be drawn up seven days after the advertisement. A motion by the company, to discharge the *ex parte* order was dismissed with costs. *Army and Navy Hotel, In re*, 31 Ch. D. 644; 55 L. J., Ch. 370, 511; 34 W. R. 389—V.-C. B.

Service—No Registered Office.—Where a petition was presented by two creditors and two shareholders for the winding-up of a company which had no registered office or place of business, and which had only eight shareholders altogether, the court held (on an *ex parte* application for directions how to serve the petition) that the petition should be served on the secretary and two principal shareholders, and that letters should be sent to the other shareholders (not being also petitioners) informing them of the petition. *Kewick Old Brewery Co., In re*, 55 L. T. 486—Chitty, J.

Affidavit—Time of Filing—Sunday.—In the computation of the time within which an affidavit verifying a petition to wind up a company must be filed under rule 4 of the Companies Rules of 1862, Sunday is not to be reckoned. *Yeoland Consols, In re*, 58 L. T. 108—Stirling, J.

Security for Costs.—A company against whom a winding-up petition had been presented applied that the petitioner, who was resident

abroad, might be ordered to give security for costs. The petitioner had obtained judgment in an undefended action against the company:—Held, that no security need be given. *Contract and Agency Corporation, In re*, 57 L. J., Ch. 5—Stirling, J.

A petitioner for the winding-up of a company, who has given a business address at which he cannot be found, and whose solicitor is unable to state his private address, will be ordered to give security for costs. *Sturgis (British) Motor Power Syndicate, In re*, 53 L. T. 715; 34 W. R. 163—Chitty, J.

Transfer to London.—Ord. XXXV. r. 16, provides that, "In any case not provided for by rules 13 and 14, any party to a cause or matter proceeding in a district registry may apply to the court or a judge, or to the district registrar, for an order to remove the cause or matter from the district registry to London, and the court, judge, or registrar may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall be just." Circumstances under which an order for transfer to the High Court will not be made. *Neath and Bristol Steamship Company, In re*, 58 L. T. 180—Kekewich, J.

Judgment Creditor.—Discretion of Court.—Evidence of Collusion.—Where, upon the hearing of a winding-up petition presented by a judgment creditor, evidence is before the court upon which the issue of whether the judgment was or was not obtained by collusion can be decided, the petition will be forthwith disposed of, notwithstanding that the judgment has not been impeached in an action at law. *United Stock Exchange, In re*, 51 L. T. 687—Pearson, J.

Two Petitions.—Carriage of Order.—Although, as a general rule, where two petitions are presented for the winding-up of a company, and an order for winding-up is made on both petitions, the carriage of the order is given to the first petitioner, the rule does not bind the judge before whom the rival petitions come; but he has a discretion as to which petitioner shall have the carriage, and he may, under s. 98 of the Companies Act, 1862, direct a meeting of contributors to be held to take their opinion as to which petitioner shall have the carriage. *Cunningham & Co., In re*, 53 L. J., Ch. 246; 50 L. T. 246—C. A.

— **Petition Advertised for Hearing on Holiday.—Subsequent Petition.**—Where the hearing of a petition for the compulsory winding-up of a company had, by inadvertence, been advertised for a legal holiday, and by direction of the court new advertisements were issued, the court refused to make an order upon the petition of an incumbrancer who with notice of the filing of the first petition issued advertisements for the hearing of a second petition, which owing to the above-mentioned mistake, obtained priority in date to those advertising the first petition. *Dublin Grains Company, In re*, Braine, *Ex parte*, 17 L. R., Ir. 512—V.-C.

c. Costs.

Supervision Order.—Petition.—Appearance by

Company.—Where, after the commencement of the voluntary winding-up of a company, a petition is presented for the continuance of the winding-up under supervision, the company ought to appear by the liquidator, and the costs of a separate appearance ought not to be allowed. *Hall & Co., In re*, 53 L. T. 633; 34 W. R. 56—Kay, J.

— **Creditors Supporting Petition.**—A petition having been presented by a creditor for the compulsory winding-up of a company, the petitioner at the hearing asked for a supervision order, and that order was made:—Held, that creditors who appeared and asked for a compulsory order were entitled to costs as supporting the petition. *Chepatow Bobbin Mills Company, In re*, 36 Ch. D. 563; 57 L. J., Ch. 168; 57 L. T. 752; 36 W. R. 180—North, J.

Dismissal on Application of Petitioner.—Shareholders and Creditors.—Where a winding-up petition is dismissed on the application of the petitioner, shareholders and creditors appearing either to oppose or support the petition are entitled to their costs. *Jablochhoff Electric Light and Power Company, In re*, (32 W. R. 168) distinguished. *Nacupai Gold Mining Company, In re*, 28 Ch. D. 65; 54 L. J., Ch. 109; 51 L. T. 900; 33 W. R. 117—Chitty, J.

Where a shareholder presented a petition for winding-up a company, but when the matter was in the paper for the day the petitioner desired to withdraw, and the other parties did not oppose, the court made no order as to costs. *Jablochhoff Electric Light and Power Company, In re*, 49 L. T. 566; 32 W. R. 168—Pearson, J.

Where at the hearing of a winding-up petition the petitioner elects to withdraw his petition, and have it dismissed with costs, shareholders and creditors, whether appearing to support or oppose the petition, are entitled to separate sets of costs. *North Brazilian Sugar Factories, In re*, 56 L. T. 229—Chitty, J.

As a general rule a petitioner who withdraws his petition for the winding-up of a company will be ordered to pay costs of the parties appearing. But the rule is not an inflexible one, and the court will have regard to the circumstances of each case. *District Bank of London, In re*, 35 Ch. D. 576; 56 L. J., Ch. 774; 57 L. T. 475; 35 W. R. 664—North, J.

Withdrawal of Unadvertised Petition.—A winding-up petition had appeared in the court paper from time to time which had never been advertised:—Held, that the petition could be withdrawn without payment of the costs of a shareholder appearing to oppose. *United Stock Exchange, In re*, Philp, *Ex parte*, 28 Ch. D. 183; 54 L. J., Ch. 310; 52 L. T. 509; 33 W. R. 389—Pearson, J.

Dismissal with Costs against Company.—Creditors appearing separately.—A creditor's winding-up petition having by arrangement stood over, it was ultimately, at the request of the petitioner, dismissed with costs as against the company, the company having paid the petitioner's debt and costs. One of the two creditors who appeared separately to support the winding up had, since the petition stood over, been paid part of his debt, but the other had not received anything:—Held, that, under such

circumstances, the proper order was to give one set of costs, but to give such costs entirely to the creditor who had gained nothing by the proceedings, to the exclusion of the creditor who had been paid his debt in part. *Peckham Tramways Company, In re*, 57 L. J., Ch. 462; 58 L. T. 876—Chitty, J.

Second Petition—When Allowed.—A second petitioner, on whose application a provisional liquidator had been appointed, was allowed his costs, notwithstanding that he had presented his petition with notice of the first, on the ground that his petition had benefited the creditors. *Commercial Bank of South Australia, In re*, 33 Ch. D. 147; 55 L. J., Ch. 670; 55 L. T. 609—North, J.

4. STAYING AND RESTRAINING PROCEEDINGS.

Action against Liquidators in Personal Capacity.—An order having been made for the winding-up of an unregistered company under the Companies Act, 1862, the court directed under s. 203 of the act that certain land which was vested in trustees for the company, subject to a rent-charge, should vest in the official liquidators, appointed for the purposes of the winding-up, by their official name.—The plaintiffs, the owners of the rent-charge upon such land, sued the liquidators in their personal capacity to recover arrears of the rentcharge from them as terre-tenants :—Held, that such action ought to be stayed as being manifestly groundless. *Graham v. Edge*, 20 Q. B. D. 688; 57 L. J., Q. B. 406; 58 L. T. 913; 36 W. R. 529—C. A.

Voluntary Winding-up—Special Resolution—Petition by Liquidator.—A company having gone into voluntary liquidation, a petition was presented by the liquidator to stay all proceedings in the winding-up with a view to the reconstruction of the company. Sect. 89 of the Companies Act, 1862, gives the court power after an order for winding-up a company, upon the application of a creditor or contributory, to make an order staying proceedings in the winding-up; and sect. 138 of the same act gives power to the liquidator or contributories in a voluntary winding-up to apply to the court when any question arises, in the same way as when any question arises in the case of a compulsory winding-up or a winding-up under supervision :—Held, that under those sections the court had jurisdiction to make an order as asked, the court being satisfied with the evidence as to the assent of the creditors. *Titian Steamship Company, In re*, 58 L. T. 178; 36 W. R. 347—Chitty, J.

Threatened Action—Supervision Order.—An old company was wound up voluntarily, by resolution of the shareholders, for the purpose of forming a new company of the same name, which is still flourishing. Upon threat of action against the old company, the liquidator petitioned the court to continue the voluntary winding-up of the old company under supervision :—Held, that the liquidator was entitled to the protection of the court under ss. 87 and 151 of the Companies Act, 1862, and that s. 138 did not apply to the threat of an action made

subsequent to and outside the voluntary winding-up. *Zoedone Company, In re*, 53 L. J., Ch. 465; 49 L. T. 654; 32 W. R. 312—V.-C. B.

Order restraining Creditor's Actions—Scotch Action—Assets in Scotland.—A company having its registered office in England, but having also assets in Scotland, passed a resolution for a voluntary winding-up. Creditors in Scotland having commenced actions against the company, a petition was presented by certain others of the English creditors, asking that the winding-up might be continued under the supervision of the court; and upon such petition coming on to be heard, an application was made ex parte that the actions commenced by the creditors might be restrained. The court granted the petition, and also made an order restraining the actions in question. *Middlesborough Firebrick Company, In re*, 52 L. T. 98; 33 W. R. 339—Pearson, J.

Early in the year 1877 the Australian Investment Company, a Scotch company having their registered offices in Edinburgh, brought an action in Scotland against the Queensland Mercantile Agency Company, an Australian company having their registered office in Brisbane, claiming to recover from the Queensland company money which the Scotch company had sent out for investment, and which had been, as the Scotch company alleged, lost by fraudulent or improper investment. For the purpose of founding jurisdiction, arrestment had been made in Scotland of unpaid capital on shares of the Queensland company held in Scotland. The pleadings in the Scotch action were closed in May, 1887. In Oct., 1887, an order to wind up the Queensland company was made by the court in Queensland, and shortly afterwards an order to wind up the same company was made in England, and directed to be ancillary to the order of the colonial court. The English liquidator moved to stay the proceedings in the Scotch action, and the Scotch company made a cross-motion that their action might be allowed to proceed, notwithstanding the winding-up :—Held, that it was more convenient that the matter should be investigated in the liquidation than in the Scotch action, and that if the Australian company had gained any priority or security by virtue of the process of arrestment it could be preserved in the winding-up. There was, therefore, no reason for allowing the Scotch proceedings to continue, and they must be stayed. *Queensland Mercantile Agency Company, In re*, 58 L. T. 878—North, J.

Restraining Scotch Solicitor from Interfering with Assets for Work done.—The solicitors of the official liquidator of a company in liquidation in England employed a solicitor in Scotland as their agent to get in the Scotch assets, upon condition that they should not be personally liable for his costs, but that he must look to the assets only for payment. The solicitor in Scotland afterwards commenced proceedings in the Scotch courts against the official liquidator to obtain payment of his costs, and also arrested certain Scotch assets of the company in the hands of auctioneers in Scotland :—Held, on a motion by the official liquidator for an injunction to restrain the Scotch solicitor from taking further proceedings, that the proceedings against the official liquidator and the arrest of the

Scotch assets were wrong, and an injunction was granted. *Hermann Loog, In re, Ramsay's Case*, 36 Ch. D. 502; 58 L. T. 47; 35 W. R. 687—North, J.

Restraining Criminal Proceedings for Penalties.—A petition had been presented for the winding-up of a company, but before any order was made for that purpose summonses were taken out at a police-court against the company, by a person not interested in the affairs of the company, to recover penalties for alleged offences under the Companies Act, 1862, and the Life Assurance Companies Act, 1870. On motion for an injunction to restrain the proceedings against the company before the magistrate, the court held, that it had jurisdiction under the 85th section of the Act of 1862, and made the order. *Briton Medical and General Life Assurance Association, In re*, 32 Ch. D. 503; 55 L. J., Ch. 416; 54 L. T. 152; 34 W. R. 390—Kay, J.

Restraining Summons for Poor Rates.—Where a petition has been presented for the winding-up of a company the court has jurisdiction under s. 85 of the Companies Act, 1862, to restrain proceedings on a summons for the enforcement of poor rates owing by the company. *Flint Coal and Cannel Company, In re*, 56 L. J., Ch. 232; 56 L. T. 16—Chitty, J.

5. LIQUIDATORS AND RECEIVERS.

Appointment—Voluntary Winding-up.—See *Indian Zeedone Company, In re*, ante, col. 408.

Provisional Liquidator.—The provisions of Ord. L. r. 17, with respect to the appointment of receivers, are applicable to the appointment of provisional liquidators; so that when an order has been made for the appointment of a provisional liquidator, it may be at once adjourned to chambers, and there completed. *Hoyland Silkstone Colliery, In re*, 53 L. J., Ch. 362; 49 L. T. 567—Pearson, J.

There being some evidence that a company had no assets beyond the property comprised in the trust deed, the court directed an inquiry in chambers whether the company had any and what assets not included in the deed and available for the general creditors, and referred it to chambers to appoint a provisional liquidator, with all the powers of an official liquidator, but the liquidator was to take no steps without the direction of the judge in chambers, beyond taking possession of the company's property within the jurisdiction, including their books and papers. *Olathe Silver Mining Co., In re*, 27 Ch. D. 278; 33 W. R. 12—Pearson, J.

New Liquidator—Absconding Liquidator—Vesting Order.—After an order had been made for the compulsory winding-up of a company A. B. was appointed official liquidator. A. B. afterwards absconded, and he was removed from the post of official liquidator, and in his place C. D. was appointed official liquidator. It was found that a sum of consols, part of the assets of the company, was standing in A. B.'s name as official liquidator. An application, under the Trustee Act, 1850, ss. 22 and 43, was therefore made by motion ex parte for an order to vest

such sum of consols in C. D. as official liquidator. A. B. had become bankrupt and could not be found:—Held, that the court had jurisdiction to make the order asked for upon motion; but that, except in simple cases like the present, the application should be made by petition:—Held, also, that the order asked for should be made, but not drawn up, within a week, and that the trustee in bankruptcy of the absconding liquidator should forthwith be served with notice of the order. *Capital Fire Insurance Association, In re*, 55 L. T. 633—Chitty, J.

Security—Supervision Order.—In the case of a supervision order a creditors' representative, appointed to act as co-liquidator with a voluntary liquidator, was not required to give security, it appearing that no security had been required from the voluntary liquidator. *Aberavon Tin Plate Company, In re*, 57 L. J., Ch. 761; 59 L. T. 498—Chitty, J.

Remuneration—"Divisible Assets"—Value of Shares.—The regulation adopted by the judges of the Court of Chancery in 1868 for fixing the remuneration of official liquidators is not binding upon the judges, but is intended as a guide to them in exercising their discretion. A limited company being in course of liquidation, a new company was formed, and a scheme was sanctioned by the court, under which the new company took over the assets of the old company, and in consideration thereof agreed to pay its debts and to allot shares to the old shareholders instead of their old shares, each share to be of the nominal value of 1l. with 15s. paid up, and their market value was about 16s. The judge, in fixing the scale of remuneration of the liquidator, treated the value of the new shares allotted to the shareholders as assets of the old company of the value of 15s. each:—Held, that the judge had acted on a right principle in having regard to the value of the new shares in fixing the scale of remuneration, and that they ought not to interfere with his discretion as to the value at which he estimated them. "Divisible assets" in the regulation means assets free to be divided among the creditors and shareholders, not assets actually divided. *Mysore Reef's Gold Mining Company, In re*, 34 Ch. D. 14; 56 L. J., Ch. 96; 55 L. T. 655—C. A.

Bankruptcy Notice given by.—See ante, col. 103.

Right to Costs—Priority.—An order giving the costs to the successful litigant directed that they should be paid by the official liquidator, and that he should be at liberty to retain them out of the assets of the company:—Held, that this form of order gave the official liquidator the right to repay himself the costs out of the assets in priority to all other creditors. *Dominion of Canada Plumbago Company, In re*, 27 Ch. D. 34; 53 L. J., Ch. 702; 50 L. T. 518; 33 W. R. 9—C. A.

Liability for Costs.—The official liquidators of a company who are defending an action in the name and on behalf of the company are not liable for costs personally. *Fraser v. Brescia Steam Tramways Company*, 56 L. T. 771—Keke-wich, J.

Costs of successful claims in a winding-up are

not given against the liquidator personally, but out of the assets. *Marseilles Extension Railway, In re, Smallpage and Brandon's cases*, 30 Ch. D. 598; 55 L. J., Ch. 116—Pearson, J.

Removal — Liquidator of Unsound Mind — Jurisdiction of High Court—Stannaries Court.]—A company registered under the Companies Acts, which was formerly engaged in working a mine within and subject to the jurisdiction of the Stannaries, was wound up voluntarily, and the mine was sold and disposed of. The liquidator subsequently became of unsound mind, and it was desirable that some person should forthwith be appointed liquidator of the company in his place. An application was accordingly made to the High Court for that purpose. The case not being expressly provided for by ss. 140 and 141 of the Companies Act, 1862, the question arose as to whether the court had jurisdiction to remove a lunatic liquidator. Another question was, whether the application was properly made to the High Court, or whether it should have been made to the Stannaries Court:—Held, that, under the circumstances, the High Court had jurisdiction to make the order asked for, notwithstanding that there might be a concurrent jurisdiction in the Stannaries Court; and an order was made removing the liquidator, and directing the usual reference to chambers to appoint a new liquidator. *North Molton Mining Company, In re*, 54 L. T. 602; 34 W. R. 527—Kay, J.

— Grounds for.]—The jurisdiction of the court to remove a liquidator under ss. 93 and 141 of the Companies Act, 1862, "on due cause shown," is not confined to cases where there is personal unfitness in the liquidator. Whenever the court is satisfied that it is for the general advantage of those interested in the assets of the company that a liquidator should be removed, it has power to remove him, and appoint a new one. *Sir John Moore Gold Mining Company, In re* (12 Ch. D. 325), explained. *Charlesworth, Ex parte, Adam Eytton, In re*, 36 Ch. D. 299; 57 L. J., Ch. 127; 57 L. T. 899; 36 W. R. 275—C. A.

— Appeal against Order for Removal.]—A liquidator who has been removed by a judge may appeal against his removal. *Id.*

Companies Act, 1862, s. 165—Security for Costs.]—A building society, formed in accordance with the provisions of 6 & 7 Will. 4, c. 32, was being wound up, and a summons was brought by the official liquidator under s. 165 of the Companies Act, 1862, against the manager. On a summons by the manager under s. 69 of the Act of 1862, for security for costs, on the ground that the assets of the society were insufficient to pay the costs of the first summons:—Held, that the court had general jurisdiction to order the official liquidator to give security for costs before any further proceedings were taken in the matter. *Seventh East Central Building Society, In re*, 51 L. T. 109—V.-C. B.

— Solicitor not "Officer" of Company.]—A solicitor of a company is not an officer of that company within the meaning of s. 165 of the Companies Act, 1862. *Great Western Forest of Dean Coal Consumers' Company, In re, Carter's*

Case, 31 Ch. D. 496; 55 L. J., Ch. 494; 54 L. T. 531; 34 W. R. 516—Pearson, J.

A solicitor who acts as solicitor of a company at the time of its formation is not a promoter, neither is he an officer of the court, so as to be amenable to the jurisdiction of the court under s. 165 of the Companies Act, 1862. *Great Wheel Polgoth, In re*, 53 L. J., Ch. 42; 49 L. T. 20; 32 W. R. 107; 47 J. P. 710—V.-C. B.

— Summons—Witness Action, setting down as—Cross-examination.]—The liquidators of a company which was in course of being wound up took out a summons, under s. 165 of the Companies Act, 1862, seeking to make the directors liable for misfeasance and breach of trust. Numerous affidavits were filed for and against the summons. The liquidators applied to the chief clerk to have the summons entered in the list of witness actions and the cross-examination of the deponents taken in court at the hearing; but the chief clerk made an order refusing the application. The liquidators accordingly moved to discharge that order, on the ground that it would be much more convenient to have the summons treated as a witness action; and that, if the cross-examination took place before the chief clerk, or one of the examiners of the court, a great deal of irrelevant matter would be gone into, and much time thus unnecessarily occupied:—Held, that the application to discharge the chief clerk's order must be refused; that, unless a special case was shown, summonses of this nature were to be heard as summonses on affidavit evidence, and any cross-examination upon the affidavits must take place before one of the examiners of the court; and that the present case was one which ought to go before an examiner of the court. *Faure Electric Accumulator Company, In re*, 58 L. T. 42—Kay, J.

Receiver—Subsequent Winding-up—Substitution of Liquidator as Receiver.]—In an action brought against a company to enforce a charge on certain calls due from shareholders, the plaintiffs were, in August, 1884, appointed as receivers. In October, 1884, the company went into voluntary liquidation, and on the 15th November, 1884, an order was made for carrying on the winding-up under the supervision of the court. On the 3rd June, 1885, the court removed the plaintiffs from being receivers, and appointed the liquidators of the company to be receivers in their place, on the ground that the liquidators could collect the outstanding calls more expeditiously and less expensively than the plaintiffs. On appeal, the court, without laying down that a receiver already appointed should be displaced by the liquidator, declined to interfere with the discretion of the judge. *Bartlett v. Northumberland Avenue Hotel Company*, 53 L. T. 611—C. A.

After the presentation of a petition for winding-up the company, but before an order for winding-up was made, or an official liquidator appointed, two of the directors of the company, in the character of trustees of a trust deed for securing certain mortgage debentures, commenced an action against the company for the enforcement of the deed, and obtained the appointment of a receiver of the property included in the trust deed, which comprised the whole, or nearly the whole, of the assets of the

company. A winding-up order was subsequently made, and an official liquidator appointed, and on his application:—Held, that the receiver appointed in the action must be removed, and the liquidator appointed receiver in his place. *Tottenham v. Swansea Zinc Ore Company*, 53 L. J., Ch. 776; 51 L. T. 61; 32 W. R. 716—Pearson, J.

6. RENT AND RATES.

Leave to Distrain for Rent.—Accrual after Winding-up Order.—A limited company mortgaged certain cotton mills, machinery, and fixtures for 22,000*l*. The mortgage deed contained a clause by which the company attorned tenants to the mortgagees at the annual rent of 1,595*l*. The company was ordered to be wound up, and the official liquidator remained in possession of the mills for more than a year in order that he might, if possible, sell them as a going concern. He paid the expenses of keeping the premises and the machinery in repair, but did not actually work the mills. The mortgagees acquiesced in this arrangement, believing it to be the best for all parties. The mortgagees then applied for leave to distrain for a year's rent accrued since the winding-up order:—Held, that as it appeared from the evidence that the occupation of the liquidator was for the benefit of the mortgagees as well as of the company, the mortgagees ought not to be allowed to distrain. *Eachall Coal Mining Company, In re* (4 D. J. & S. 377), disapproved but followed. *Carnelley, Ex parte, Lancashire Cotton Spinning Company, In re*, 35 Ch. D. 656; 56 L. J., Ch. 761; 57 L. T. 511; 36 W. R. 305—C. A.

When a landlord applies to the court for leave to distrain for rent upon the goods of a company which is being wound up, he must show either that there are special circumstances rendering it inequitable for the 163rd section to be enforced against him; or that the rent has accrued under such circumstances that it ought to be paid as part of the costs of the winding up. Semble, a mortgagee with an attornment clause who asks for leave to distrain for his interest after a winding-up order, is in a more unfavourable position than a landlord who asks for leave to distrain for rent. *Id*.

— House in Occupation of Under-tenants.—Charge of Debenture-holders.—A company who were the lessees of a house where they carried on their business were ordered to be wound up, being indebted in an arrear of rent to their landlord. A scheme of reconstruction was sanctioned by the court under which the lease was purchased by a new company; and the new company agreed with the landlord to pay him the arrears of rent and "all subsequent rent accruing due under the lease in manner therein provided," but no assignment of the lease to the new company was ever executed. The new company issued debentures charging all their property to a much larger amount than the value of the furniture in the house. The new company was also ordered to be wound up, a year's rent being due to the landlord:—Held, by Kay, J., that the landlord was entitled to distrain on the furniture as against the debenture-holders, and that as it was the only property of the company and the

debenture debt was much greater than its value, the official liquidator had no interest in the matter and no power to interfere; and further, that if the debenture-holders were out of the way, the landlord, although he had a claim for the rent under the agreement for which he could prove in the winding-up, could distrain according to *Ex parte Clemence* (23 Ch. D. 154), which however was disapproved:—Held, by the Court of Appeal, that as the charge of the debenture-holders was more than the value of the furniture, the furniture did not belong to the company, and the landlord was therefore entitled to distrain upon it; but the court gave no opinion on the question whether the landlord could have distrained if the debenture-holders had been out of the way: that the fact that the debenture-holders were willing, and offered to release their security and stand as general creditors made no difference in the landlord's right; and that under an agreement between the liquidator and the landlord that the liquidator should sell the furniture and pay the proceeds of the sale, "less the auction charges," into court, the liquidator was not entitled to deduct his own costs and charges in carrying out the sale. *Purcell, Ex parte, New City Constitutional Club Company, In re*, 34 Ch. D. 646; 56 L. J., Ch. 332; 56 L. T. 792; 35 W. R. 421—C. A.

Payment of Rates.—Voluntary Liquidation.—Provisional Liquidator.—Rates due after Appointment of.—Priority.—Between the dates of the appointment of a provisional liquidator on a winding-up petition and of a subsequent resolution by the company for a voluntary winding-up, the overseers of a parish proceeded, without the leave of the court, to distrain for rates which had become due for the current half-year in respect of the company's premises:—Held, by the court below, that the overseers were not entitled to the benefit of their distress, and that, as the rates were due before the commencement of the winding-up—that is, the passing of the winding-up resolution, *Weston's case* (4 L. R., Ch. 20)—the overseers were not entitled to any priority in respect of them, and that an injunction ought to be granted to restrain them from proceeding with the distress. But held on appeal, that as the overseers' right of distress was defeated only by the appointment of the provisional liquidator, the case was one where if leave to distrain had been applied for it would have been granted, and that an injunction ought only to have been granted on the terms of the liquidators paying the rates. *Dry Docks Corporation, In re*, 39 Ch. D. 306; 58 L. J., Ch. 33; 59 L. T. 763; 37 W. R. 18; 1 Meg. 86—C. A.

— Business carried on by Liquidator.—Beneficial Occupation.—An hotel company was wound up under an order of the court, and the liquidator was directed to sell the hotel, but with liberty to carry on the business till the sale, so as to sell it as a going concern. The liquidator accordingly carried on the business in the hotel, but made no profit by it. Shortly after the commencement of the winding-up a poor-rate was made, and the overseers claimed payment of the rate from the liquidator in respect of his occupation of the hotel:—Held, that the rate must be paid in full. *West Hartlepool Iron Company, In re* (34 L. T. 568), and *Watson, Kipling & Co., In re* (23 Ch. D. 500),

distinguished. *International Marine Hydrographic Company, In re*, 28 Ch. D. 470; 33 W. R. 587—C. A.

A company was being wound up under supervision, the liquidation commencing in 1882. The liquidator did not keep the concern in full work, but remained in occupation of the business premises for the purpose of carrying out some pending contracts, finishing a quantity of unfinished articles, and storing and keeping in order a quantity of completed articles with a view to selling them. In March, 1883, a rating authority made a rate for 1883 on all the property within the district. The liquidator allowed the time for appealing against the assessment to go by. The rating authority applied to the court for payment of the rate in full:—Held, that as the liquidator had from the commencement of the winding-up occupied the property for the purposes of the company, and with a view to acquiring gain or avoiding loss to the company, the rate ought to be paid in full. *National Arms and Ammunition Company, In re*, 28 Ch. D. 474; 54 L. J., Ch. 673; 52 L. T. 237; 33 W. R. 585—C. A.

Whether, in order to entitle the rating authority to be paid in full, it is necessary for the liquidator to have any more beneficial occupation of the property than is required under the ordinary law as to rating, *quære*. The test in *West Hartlepool Iron Company, In re* (34 L. T. 568), doubted. *Ib.*

Where the liquidator, being in possession, does not appeal against the assessment, the court will not refuse to order payment of the rate in full on the ground of its being too high, except perhaps in extreme cases. *Ib.*

— **Staying Proceedings.**—See ante, col. 419.

7. SET-OFF.

Judicature Act, 1875, s. 10—Sale of Goods—Contract for Delivery of Goods by Instalments.—

—The respondents bought from the appellant company 5,000 tons of steel of the company's make, to be delivered 1,000 tons monthly, commencing January, 1881, payment within three days after receipt of shipping documents. In January the company delivered part only of that month's instalment, and in the beginning of February made a further delivery. On the 2nd of February, shortly before payment for these deliveries became due, a petition was presented to wind up the company. The respondents *bonâ fide*, under the erroneous advice of their solicitor that they could not without leave of the court safely pay pending the petition, objected to make the payments then due unless the company obtained the sanction of the court, which they asked the company to obtain. On the 10th of February the company informed the respondents that they should consider the refusal to pay as a breach of contract, releasing the company from any further obligations. On the 15th of February an order was made to wind up the company by the court. A correspondence ensued between the respondents and the liquidator, in which the respondents claimed damages for failure to deliver the January instalment, and a right to deduct those damages from any payments then due; and said that they always had been and still were ready to

accept such deliveries and make such payments as ought to be accepted and made under the contract, subject to the right of set-off. The liquidator made no further deliveries, and brought an action in the name of the company for the price of the steel delivered. The respondents counterclaimed for damages for breaches of contract for non-delivery:—Held, that s. 10 of the Judicature Act, 1875, imported into the winding-up of companies the rules as to set-off in bankruptcy; that the respondents were entitled, after the winding-up order was made, to set-off damages for non-delivery against the payments due from them, and to counterclaim for damages in this action. *Mersey Steel and Iron Company v. Naylor*, 9 App. Cas. 434; 53 L. J., Q. B. 497; 51 L. T. 637; 32 W. R. 989—H. L. (E.).

— **Claim to Return of Goods Pledged—Detinue.**—The plaintiff company had deposited cigars with the defendants to secure a debt. An order for winding up the company was afterwards made, and, the secured debt having been paid off, the liquidator of the company claimed a return of the cigars, but the defendants refused to give them up. The liquidator brought an action of detinue for the cigars. Their value having been assessed in the action, the defendants claimed by way of counterclaim to set off another debt due from the company to them against such value by virtue of the conjoint effect of s. 38 of the Bankruptcy Act, 1883 (the "mutual dealings" section), and s. 10 of the Judicature Act, 1875, which applies the rules of bankruptcy law to cases of winding-up:—Held, that they were not entitled to do so on the ground that s. 38 is only applicable where the claims on each side are such as result in pecuniary liabilities, whereas the right of the plaintiffs was to a return of the goods. *Eberle's Hotel Company v. Jonas*, 18 Q. B. D. 459; 59 L. J., Q. B. 278; 35 W. R. 467—C. A.

— **Claim against Company assigned to Debtor to Company and again assigned by him.**—

—A company in 1887 was ordered to be wound up. In 1879 H. took assignments for value of the debts proved by and certified to be due to several creditors. On the 23rd of January, 1880, the liquidator took out a summons under s. 165 of the Companies Act, 1862, that H., who had been a director, might be ordered to pay 2,000*l.*, the nominal value of certain shares in the company received by him from the promoter, or to make compensation on the ground of misfeasance. On the 25th of February, 1880, H. assigned the above debts to T. for value, T. knowing nothing of the claims against H., and notice of the assignment was at once given to the liquidator. In July, 1880, an order was made on the summons for H. to pay 2,000*l.* to the liquidator. On the 4th of August, 1881, an order was made giving the liquidator liberty to declare a dividend of 1*l.*s. in the pound on the debts of the company. T. applied for payment of this dividend on the debts assigned to him, but the liquidator claimed to retain the dividend by way of set-off against the 2,000*l.*:—Held, that the liquidator had no such right of set-off, and that T. was entitled to receive the dividend. *Milan Tramways Company, In re, Theys, Ex parte*, 25 Ch. D. 587; 53 L. J., Ch. 1008; 50 L. T. 545; 32 W. R. 601—C. A.

Qualification of Directors provided by Promoter.—A director, upon finding that he was not justified in receiving from the promoter shares to give him the necessary qualification without payment, offered to pay the full sum due from him, and gave a cheque for the amount, which, however, was accepted as an advance to the company, and was added to previous advances made by him for preliminary expenses:—Held, that he was not at liberty to set off the value of his shares against the amount paid in respect of advances, though he would have a claim against the company for those advances. *Carriage Co-Operative Supply Association, In re*, 27 Ch. D. 323; 53 L. J., Ch. 1154; 51 L. T. 286; 33 W. R. 411—Pearson, J.

Payment by Director after Winding-up Order, of Promissory Note given before, on behalf of Company.—A director of an unlimited company paid to the bankers of the company, after a winding-up order, and after a call had been made, 500*l.* in respect of an overdraft of the company, for which he had become surety. On a summons asking the court to declare that under s. 101 of the Companies Act, 1862, the director was entitled to set off this sum against 875*l.* due from him for calls on shares:—Held, that the amount, if any, owing to the director was one which could only be ascertained by inquiry; that it was not clear that the director had any claim to be repaid; and that the court, in the exercise of the discretion given by the section, ought not to allow the set-off. *Norwich Equitable Fire Insurance Company, In re, Brasnett's case*, 53 L. T. 569; 34 W. R. 206—C. A. Affirming 54 L. J., Ch. 227—V.-C. B.

Charge on Money payable under Contract—Damages under Independent Contract.—Under a contract for paying and maintaining V. Street between certain commissioners and a company, the commissioners were empowered to retain the cost of maintenance and to set it off against any money which might be payable by them to the company. The company, on the 15th of November, 1882, gave L. a letter of charge upon all their interest in the contract to secure a debt due from them to him. On the 9th of December L. gave the commissioners notice of this charge, and later on the same day the company presented a petition for a winding-up order, after which the provisional liquidator was empowered to complete the contract subject to any prior charge in favour of L. On the 13th of January, 1883, the winding-up order was made. The commissioners claimed damages for non-fulfilment of the contract to maintain V. Street, and also four other streets under similar contracts, and they claimed to set off these sums against money due from them to the company:—Held, that the commissioners were not entitled to set-off against moneys due from them to the company under the contract relating to V. Street any damages to which they might be entitled for breaches of the other contracts. Held also, that the charge in favour of L. being given prior to the liquidation, the commissioners were not entitled to a set-off against L., but that they could set-off the damages against the liquidator under the mutual credit section of 32 & 33 Vict. c. 71. *Asphaltic Paving Co., In re, Lee and Chapman, Ex parte*, 30 Ch. D. 216; 54 L. J., Ch. 460; 53 L. T. 65; 33 W. R. 513—C. A.

8. ASSETS.

a. Sale of.

Jurisdiction—Sanction of Court to Conditional Contract—Judicial Discretion—Appeal.—Sect. 95 of the Companies Act, 1862, enables the official liquidator of a company in course of winding-up, with the sanction of the court, to sell the whole of the assets of the company en bloc. Although, as a general rule, when a liquidator is proposing to sell the assets of the company with the sanction of the court, it is proper to obtain a valuation of the property to be sold, yet the court will, in the absence of such a valuation, sanction a sale under peculiar circumstances—e.g., when an early sale is desirable and the assets are large, in distant and different parts of the world, and of fluctuating value. When asked to sanction a contract for the sale of the assets of a company in liquidation, the court is justified in acting principally on the information of the court and the liquidator in the winding-up, without requiring strict proof of all the circumstances. It is a strong ground for ordering an early sale of the assets that the liquidator, by retaining possession of the assets, is, by reason of their peculiar character, carrying on a speculation which may involve the creditors in loss, or greatly diminish their chances of being paid. The judge to whose court a winding-up is attached has a judicial discretion as to sanctioning a sale of the company's assets under s. 95 of the Companies Act, 1862. Although an appeal lies from the exercise of such discretion, yet the Court of Appeal will only interfere (1) when the judge has decided on a matter not within his discretion; (2) when his assumed discretion has been exercised on wrong principles; (3) when some great loss will be occasioned by a clearly erroneous exercise of discretion. *Oriental Bank Corporation, In re*, 56 L. T. 868—C. A.

When the court has sanctioned a conditional private contract for the sale of the assets of a company, the court ought not to entertain a subsequent (even higher) offer from another person, as such a practice is within the principle condemned by the Sale of Land by Auction Act, 1867. *Ib.*—Per Chitty, J.

b. Distribution of.

Injunction to Restrain—Future Liabilities under Lease.—An injunction was granted, on motion by the lessor, to restrain a company in voluntary liquidation from distributing assets among its shareholders without setting aside sufficient assets to provide for future rent and other liabilities under a lease. An appeal from this decision was compromised. *Gooch v. London Banking Association*, 32 Ch. D. 41—Pearson, J. Compromised in C. A.

— **Unassignable Lease.**—When a limited company is voluntarily wound up a lessor who has granted a lease to the company not assignable without his consent, may obtain an interdict against the liquidator of the company from dividing the surplus among the shareholders until some provision to meet his future contingent claims against the company is made. *Elphinstone (Lord) v. Monkland Iron and Coal Company*, 11 App. Cas. 332—H. L. (Sc.).

Surplus Assets—Ordinary and Preference Shareholders.—The articles of association of a limited company provided that the entire net profits of each year, subject to providing a reserve, should belong to the holders of shares. After this preference shares entitling the holders to a fixed dividend were issued under a power in the articles. A statute enacted that the company should sell to another company its undertaking for a specified price, which left a large surplus after payment of liabilities and return of paid-up capital:—Held, that the balance of the purchase-money, after satisfaction of the liabilities of the company and the return of the paid-up capital, was not profit belonging solely to the ordinary shareholders, but was divisible between the holders of ordinary and preference shares in proportion to the amounts paid up on the shares. *Bridgewater Navigation Company, In re*, 39 Ch. D. 1; 57 L. J., Ch. 809; 58 L. T. 866; 36 W. R. 769; 1 Meg. 1—C. A.

— Advance by Shareholders in excess of Calls—Interest on Advance.—By an agreement set out in articles of association a certain number of the shares, called "vendors' shares," were issued as fully paid up, and it was agreed that the holders of these shares should be entitled to dividends upon so much thereof as should be equal to the amount paid up on the ordinary shares, and to interest at five per cent. upon the remainder. 7l. only out of 10l. was called up on the ordinary shares. The company went into voluntary liquidation, and, after paying all the debts and liabilities, the liquidator, having a considerable surplus in his hands for distribution among the contributories, paid interest at five per cent. to the holders of the vendors' shares on 3l. per share up to the date of the commencement of the winding up. On motion made by the liquidator for the order of the court as to the distribution of the remaining assets of the company:—Held, that the agreement was binding as between the shareholders, and that 3l. a share must be repaid to the holders of the vendors' shares, with interest thereon at five per cent. from the date of the winding up until such repayment, before any payment could be made to the ordinary shareholders. *Exchange Drapery Company, In re*, 38 Ch. D. 171; 57 L. J., Ch. 914; 58 L. T. 544; 36 W. R. 444—Kay, J.

— Partly Paid-up Shares.—Upon an issue of capital by a company the subscribers were offered the option of subscribing for stock and paying in full, or for shares of 20l. each on which 5l. only could be paid unless a further call should be made by the company. The capital was taken up by subscribers of both classes, and no further call made in respect of the shares. At the time of this issue of capital the Government, by virtue of certain Acts of Parliament and contracts made thereunder, had the option of purchasing the undertaking and the property of the company at a price equal to the average market value for three years of the whole of the shares and stock. The Government exercised their option of purchase, and the purchase-money paid by them exceeded the total of the amounts paid up:—Held, that the purchase-money ought to be divided between the holders of stock and the shareholders rateably, according to the actual amounts contributed by them to the capital of

the company. *Somes v. Curric* (1 Kay & J. 605), considered. *Sheppard v. Seinde, Punjab, and Delhi Railway*, 56 L. J., Ch. 866; 57 L. T. 585; 36 W. R. 1—C. A. Affirmed on construction of Special Act, 60 L. T. 641—H. L. (E.)

— Issue of Shares at a Discount.—Certain shares of a joint-stock company were issued at a discount of 7s. 6d. There was no contract in writing that these should be deemed fully paid-up shares under s. 25 of the Companies Act, 1867. The company went into liquidation, and the realization of its property produced more than enough to pay all the debts and expenses, leaving a surplus distributable among the shareholders:—Held, that the case came within the 25th section of the Companies Act, 1867, and that the holders of shares on which 12s. 6d. only was paid were not entitled to claim any portion of the surplus assets as against the fully paid-up shareholders without first accounting for the 7s. 6d. per share, being the discount at which the shares were issued. *Newtownards Gas Company, In re Stephenson, Ex parte*, 15 L. R., Ir. 51—V.-C.

Priority—Crown—Payment in Full.—The provisions of the Bankruptcy Act, 1883, which take away the priority of the Crown over other creditors in the distribution of assets in bankruptcy, have not, by virtue of the assimilating provisions contained in the Judicature Act, 1875, s. 10, been incorporated into the Companies Act, 1862, so as to bar the prerogative right of the Crown to issue process and thus to obtain payment in full, in priority over other creditors, in respect of a debt due from a company in course of liquidation under the Companies Act. *Oriental Bank Corporation, In re, The Crown, Ex parte*, 28 Ch. D. 643; 54 L. J., Ch. 327; 52 L. T. 170—Chitty, J.

Letter-receivers were in the habit, with the sanction of the Postmaster-General, of paying moneys received on account of the Post-office into a bank to their private account, together with their own moneys, and of drawing cheques both for their own purposes and for payment to the Post-office. The bank had notice that their customers were letter-receivers, and drew cheques for Post-office purposes. The bank having gone into liquidation:—Held, that the Postmaster-General, on behalf of the Crown, was entitled to payment in priority over other creditors of the bank of the balance due upon the letter-receivers' accounts in respect of Post-office moneys. *Rea v. Ward* (2 Ex. 301, n.) followed. *West London Commercial Bank, In re*, 38 Ch. D. 364; 57 L. J., Ch. 925; 59 L. T. 296—Chitty, J.

— Preferential Claim—Clerk or Servant—Arrears of Salary.—The provisions of s. 4 of the Companies Act, 1883, which direct that, in the distribution of the assets of any company being wound up, there shall be paid, in priority to other debts, all wages or salary of any clerk or servant in respect of service rendered to the company during four months before the commencement of the winding-up not exceeding 50l., apply to the case of a winding-up commenced before the act came into force. Accordingly, where a winding-up order had been made before the commencement of the act:—Held, that the company's former secretary, to whom arrears were owing, being a "clerk or servant" within the meaning of s. 4, was entitled to payment in

full of four months' salary; but that such payment was not to disturb past dividends. *Anglo-French Co-Operative Society, In re, Pelly, Ex parte*, 50 L. T. 754; 32 W. R. 748—Kay, J.

— **Costs of Landlord of Company.**—[Pending the winding-up of a company voluntarily under the supervision of the court, the landlord of premises held by the company, without leave of the court, brought an action to recover possession, and obtained judgment:—Held, that the landlord was entitled to be paid his costs in full in priority to the general creditors of the company but not to an order for immediate payment. *National Building and Land Investment Company, In re, Clitheroe, Ex parte*, 15 L. R., Ir. 47—V.-C.

— **Costs of Successful Litigant.**—[In the winding-up of a company the liquidator changed his solicitor. The first solicitor claimed to be paid his costs. The liquidator set up in defence that he had, in pursuance of an order of the court, paid away part of the assets in discharging the costs of an unsuccessful attempt to settle an alleged shareholder on the list of contributories, and that the only remaining assets amounted to 9%, which was quite insufficient to pay the applicant, and which he claimed to retain for costs out of pocket:—Held, that the successful litigant whose costs were ordered to be paid by the liquidator, was entitled to immediate payment of those costs in priority to the general costs of liquidation including costs of realization; and that the remaining assets, amounting to 9%, must be apportioned equally between the liquidator and the applicant. *Home Investment Society, In re* (14 Ch. D. 167), followed; *Dronfield Coal Company, In re* (23 Ch. D. 511), not followed. *Dominion of Canada Plumbago Company, In re*, 27 Ch. D. 33; 53 L. J., Ch. 702; 50 L. T. 518; 33 W. R. 9—C. A.

— **Action by Debenture-holders—Costs—Receiver and Manager—Trustees.**—[In a suit instituted by a debenture-holder of a company, on behalf of himself and the other debenture-holders, against the company and the trustees of a deed, by which leasehold collieries and plant of the company were assigned to trustees to secure the payment of the debentures, to enforce the security, a receiver and manager was appointed. He worked the collieries for some years at a loss. Ultimately the property was sold, the plaintiff having the conduct of the sale, and the purchase-money was paid into court. The fund was insufficient. The original plaintiff became bankrupt in the course of the proceedings, and another debenture-holder was substituted for him as plaintiff. On the further consideration of the suit:—Held, that the costs and other expenses must be paid out of the fund in the following order: (1) The plaintiff's cost of the realization of the property, including the costs of an abortive attempt to sell; (2) The balance due to the receiver and manager (including his remuneration) and his costs of the suit; (3) The costs, charges, and expenses of the trustees of the deed; (4) The two plaintiffs' costs of the suit, *pari passu*. *Batten v. Wedgwood Coal and Iron Company*, 28 Ch. D. 317; 54 L. J., Ch. 686; 52 L. T. 212; 33 W. R. 303—Pearson, J.

— **Withdrawal of Members—Mutual Loan**

Society—Payment out of Special Fund.—[The rules of an unlimited mutual loan society provided that a separate fund should be formed by the subscriptions of members joining in each year, which subscriptions might, with the consent of the directors, be paid in advance. The accounts of each fund were to be kept distinct, and the members were to receive advances called "appropriations," out of the accumulations of the particular fund to which they subscribed. The appropriations were to be repaid by instalments extending over twenty years. Members might withdraw on giving notice, and were in that case entitled to a return of their subscriptions, together with the payment of bonuses declared in respect of their shares, such payments to be made in the order of the dates of their notices, and only out of moneys received after the dates of their notices in repayment of appropriations. When appropriations had been made to all members of a fund, or before that under certain circumstances, the fund was to be declared closed and the accumulations were to be divided among the continuing members of the fund. The company was wound up voluntarily, and the liquidator applied for the direction of the court as to the distribution of the assets among the members, there being no outside creditors. There were four classes of members whose interests were in dispute: (1) Members who had given notice of withdrawal after the closing of their funds, and before the commencement of the winding-up; (2) Members who had given notice of withdrawal after the closing of their funds, but before the commencement of the winding-up; (3) Continuing members who had paid subscriptions in advance; (4) Continuing members who had not paid any subscriptions in advance:—Held, by Kay, J., that the provision for the repayment of withdrawing members out of the particular fund ceased to apply on the winding-up of the company, and that those members who had given notice of withdrawal before the commencement of the winding-up had no priority over the continuing members:—Held, also, that the continuing members who had paid their subscriptions in advance had no priority over the other members:—But, held, by the Court of Appeal, that, according to the true construction of the articles, members who had given notice of withdrawal before the closing of their fund and before the commencement of the winding-up had a charge on the repayments of appropriations belonging to their particular funds; that such charge did not cease on the closing of the fund or on the winding up, and that they were therefore entitled to be paid in full out of such repayments in priority to all other members. *Blackburn and District Benefit Building Society, In re* (10 App. Cas. 33), followed; *Mutual Society, In re* (24 Ch. D. 425, n.), distinguished. *Alliance Society, In re*, 28 Ch. D. 559; 54 L. J., Ch. 540; 52 L. T. 695—C. A.

— **Depositors—Outside Creditors—Non-Members—Notices of Withdrawal.**—[A registered company, carrying on business in the nature of that of a building society, had power to receive money by way of deposit from any person or partnership. Deposits were withdrawable upon giving a certain notice, according to the amount thereof. In December, 1881, C. deposited 300l. with the company, upon which interest was duly

paid until June, 1884. In December, 1884, C. gave notice that he required to withdraw his deposit, but the same was not repaid, nor was any date fixed for its repayment. In January, 1885, a petition was presented for the winding up of the company, and it was accordingly ordered to be wound up. The question arose whether, in the distribution of the funds of the company, C. and all other unpaid depositors who had given notice of withdrawal of their deposits before the date of the presentation of the petition, were entitled to rank as creditors of the company in priority to those depositors who had not given such notice at that time:—Held, that there was no priority between the depositors, or between them and the outside creditors, but that they must all rank *pari passu*. *Progressive Investment and Building Society, In re, Corbold, Ex parte*, 54 L. T. 45—Chitty, J. See also cases, ante, col. 280.

— Directors' Fees Postponed to Claims of Outside Creditors.—The articles of association of a company provided that any director should vacate his office if he ceased to be a member, and that the remuneration of directors should be such as should be determined by the company in general meeting. The company was ordered to be wound up compulsorily in May, 1884. By an agreement dated the 30th of May in the same year, and subsequently confirmed by the court, the official liquidator agreed to sell all the assets of the company for the sum of 7s. 3d. in the pound on the claims provable against the company. The chief clerk by his certificate certified that the claims set forth in the 1st and 2nd schedules had been allowed against the company, but that the claims set forth in the 2nd schedule were allowed to the persons therein named for their fees as directors, and were payable only after all the other creditors of the company had been paid in full. One of the directors, who was not present when the certificate was settled, took out a summons asking that the official liquidator might be ordered to pay him the dividend of 7s. 3d. on the debt found due to him for fees:—Held, that a sum due to a director for fees was a sum due to him in his character of a member "by way of dividends, profit, or otherwise," within sub-s. 7 of s. 38 of the Companies Act, 1862, and must be postponed until after the outside creditors had been paid in full. *Leicester Club and County Race Course Company, In re*, 30 Ch. D. 629; 55 L. J., Ch. 206; 53 L. T. 340; 34 W. R. 14—Pearson, J.

9. INVALID AND PROTECTED TRANSACTIONS.

Order and Disposition—Judicature Act, 1875, s. 10.—The Bankruptcy Rules as to reputed ownership are not imported into the winding up of companies by s. 10 of the Judicature Act, 1875. *Gorringe v. Irwell India Rubber and Gutta Percha Works*, 34 Ch. D. 128; 56 L. J., Ch. 85; 55 L. T. 572; 35 W. R. 86—C. A.

Chose in Action—Assignment of Debt—Notice.—A limited company being indebted to H. & Co. on an acceptance, wrote to them a letter in January, 1885, in the following terms:—"We hold at your disposal the sum of 424l. due from Messrs. C. & Co. for goods delivered by us to them up to the 31st of December, 1884, until

the balance of our acceptance for 660l. has been paid. No notice was given by H. & Co. to C. & Co. until the 5th of February, 1885, which was after a petition for winding up the company had been presented:—Held, that the letter was an immediate equitable assignment to H. & Co. of all the debt due from C. & Co. to the amount of 425l., and was complete as between the assignors and the assignees without any notice to C. & Co., and that as the Bankruptcy Rules as to reputed ownership do not apply to the winding up of companies, the debt did not form part of the assets of the company at the commencement of the winding-up. *Crumlin Viaduct Works Company, In re* (11 Ch. D. 755), approved. *Id.*

Fraudulent Preference—Agreement to apply Debt due from Company to Shareholders in payment of future Calls.—K., being a shareholder in a company whose directors were empowered to receive from shareholders payments in advance of future calls, purchased a debt due from the company and requested the directors to apply a sufficient part of the debt in paying up his shares in full. The directors passed a resolution that the debt should be so applied. Nothing further was done to carry the transaction into effect, there was no entry in reference to it in the books of the company other than the minute of the resolution, nor was any contract registered as to the shares within s. 25 of the Companies Act, 1867. In the subsequent winding-up of the company:—Held, that the transaction was void as a fraudulent preference, and that K. was therefore liable for calls made in the winding-up in respect of the shares. *Ferrao's Case* (9 L. R. Ch. 355) distinguished. *Land Development Association, In re, Kent's Case*, 39 Ch. D. 259; 57 L. J., Ch. 977; 59 L. T. 449; 36 W. R. 818; 1 Meg. 69—C. A.

— Dealing by Company in Course of Business—Payment by Directors of Debt due to them.—B. and H. who were directors of a limited company, B. being the managing director, advanced moneys from time to time to the company to purchase goods and discharge pressing claims. In September, 1884, the company's premises were burnt down, and an insurance company admitted their liability to pay 3000l. in respect of the damage. B. and H. then held a "directors' meeting," two directors forming a quorum, and passed resolutions for commencing actions against the company for the moneys they had advanced and for instructing solicitors to appear and consent on behalf of the company to immediate judgment. The actions were accordingly brought and immediate judgment was taken by consent, and thereupon (the limited company being at the time practically insolvent), B. and H. obtained the 3000l. from the insurance company under garnishee orders, and applied it in part payment of the debts due to themselves by the company. The company had issued mortgage debentures, each of which was in form a first charge upon all the property of the company both present and future, including uncalled capital, subject to the condition that such charge should be a floating security, and that the company might in the course of its business deal with the property charged in such manner as the company might think fit; and in December, 1884, the holder of one of these debentures brought an action on behalf of himself and the

other holders of the debentures against the company and B. and H., and claimed (1) repayment of the 3000*l.* by B. and H., and (2) the usual relief in a debenture-holder's action. Two days after the issue of the writ in this action a petition was presented for winding-up the company, and shortly afterwards a winding-up order was made. At the trial of the action the plaintiff relied on s. 164 of the Companies Act, 1862, as entitling him to recover the 3000*l.* on the ground of "fraudulent preference."—Held, that so much of the plaintiff's claim as was based on fraudulent preference must be dismissed, and, secondly, that the transaction complained of, being in fact the payment of a just debt while the company was still a going concern, was a dealing by the company in course of business within the condition of the debentures. *Willmott v. London Celluloid Co.*, 34 Ch. D. 147; 56 L. J., Ch. 89; 55 L. T. 696; 35 W. R. 145—C. A.

— Loan by Officer—Repayment to, after Petition presented.—G. the auditor and accountant of a limited liability company, at the pressing instance of its secretary, on the 5th February, advanced 1,500*l.* to the company, to enable it to meet urgent liabilities, on the personal undertaking of the secretary that the sum advanced should be repaid on the 4th March following, when it was expected that a meeting of the shareholders would have authorized additional capital to be raised by unissued debentures, which would enable the company to pay G. and carry on its business. No security was asked for, or given, though G. was aware of the embarrassment of the company. The shareholders, at their meeting on the 3rd March, refused to authorize the further issue of debentures and passed a resolution to wind up the company, and a petition for a voluntary winding up was presented on the 6th and an order for winding up was made on the 19th March. On the 7th, 10th, and 13th March the secretary, with the sanction of the directors, repaid out of the assets of the company, the 1,500*l.* in three sums which were entered in the cash book as payments on the 3rd March:—Held, that the transaction was a fraudulent preference of G. under the Bankruptcy (Ireland) Act, 1872, s. 53, and also void, under the Companies Act, 1862, s. 153, as the payments to G. were made after the petition for winding up had been presented; and on the application of the official liquidator G. was ordered to repay the money. *Daly & Co., In re*, 19 L. R., Ir. 83—M. R.

Agreement for General Lien.—See *Llangennech Coal Company, In re*, ante, col. 293.

Contract by Foreign Branch—No Notice of Winding-up.—In consideration of moneys paid in at a distant foreign branch of a banking company whose head office was in London, drafts on the head office were given after presentation of a petition to wind up the company, and appointment of a provisional liquidator in England, but before (from want of direct telegraphic communication) any notice of the stoppage of the bank in London had been received at the foreign branch, and before the date of the winding-up order:—Held, that the contract which was entered into by the officers of the foreign branch on behalf of the company without any notice of the winding-up proceedings,

and therefore before revocation of their authority, was not invalidated by the Companies Act, 1862, s. 153; and accordingly that the creditors in respect of such transaction were not entitled to have their money refunded, as on the footing of a void transaction, but merely to prove for the amount under the winding-up *pari passu* with the other creditors. As between the holders for value of the drafts and the persons by whom the consideration was paid, the holders were held entitled to prove. *Oriental Bank Corporation, In re, Guillemin, Ex parte*, 28 Ch. D. 634; 54 L. J., Ch. 322; 52 L. T. 167—Chitty, J.

Payment by Company subsequently to commencement of Winding-up.—Payment by a company, after the commencement of the winding-up, of a debt previously due is not, even in the case of a perfectly bona fide debt of the company, a transaction to which the court will, in the exercise of its discretion under s. 153, give validity. *Civil Service and General Store, In re*, 57 L. J., Ch. 119; 58 L. T. 220—Chitty, J.

On the same day on which a petition for winding-up a company was presented, the company agreed to pay a trade creditor, who was ignorant of the presentation of a petition, a sum of 175*l.*, being part of a debt of 320*l.* previously due to him, on condition that he should continue to supply the company with goods for cash payment. The 175*l.* was paid after the presentation of the petition, and also 13*l.* for goods supplied. A winding-up order having been made, the payment of the 13*l.* was allowed, but the 175*l.* was ordered to be repaid. *Id.*

Payments on behalf of Company.—Payments made on behalf of a company, even with the authority of the board of directors, will not be allowed in the winding-up of the company, unless they have been made for purposes strictly within the objects for which the company was established. *Branksa Island Company, In re, Bentinck, Ex parte*, 1 Meg. 12—C. A.

Interest on Advances to Company.—Interest on advances to the company can be allowed only if there is a valid agreement between the company and the lender for payment of interest, and although entries in the books of the company are *prima facie* evidence against the company, still, if they can be shown to have been made erroneously or improperly, then the evidence which they would otherwise supply will be rejected. *Id.*

Dispositions of Property pending Petition—Anticipatory Sanction.—In an action by debenture-holders of a company to enforce their security, followed by a petition for winding-up not yet heard, the court, being satisfied that the transaction was one for the benefit of all possible parties, made an order both in the action and in the winding-up authorising the plaintiffs and defendants to do all necessary acts for acquiring certain leases, the leases to be handed to the trustees for the debenture-holders notwithstanding section 153 of the Companies Act, 1862. *Carden v. Albert Palace Association*, 56 L. J., Ch. 166; 55 L. T. 831—Chitty, J.

Money placed to Credit of Company to be held in Trust.—B., for the purpose of enabling a

company to have a fictitious credit, in case of inquiries at their bankers, placed money to their credit which they were to hold in trust for him. Some of the money having been drawn out with B.'s consent, and the company having been ordered to be wound up while a balance remained:—Held, that B. could not claim to have the balance paid to him. *Great Berlin Steamboat Company, In re*, 26 Ch. D. 616; 54 L. J., Ch. 68; 51 L. T. 445—C. A.

10. SCHEME OF ARRANGEMENT.

Between secured Creditors — Sanction by Court.—A company registered in 1881, issued debentures to the extent of 60,000*l.*, which did not charge its property, but were secured by a trust deed, made between the company and trustees for the debenture-holders. The trust deed expressly provided that the debenture-holders might assent to any modification of the provisions thereof by passing resolutions to that effect. Such resolutions were to be passed at meetings summoned by the trustees of the deed, notice whereof was to be given by means of advertisements. A meeting of the debenture-holders was afterwards duly called, and resolutions were passed for the purpose of creating a rent charge of 720*l.* per annum, and the debenture-holders gave to the holders of the rent-charge priority over the debentures. Subsequently the company determined upon a voluntary winding-up. In the course of the winding-up proceedings, the liquidator prepared a scheme of arrangement, pursuant to the Joint Stock Companies Arrangement Act, 1870, under which the assets of the company were, in the first place, to be charged with the payment of the sum of 20,000*l.* (whereof 12,000*l.* was to represent the claims of the holders of the rent charge, and 8,000*l.* certain fresh moneys obtained), and in the second place, with the payment of the 60,000*l.* debenture moneys. The scheme having been approved by the statutory majority both of the debenture-holders and the rent-charge security holders, a petition was presented to the court for its sanction thereto. One of the debenture-holders opposed the petition on the ground that the proposed scheme was not fair to the debenture-holders; that the majority of the debenture-holders had no power to bind the minority; and that, if they had such power, the resolution of the debenture-holders approving the scheme was invalid, because the notice sent round to the debenture-holders did not state that there was a question of priority between the secured creditors of the company:—Held, that the scheme was within the scope of the authority given by the trust deed, and was a fair scheme, such as the court ought to sanction under the Joint Stock Companies Arrangement Act, 1870. Held, also, that the notice to the debenture-holders was good, inasmuch as it referred to the scheme which, on the face of it, gave a priority to the holders of the rent charge. *Dominion of Canada Freehold Estate and Timber Company, In re*, 55 L. T. 347—Chitty, J.

Assent of Creditors and Shareholders.—A scheme under s. 2 of 33 & 34 Vict. c. 104, had received the sanction of the creditors of the company, but the court directed that the scheme should also receive the assent of the share-

holders by special resolution under s. 161 of the Companies Act, 1862. *Akanhoo Mining Company, In re*, 1 Meg. 43—Chitty, J.

11. RECONSTRUCTION.

Right of dissentient Member to Inspection before Arbitration.—A banking company being in the course of voluntary winding-up for the purpose of reconstruction, one of the members having been, with the others, offered 5*s.* in the pound for her holding in the old company, gave notice to arbitrate under the 161st section, as a dissentient. She then claimed the right to examine the books of the company, in order to see whether it would be better for her to accept the offer of 5*s.*, or go on with the arbitration. Application refused, with costs of adjournment into court. *Glamorganshire Banking Company, In re, Morgan's Case*, 28 Ch. D. 620; 54 L. J., Ch. 765; 51 L. T. 623; 33 W. R. 209—V.-C. B.

12. EXAMINATION OF WITNESSES AND BOOKS.

Right of Plaintiff in Separate Action against Company.—A winding-up order was made against a company in December, 1884. In November, 1885, P., who was a shareholder in the company, and had also entered into an agreement with the company and had been placed on the list of contributories, commenced an action against the company and its directors for specific performance of his agreement, damages, &c. In March, 1886, P. obtained an order in the winding-up, under s. 115 of the Companies Act, 1862, for the examination of the directors. Chitty, J., directed that the examination should be stayed until after the trial of the action on the ground that the order was in effect for the benefit of the plaintiff in the action, rather than for the purposes of the winding-up:—Held, on appeal, that *prima facie* the powers under s. 115 of the act were to be exercised for the purposes of the winding-up, that the proposed examination would not be beneficial except to the plaintiff in his action, and that the plaintiff ought not, because the company happened to be in liquidation, to have the additional benefit of the powers of the section. *Imperial Continental Water Corporation, In re*, 33 Ch. D. 314; 56 L. J., Ch. 189; 55 L. T. 47—C. A.

Examination of Officer — Pending Action against him.—The pendency of an action against an officer of a company which is in course of being wound-up is not sufficient to justify him in refusing to be examined under s. 115 of the Companies Act, 1862, and it makes no difference whether such action was commenced before or after the winding-up. The official liquidator of a company may properly apply s. 115 for the purpose of ascertaining whether proceedings should be continued or not against an officer of the company, or against any other person. *Metropolitan (Brush) Electric Light and Power Company, In re, Leaver, Ex parte*, 51 L. T. 817—Kay, J.

Right of Contributory to Examine—Jurisdiction to discharge Order made in Chambers.—

An order was made under s. 115 of the Companies Act, 1862, in the winding-up of the L. company, upon the application of the liquidator, for the examination of certain directors of the company. C., who had been served with a notice as a contributory, but who disputed his liability, obtained an order giving him and his solicitor leave to attend at any appointment for the examination of directors under s. 115, and to examine and cross-examine the witnesses. This order was made by the chief clerk, and was not brought before the judge in person. It appeared that C.'s solicitor was also acting as solicitor for a shareholder of the company who was suing the directors for alleged fraudulent statements in the prospectus:—Held, that although an order for examination under s. 115 is an *ex parte* one, and is not generally subject to appeal, a witness has yet a right to bring the matter before the judge personally by a motion to discharge, and that in the present case the order for examination by C. was not a proper one, and should be discharged. *London and Lancashire Paper Mills Company, In re*, 57 L. J., Ch. 766; 59 L. T. 362—North, J.

Who may Attend Examination.—Admitted creditors of a company in course of winding-up have not a general right under rule 60 of the General Order of the 11th of November, 1862, to attend an examination of witnesses before an examiner summoned under s. 115 of the Companies Act, 1862. But the court in its discretion may allow the attendance. The word "proceedings" in that rule cannot be held to include an examination before an examiner which is strictly of a private character. *Empire Assurance Corporation, In re* (17 L. T. 488), and *Merchants' Company, In re* (4 L. R., Eq. 454), discussed. *Grey's Brewery Company, In re*, 25 Ch. D. 400; 53 L. J., Ch. 262; 50 L. T. 14; 32 W. R. 381—Chitty, J.

In the winding-up of a company persons who claimed to be creditors obtained leave to attend all the proceedings at their own expense:—Held, that notwithstanding this order, they ought not to be allowed to be present at the examination of a former official of the company, conducted by the liquidator under s. 115 of the Companies Act, 1862. *Norwich Equitable Fire Assurance Company, In re*, 27 Ch. D. 515; 54 L. J., Ch. 254; 51 L. T. 404; 32 W. R. 964—C. A.

Production of Books—Subpœna or Summons.—Where a company is being wound up under the Companies Acts, and an examiner has been appointed, the proper mode of obtaining the production before the examiner of any books or documents relating to the company, in the custody or power of any officer or person under the 115th section of the Companies Act, 1862, is not by subpœna but by summons according to Form No. 54 in the 3rd Schedule to the General Orders of November, 1862. *Credit Company v. Webster*, 53 L. T. 419—Kay, J.

Depositions — Admissibility.—Depositions taken, under the Companies Act, 1862, s. 115, by the liquidator of a company which is being wound up are not admissible in evidence against persons in whose absence they have been taken, even though such persons have obtained an order requiring the liquidator to specify the depositions or parts of depositions on which he intends

to rely against them, and he has accordingly specified the depositions which he desires to use. *Great Western Forest of Dean Coal Consumers' Company, In re, Crawshaw's case*, 54 L. J., Ch. 506; 33 W. R. 444—Pearson, J.

Putting on File.—Depositions taken under s. 115 of the Companies Act, 1862, need not be put upon the liquidator's file of proceedings as soon as taken under rule 58 of the General Order of the 11th of November, 1862. *London and Lancashire Paper Mills Co., In re*, supra.

Inspection of Documents—When ordered.—The power given by the Companies Act, 1862, s. 156, of ordering inspection of the books and papers of a company which is in course of winding-up is *prima facie* to be exercised only for the purposes of the winding-up, and for the benefit of those who are interested in the winding-up and will not in general be exercised for the purpose of enabling individual shareholders to establish claims for their personal benefit against the directors or promoters. The section only applies to books and papers in the possession of the company, and does not enable the court to decide any question of right against third parties who have the books in their possession and claim to be entitled to such possession. *North Brazilian Sugar Factories, In re*, 37 Ch. D. 83; 57 L. J., Ch. 110; 58 L. T. 4—C. A. See also *Glamorganshire Banking Co., In re*, ante, col. 438.

Cost-Book Mine.—The practice of the Stannaries Court is the same as that of the High Court of Justice, that the mere fact of a petition is not enough to justify an order for inspection of books. But if grounds are shown, the petition may properly be ordered to stand over to allow the petitioner to enforce his right as a shareholder to inspection. The right of inspection under the 22nd section of the Stannaries Act, 1855, is personal to the shareholder, and does not extend to his solicitors or agents. *West Devon Great Consols Mine, In re*, 27 Ch. D. 106; 51 L. T. 841; 32 W. R. 890—C. A.

13. PRACTICE.

In case of Petitions.—See ante, cols. 414 et seq.

Under s. 165 of Companies Act, 1862.—See ante, col. 421.

Commencement of Winding-up—Provisional Liquidator—Resolution for Voluntary Winding-up.—On the day of the presentation of a creditor's petition for the compulsory winding-up of a company a provisional liquidator was appointed under that petition. A meeting of the company was afterwards held, at which a resolution was passed for a voluntary winding-up, and at a subsequent meeting this resolution was confirmed. A supervision order was then made on the petition:—Held, that the winding-up must be treated as having commenced at the date of the confirmatory resolution, and not at the date of the appointment of a provisional liquidator. *Emperor Life Assurance Society, In re, Holliday, Ex parte*, 31 Ch. D. 78; 55 L. J., Ch. 3; 53 L. T. 591; 34 W. R. 118—V.-C. B.

Vesting Order—Ex parte.—A vesting order under the Companies Act, 1862, s. 203, cannot, except under special circumstances, be obtained *ex parte*. *Albion Mutual Permanent Building Society, In re*, 57 L. J., Ch. 248—Chitty J.

Service of Notices out of the Jurisdiction.—A notice under the General Order of Nov. 11, 1862, r. 30, of an appointment to settle the list of contributories of a company may be served out of the jurisdiction in manner provided by rule 60. *Anglo-African Steamship Company, In re* (32 Ch. D. 348) distinguished. *Nathan Newman & Co., In re*, 35 Ch. D. 1; 56 L. J., Ch. 752; 56 L. T. 95; 35 W. R. 293—C. A.

The court has no jurisdiction to give leave to serve notices of orders and other proceedings in the winding-up of a company on persons residing out of the jurisdiction. *Anglo-African Steamship Company, In re*, 32 Ch. D. 348; 55 L. J., Ch. 579; 54 L. T. 807; 34 W. R. 554—C. A.

Summons for Payment out.—A company being in liquidation, an order was made for closing the liquidation upon payment of a dividend upon the unpaid debts of the company. One of the claims certified to be due was made in the names of S. and P., and the dividend upon this claim was paid into court. S. claimed to be entitled to the whole sum discharged from any claim of P., who was resident out of the jurisdiction, and took out a summons for payment to him. He asked for leave to serve this summons on P. out of the jurisdiction:—Held, that leave should be given to serve the summons on P. out of the jurisdiction. *Baron Liebig's Cocoa and Chocolate Works, In re*, 59 L. T. 315—North, J.

Discharge of Servants—Appointment of Manager and Receiver.—The plaintiff was in the service of the defendant company under a contract which provided that his employment might be determined by six months' notice. A manager and receiver was appointed by order of the Chancery Division at the instance of holders of debentures of the company. The plaintiff, by the instructions of the manager, continued for more than six months to discharge his former duties at the same salary. The business was then sold to a new company, and the plaintiff was dismissed without notice. In an action for wrongful dismissal:—Held, that the appointment of a manager and receiver operated to discharge the servants of the company and that the defendant could not recover. *Reid v. Explosives Company*, 19 Q. B. D. 264; 56 L. J., Q. B. 388; 57 L. T. 439; 35 W. R. 509—C. A.

Resolution to Wind-up.—The passing of a resolution to wind-up a company operates as notice of dismissal to the company's servants. Circumstances may exist which would amount to a waiver of such implied notice, or which would be evidence of a new agreement between the liquidator and the servant; but clear and satisfactory evidence is necessary to establish such a case. *Schumann, Ex parte, Forster & Co., In re*, 19 L. R., Ir. 240—V. C.

Order for Winding-up.—The rule that an order for winding-up a company operates as a notice of discharge to the servants when the

business of the company is not continued after the date of the order, applies though the liquidator without continuing the business employs the servants in analogous duties with a view to reconstruction. *Chapman's case* (1 L. R. Eq. 346) followed; *Harding, Ex parte* (3 L. R. Eq. 341) distinguished. *Oriental Bank Corporation, In re, MacDowall's case*, 32 Ch. D. 366; 55 L. J., Ch. 620; 54 L. T. 667; 34 W. R. 529—Chitty, J.

Arrest of Contributory—Seizure of Goods.—Upon affidavits by the official liquidator and his solicitor, stating that certain contributories (one of whom was a director of the company charged with breaches of trust) had transferred their shares, were selling off their property, and, as the deponents were informed and believed, were immediately about to quit the country, for the purpose of evading payment of a call and their responsibilities to the company; and that it would be necessary to examine these persons for the elucidation of the affairs of the company; the court made an order for seizure and arrest under section 118 of the Companies Act, 1862. Form of order and proceedings in such cases. *Ulster Land Co., In re*, 17 L. R., Ir. 591—V. C.

Solicitor's Lien on Documents.—See Cases, post, SOLICITOR.

Prosecution of Directors—Petition for.—A company was being wound up subject to the supervision of the court, and the liquidator presented a petition for a direction under the Companies Act, 1862, s. 167, that he might prosecute a director at the expense of the assets. The petition was not served on any one. It appeared by an affidavit made by the liquidator that a substantial body of creditors approved of the petition. Other persons claiming to be creditors appeared at the hearing by counsel, who read an affidavit showing that creditors to a substantial amount wished to oppose the petition, and asked that it should stand over. The facts on which the petition was based had been before the court judicially upon a successful application to make the director liable under the Companies Act, 1862, s. 165, for breaches of trust:—Held, that as the court was satisfied the opposition to the petition came, not from a desire to save the assets, but from a desire to save the director, and also that if the petition were not at once acceded to there would be a risk of justice being defeated, the prosecution must be at once directed, without further consultation of the creditors. *Denham, In re*, 53 L. J., Ch. 1113; 51 L. T. 570; 32 W. R. 920—Chitty, J.

Call—Affidavit in Support.—In the winding-up of an unlimited company the court has power to make a call under s. 102 of the Companies Act, 1862, on a proper case shown by the official liquidator; and the debts of the company not having been paid, an affidavit by the liquidator that the call was required for "the adjustment of the rights and liabilities of the members amongst themselves" was held to imply that the call was necessary for the payment of debts, and to be a sufficient compliance with form 33 of the General Order of November, 1862, rule 33. *Norwich Equitable Fire Assurance Company, In re, Miller's case*, 54 L. J., Ch. 141; 51 L. T. 619; 33 W. R. 271—V.-C. B.

14. BALANCE ORDER.

Action on.—By a balance order made in the winding-up of a company, the defendant, who was a shareholder and director of the company, was ordered to pay a sum of 252*l.* due in respect of calls to the official liquidator of the company. The liquidator brought an action against the defendant for the sum due under the balance order and the defendant claimed to set off a sum due to him from the company:—Held, that no action can be brought upon a balance order. *Chalk & Co. v. Tennent*, 57 L. T. 598; 36 W. R. 263—North, J.

Effect of, on Executor's Right of Retainer.—

Where, under ss. 76 and 103 of the Companies Act, 1862, and rule 35 of General Order, Nov. 1862, a balance order has been obtained by the official liquidator of a company against the legal personal representative of a deceased contributory for payment of a call made after the death, the order being in accordance with Form 39 in Schedule III. to the General Order, and directing the legal personal representative to pay the call "out of the assets of the deceased in his hands as such legal personal representative to be administered in due course of administration," such an order is not in the nature of a judgment so as to constitute the liquidator a judgment creditor; it is to be treated simply as analogous to a common administration judgment, or as a step to the administration judgment, which may be obtained by the liquidator under s. 105 of the Companies Act, 1862, and which is his proper remedy in case the legal personal representative has failed to comply with the order; and therefore, the order, whether followed by an administration judgment or not, leaves untouched all priorities and rights usually existing in the due course of the administration of the estate of a deceased person, including an executor's right of retainer. Thus, the order, if obtained against executors, does not give the liquidator priority over a debt due to one of them from the testator, and therefore retained by that executor out of the assets, even though the order be prior in date to notice of the retainer. *Hubback, In re, International Marine Hydropathic Company v. Hawes*, 29 Ch. D. 934; 54 L. J., Ch. 923; 52 L. T. 908; 33 W. R. 666—C. A.

Bankruptcy—"Final Judgment."—A balance order made in a voluntary winding-up of a company on a contributory, for the payment of calls which had been made upon him before the commencement of the winding-up, is not a "final judgment" within the meaning of sub-s. 1 (g) of s. 4 of the Bankruptcy Act, 1883, and therefore a bankruptcy notice cannot be issued in respect of such an order. *Whinney, Ex parte, Sanders, In re*, 13 Q. B. D. 476; 1 M. B. R. 185—D.

A "balance order" in respect of calls made on a contributory in the winding-up of a company is not a "final judgment" within the meaning of sub-s. 1 (g) of s. 4 of the Bankruptcy Act, 1883, and a bankruptcy notice cannot be issued in respect of such an order. *Ex parte Whinney* (13 Q. B. D. 476), followed. *Grimwade, Ex parte, Tennent, In re*, 17 Q. B. D. 357; 55 L. J., Q. B. 495; 3 M. B. R. 166—C. A.

— Issue of Notice in name of Liquidator.]

—A balance order was made against A. to pay to the official liquidator of the Land Development Association a certain sum for calls due from A. to the company. The official liquidator brought an action as official liquidator on that order, and obtained judgment against A., and thereupon issued a bankruptcy notice in his own name as official liquidator of the company. A petition was presented against A., founded on that notice, and came on for hearing before the registrar, who dismissed it, and from his dismissal this appeal was brought:—Held that the petition was rightly dismissed by the registrar, as it was irregular. *Mackay, Ex parte, Shirley, In re*, 58 L. T. 237—D.

15. CONTRIBUTORIES.

a. Qualification Shares.

Acting as Director not a Contract to take full Number.—

By the articles of association of a limited company it was provided that the qualification of a director should be the holding 250 shares at least, that he might act before acquiring his qualification, but that his office should be vacated if he did not acquire it within three months after his election. J., who had subscribed the memorandum of association for ten shares, was elected a director, accepted the office, and attended meetings of directors for more than three months from his election, but never applied for, nor had allotted to him, any other shares than his original ten. In the winding-up of the company:—Held, that the acceptance of the office of director and the continuing to act after the time by which the qualification ought to have been acquired, did not amount to a contract by J. to take the additional shares requisite for his qualification, and that he must be upon the list for ten shares only. *Wheel Buller Consols, In re, Jobling, Ex parte*, 38 Ch. D. 42; 57 L. J., Ch. 333; 58 L. T. 823; 36 W. R. 723—C. A.

The mere acting as a director is not sufficient evidence of a contract to take the shares required for qualification. An actual contract must be proved. *Medical Attendance Association, In re, Onslow's case*, 55 L. T. 612—North, J. Affirmed 58 L. T. 824, n.—C. A.

Contract to Purchase—Directors entitled to Reasonable Time.—

A company was registered in June, 1879. B. and H. signed the memorandum of association as subscribers for one share each. By the articles B. and H. were named as original directors, and it was provided that the qualification of a director should be fifty shares. B. and H. attended meetings of the directors, but no shares were allotted to them, nor did their names appear on the register for any shares except those for which they had signed the memorandum. In September B. resigned his office, but H. continued a director. No business was ever done by the company, and in November a resolution was passed to wind up the company. The liquidator placed B. and H. on the list of contributories for fifty shares each:—Held, that assuming that the contract entered into by B. and H. to obtain a qualification amounted to an agreement to take fifty shares within the 23rd section of the Companies Act, 1862, they were

entitled to a reasonable time for performing the agreement, and that under the circumstances such reasonable time had not elapsed at the commencement of the winding-up of the company. Consequently they could not be held liable as contributories in respect of the fifty shares. Whether the contract amounted to an agreement to take the fifty shares within the 23rd section, *quære*. *Colombia Chemical Factory Manure and Phosphate Works, In re, Hewitt's and Brett's case*, 25 Ch. D. 283; 53 L. J., Ch. 343; 49 L. T. 479; 32 W. R. 234—C. A.

Original Director—Withdrawal before Qualification.—The articles of association of the S. Company provided that the first directors should, within two months of the date of their appointment, become the registered proprietors of 250 shares of 1*l.* each, and that the first directors of the company should be appointed by a meeting of subscribers to the memorandum of association forthwith after registration. The company was incorporated on the 11th January, 1884. A meeting of the subscribers to the memorandum was held on the 12th, and R. B. T., who was not a subscriber, was elected to be one of the first directors. On the 14th January, 1884, a meeting was held of the directors of the company, which R. B. T. attended. A draft prospectus was then settled and signed by the directors present, including R. B. T., which gave the name of R. B. T. as a director. He alleged that he did not know the company was formed before the meeting of the 12th, but thought it was a preliminary meeting. He never attended another meeting, or in any way acted as director, or applied for or was allotted any shares. The company was ordered to be wound up on the 8th August, 1885. The liquidator claimed to put R. B. T. on the list of contributories for 250 shares, the qualification required for a director:—Held, that, if R. B. T. had ever acted as a director, he had withdrawn during the two months allowed for qualifying, and he could not be put on the list of contributories. *Self-Acting Sewing Machine Company, In re*, 54 L. T. 676; 34 W. B. 758—Pearson, J.

Gift—Liability to Account.—A director of a company received from the promoters a present of the sum of 1,000*l.* to buy 100 shares in the company, which was the qualification of a director, the present being expressed to be given as part commission, in respect of certain contracts he was about to enter into at the request of the promoters, in relation to the proposed company. The director afterwards took part in making an agreement for the purchase by the company of a quarry of which the promoters were part owners, the carrying out of which was stated in the memorandum and articles of association of the company to be the first object of the company. The company was subsequently wound up:—Held, that the director was liable to account to the liquidator for the value of the shares, at the value at which they stood at the date he received the present, together with interest at 5 per cent. from the date of such gift. *Drum Slate Quarry Company, In re, McLean's case*, 55 L. J., Ch. 36; 53 L. T. 250—Kay, J.

Joint and Several Liability.—The first five directors of a company, being bound by the articles of association to hold twenty shares each as a qualification, accepted, with the knowledge

and approval of each other, twenty fully paid shares each from the promoter, who had received them as cash from the company:—Held, upon summons by the official liquidator in the winding-up, that all the directors were jointly and severally liable to pay the full value of the shares. *Carriage Co-Operative Supply Association, In re*, 27 Ch. D. 323; 53 L. J., Ch. 1154; 51 L. T. 286; 33 W. R. 411—Pearson, J.

—Set-off.—One only of the five directors, upon finding that he was not justified in receiving the shares without payment, offered to pay the full sum due from him, and gave a cheque for the amount, which, however, was accepted as an advance to the company, and was added to previous advances made by him for preliminary expenses:—Held, that this director was not at liberty to set-off the value of his shares against the amount paid in respect of advances, though he would have a claim against the company for those advances. *Id.*

b. Fully Paid Shares.

Contract filed "at or before" Issue.—A contract for the issue of shares as fully paid up was given to the allottee late in the day for the purpose of his getting it filed with the Registrar of Joint Stock Companies, together with a certificate of the shares. The contract was filed on the following morning:—Held, that the contract was filed "at the time of" the issue of the shares, and they were to be deemed fully paid up. *Tunnel Mining Company, In re, Pool's Case, or Pool v. Tunnel Mining Company*, 35 Ch. D. 579; 56 L. J., Ch. 1049; 36 L. T. 822; 35 W. R. 565—North, J.

Registering Number of Shares.—A contract to issue fully paid-up shares for a consideration other than money, registered under the Companies' Act, 1867, s. 25, need not specify the numbers of the shares. *Delta Syndicate, In re, Forde, Ex parte*, 30 Ch. D. 153; 54 L. J., Ch. 724; 53 L. T. 559; 33 W. R. 839—Pearson, J.

Refusal of Registrar to file Contract—Remedy for.—An application was made for a mandamus to compel the Registrar of Joint Stock Companies to file, under s. 25 of the Companies Act, 1867, a contract which he had refused to file on the ground that it was insufficiently stamped:—Held, that the proper mode of questioning the legality of the Registrar's refusal was by obtaining the opinion of the Commissioners of Inland Revenue, and appealing from their decision to the High Court, under ss. 18, 19, and 20 of the Stamp Act, 1870, and therefore, as there was another appropriate remedy, a mandamus must be refused. *Reg. v. Registrar of Joint Stock Companies*, 21 Q. B. D. 131; 57 L. J., Q. B. 433; 59 L. T. 67; 36 W. R. 695; 52 J. P. 710—D.

Leave to Register Contract after Lapse of Time—Evidence to sustain Application.—At the date of the formation of a limited company, an agreement was entered into between the company and certain persons from whom the company purchased the premises and stock of the business which the company was formed to carry on, whereby it was, *inter alia*, agreed that the vendors should take 3,000 fully paid-up shares

in part discharge of the purchase-money. This agreement was not filed by the Registrar of Joint Stock Companies. More than six years afterwards the vendors applied to the company to file the agreement, and issue new shares of the like amount. The company declined to do so, unless under an order of the court to that effect. The court refused to make such an order, without being satisfied that creditors of the company would not be prejudicially affected. *Dublin and Wicklow Manure Company, In re, O'Brien, Ex parte*, 13 L. R., Ir. 198—V.-C.

Agreement to apply Debt in payment of future Calls.]—K., being a shareholder in a company

whose directors were empowered to receive from shareholders payments in advance of future calls, purchased a debt due from the company and requested the directors to apply a sufficient part of the debt in paying up his shares in full. The directors passed a resolution that the debt should be so applied. Nothing further was done to carry the transaction into effect, there was no entry in reference to it in the books of the company other than the minute of the resolution, nor was any contract registered as to the shares within s. 25 of the Companies Act, 1867. In the subsequent winding-up of the company:—Held, that the transaction between K. and the directors not having been carried into effect by any entry in the books of the company showing that the shares had been paid up, or by any other step beyond the resolution, was not equivalent to payment in cash within the last-mentioned section, and that K. was therefore liable for calls made in the winding-up in respect of the shares. *Ferrao's Case* (9 L. R. Ch. 355) distinguished. *Land Development Association, In re, Kent's Case*, 39 Ch. D. 259; 57 L. J., Ch. 977; 59 L. T. 449; 36 W. R. 818; 1 Meg. 69—C. A.

Stated Account.]—A mere agreement with a shareholder to set off the amount of any calls which might at any time be made, against debts owing to him by the company, will not relieve the shareholder from being put on the list of contributories in respect of calls made before the winding-up; but if it can be shown that before the winding-up accounts have been stated between the parties in which calls made have been treated as paid by their having been set off against the company's debt to the shareholder, s. 25 of the Companies Act, 1867, has no application, because such stated accounts would support a plea, not of accord and satisfaction, but of payment. *Branksea Island Company, In re, Bentinck, Ex parte*, 1 Meg. 12—C. A.

No Rescission possible after Order to Wind up.]—A limited company issued part of its capital in 10% preference shares at par, every present shareholder to be entitled to one preference share at 25 per cent. discount for each ordinary share held by him. Some of the shareholders took these preference shares, paid the 7½. 10s. per share, and had certificates given them stating them to be holders of shares fully paid up. No contract was registered under s. 25 of the Companies Act, 1867. The company having been ordered to be wound up, the preference shareholders who had taken their shares at a discount were placed on the list of contributories, and calls for the unpaid 2½. 10s. per share were made on them and paid. Some of them then

applied for leave to prove in the winding-up "in damages for breach of contract or otherwise in respect of the issue of the preference shares":—Held, by Kay, J., that if there were any claim, for damages the case fell within s. 38, sub-s. 7, of the Companies Act, 1862, but that the applicants could not have maintained an action for damages against the company if it had not been wound up, and could not prove for damages in the winding-up, either against other creditors or shareholders or the company:—Held, on appeal, that if the contract between the company and the shareholders was to be treated as a contract to issue fully paid-up shares, the shareholders might, on finding out that the shares were not in point of law fully paid-up, have rescinded the contract to take them, but as after an order to wind up there could be no rescission, the shareholders had no remedy, it being settled by *Houldsworth v. City of Glasgow Bank* (5 App. Cas. 317) that a shareholder retaining his shares cannot bring an action against the company for misrepresentations by which he was induced to take them, and the Court being of opinion that no substantial distinction could be drawn for this purpose between misrepresentation and a breach of a contract that the shares should be fully paid-up shares. *Mudford's Claim* (14 Ch. D. 634) and *Ex parte Appleyard* (18 Ch. D. 587) questioned. *Addlestone Linoleum Company, In re, Benson's Case*, 37 Ch. D. 191; 57 L. J., Ch. 249; 58 L. T. 428; 36 W. R. 227—C. A.

Contract to Issue Shares at a Discount.]—

Semble, that, if the contract was to issue shares at a discount, the allottees took the shares subject to a liability to pay their nominal amount in full, and could not be exonerated from this liability even by a registered contract. *Ince Hall Rolling Mills Company, In re* (23 Ch. D. 545, n.), and *Plaskynaston Tube Company, In re* (23 Ch. D. 542), disapproved. *Ib.*

Non-registration of Contracts—Constructive Notice.]—

In October, 1881, a company was formed, as stated in the memorandum of association, with the object of purchasing the business of A. W. H. & Co., for, inter alia, a sum to be paid in fully paid-up shares. N., who was A. W. H.'s solicitor, prepared the memorandum and articles of association, and to some extent acted as the solicitor of the company. The shares were duly allotted, and certificates for them were issued to A. W. H., which stated that the full amount had been paid up thereon; but the contract under which the shares were issued was not registered. In January, 1882, upon the marriage of a Miss H., A. W. H., who was indebted to her, gave a bond to the trustees of her marriage settlement, of whom N. was one, to secure the debt, which bond formed part of the settled property; and A. W. H. also, as a collateral security, deposited with the trustees the certificates for some of his paid-up shares. N. prepared the bond and the memorandum of deposit. In 1885 the deposited shares were transferred to the trustees, and fresh certificates were issued to them, which also bore the statement that such shares were fully paid up. The company was afterwards ordered to be wound up, and the liquidator applied to enforce against the trustees a call upon the shares standing in their names. According to the evidence N. did

not know that the particular shares deposited with the trustees were vendor's shares, and the other trustees relied on a statement made by him to them that such shares were fully paid up:—Held, first, following *Burkinshaw v. Nicolls* (3 App. Cas. 1004), that as the certificates of the shares in question contained a statement by the company that such shares were fully paid up, the onus of proving that the trustees had notice that they were not fully paid lay on the liquidator; and secondly, that N. had not been guilty of gross or culpable negligence in omitting to inquire whether the shares in question were not vendor's shares, or whether the contract had been duly registered, and consequently that the trustees were not liable for the call. *Hall & Co., In re*, 37 Ch. D. 712; 57 L. J., Ch. 288; 58 L. T. 156—Stirling, J.

—**Estoppel—Notice—Breach of Contract to register.**—By an agreement in writing between an English company and a French company, the English company agreed, in consideration of services to be rendered by the French company, to issue and allot to the French company, or its nominees, 1000 fully paid-up shares, and to procure the agreement to be filed with the registrar of Joint Stock Companies before the issue of the shares. This agreement was never registered, as required by s. 25 of the Companies Act, 1867. 200 of these shares were issued and allotted to a nominee of the French company, with certificates, stating that the shares were fully paid, and were subsequently transferred by him for value to H., who transferred 100 to B., and retained 100. H. and B. were acting directors of the English company from its commencement until its winding-up in 1884. Upon an application by H. and B. in the winding-up to be relieved from liability on their shares:—Held, that the applicants were not entitled to relief by reason of the representation on the certificates that the shares were fully paid, inasmuch as all the parties must be taken to have known the circumstances under which the shares were issued; nor by reason of the omission of the company to register, because their liability in respect of their shares did not arise from the default of the company, but from the terms of the statute; and that the application failed. *Burkinshaw v. Nicholls* (3 App. Cas. 1004), discussed. *London Celluloid Company, In re, Bayley and Hanbury, Ex parte*, 39 Ch. D. 190; 57 L. J., Ch. 843; 59 L. T. 109; 36 W. R. 673; 1 Meg. 45—C. A.

—**Contract to Register—Non-Registration—No Assent to becoming Shareholder.**—Where a company enters into a contract to issue shares to a person as fully paid up for a consideration other than a payment in cash, if the company fail to register the contract under s. 25 of the Companies Act, 1867, such person is not liable for the amount of the shares as a member of the company, either as between the company and himself, or subsequently when the company has been ordered to be wound up, unless such person has, by something besides entering into the contract, assented to his name being registered as a shareholder. *Blyth's case* (4 Ch. D. 140), distinguished. *Barangah Oil Refining Company, In re, Arnot's case*, 36 Ch. D. 702; 57 L. J., Ch. 195; 57 L. T. 353—C. A.

c. Subscribers to Memorandum.

Subsequent Application for Additional Shares.—On the formation of a limited company, G., a director, subscribed the memorandum of association for fifty shares as his qualification. Shortly afterwards he expressed his intention of taking fifty more shares, and thereupon, in order to satisfy the requirements of the Stock Exchange prior to settlement and quotation, signed a formal letter of application for 100 shares, it being, as alleged, intended by him and also understood by his co-directors that these 100 shares included the fifty for which he had subscribed the memorandum. 100 shares were then duly allotted to him; they were registered in his name, and he fully paid them up. The company having afterwards been ordered to be wound up, an application by the liquidator under s. 23 of the Companies Act, 1862, to fix G. as a contributory in respect of the fifty shares for which he had subscribed the memorandum, was dismissed with costs. *Crooke's Mining and Smelting Company, In re, Gilman's case*, 31 Ch. D. 420; 55 L. J., Ch. 509; 54 L. T. 205; 34 W. R. 362—V.-C. B.

Lapse of Time—Estoppel.—W. signed the memorandum of association of a company for 100 shares, and was one of its first directors. He attended the first meeting, when it was stated that there was a sum of money which the directors proposed to divide amongst themselves. He disapproved of this transaction, and expressed his desire to withdraw from the company. He never attended any subsequent meeting. The company had no power to accept surrenders of shares. Shortly afterwards the secretary informed W. that his shares had been taken up by a person named M., and that a new director would be elected in his stead. He applied for an indemnity, but was informed that none was necessary. In 1879 the company went into voluntary liquidation, which was continued under the supervision of the court. Two of the directors were appointed liquidators, but for four years they took no steps in the winding up. They were then removed by the court, and a new liquidator was appointed, who placed W.'s name on the list of contributories. W. sought to have his name removed from such list. The question was whether, after the lapse of time which had occurred, and after the transaction which had taken place between W. and the company, the company was not estopped from relying on any irregularity in reference to the issue of W.'s shares to M.:—Held, that W., having signed the memorandum of association for the shares, could not get rid of his liability, except by means of a regular transfer; that there was nothing to identify the shares allotted to M. with those for which W. signed the memorandum, and there was no evidence of any communication between the applicant and M.; that the irregular proceeding which had taken place did not free W. from liability; and that, notwithstanding the lapse of time, he was rightly placed on the list of contributories. *Argyle Coal and Cannell Company, In re, Watson, Ex parte*, 54 L. T. 233—Kay, J.

Signature by Agent—Authority of Agent to Sign.—C. verbally authorized O. to sign on his behalf the memorandum of association of a com-

pany. O. accordingly signed the name of C. to the memorandum without his own name appearing. The company being in course of winding up, C. was put on the list, and applied to have his name removed, on the ground that he had never signed the memorandum nor agreed to take shares:—Held, that there being nothing in the Companies Act, 1862, to show that the Legislature intended anything special as to the mode of signature of the memorandum, the ordinary rule applied that signature by an agent is sufficient; that although by s. 11 of the act a subscriber is bound in the same way as if he had signed and sealed the memorandum, still the memorandum is not a deed, and it is not necessary that the authority to sign it should be given by deed; that though it was irregular for O. to sign C.'s name without denoting that it was signed by O. as his attorney, the signature was not on that ground invalid; and therefore that C. was not entitled to have his name removed from the list. *Whitley & Co., In re, Callan, Ex parte*, 32 Ch. D. 337; 55 L. J., Ch. 540; 54 L. T. 912; 34 W. R. 605—C. A.

d. Allottees and Applicants.

Conditional Application — Condition Subsequent—Allotment—Non-compliance with Condition—Neglect to rescind by Allottee—Sale and Transfer by Allottee.—A new company was constituted to take over the assets and liabilities of an old company in liquidation, under a scheme by which each shareholder in the old company was entitled to a share in the new company in respect of every share held by him in the old company, but no sum was to be deemed paid up on any share, 1*l.* per share was to be paid up within a month, and no share was to be transferred until all calls thereon had been paid. R. F., a shareholder in the old company, had declined to come in under the scheme, but was willing to pay 700*l.* on being relieved within two years of all liability in respect of the old company. Before any payment had been made by R. F., one Fisher, a shareholder in the old company, applied for 700 shares in the new company "on condition that I am credited with 1*l.* per share paid into a fund by R. F." By a resolution of the directors of the new company passed in the presence of Fisher, certain ordinary shares were allotted to him, and 700 ordinary shares were also allotted to him "conditional," that word being placed opposite to them in a list of allotments appended to the resolution. Letters of allotment and certificates in respect of the first-mentioned ordinary shares were sent to Fisher, but none were sent to him in respect of the 700 shares, and his name was, but without his knowledge, entered on the register of shareholders in respect of the 700 shares as well as the others, but with the word "conditional" written opposite the 700 shares. Fisher afterwards sold and transferred 400 of the 700 shares to Sherrington, and the company registered the transfer and issued certificates to Sherrington for 400 shares, crediting him with 1*l.* as paid up thereon and placing him on the register as the holder of 400 shares. R. F. was not relieved from his liability within the two years, and did not pay the 700*l.*; and the new company went into liquidation without any steps having been taken by Fisher to enforce the condition of his

application or to rescind it:—Held, in Fisher's case, that the condition attached to his application was a condition subsequent, which owing to the liquidation of the company, could not now be enforced; that under the circumstances Fisher must be deemed to be a member of the company within the meaning of s. 23 of the Companies Act, 1862, and must be placed upon the list of contributories in respect of 300 shares. And held, in Sherrington's case, that he must be placed upon the list of contributories in respect of 400 shares. *Southport and West Lancashire Banking Company, In re, Fisher's case, Sherrington's case*, 31 Ch. D. 120; 55 L. J., Ch. 497; 53 L. T. 832; 34 W. R. 49, 335—C. A.

Application for Shares—Absolute or Conditional.—M. having applied for the post of district manager to the P. company, the secretary on the 15th of April sent to him a synopsis of terms, which required candidates to take shares in the company. On the 21st of April, 1887, the secretary wrote to M. that he had been selected for the post, and enclosed a share application, which was in form unconditional. On the 27th of April M. returned the application signed, together with a cheque for the price of the shares, and he duly received notice of allotment of the shares, but he never received any share certificates. On the 29th of April M. read something in a newspaper which made him unwilling to become a shareholder, and stopped his cheque. On the 30th of April he received from the secretary for signature a document called the official appointment, containing onerous conditions which did not appear in the synopsis. He declined to sign the official appointment, and on the 3rd of May he repudiated all connexion with the company. On the 28th of May the company went into voluntary liquidation. The liquidator sought to make M. liable as a contributory:—Held, that the application for shares was conditional upon the appointment being obtained; that the negotiations between M. and the secretary were binding on the company; that M. was entitled to reject the appointment; and that his name ought to be struck off the list of contributories. *London and Provincial Provident Association, In re, Mogridge's case*, 57 L. J., Ch. 932; 58 L. T. 801—Stirling, J.

Delay in giving Notice of Allotment—Repudiation of Shares after Winding-up.—In July, 1882, B., who was residing in the Cape Colony, at the solicitation of the local agent of a company, signed an application for shares in the company. The company was not registered until December, 1883, when shares were allotted to B., and a notice of allotment sent to him which he received in February, 1884. B. then called upon the local agent and verbally repudiated the shares; but the local agent stated he was not then instructed in the matter. B. then proceeded to this country, and arrived here on the 29th of May, 1884. On the 6th of June, 1884, he took proceedings to have his name removed from the register of shareholders. On the 23rd of May, 1884, a petition for the winding-up of the company was presented, and a winding-up order was subsequently made thereon:—Held, that as B. had not repudiated the shares in any effective way until after the winding-up of the company commenced, he was

liable as a contributory in the winding-up. *Land Loan Mortgage and General Trust Company of South Africa, In re, Boyle's case*, 54 L. J., Ch. 550; 52 L. T. 501; 33 W. R. 450—Kay, J.

See also ante, col. 381.

e. Transferees and Nominees.

Pending Proceedings—Commencement of Winding-up—B List.—The articles of a company enabled the board of directors to appoint committees of their own number, and to delegate to any such committee all or any of the powers of the board. Transfers of shares were to be effected only by instruments executed both by the transferor and transferee, and were not to be made without the approval of the board, which had an absolute discretion as to accepting a transfer. On the 2nd of November, 1874, the board appointed H. B. a committee with all the powers of the board. On the 24th of December, 1874, a board meeting was held, at which only H. B. and the secretary were present. At this meeting transfers, which had on the previous day been executed by X. and Y. to various persons of 1,519 shares standing in the joint names of X. and Y., were approved, and the transferees placed on the register. H. B. deposed that all formalities had been waived, and there was no evidence whether the transfers had been executed by the transferees. On the same day a general meeting of shareholders was held, at which resolutions were passed for a voluntary winding-up of the company, and the transfer of its business to a new company, each shareholder in the old company taking the same number of shares in the new, and this was confirmed by a meeting of the 15th of January, 1875. At neither of these meetings did the transferors vote in respect of the shares transferred, but several of the transferees did, and the transferees were registered as shareholders in the new company. It did not appear that the old company was insolvent, but it was considered desirable to reconstitute it. In March, 1877, a petition was presented by some of the transferees for the compulsory winding-up of the old company, upon which an order was made on the 17th of the same month. The transferees were placed on the list of contributories. In 1881 some creditors, pursuant to leave given, applied in the name of the official liquidator to put X. and Y. on a supplemental list of contributories of the old company for the 1,519 shares, and if not, then on a B list as past members. The application was refused by Bacon, V.-C.:—Held, that the fact that the transferors knew that the company was on the eve of being wound up voluntarily did not take away their power of transferring their shares, and that the transfers of the 1,519 shares were not invalid on that ground; that a committee of the board of directors need not consist of more than one person, and that H. B. had authority to approve the transfers; that it was not to be inferred in the absence of express evidence that the transfers had not been executed by the transferees; that, if they had not been so executed, they were not a nullity but only irregular, and that after they had been acted upon and treated as valid for so long a period they could not be impeached; and, therefore, that X. and Y. could not be

placed on the list of contributories as present members. *Chappell's case* (6 L. R., Ch. 902) distinguished. *Taurine Company, In re*, 25 Ch. D. 118; 53 L. J., Ch. 271; 49 L. T. 514; 32 W. R. 129—C. A.

Held, by Lindley and Fry, L.J.J., that X. and Y. could not be placed on the B list as past members, for that the winding-up was to be treated as having commenced at the presentation of the petition, which was more than twelve months after they transferred their shares. Dissenting, Cotton, L.J., who was of opinion that it commenced from the date of the resolution for voluntary winding-up, at which time X. and Y. had not ceased for twelve months to be shareholders. *Id.*

Unregistered Transfer—Laches of Company—Order to substitute Name.—In February, 1883, A., the registered holder of certain shares, executed for value a deed of transfer (the name of the transferee being left in blank), and handed the transfer and the share certificate to the purchaser. Afterwards the transfer and certificate came into the possession of W., who, in February, 1884, filled in his own name as transferee and sent the complete transfer (with the certificate) to the office of the company, requesting that the shares might be registered in his name and a new certificate issued. A. never took any steps to get the transfer registered. Through the default of the company the transfer never was registered. In April, 1884, a winding-up order was made. A. now applied to have W.'s name substituted for his as the holder of the shares:—Held, that he was entitled to the order asked for. *Manchester and Oldham Bank, In re*, 54 L. J., Ch. 926—Pearson, J.

Infant—Acquiescence.—Six hundred shares in a company were in 1882 put in the name of W., then an infant, by his employer, and W. was informed that he was entered on the register in respect of them. W. never made any application for the shares, nor was any notice of allotment sent to him. In May, 1883, W. executed a transfer of the shares, and left it with the company for registration, but the company declined to register it. W. was informed of this, and he then mentioned to the secretary of the company that he intended to repudiate the shares, but he took no steps at that time to do so. W. attained twenty-one on the 13th Jan., 1886. On the 10th October, 1887, a resolution was passed to wind up the company, and on the 18th Nov., 1887, W. took out a summons, asking to have his name struck off the list of contributories:—Held, that from the date of his coming of age to the date of the resolution to wind up the company W. must be taken to have known that his name was on the register, and that as he had chosen to allow it to remain there during all that time without taking any steps to remove it, he could not have it removed now. *Yeoland Console, In re*, 58 L. T. 922; 1 Meg. 39—Stirling, J.

f. Trustees.

Trustees for Company—Whether entitled as against Creditors to Indemnity.—D. and F. were joint managers of the Munster Bank, and while so acting, a number of stocks, shares, and other securities, and amongst others 40,000l.

Consols and 60,000*l*. New Three per Cent. Stock, were transferred into their names as trustees for the bank. There was also assigned to them by certain customers of the bank 801 shares in the bank itself, as security for moneys due or to become due from them to the bank; and these shares were at the date of the liquidation standing in the names of D. and F. During the years 1883 and 1884 the 40,000*l*. Consols and 60,000*l*. New Three per Cent. Stock were transferred to the Bank of Ireland as security for advances to the M. Bank on an account entitled in the name of the Governor and Company of the Bank of Ireland "in collateral account with D. and F., both of the M. Bank." The M. Bank stopped payment in July, 1885, and was being wound up. F. absconded, and on the 1st October, 1885, an order was made that the estate and interest of D. and F. in the 40,000*l*. Consols and 60,000*l*. New Three per Cent. Stock should vest in D. and the liquidators of the M. Bank. The Bank of Ireland having been paid off, the 40,000*l*. Consols and 60,000*l*. New Three per Cent. Stock were, on the 5th October, 1885, transferred into the names of D. and the liquidators. The liquidators placed D. on the list of contributories in respect of the 801 shares and made a call thereon, and they also required D. to join with them in realizing the stock. D. claimed to be indemnified against the calls out of these stocks. On a summons to decide on D.'s claim:—Held, that as against creditors, D. had no such right of indemnity. *Munster Bank, In re, Dillon's Claim*, 17 L. R., Ir. 341—C. A.

g. Company Limited by Guarantee.

Memorandum and Articles—Limitation of Liability in event of Winding-up.]—The defendant was the owner of a ship insured and entered in a certain class of a mutual marine insurance association, which was limited by guarantee and incorporated under the Companies Act, 1862. The object of the association was the mutual insurance of ships of members or in which they were interested. According to its rules a person, by entering his ship to be insured, as the defendant had done, became a member of the association, and whilst his ship was insured by the other members of his own class he was an insurer of the vessels of such other members entered in the same class as that in which his own had been so entered. By the memorandum of association the declaration of the undertaking required, by s. 9 of the Companies Act, 1862, on the part of a member of an association limited by guarantee, was as follows:—"Every member of the association undertakes to contribute to the assets of the association in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the association contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding-up the same, and for the adjustment of the rights of the contributories amongst themselves such amount as may be required, not exceeding 5*l*." Whilst the defendant's ship continued to be so insured and the defendant was such member the association resolved to be wound up voluntarily:—Held, that the defendant was liable to pay his proportion of losses in

respect of vessels entered and insured in the same class as his own, and that his liability was not limited to 5*l*., since the debts and liabilities mentioned in the declaration of undertaking were those of the association as against its members, and in respect of which the 9th section of the statute required such declaration to be contained in the memorandum of association, and were not the debts and liabilities to which the members by the rules of the association were to contribute as insurers or as insured. *Lion Insurance Association v. Tucker*, 12 Q. B. D. 176; 53 L. J., Q. B. 185; 49 L. T. 764; 32 W. R. 546—C. A.

COMPENSATION.

On taking Lands.]—See LANDS CLAUSES ACT.

Under Public Health Act.]—See HEALTH.

Under Artisans' Dwellings Act.]—See ARTISANS.

In respect of Telegraphs.]—See TELEGRAPH.

COMPOSITION.

See BANKRUPTCY.

COMPROMISE.

Depriving Solicitor of Lien.]—See SOLICITOR (LIEN).

Of Intended Action—Good Consideration.]—A bona fide compromise of a real claim is a good consideration, whether the claim would have been successful or not. *Cook v. Wright* (1 B. & S. 559); *Callisher v. Bischoffsheim* (5 L. R., Q. B. 449); and *Ockford v. Barelli* (20 W. R. 116), approved, and the observations in *Banner, Ex parte* (17 Ch. D. 480, 490), by Lord Esher, M.R., on the authority of these cases, dissented from by the court. *Miles v. New Zealand Alford Estate Company*, 32 Ch. D. 266; 55 L. J., Ch. 801; 54 L. T. 582; 34 W. R. 669—C. A.

Agreement for—Subsequent Death of Plaintiff Intestate—Adoption by Administrator—Reliance back.]—The plaintiff in an action having, at the instance of the defendant, consented to a compromise of the action, the plaintiff's solicitors suggested that the defendant should make an offer of a money payment in satisfaction of the plaintiff's interest in certain property which was the subject of the action. The defendant's solicitors asked the plaintiff to name a sum which he would accept. A few days later the plaintiff died intestate. His daughter thereupon instructed the plaintiff's solicitors to agree to a

compromise of the action on payment by the defendant of 500%. The defendant's solicitors replied that the defendant would pay 450% in discharge of all claims. This offer was accepted by the plaintiff's daughter. It was then arranged that a summons should be taken out by consent, staying all further proceedings in the action on the terms agreed upon. Shortly afterwards the defendant's solicitors stated that, the defendant having discovered the property to be less valuable than he originally believed, it was impossible for him to pay 450%. The plaintiff's solicitors declined, however, to vary the terms of the compromise. Letters of administration to the plaintiff's estate were subsequently granted to his daughter, and an order was made that the proceedings in the action should be carried on by her as plaintiff. A summons was then taken out, on behalf of the plaintiff, to stay all further proceedings in the action on the terms agreed upon. The defendant refused to consent to such summons:—Held, that the administration related back to the date of the death of the plaintiff intestate, and the plaintiff's daughter was entitled to enforce the agreement to compromise the action, although the same had been entered into before the grant of administration; that the evidence did not show that there had been any repudiation of such agreement; and that therefore the order asked for by the summons must be made. *Baker v. Baker*, 55 L. T. 723—Kay, J.

— **Divorce Action—Power to make Agreement an Order of Queen's Bench Division.**—An action for judicial separation in the Divorce Division was compromised by the parties, and an agreement of compromise signed by them which provided that a separation deed should be executed; that the agreement might be made a rule of the High Court, and that the respondent should pay the petitioner's taxed costs. A separation deed was afterwards executed, but the respondent refused to pay the taxed costs, and the agreement was made an order of the Queen's Bench Division for the purpose of enforcing payment:—Held, that there was power to make the agreement an order of court in the Queen's Bench Division, and that as the agreement of compromise had been reduced to an agreement to pay costs, the discretion of the court to make the order had been rightly exercised. *Smythe v. Smythe*, 18 Q. B. D. 544; 56 L. J., Q. B. 217; 56 L. T. 197; 35 W. R. 346—D.

Power of Counsel to enter into.—See *BAR- RISTER*.

COMPULSORY PILOTAGE.

See *SHIPPING*.

COMPULSORY PURCHASE OF LANDS.

See *LANDS CLAUSES ACT*.

COMPULSORY REFERENCES.

See *ARBITRATION*.

CONDITIONS.

In Contracts.—See *CONTRACT*.

On Sale of Property.—See *VENDOR AND PURCHASER*.

In Bills of Sale.—See *BILL OF SALE*.

In Wills.—See *WILL*.

CONFESSION.

See *CRIMINAL LAW (PRACTICE)*.

CONFLICT OF LAWS.

See *INTERNATIONAL LAW*.

CONSIDERATION.

Of Bills of Exchange.—See *BILLS OF EXCHANGE*.

Of Bills of Sale.—See *BILLS OF SALE*.

In other cases.—See *CONTRACT*.

CONSIGNEE.

Under Bill of Lading.—See *SHIPPING*.

Carriage of Goods and Animals.—See *CARRIER*.

CONSPIRACY.

Combination to keep down Freights—Rival Shipowners.—The plaintiffs complained that the defendants unlawfully contrived and conspired to prevent the plaintiffs carrying on their

trade by forming themselves into a conference offering a rebate of five per cent. upon all freights paid by those shippers who shipped their cargoes on board conference vessels alone, to the exclusion of the plaintiffs' vessels:—Held, that the combination was not unlawful, and that the defendants were not guilty of a misdemeanour; that the acts done in pursuance of the combination were not unlawful, wrongful, malicious, nor in restraint of trade. The bargain was one the defendants had a right to make, and they were entitled to judgment. *Mogul Steamship Company v. McGregor*, 21 Q. B. D. 544; 57 L. J., Q. B. 541; 59 L. T. 514—Coleridge, C. J. Affirmed 33 S. J. 608—C. A.

Combination to exclude Ships from particular Ports.—Semble, a combination made with a view of excluding particular ships from certain ports altogether, resulting in injury to the owners of such ships, and not merely to advance the trade of the persons combining, is against public policy, and an actionable conspiracy. *Mogul Steamship Company v. McGregor*, 15 Q. B. D. 476; 54 L. J., Q. B. 540; 53 L. T. 268; 49 J. P. 646; 15 Cox, C. C. 740; 5 Asp. M. C. 467—D.

Granting of Interim Injunction.—Several shipping merchants whose vessels traded regularly and all the year round to and from certain Chinese ports, formed themselves into a conference, and agreed to allow a rebate every six months of five per cent. on all freight to those merchants who shipped their goods exclusively on conference vessels, and issued a circular notice that any shipment of goods on a non-conference vessel would render the shipper liable to forfeit the rebate on all his shipments in the conference vessels. The result was that the plaintiffs, part owners of non-conference vessels, trading to the same ports, had to ship goods at an unremunerative rate to counteract the loss of the rebate, and sustained damages, for which they sued. On an application for an interim injunction to restrain the issue of the circulars, and to restrain the defendants so acting as to prevent the plaintiffs shipping goods from those ports at an unremunerative rate:—Held, that there being no evidence of danger of irreparable injury to the plaintiffs, and the cause of action being on the affidavits not free from doubt, the court ought not to grant an interim injunction. *Ib.*

Criminal Conspiracy.—See CRIMINAL LAW.

CONSTABLE.

See POLICE.

CONTAGIOUS DISEASES.

See ANIMALS.

CONTEMPT OF COURT.

1. *What Amounts to.*
2. *Practice.*

1. WHAT AMOUNTS TO.

Abusive Language—Interference with Administration of Justice—Judge in Chambers.—After the hearing of an application before the judge in Chambers, a solicitor who was engaged in the case, after the parties had left the judge's chambers and gone into the adjoining hall, began to call the solicitor for the other side foul and offensive names in connexion with the proceedings before the judge, and continued doing so while going downstairs until they reached the entrance to the building, when he shook his fist in the other solicitor's face, though he did not actually strike him:—Held, that this conduct was an interference with the administration of justice in connexion with the proceedings at chambers; and that as the judge in chambers was engaged in the exercise of his judicial functions as a judge of the High Court, the conduct was a contempt of the court of which the judge was the representative, and the court had power to commit for contempt. *Johnson, In re*, 20 Q. B. D. 68; 57 L. J., Q. B. 1; 58 L. T. 160; 36 W. R. 51; 52 J. P. 230—C. A.

Insult to Judge.—To observe to a judge in the course of and in reference to his judgment that "That is a most unjust remark" is an insult to the court in whatever manner expressed, and if not withdrawn, amounts to such a "wilful insult" as is contemplated by s. 113 of the County Courts Act, 1856. *Reg. v. Jordan*, 36 W. R. 589—D. See *S. C.* in *C. A. s. n. Reg. v. Staffordshire County Court Judge*, sub tit. COUNTRY COURT.

Comments in Newspaper—Lis pendens.—Contempt of court in connexion with public comments on proceedings in a court of justice is an attempt to distort the ends of justice. *Dallas v. Ledger*, 52 J. P. 328—D.

L. was defendant in an action for libel, and at the trial the jury found a verdict against him. L. thereupon gave notice of motion for a new trial, and meanwhile wrote an article in his newspaper commenting adversely upon the conduct of the jury:—Held, that such comment did not amount to a contempt of court. *Ib.*

Advertisement Offering Reward for Evidence.]

—In a suit for divorce on the wife's petition on the grounds of adultery and cruelty, the husband caused to be printed and published about the district in which the wife and her family resided a notice purporting to be signed by him, offering a reward of 25l. for evidence of the confinement of a young married woman of a female child, "probably not registered:—Held, that this was a contempt of court as tending to prejudice the petitioner, and discrediting her in the assertion of her rights, and a writ of attachment ordered to issue. *Pool v. Sacheverel* (1 P. Wm. 675) questioned. *Butler v. Butler*, 13 P. D. 73; 57 L. J., P. 42; 58 L. T. 563—Butt, J.

After service of the citation upon a correspondent in a divorce suit, he forthwith caused

to be inserted in the local newspapers an identical advertisement, denying the allegations in the petition and offering a reward for information concerning them :—Held, to constitute a contempt of court. *Brodrick v. Brodrick*, 11 P. D. 66 ; 55 L. J., P. 47 ; 56 L. T. 672 ; 34 W. R. 580 ; 50 J. P. 407—Hannen, P.

Circular containing Libel on Business—Partnership—Receiver and Manager.—A libel on the business carried on by a receiver and manager appointed by the court is a contempt of court, and may be punished by committal of the offender. After the court had made an order appointing a receiver and manager of a business, a former clerk of the firm sent round a circular to the customers of the firm containing an unfair statement of the effect of the order, and soliciting their custom for his own business. As he declined to give an undertaking not to repeat the offence, the judge committed him to prison for contempt of court, and the committal was upheld by the Court of Appeal. *Helmere v. Smith*, 35 Ch. D. 449 ; 56 L. J., Ch. 145 ; 56 L. T. 72 ; 35 W. R. 157—C. A.

Chief Clerk's Summons—Disobedience to—Witness—Party.—An action was commenced (inter alia) to recover from the defendant certain books, papers, documents, and securities belonging to the plaintiff which were retained in the possession of the defendant. The defendant did not enter an appearance, nor did he deliver any defence. A chief clerk's summons was subsequently issued on the part of the plaintiff for the attendance of the defendant at the chambers of the judge to be examined on the part of the plaintiff for the purpose of the proceedings directed by the judge ; and also to bring with him and produce all the documents in his possession relating to the matters in dispute in the action. The defendant having neglected to obey the summons, a motion was made for leave to issue a writ of attachment against him for his contempt. In support of the motion it was contended that, the motion being made under rules 16 and 17 of Ord. LV. of the Rules of Court, 1883, the defendant was guilty of contempt in not attending within the meaning of those rules, disobedience to a summons being equivalent to disobedience to an order of the court, and that the defendant was being dealt with as a party :—Held, that it was immaterial that the defendant was a party to the action, inasmuch as he was summoned to be examined as a witness, and must be dealt with accordingly ; that the disobedience was not disobedience to an order of the court ; and that the proper course was for an order to be made, under the rule 13 of Ord. XXXVII., before the writ of attachment was issued. *Powell v. Nevitt*, 55 L. T. 728—Kay, J.

Subpœna to bring Script into Registry.—Where a writ of subpœna was issued in a non-contentious matter directing R., a solicitor, to bring into the Probate Registry a script which was stated to be, but which was not in fact, in his possession or control :—Held, that his non-compliance with the subpœna was not under the circumstances a contempt ; that the fact that he had not followed the practice general in such a case (and compulsory in a contentious matter) of filing an affidavit explaining the reason for his non-compliance, with which practice he was

acquainted, was not a contempt. *Emmerson, In re, Rawlings v. Emmerson*, 57 L. J., P. 1—C. A.

Barrister—Untrue Affidavits.—On a motion to commit a barrister and counsel in a case to prison for contempt of court, the court held that it is the barrister's duty when he knew affidavits were about to be used which amounted to chicanery to disclose the fact, and that his fault did not consist in not throwing up his brief, but in having made himself a party to a fraud, by conspiring with others in inducing a person to make these affidavits, which were used to delude the court. *Linwood v. Andrews*, 58 L. T. 612—Kay, J.

Neglect to File Affidavit of Documents.—See DISCOVERY.

2. PRACTICE.

Proceedings for Attachment.—See ATTACHMENT.

Committal Order—Contents.—A committal order for contempt of court must specify in what particular the party was guilty of contempt, so as to enable him to purge his contempt, and if the order does not contain the necessary particulars it is bad for uncertainty. *Reg. v. Lambeth County Court Judge*, 36 W. R. 475—D.

Procedure in County Court.—See COUNTY COURT.

Terms of Order for Discharge of Prisoner.—The defendant was in custody for contempt of court under the following circumstances :—In 1877 she had brought an action for the recovery of some houses which she supposed to be her property. It was decided that she had no title, but between this date and 1886 she continued to assert her claim by legal proceedings, and attempted to take forcible possession of the premises. In 1885 an injunction was obtained by the plaintiff restraining the defendant and her agents from further molesting the owner and tenants of the estate ; but she, notwithstanding, again endeavoured to take possession, and was in consequence, in December, 1886, imprisoned for contempt of court. She was informed when sent to prison that if she would undertake to abandon her claim and to abstain from further efforts to take possession of the premises, she would be released. She refused to give this undertaking, and, in consequence, remained in custody till June, 1888 :—Held (in June, 1888), that the defendant might be discharged from custody on the terms of an order which had been assented to by the counsel for the plaintiff, and which was read in her presence. The terms of the order were that the injunction should continue for the term for which the plaintiff held the premises, and that in order to prevent any breach of the injunction by the defendant, a copy of the order should be given to the owner with a view to his obtaining the assistance of the police, should the defendant again attempt to obtain possession ; that in case of any breach of the injunction the official solicitor should, upon the application of the plaintiff, take the necessary steps to bring the offenders before the court and to enforce performance of the order ; that the defendant

should not be allowed to issue any writ or summons, or make any application or motion without the leave of a judge at chambers; and that, should notice of any application or motion be given without such leave, the official solicitor might be informed by letter, and the respondent should not be required to appear unless the court should otherwise order. *Davies, In re*, 21 Q. B. D. 236; 37 W. R. 57—D.

CONTRACT.

I. FORMATION AND CONSTRUCTION.

1. *Formation Generally*, 463.
2. *What Terms Implied*, 465.
3. *Extrinsic Evidence—Admissibility*. See EVIDENCE.
4. *Causes vitiating Agreements*, 467.
5. *Construction and Form*, 467.
6. *Statute of Frauds*, 468.
 - a. Sufficiency of Note or Memorandum, 468.
 - b. Sale of Goods, 472.
 - c. Interest in Land, 472.
 - d. Agreement in consideration of Marriage, 472.
 - e. Not to be performed within a Year, 473.
 - f. Part Performance, 474.

II. PARTIES TO THE CONTRACT.

III. THE MATTER OF CONTRACTS, 475.

1. *Conditions*, 476.
2. *Consideration*, 478.
3. *Illegal Contracts*, 481.
 - a. General Principles, 481.
 - b. Contrary to Statute, 481.
 - c. Gaming and Wagering, 482.
 - d. Against Public Policy and Decency, 483.
 - e. Contrary to Morality, 483.
 - f. Affecting Administration of Justice, 483.
 - g. In Restraint of Trade, 485.
 - i. General Principles, 485.
 - ii. Reasonableness, 485.
 - iii. What Constitutes a Breach, 487.
 - iv. Proceedings by Assignee to enforce, 488.

IV. DISCHARGE AND BREACH OF CONTRACTS.

V. ASSIGNMENT OF CONTRACTS—See ASSIGNMENT.

VI. SPECIFIC PERFORMANCE—See SPECIFIC PERFORMANCE.

I. FORMATION AND CONSTRUCTION.

1. FORMATION GENERALLY.

Contract by Notice.—Where the owners of a tug gave notice that they would not be answerable for any loss or damage occasioned to any tow by any negligence or default of them or their servants, and such notice was brought to the knowledge of the owners of the tow, and the latter was lost through the tug taking more

vessels than she could properly manage, and more than were allowed by regulations made under the Piers and Harbours Act, 1847 (10 & 11 Vict. c. 27), and the Great Yarmouth Port and Haven Act, 1866:—Held, that the owners of the tug were exempt from liability. *The United Service*, or *Cole v. Great Yarmouth Steam Tug Company*, 9 P. D. 3; 53 L. J., P. 1; 49 L. T. 701; 32 W. R. 565; 5 Asp., M. C. 170—C. A.

No concluded Agreement—Formal Contract contemplated.—A. and B. agreed to take C. into partnership at a future date, the agreement required by both sides to be drawn up by solicitors. The parties had not considered, and could not afterwards agree upon, several terms of the intended partnership:—Held, that there was no concluded agreement between the parties. *Connery v. Best*, 1 C. & E. 291—Hawkins, J.

In July, 1884, P., who was entitled in fee to a beerhouse at B. as trustee, agreed to sell the same to the plaintiffs, but he declined to complete the purchase, and the plaintiffs threatened him with legal proceedings. Subsequently fresh negotiations were entered into for the purchase of the property, and on the 20th December P. authorised his solicitor to sell to the plaintiffs for 1,000*l.* on condition that they relinquished any right of action they might have against him. At that time 1,000*l.* was the best price obtainable for the property. The plaintiffs' solicitors were authorised to make a contract for the plaintiffs. On the 24th P.'s solicitor wrote to the plaintiffs' solicitors, "I now send you for approval draft contract containing the terms on which P. is willing to sell this property to your clients. My client declines to produce an earlier title than that stated as the commencement of the title in the draft contract." The draft contract contained stipulations as to payment of price and commencement of title, but it contained no provision as to the relinquishment of any right of action. The contract was shortly after returned by the plaintiffs' solicitors approved. Upon P.'s refusal to complete, the plaintiffs brought an action against him for specific performance:—Held, that there was no concluded agreement between the parties. Held, also, that the draft contract was not in accordance with the authority given to P.'s solicitor. Whether an agreement in accordance with such authority would have been a breach of trust, *quære*. *Bushell v. Pocock*, 53 L. T. 860—North, J.

The plaintiff and defendant signed a written document whereby the defendant agreed to buy and the plaintiff agreed to sell an estate therein described at a specified price, "subject to a formal contract being prepared and signed by both parties as approved by their solicitors." A correspondence ensued, in the course of which the defendant's solicitor stated that the defendant was "quite firm in adhering to the agreement he entered into" to give a certain sum per acre for the property, which amounted to less than the specified price. A formal contract was prepared in draft, but was not, nor was any other formal contract, signed by the parties or approved by their solicitors. In an action for specific performance of the agreement as modified by the correspondence:—Held, that there was no concluded agreement between the parties which was capable of being specifically enforced. *Winn v. Bull* (7 Ch. D. 29) followed. *Hawkes-*

worth v. Chaffey, 55 L. J., Ch. 335 ; 54 L. T. 72—Kay, J.

Where made—Contract by Telegraph.—An order to make certain bets having been transmitted by postal telegraph from the plaintiff without the City of London to the defendant within it, he telegraphed from the City that the order had been obeyed :—Held, that the contract of agency was made in the City, and that an action for the breach of such contract was within the jurisdiction of the Mayor's Court. *Cowan v. O'Connor*, 20 Q. B. D. 640 ; 57 L. J., Q. B. 401 ; 58 L. T. 857 ; 36 W. R. 895—D.

2. WHAT TERMS IMPLIED.

Assignment of Patent by Deed in consideration of Royalty—Lapse of Patent through omission of Assignee—Covenant to maintain.—By a deed, dated in 1883, a patent was assigned by the inventors and patentees to a company in consideration of 250*l.*, and the other considerations thereafter appearing. The deed contained covenants for title by the assignors, including a covenant for quiet enjoyment of the patent "during the term subsisting therein." The company covenanted for the payment of a royalty for every article manufactured and sold by them under the patent "while subsisting," and also for payment of a share of any sums obtained by granting licences under the patent "while subsisting." In consequence of the company having, by inadvertence, omitted to pay one of the renewal fees of 10*l.*, payable under the Patents, Designs, and Trade Marks Act, 1883, in lieu of the stamp duty of 50*l.*, the patent became void. An unsuccessful application was then made by the company to Parliament for an Act to revive the patent. Subsequently the company went into voluntary liquidation. The assignors sent in a claim to the liquidators for 2,000*l.* damages for the loss of the patent, contending that the assignment contained, by implication, though not in express terms, a covenant by the company to keep the patent on foot. Thereupon a summons was taken out by the liquidators under s. 138 of the Companies Act, 1862, for directions as to whether they should allow all or any part of the claim :—Held, that there was no implied covenant to keep the patent on foot, and that, therefore, the claim of the patentees entirely failed. But held, that even if such a covenant could be implied, yet, as there was no obligation on the part of the company to manufacture the patented article, in no circumstances could more than nominal damages be claimed. *Railway and Electric Appliances Company, In re*, 38 Ch. D. 597 ; 57 L. J., Ch. 1027 ; 59 L. T. 22 ; 36 W. R. 730—Kay, J.

Contract of Indemnity.—Whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted. *Ford, Ex parte, Chappell, In re*, 16 Q. B. D. 307 ; 55 L. J., Q. B. 406—Per Esher (Ld.), M. R.

Goods lawfully seized for another's Debt.—As a general rule, where one person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them, and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt the owner is entitled to recover the value of them from the debtor ; and the right to indemnity exists although there may be no agreement to indemnify, and although there may be in that sense no privity between the owner of the goods and the debtor. *Edmunds v. Wallingford*, 14 Q. B. D. 811 ; 54 L. J., Q. B. 305 ; 52 L. T. 720 ; 33 W. R. 647 ; 49 J. P. 549—C. A. Affirming 1 C. & E. 334—Huddleston, B.

The defendant bought the business of an iron-monger in his own name for his two sons ; he paid the greater part of the purchase-money. The banking account of the business was kept by him, and he drew the cheques on that account. A society having obtained judgment in an action against the defendant, certain goods of his sons were seized by the sheriff : the sons claimed the goods ; but upon an interpleader summons taken out by the sheriff, the claim of the sons was barred, and the goods were sold. They realized 1,300*l.*, and this sum was paid into court in the action by the society against the defendant as a security for what might be found due to the society from the defendant upon taking certain accounts. The defendant's sons were afterwards adjudicated bankrupts, and the plaintiff was appointed their trustee. The defendant agreed with the plaintiff that in consideration of his sons' goods having been seized and sold on behalf of the society in respect of an alleged claim against him, he would pay 300*l.* per annum to the plaintiff until he should have paid a sufficient sum to pay the trade creditors of his sons in full. The plaintiff having brought the present action to recover 1,200*l.* due by virtue of the above-mentioned agreement, or in the alternative 1,300*l.*, the value of the goods seized :—Held, that even if the defendant's express promise to pay 1,200*l.* was not legally binding upon him, nevertheless the action was maintainable ; for although the decision upon the interpleader summons did not estop the defendant from showing that the seizure by the sheriff was unlawful, nevertheless he had by his conduct led to the seizure, and the goods of his sons had been legally taken for his debt ; the defendant, therefore, was bound to indemnify his sons, and the plaintiff, as their trustee in bankruptcy, was entitled to have judgment entered for him for the sum of 1,200*l.*, which he was willing to accept instead of 1,300*l.*, the value of the goods seized. *Id.*

Recovery of Tithes.—The defendant was the owner and occupier of certain lands which were charged with payment of tithes ; there was a provision for recovery. In an action of debt for arrears accrued in respect of the whole of the lands charged for four years, during which time the defendant was the owner and occupier of a portion only of such lands :—Held, that the defendant had his remedy by action against the co-owners for contribution. *Christie v. Barker*, 53 L. J., Q. B. 537—C. A.

Altered Circumstances—Conditions rendered inapplicable—Extra Cost.—Where a contract

Compulsory Payment.—See MONEY COUNTS.

is made with reference to certain anticipated circumstances, and when it becomes wholly inapplicable or impossible of application to any such circumstances, without any default on the part of the plaintiff, it ceases to have any application: it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made. *Bush v. Whitehaven Trustees*, 52 J. P. 392—D.

B. contracted with W. in the month of June to lay a certain conduit pipe, and W. agreed to be ready at all times to give B. possession of the sites, to enable him to proceed with the construction of the works. By means of W.'s delay in giving possession of portions of the sites to B., B. was thrown into the winter months when wages were higher and the works were more difficult to construct:—Held, that a summer contract having, by implication, been in the contemplation of the parties when the contract was made, B. was entitled to a quantum meruit or damages in respect of the increased expenditure which he was thereby compelled to incur. *Id.*

3. EXTRINSIC EVIDENCE—ADMISSIBILITY—*See* EVIDENCE.

4. CAUSES VITIATING AGREEMENTS.

Fraud.—*See* FRAUD.

Mistake.—*See* MISTAKE.

Illegality.—*See* infra, III., 3.

5. CONSTRUCTION AND FORM.

By what law governed.—*See* INTERNATIONAL LAW.

Reference to Foreign Law—Effect of.—A reference to foreign law in an English contract does not incorporate the foreign law, but merely affects the interpretation of the contract. *Dever, Ex parte, Suse, In re*, 18 Q. B. D. 660; 56 L. J., Q. B. 552—C. A.

Alterations of.—Where the subject-matter of an agreement of hiring was expressed to be "furniture, &c., &c., mentioned in the schedule hereto," and the schedule was added by the plaintiff after execution:—Held, that this did not vitiate the agreement. *Harris v. Tenpenny*, 1 C. & E. 65—Lopes, J.

Right to retake Possession of Goods.—A piano was let on the three years' hire system, under an agreement providing that "In case of default in the punctual payment of any instalment, the instalments previously paid shall be forfeited to J. B. C., who shall thereupon be entitled to resume possession of the instrument":—Held, upon default, that J. B. C. was entitled to the possession of the piano, although the instalments in arrear were tendered by the hirer, before action brought. *Cramer v. Giles*, 1 C. & E. 151—Lopes, J. Affirmed in C. A.

Construction—Fortius contra Proferentem.—

See *Burton v. English*, sub tit. SHIPPING, and *Birrell v. Dryer*, sub tit. INSURANCE (MARINE).

"His Share" equivalent to Share of Firm.—Where a memorandum of mutual agreement had been entered into between M., the plaintiffs, and three other firms, whereby M. agreed to surrender to the plaintiffs "his share" in a certain mortgage held by him as trustee:—Held, upon all the circumstances of the case, that the share of M.'s firm therein passed, and not merely his own individual share as between himself and his partner. *Marshal v. Maclure*, 10 App. Cas. 325—P. C.

Effect of Misunderstanding as to Subject-matter.—A negotiation took place as to the sale by L. to P. of a British patent and certain foreign patents for the same invention, and ultimately an offer was made for sale at 500*l.*, and accepted by letter, but it was not quite clear whether the offer and acceptance related to all the patents or to the English patent only. P. brought an action for specific performance, and moved for an injunction as to the British patent only:—Held, that an injunction should be granted, for that where a written agreement has been signed, the fact that the plaintiff has put a wrong construction upon it, and insisted that it included what it did not include, does not prevent there being a contract, nor preclude the plaintiff from waiving the question of construction and obtaining specific performance according to what the defendant admits is its true construction. *Preston v. Luck*, 27 Ch. D. 497; 33 W. R. 317—C. A.

Whether Acceptance final.—*See* *Harston v. Harvey*, post, col. 480.

When Sealing Contract is Necessary.—*See* CORPORATION—HEALTH—SCHOOL.

6. STATUTE OF FRAUDS.

a. Sufficiency of Note or Memorandum.

Contract of Suretyship.—Where the contract between a creditor, debtor and surety is contained in a bill of exchange, in an action by the creditor against the surety on the bill no other evidence save the bill is required to satisfy the Statute of Frauds, if the obligation appearing on the face of the bill is the precise obligation the surety has agreed to undertake. *Holmes v. Durkee*, 1 C. & E. 23—Williams, J.

Omission of Terms of Agreement.—Where a broker employed by the seller alone, effects a contract by means of a note sent to and accepted by the purchaser, a variation between this note and a note sent by the broker to the seller is immaterial. Letters not containing any reference to the quality or the time for payment of goods sold as agreed upon, do not constitute a sufficient memorandum of a contract to satisfy the Statute of Frauds. *McCaull v. Strauss*, 1 C. & E. 106—Stephen, J.

Letter cancelling Contract.—A letter signed by the defendant cancelling a contract, and referring to an enclosed invoice which contained all the terms of the contract, is a sufficient note or memorandum within the 17th section of the

Statute of Frauds. *Elliott v. Dean*, 1 C. & E. 283—A. L. Smith, J. Affirmed in C. A.

What Amounts to Acceptance of Offer.]—See *Harston v. Harvey*, post, col. 480.

Conditional Acceptance.]—See *White v. McMahon*, infra.

Agreement for Lease—Commencement of Term.]—A lessee, D., wrote to his landlord's agents, asking for an extension of his term for twenty-one years from the termination of his present lease, and offering a premium. The landlord wrote to his agents declining D.'s offer, but adding, "As the lease will not run out for the next two years, I think there is plenty of time to think over the matter. However, if Mr. D. is very urgent, I will consent to grant him a lease for twenty-one years at 50*l.* a year, and a premium of 100*l.*" The latter part of the letter was communicated to D., who accepted the offer.—Held, that D. was entitled to a lease for twenty-one years at a rent of 50*l.* a year, and a premium of 100*l.*, commencing from the expiration of his existing lease. *Wood v. Aylward*, 58 L. T. 662—C. A. Reversing 51 J. P. 724—Kekewich, J.

An agreement in writing between A. and B., that on paying 20*l.* B. was to get possession of a farm of land, and also a lease for twenty-one years, at the yearly rent of 16*l.* a year; and that B., on giving up possession at the end of twenty-one years, having done no injury, was to get his money returned.—Held, to constitute a valid agreement for an executory demise for twenty-one years from the date of the payment of the 20*l.* *Erskine v. Armstrong*, 20 L. R., Ir. 296—C. A.

Where an agreement in writing for a lease for a term of years did not expressly state the date at which the term was to commence, but contained a reference to circumstances from which such date could be clearly ascertained.—Held, sufficient to satisfy the Statute of Frauds, and specific performance of the agreement was decreed. *Phelan v. Pedcastle*, 15 L. R., Ir. 169—V.-C.

The plaintiff made a proposal in writing to the defendant as follows:—June 7th, 1886, to rent same (i.e., licensed house), with fixtures, &c., at 2*l.* 10*s.* a week. This tenancy to be for two years certain. The plaintiff to have the option of purchase at any time within that term, at a sum of 1,200*l.* to give solvent security in the sum of 500*l.* for the preservation of the retail licence attached to said premises, and for payment of above weekly rent. The defendant accepted the above proposal in the following terms:—"I accept the within proposal, provided Mr. M. C. is the security." An action being brought by the plaintiff to recover possession of the premises, and for specific performance, the statement of claim alleged that M. C. was ready and willing to become security, as the defendant was aware, and that the plaintiff went into possession of the premises under the proposal and continued therein until the defendant resumed possession. The defendant pleaded inter alia the Statute of Frauds.—Held, that the proposal and acceptance did not satisfy the requirements of the statute, as no date was fixed expressly or by reference from which the term was to run; also that the acceptance was conditional,

and that as performance of the condition was not averred, the documents could neither constitute a present demise nor a complete agreement, entitling the plaintiff to specific performance. *White v. McMahon*, 18 L. R., Ir. 460—C. P. D.

Description of Vendor—Name of Vendor's Solicitor—Solicitor himself the Vendor.]—If, in a contract for sale, the vendor is described simply as "proprietor," "owner," "mortgagee," or the like, the description is sufficient to satisfy the requirements of the Statute of Frauds; but not so if he is described as "vendor," or "client," or "friend" of a named agent, or as "solicitor to the vendor," even where the solicitor is himself the vendor and is described in the contract as "A. B., solicitor to the vendor." *Jarrett v. Hunter*, 34 Ch. D. 182; 56 L. J., Ch. 141; 55 L. T. 727; 35 W. R. 132; 51 J. P. 165—Kay, J.

Semble, a mere reference in a condition of sale to a conveyance or other document of title relating to the property, the name or description of the vendor not being stated in the condition, is not sufficient to import its contents into the contract so as to satisfy the requirements of the Statute of Frauds, even if such conveyance or other document does show who is the vendor. A contract, which under the Statute of Frauds is invalid through not naming or sufficiently describing the vendor, is not rendered valid by the fact that the purchaser knew, at the time he entered into the contract, who the vendor was. *Id.*

Land indefinite—Land belonging to Another—Agency.]—A proposal had been made that the two plaintiffs should buy a triangular field of about three acres, and that the defendant should buy half an acre of it from them. One of the plaintiffs and the defendant met on the field; the defendant wished to have a piece in one of the angles, and the plaintiff stepped so as to mark out where a base line would cut off half an acre. Some days afterwards the same plaintiff wrote to the defendant asking her to let them have a letter agreeing to purchase the half acre she had selected for 350*l.* She wrote back, not expressly referring to the other letter, that she was willing to take half an acre of the land as agreed upon for 350*l.* The plaintiffs did not obtain a contract with the owner of the land for the purchase until the 4th of November, which was three months afterwards. On the 13th of November the defendant threatened to withdraw, and on the 20th of November her solicitors wrote that she did withdraw from the contract.—Held, that the small element of uncertainty in the measurement of the land might be disregarded, and that the parties must be considered as having determined the exact piece of land to be taken; that the second letter contained a sufficient reference to the first; and that the two letters formed a valid contract within the Statute of Frauds, and that, though the two plaintiffs were the purchasers of the land, and the letters forming the contract passed between the defendant and one only of the plaintiffs, he must under the circumstances be considered as agent for the other as well. *Wylson v. Dunn*, 34 Ch. D. 569; 56 L. J., Ch. 855; 56 L. T. 192; 35 W. R. 405; 51 J. P. 452—Kekewich, J.

Connected Documents—Previous Parol Con-

tract.]—Two or more documents which do not refer to each other, but do refer to the same parol contract, and which, when taken together, contain all the terms of the parol contract, may together constitute a sufficient memorandum within the Statute of Frauds. On the 22nd of September, 1882, the defendant verbally agreed with the plaintiff to sell him her share in certain property, for 200*l.*, and signed and gave to him the following receipt: "Sept. 22nd, 1882. Received of J. Studds one pound of my share in the Barrett's Grove property the sum of two hundred pounds." No time was fixed for completion, and no abstract was delivered, and on the 19th of March, 1883, the defendant wrote to plaintiff: "Mr. Studds,—Sir,—If the balance of 189*l.* on account of the purchase of my share of the property be not paid on or before the 22nd instant I shall consider the agreement (made 22nd of Sept., 1882) not any longer binding":—Held, that the word "balance" in the letter sufficiently referred to the receipt to enable the two documents to be read together, and that they constituted a sufficient memorandum within the Statute of Frauds, s. 4. *Studds v. Watson*, 28 Ch. D. 305; 54 L. J., Ch. 626; 52 L. T. 129; 33 W. R. 118—North, J.

Held, also, that even if the word "balance" was not sufficient to connect the two documents, yet that, as they both referred to the same parol contract, all the terms of which were contained in one or other of them, they could be read together, and together constituted a good memorandum within the statute. *Ib.*

Reference to and Incorporation of Documents.]

—The defendant entered into a verbal agreement with the plaintiff to grant him the lease of a house for a term of years. A draft for the proposed lease was furnished by the plaintiff's solicitor to the defendant's solicitors, and returned by them approved of on behalf of the defendant. The defendant subsequently wrote a letter to the plaintiff complaining that the lease had not been engrossed. Upon the defendant declining to carry out the agreement, the plaintiff applied for a decree for specific performance:—Held, that the letter contained a sufficient reference to the draft of the lease to admit parol evidence to show that there was such a draft, and thus to connect the draft with the letter signed by the defendant; and that these papers so connected constituted a sufficient writing to satisfy the requirements of the Statute of Frauds. *Craig v. Elliott*, 15 L. R., Ir. 257—V.-C. See also *Wylson v. Dunn*, *supra*.

Correspondence referring to Formal Contract

—**Duly authorized Agent.**]—An action was brought by vendors for specific performance. The following telegram had been signed and sent by the purchaser's solicitor to the vendor's solicitor. "Mr. H. will purchase Stonyroad at the sum named to me as owing to the mortgagees. Will write to-night." A telegram in reply was sent by the vendor's solicitor as follows, "Telegram with offer received, which I accept as solicitor to the second mortgagees." The purchaser's solicitor then wrote to the vendor's solicitor thus: "I am in receipt of your telegram accepting Mr. H.'s offer. If I recollect rightly the amount was some 1,578*l.* Send me the contract, and I will get it signed." It was admitted by the purchaser that his solicitor was

his agent, duly authorized on his behalf to send the telegram. Beyond this there was no distinct evidence of agency:—Held, that there was no sufficient note or memorandum in writing to satisfy s. 4 of the Statute of Frauds; that it could not be inferred that the purchaser's solicitor was his agent to write the letter; but even if this could be inferred, the words "send me the contract," &c. showed that it was not the intention of the parties that the letter should constitute a contract between them. *Goodall v. Harding*, 52 L. T. 126—Kay, J.

b. Sale of Goods.

Picture to be Painted.]—A contract by an artist with a picture-dealer to paint a picture of a given subject at an agreed price, is a contract for the sale of a chattel. *Isaacs v. Hardy*, 1 C. & E. 287—Mathew, J.

Receipt and Acceptance.]—Where goods of the value of 10*l.* or upwards are sold by a verbal contract and delivered, and the purchaser retains them, and deals with them in such a way as to prove that he admits the existence of a contract, and admits that the goods were delivered under the contract, this is a sufficient acceptance to satisfy s. 17 of the Statute of Frauds, although the purchaser afterwards rejects the goods on the ground that they are not equal to sample, and if the goods prove equal to sample the purchaser is liable. *Page v. Morgan*, 15 Q. B. D. 228; 54 L. J., Q. B. 434; 53 L. T. 126; 33 W. R. 793—C. A.

Entry in Auctioneer's Book—Bill of Sale.]

Where a contract for sale of goods within s. 17 of the Statute of Frauds is valid solely by virtue of a memorandum in writing, such memorandum is an assurance of personal chattels within the Bills of Sale Act, 1878. *Roberts, In re, Evans v. Roberts*, 36 Ch. D. 196; 56 L. J., Ch. 952; 57 L. T. 79; 35 W. R. 684; 51 J. P. 757—Kay, J.

Earnest, what is.]—See *Howe v. Smith*, 27 Ch. D. 89; 53 L. J., Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773—Per Fry, L. J.

c. Interest in Land.

Advance of Money on Security.]—An agreement to advance money on the security of land is an agreement which requires to be in writing by s. 4 of the Statute of Frauds. *Mounsey v. Rankin*, 1 C. & E. 496—Wills, J.

Sale of Building Materials.]—A contract for the sale of building materials to be taken down and removed by the purchaser is a contract for the sale of an interest in land within s. 4 of the Statute of Frauds. *Marshall v. Green* (1 C. P. D. 35) discussed and distinguished on this point. *Lavery v. Purssell*, 39 Ch. D. 508; 57 L. J., Ch. 570; 58 L. T. 846; 37 W. R. 163—Chitty, J.

d. Agreement in Consideration of Marriage.

What is.]—P. V., shortly before his marriage with the plaintiff, wrote her a letter, in which

occurred the following passage: "And now, my dearest Lizzie, as life is very uncertain at my time of life, and as you are of all the world the person I love best, I hereby will and bequeath to you, after my death, the eight cottages in Peckham's-Walk, occupied by Charles Warren and Edward Neath and others. You will keep this letter as a proof of my intention, in case of any sudden change occurring to me, rendering me incapable of, or not in a state of mind fit for, the performance of so important a document, and making null and void any former will and bequest I may have made previously. I am doing this, my dearest, as a temporary provision for you in case of any emergency . . . I am your future husband in its most holy sense.—P.V." Another part of the will contained a reference to the wedding-ring, of which the plaintiff then apparently had the custody. After the marriage P. V. died, leaving a will whereof the defendants were executors and trustees. By this will the eight cottages were not left to the plaintiff. The plaintiff claimed a declaration that P. V. duly contracted with her to leave to or settle upon her the eight cottages, and that by virtue of the letter the plaintiff was entitled to them in equity. The court held that the letter did not satisfy the requirements of the Statute of Frauds with respect to a memorandum, either as to the statement of consideration or a promise:—Held, on appeal, that no contract had been intended, that the writer had mistakenly thought that he was making a gift, and that the judgment must be affirmed. *Vincent v. Vincent*, 56 L. T. 243—C. A.

Part Performance.]—See infra.

e. Not to be Performed within a Year.

Agreement for Maintenance of Wife.]—A husband and wife having taken out cross-summonses against each other for assaults, entered into an oral agreement with each other to withdraw the summonses and to live apart, the husband agreeing to allow the wife a weekly sum for maintenance, and the wife agreeing to maintain herself and her children and to indemnify the husband against any debts contracted by her. An action having been brought in the county court by the wife against the husband for six weeks' arrears of maintenance under the agreement:—Held, that the agreement was not an agreement "not to be performed within one year" within the 4th section of the Statute of Frauds, and, therefore, need not be in writing. *Davey v. Shannon* (4 Ex. D. 81) not followed. *McGregor v. McGregor*, 21 Q. B. D. 424; 57 L. J., Q. B. 591; 37 W. R. 45; 52 J. P. 772—C. A. Affirming 58 L. T. 227—D.

Where Performance by one Party possible.]—Where by the terms of a contract one party can perform his part of it within a year, a subsequent request by the other party that such performance should be postponed till after a year does not bring the case within s. 4 of the Statute of Frauds, although such request be acceded to. *Bevan v. Carr*, 1 C. & E. 499—Wills, J.

Promise to Subscribe—Instalments.]—A verbally promised to give 20,000*l.* to the Jubilee Fund of the Congregational Union, and also filled up and signed a blank form of promise,

not addressed to any one, but headed "Congregational Union of England and Wales—Jubilee Fund," whereby he promised to give 20,000*l.*, in five equal annual instalments of 4,000*l.* each, for liquidation of chapel debts. A. paid 12,000*l.* to the fund within three years after giving the promise, and then died, leaving the last two instalments of 4,000*l.* each unpaid and unprovided for:—Held, that there was no enforceable contract, on the ground that there was no sufficient memorandum in writing to satisfy the Statute of Frauds. *Hudson, In re, Creed v. Henderson*, 54 L. J., Ch. 811; 33 W. R. 819—Pearson, J.

Agreement to Abandon Proceedings—Defence to Action.]—An agreement to abandon threatened proceedings which might otherwise be brought at any time within six years, is, if followed in fact by an abstention from proceedings, a contract which is performed by one of the parties within one year, and consequently is not such a contract as is required by s. 4 of the Statute of Frauds to be in writing. That section does not require that an agreement which is set up as a defence to an action should be in writing. *Miles v. New Zealand Alford Estate Company*, 32 Ch. D. 266; 54 L. J., Ch. 1035; 53 L. T. 219; 34 W. R. 669—North, J.

f. Part Performance.

When applicable—Easement.]—The equitable doctrine of part performance has not been confined to contracts for an acquisition of an interest in land. Probably it applies to all cases in which the court would entertain a suit for specific performance if the contract had been in writing. A verbal agreement for an easement may be enforced where there has been part performance, whether it is or is not within the 4th section of the Statute of Frauds. And semble it is within the section. *Britain v. Rossiter* (11 Q. B. D. 123) discussed. *McManus v. Cooke*, 35 Ch. D. 681; 56 L. J., Ch. 662; 56 L. T. 900; 35 W. R. 754; 51 J. P. 708—Kay, J.

—Agreement in Consideration of Marriage.]—A parol agreement before marriage that money of the intended wife at the bank shall be hers for her separate use, followed by the wife dealing with it with the husband's knowledge, and the husband not interfering:—Held to amount to a gift to the wife for her separate use. *Routh, Ex parte, Whitehead, In re, or Whitehead, Ex parte*, 14 Q. B. D. 419; 54 L. J., Q. B. 240; 52 L. T. 597; 33 W. R. 471; 49 J. P. 405—C. A.

What sufficient.]—The making of alterations in premises by the intended landlord under a verbal agreement to let:—Held, not to be a part performance, taking the case out of the Statute of Frauds. *Whittick v. Mozley*, 1 C. & E. 86—Field, J.

M., a tenant of L., was offered a lease of certain lands, and a written agreement was produced for a term of thirty-one years, at 38*l.* rent, and tendered to her for signature. M. objected to 38*l.* as a mistake for 33*l.* Whereupon L.'s agent said that M. should have the farm for 33*l.*, and wrote a memorandum upon the agreement that M. said her rent was 33*l.* M. then signed the agreement. She paid the 33*l.* and continued in possession for six years, when L. commenced an

action to enforce specific performance of the agreement at the rent of 33*l.*—Held, that there was a complete agreement, partly written and partly verbal, for a lease at the rent of 33*l.*; and that the circumstance of M. being permitted to continue in possession after the expiration of her lease, and the payment of rent by her at the agreed amount, constituted part performance sufficient to take the case out of the Statute of Frauds, and to entitle L. to a decree for specific performance. *Lanyon v. Martin*, 13 L. R., Ir. 297—Flanagan, J.

The bankrupt, being indebted to a banking company, made an oral promise to the directors to give them, when required, security for the debt. He was then entitled to a reversionary interest in one-fifth of a farm, to come into possession on the death of his mother, who was tenant for life, and who held the title-deeds. The mother afterwards died, and the title-deeds came into the possession of the respondent, who was manager of the bank, and who was also entitled to one-fifth of the property. The respondent told the bankrupt that he had possession of the deeds, and that he held his (the bankrupt's) one-fifth for the bank. The bankrupt expressed his assent:—Held, that the company had not a valid equitable mortgage of the bankrupt's share in the farm, for there was no memorandum in writing to satisfy the Statute of Frauds, and the conversation which took place between the bankrupt and the respondent as to the custody of the deeds, not being followed by any act which altered the legal position of the parties, was not such a part performance of the oral promise to give security as would exclude the operation of the statute. *Broderick, Ex parte, Beetham, In re*, 18 Q. B. D. 766; 56 L. J., Q. B. 635; 35 W. R. 613—C. A.

II. PARTIES TO THE CONTRACT.

Right of Third Party to sue.—A provision in an act of parliament may enable an outsider to sue. There is in such cases a statutory obligation, of which the person named can take the benefit—an action for debt on a statute being a well-known old form of action at common law; but an agreement between A. and B. that B. shall pay C. gives C. no right of action against B. I cannot see that there is in such a case any difference between equity and common law; it is a mere question of contract. *Rotherham Alum and Chemical Company, In re*, 25 Ch. D. 111; 53 L. J., Ch. 290; 50 L. T. 219; 32 W. R. 131—per Lindley, L. J.

To entitle a third person not named as party to a contract to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of *c'estui que trust* under the contract. *Gandy v. Gandy*, 30 Ch. D. 57; 54 L. J., Ch. 1154; 53 L. T. 306; 33 W. R. 803—C. A.

Action by Members of Committee of Church Fund against others.—An action was brought by five of the members of a church building committee on behalf of themselves and the other members of the committee, against a former member, claiming an account of all moneys received and paid by him in respect of the church building fund during the period of his membership. The fund was raised by voluntary contributions; seventeen persons having constituted

themselves into a committee to receive subscriptions for the purpose of improving the parish church and to apply the moneys thus collected:—Held, that the members of the committee being mere agents of the subscribers, the action could not be maintained by some of the agents against the others. *Strickland v. Weldon*, 28 Ch. D. 426; 54 L. J., Ch. 452; 52 L. T. 247; 33 W. R. 545—Pearson, J.

Infants.—See INFANT.

Ratification—Illegality of the Transaction—Absence of full Knowledge.—Acquiescence and ratification must be founded on a full knowledge of the facts, and further, it must be in relation to a transaction to which effect may be given thereby. *Banque Jacques-Cartier v. Banque d'Epargne*, 13 App. Cas. 111; 57 L. J., P. C. 42—P. C.

Where the accounts of a bank in liquidation had been changed so as to represent the bank as a debtor in respect of a sum which had been borrowed by its manager for his own purposes:—Held, that the doctrine of acquiescence and ratification by the liquidating authorities would not avail to render the bank liable to pay a debt which it never owed. *Id.*

— **Contract with projected Company.**—See ante, col. 402.

— **By Company of Acts of Directors.**—See *Blackburn, &c., Building Society v. Brooks*, ante, col. 269, and *Grimwade v. Mutual Society*, ante, col. 360.

III. THE MATTER OF CONTRACTS.

1. CONDITIONS.

Precedent—What amounts to.—Where an action was compromised upon terms, one of which was that the defendant should pay the plaintiff 150*l.*, and another that the plaintiff should pay a third party's claim against the defendant:—Held, that the payment of the third party's claim by the plaintiff was not a condition precedent to the plaintiff's right to sue for the 150*l.* *Lockhart v. Webster*, 1 C. & E. 71—A. L. Smith, J.

— **Monthly Deliveries—Non-payment for one Delivery.**—The respondents bought from the appellant company 5,000 tons of steel of the company's make, to be delivered 1,000 tons monthly, commencing January, 1881, payment within three days after receipt of shipping documents. In January the company delivered part only of that month's instalments, and in the beginning of February made a further delivery. On the 2nd February, shortly before payment for these deliveries became due, a petition was presented to wind up the company. The respondents, *bonâ fide*, under the erroneous advice of their solicitor that they could not, without leave of the court, safely pay pending the petition, objected to make the payments then due unless the company obtained the sanction of the court, which they asked the company to obtain. On the 10th February the company informed the respondents that they should consider the refusal to pay as a breach of contract, releasing the company from any further obligations. On the 15th February an order was made

to wind up the company by the court. A correspondence ensued between the respondents and the liquidator, in which the respondents claimed damages for failure to deliver the January instalment, and a right to deduct those damages from any payments then due; and said that they always had been and still were ready to accept such deliveries and make such payments as ought to be accepted and made under the contract, subject to the right of set-off. The liquidator made no further deliveries, and brought an action in the name of the company for the price of the steel delivered. The respondents counter-claimed for damages for breaches of contract for non-delivery:—Held, that, upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery; that the respondents had not, by postponing payment under erroneous advice, acted so as to shew an intention to repudiate the contract, or so as to release the company from further performance. *Mersey Steel and Iron Company v. Naylor*, 9 App. Cas. 434; 53 L. J., Q. B. 497; 51 L. T. 637; 32 W. R. 989—H. L. (E.).

— **Inchoate Agreement—Building Agreement.**—The Metropolitan Board of Works, the owners in fee of two adjoining pieces of land, agreed with X. to grant him a lease of one plot on his erecting on the land a building according to certain plans to be approved by the board. The board entered into a similar agreement with W. as to the other plot. X. then agreed with W. for a sublease of the first plot on similar terms. W. subsequently entered into two agreements with a company (formed for the purpose of erecting an hotel) by each of which he contracted to grant them a sublease of one of the two plots on the completion of a building according to the terms of the agreement. Each agreement provided that the company "shall before the 30th Oct. 1884 cover the ground . . . with a substantial building or part of a substantial building of such class, size, form, elevation, &c., and general character as shall be approved by the board or their superintending architect on their behalf, before the erection of such building is commenced." Another clause provided that the company should forthwith submit for the approval of the board plans of the building to be built by the company, and submit to any modifications required by the board. Another clause provided that "no building shall be commenced before the said plans, &c., shall have been approved by the board as aforesaid." The plans were duly submitted to the board, which was satisfied with them, but declined to grant separate leases of the two plots if one entire building was erected over both, and required that the title to both leases should be vested in one and the same person. W. endeavoured to arrange this, but failed. The company having gone into liquidation, the building not being completed, W. claimed to be admitted as a creditor of the company in respect of damages for the alleged breach of the agreement:—Held, by Chitty, J., that the approval of the board was a condition precedent to the agreement to build, that the performance of the conditions had not been waived, and that the company were not liable:—Held, on appeal, that there was no condition precedent, but an agreement to erect such

particular kind of building as the board should have approved, and that, the board not having approved of any particular kind of building, there was nothing capable of performance, and therefore the company had committed no breach of the agreement. *Northumberland Avenue Hotel Company, In re, Fox's claim*, 56 L. T. 833—C. A.

— **When Arbitration is.**—See ARBITRATION.

Dependent Conditions.—Where an agreement specified that advertisements should be inserted to the value of 90*l.* in part payment of goods to be purchased to the amount of 360*l.*:—Held, that the plaintiff was not entitled to recover in respect of the 90*l.* worth of advertisements without taking the 360*l.* worth of goods. *Minshull v. Brinsmead*, 1 C. & E. 97—Day, J.

2. CONSIDERATION.

Any Loss or Benefit.—Any benefit to the assignee of a contract or any loss to the assignor is a valuable consideration, and therefore the sale of an alleged claim against a railway company for services rendered, which, though not admitted, was not rejected by them, is a sufficient consideration to support an action for the purchase money. *McGreevy v. Russell*, 56 L. T. 501—P. C.

Contract by Creditor to take less than Sum due.—An agreement between judgment debtor and creditor that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor or his nominee the residue by instalments, the creditor will not take any proceedings on the judgment is nudum pactum, being without consideration, and does not prevent the creditor after payment of the whole debt and costs from proceeding to enforce payment of the interest upon the judgment. *Pinnel's case*, (5 Rep. 117 a), and *Cumber v. Wane* (1 Str. 426), followed. *Foakes v. Beer*, 9 App. Cas. 605; 54 L. J., Q. B. 130; 51 L. T. 833; 33 W. R. 233—H. L. (E.). See also cases sub tit. ACCORD AND SATISFACTION.

Promise to give Sum to Charity.—A. promised to give 20,000*l.* to a fund of the Congregational Union, and paid certain instalments of the amount, but died leaving 8,000*l.* unpaid and unprovided for. The Union claimed that sum from A.'s executors, alleging that they had been led by A.'s promise to contribute larger sums to churches than they would otherwise have done, that money had been given and promised by other persons in consideration of A.'s promise, and that the committee of the Union had incurred liabilities in consequence of A.'s promise:—Held, that, the promise was without consideration. *Hudson, In re, Creed v. Henderson*, 54 L. J., Ch. 811; 33 W. R. 819—Pearson, J.

Agreement to enter into an Agreement with Third Party.—A. contracts with B. that he will enter into a binding agreement with C., B.'s landlord, for a lease at a given rent for such a term and upon such conditions as the landlord shall approve; and B. agrees, upon

such lease being granted, to surrender his existing lease. Upon A.'s refusal to perform his agreement, B. is entitled to recover damages against A. for breach of contract. *Foster v. Wheeler*, 38 Ch. D. 130; 57 L. J., Ch. 871; 59 L. T. 15; 37 W. R. 40—C. A.

Agreement not to Sue.]—In a petition by husband against wife praying that the marriage celebrated between them might be declared null and void on the ground of her incapacity, the respondent pleaded that she and the petitioner after a year's cohabitation had agreed to live apart, and had bound themselves not to make any claim against each other either in a court of law or equity; and that if either party should break the agreement the other should be entitled to an injunction to restrain such breach. That it was further agreed that if the respondent committed a breach of the agreement the petitioner should be entitled to proceed in this court for a declaration of nullity. Averment that there had been no breach of the agreement on the part of the respondent.—Held, that the respondent's agreement not to sue was a sufficient consideration for the husband's engagement to do the like, and that such an agreement although not by deed was therefore a bar to a petition for declaration of nullity. *Aldridge v. Aldridge*, or *A. v. M.*, 13 P. D. 210; 58 L. J., P. 8; 59 L. T. 896; 37 W. R. 240—Hannen, P.

Forbearance to Sue.]—For the purpose of inducing the plaintiff to give time to the defendant's father for payment of a debt, the defendant signed a promissory note whereby the defendant's father and the defendant jointly and severally promised to pay to the plaintiff the amount of the debt with interest half-yearly at the rate of 5 per cent. per annum until the amount was paid. The plaintiff having forbore to sue for several years.—Held, that, the plaintiff having forbore from suing the defendant's father at the defendant's request, there was a good consideration for the defendant's liability on the note although there was no contract by the plaintiff to forbear from suing. *Crears v. Hunter or Burnyeat*, 19 Q. B. D. 341; 56 L. J., Q. B. 518; 57 L. T. 554; 35 W. R. 821—C. A.

Compromise of Intended Action.]—A bona fide compromise of a real claim is a good consideration, whether the claim would have been successful or not. *Cook v. Wright* (1 B. & S. 559); *Callisher v. Bischoffsheim* (5 L. R., Q. B. 449); and *Ockford v. Barelli* (20 W. R. 116) approved, and the observations in *Banner, Ex parte* (17 Ch. D. 480, 490) by Lord Esher, M. R., on the authority of these cases, dissented from by the Court. *Miles v. New Zealand Alford Estate Company*, 32 Ch. D. 266; 55 L. J., Ch. 801; 54 L. T. 582; 34 W. R. 669—C. A.

A shareholder in a company made an equitable mortgage of his shares in favour of the plaintiff as security for an advance, and the plaintiff gave the company notice of his charge; after the date of the notice the shareholder gave a written guarantee to the company. The guarantor was not only a shareholder, but he was also a director of and the vendor to, the company. The guarantee was given at a general meeting of the shareholders, after an angry

discussion had taken place, but it did not appear that any resolution was passed at such meeting with reference to it. It was, that a minimum dividend should be paid to the shareholders yearly during ninety years; and that the guarantor should pay sums sufficient to make up that minimum in every year in which the company had not earned it. There was no consideration for the giving of the guarantee upon the face of the instrument, but it was found by the court that it was, in fact, given in consideration of an agreement come to at the general meeting of the shareholders, to abandon proceedings in contemplation against the guarantor. But it was held, upon appeal (Bowen, L.J., dissentiente), that there was no sufficient evidence of any intended claim by the company or the shareholders against the guarantor, or any contract binding the company to abandon such claim, and accordingly that there was no consideration to support the guarantee.—Held, by Bowen, L.J., that upon the evidence proceedings had, in fact, been threatened, and were dropped in consequence of the guarantee; and that this was sufficient consideration to support it. *Id.*

Implied Undertaking to keep Document.]—A. was a judgment creditor of C.; B. wrote to A. a letter in the following terms (so far as is material): "If C. leaves in your hands the order of Messrs. F., drawn upon Messrs. R., for 250 eight per cent. preference shares, &c., I will obtain, within one month from this date, with the sanction of C., a loan for him of 1,000l. upon said order, and pay that sum to you against the delivery of said order." C. left the order in A.'s hands, and sanctioned the proposal contained in the letter. A. then wrote to B. as follows:—"C. brought me your letter on the 27th, and he has given me his written sanction to your obtaining the loan of 1,000l. for him referred to in that letter, and we shall be glad to hear that everything is in order"—Held, that, assuming A.'s letter to B. to be a final acceptance of the offer contained in B.'s letter to A., there was consideration moving from A., to support B.'s promise, such consideration being the implied undertaking on the part of A. when he received the order to keep it till required for the purpose of being handed over to the person who would advance the 1,000l. on its security. But held also that A.'s letter to B. was not an acceptance of the offer contained in B.'s letter to A., and that the two letters did not therefore constitute a contract. *Harston v. Harvey*, 1 C. & E. 404—Wills, J.

Sale of Goodwill by Bankrupt and Trustee.]—If a bankrupt join with his trustee in selling the goodwill and business previously carried on by the bankrupt, and agrees with the purchaser not to carry on a similar business within a prescribed district, such agreement is binding on him, for there is good consideration for the defendant's promise in the payment, on the faith of that promise, by the purchasers to the trustee, and he can be restrained from so doing. *Buston and High Peak Company v. Mitchell*, 1 C. & E. 527—Day, J.

Agreement to Procure Charter.]—A shipbroker agreed with a shipowner to procure him a charter of a vessel, in consideration of the ship-

owner chartering the same :—Held, in an action by shipowner against shipbroker for breach of contract, that there was a good consideration for the shipbroker's promise. *Gliddon v. Brodersen*, 1 C. & E. 197—Cave, J.

Admissibility of Evidence to add to Consideration Expressed.—By an agreement in writing G. agreed that Y. should receive all the money that was then due, and which should become due to G. upon the winding-up of the Barnstaple Second Annuitant Society, Y. paying to G. out of such money the sum of 100*l*. The consideration was stated to be "In consideration of a sum of money this day paid," &c. :—Held, that evidence was admissible to show that in addition to the consideration expressed there was another consideration, namely, that Y. should vote for the winding-up of the society. *Barnstaple Second Annuitant Society, In re*, 50 L. T. 424—D.

3. ILLEGAL CONTRACTS.

a. General Principles.

Severance of Good Part from the Bad.—Where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void ; but, where you can sever them, whether the illegality be created by statute or by common law, you may reject the bad part and retain the good. *Byrne, Ex parte, Burdett, In re*, 20 Q. B. D. 314 ; 57 L. J., Q. B. 263 ; 58 L. T. 703 ; 36 W. R. 345 ; 5 M. B. R. 32—C. A.

The principle of construction which guides the court in severing the valid and rejecting the invalid portions of covenants considered. *Baker v. Hedgecock*, 39 Ch. D. 520 ; 57 L. J., Ch. 889 ; 59 L. T. 361 ; 36 W. R. 840—Chitty, J.

b. Contrary to Statute.

Serving Unqualified Medical Practitioner as Assistant.—The act 55 Geo. 3, c. 194, prohibiting medical practice by unqualified persons, is not repealed by implication by the Medical Act, 1858. The defendant, a duly qualified medical practitioner, agreed with the plaintiff, a medical practitioner not duly qualified, but who was described in the agreement as "medical practitioner," to serve the plaintiff as assistant in his profession as a medical practitioner, and not to practise at R. within five years after the close of the engagement. The plaintiff applied for an injunction to prevent the defendant from practising at R. in breach of this agreement :—Held, that his doing so was made illegal by the act 55 Geo. 3, c. 194, s. 14, that the agreement therefore was to assist the plaintiff in carrying on a business which he could not lawfully carry on, and that the agreement was illegal and could not be enforced. *Davies v. Mahuna*, 29 Ch. D. 596 ; 54 L. J., Ch. 1148 ; 53 L. T. 314 ; 33 W. R. 668 ; 50 J. P. 5—C. A.

Seemingly, if the plaintiff had carried on his business by means of duly qualified assistants, without personally acting as a physician, surgeon, or apothecary, the agreement might have been legal. *Ib.*

Officer of Local Authority interested in

Contract.—A contract by a local board of health made with two persons, one of whom is the surveyor of the board at a yearly salary, and who, as an officer appointed by the local authority, is required by s. 193 of the Public Health Act, 1875, not to be interested in any contract made with the authority, is illegal. *Mellis v. Shirley Local Board*, 16 Q. B. D. 446 ; 55 L. J., Q. B. 143 ; 53 L. T. 810 ; 34 W. R. 187 ; 50 J. P. 214—C. A.

Policy on Advances on Ship—"Full interest admitted."—A policy insuring cash advances on a ship is within 19 Geo. 2, c. 37, s. 1. Such a policy containing the term "full interest admitted" is avoided by that statute. *Smith v. Reynolds* (1 H. & N. 221) ; and *De Mattos v. North* (3 L. R., Eq. 185), followed. *Berridge v. Man On Insurance Company*, 18 Q. B. D. 346 ; 56 L. J., Q. B. 223 ; 56 L. T. 375 ; 35 W. R. 343 ; 6 Asp. M. C. 104—C. A.

c. Gaming and Wagering.

Wagering Policies—Action for Recovery of Premiums.—J. H. effected with the defendant company two policies of insurance on the life of his father J. H., in which he had no insurable interest. According to the policies the premiums were to be paid by weekly payments. J. H., the son, continued to make these weekly payments for some years. J. H., the father, had at first no knowledge of the insurances effected on his life, but when he became aware of them he objected to their being continued, and gave notice to that effect to the company. J. H., the son, then gave notice to the defendants that the policies were at an end, and claimed the return of the amount of the premiums. The defendants refused to pay, and J. H., the son, brought his action for their recovery, and the County Court judge gave judgment for the plaintiff. The defendant appealed :—Held, on appeal, that, under the circumstances of the case, the policies were wagering policies, and consequently the premiums paid in respect of them could not be recovered. *Howard v. Refuge Friendly Society*, 54 L. T. 644—D.

Note given for Gambling Transactions—Indorsement.—The plaintiff brought an action to recover the amount due on two promissory notes given by the defendant to B. in respect of certain gambling transactions on the Stock Exchange, and indorsed over by B. to the plaintiff for valuable consideration :—Held, that the plaintiff's right to recover was not affected by the fact that he had notice of the notes having been given by the defendant to B. in respect of gambling transactions, the consideration for the notes not being illegal, but falling only within the category of void contracts under 8 & 9 Vict. c. 109. *Lilley v. Rankin*, 56 L. J., Q. B. 248 ; 55 L. T. 814—D.

Cheque given for Gambling Debt.—A cheque given in payment for counters obtained from the secretary of a club to enable the purchaser to gamble at cards, cannot be sued upon by the secretary. *St. Croix v. Morris*, 1 C. & E. 485—Stephen, J.

d. Against Public Policy and Decency.

Removal of Corpses.—An agreement to build houses on a disused, unconsecrated, burial ground, necessitating the removal of some thousands of corpses, which removal would of necessity involve an outrage on public decency, and amount to an indictable offence, is illegal. *Gibbons v. Chambers*, 1 C. & E. 577—Day, J.

Agreement to Divide Benefits to be received under a Will.—Contracts made during the lifetime of a testator, and fairly obtained by persons living in expectation of receiving benefits under his will, to divide among them any such benefits after his death, if amounting to agreements to use undue influence upon the testator, are bad; but they are good if amounting to agreements to disinterestedly abstain from interfering with the testator, and will be upheld where there is mutuality of consideration. *Higgins v. Hill*, 56 L. T. 426—Chitty, J.

e. Contrary to Morality.

Continuance of Cohabitation—Presumption.—The testator six months before his death gave a bond to a lady with whom he had cohabited for more than thirty years, conditioned for the payment to her at the expiration of two years of a sum of money and interest; and he continued to cohabit with her until his death. There was nothing on the face of the bond with reference to the cohabitation, and there was no evidence that it was in fact given to secure the continuance of the cohabitation:—Held, that the mere continuance of the cohabitation was not enough to raise the presumption that the bond was given in consideration of future cohabitation, and accordingly that the bond was good. *Gray v. Mathias* (5 Ves. 286) observed on *Vallance, In re, Vallance v. Blagden*, 26 Ch. D. 353; 50 L. T. 574; 32 W. R. 918; 48 J. P. 398—Kay, J.

Absolute Covenant in Separation Deed to pay Annuity.—In a separation deed a covenant, by which the husband undertakes to pay his wife an annuity without restricting his liability to such time as she shall be chaste, is good, and is not against public policy, and the covenant remains in force and the annuity continues payable, although the wife afterwards commits adultery. But, *semble*, per Cotton, L.J., on the authority of *Evans v. Carrington* (2 De G., F. & J. 481), that if the covenant had been inserted in the separation deed with the intent that the wife might be at liberty to commit adultery, the deed would have been void. *Fearon v. Aylesford (Earl)*, 14 Q. B. D. 792; 54 L. J., Q. B. 33; 52 L. T. 954; 33 W. R. 331; 49 J. P. 596—C. A.

f. Affecting Administration of Justice.

Threat of Criminal Proceedings.—Any contract having a tendency, however slight, to affect the administration of justice is illegal and void. The consideration of a bond was expressed to be that the obligor was to be free from any legal proceedings or other consequences for having introduced the obligee to C., through whom the obligee had lost money:—Held, on the evidence,

that the consideration included promises that no criminal proceedings should be commenced against the obligor, and that certain criminal proceedings then pending against C. should be so conducted that the name of the obligor should not be mentioned, or should be mentioned in such a way as not to damage him; that the consideration was partly illegal as tending to affect the course of justice; and that there was no good consideration for the bond. *Lound v. Grimwade*, 39 Ch. D. 605; 57 L. J., Ch. 725; 59 L. T. 168—Stirling, J.

Indemnifying Bail.—A contract is illegal, whereby a defendant in a criminal case, who has been ordered to find bail for his good behaviour during a specified period, deposits money with his surety upon the terms that the money is to be retained by the surety during the specified period for his own protection against the defendant's default, and at the expiration of that period is to be returned; and no action by the defendant in the criminal case will lie to recover back the money deposited with the surety either before or after the expiration of the specified period, although the defendant in the criminal case has not committed any default, and although the surety has not been compelled to pay the amount for which he has become bound. *Wilson v. Strugnell* (7 Q. B. D. 548) as to this point overruled. *Herman v. Jeuchner*, or *Zeuchner*, 15 Q. B. D. 561; 54 L. J., Q. B. 340; 53 L. T. 94; 33 W. R. 606; 49 J. P. 502—C. A. Reversing 1 C. & E. 364—Stephen, J.

Procuring withdrawal of Criminal Prosecution.—A banking company commenced a prosecution against a customer for having obtained credit from them under false pretences, which is by s. 13 of the Debtors Act, 1869, made a misdemeanour. At this time the bank had notice of an act of bankruptcy committed by the customer. On the day on which the summons was to be heard by the magistrate, H. signed an undertaking that, if the magistrate would allow the summons to be withdrawn, he would pay the bank the sum which the customer had obtained by false pretences. An application was made to the magistrate by the customer's solicitor to allow the summons to be withdrawn. The application was assented to by the bank's solicitor, and granted by the magistrate. H. then paid the money to the bank. The bank manager believed that H. was paying the money out of his own pocket. The customer was soon after adjudicated a bankrupt, upon the act of bankruptcy of which the bank had notice. The trustee in the bankruptcy discovered that the money which H. had paid to the bank had been previously handed to him by the bankrupt's wife, she having, with the bankrupt's knowledge, taken it for the purpose of paying the bank out of a bag of money belonging to the bankrupt:—Held, that the consideration for the payment to the bank being the stifling of a prosecution, there was no legal consideration, and that, though H., being *in pari delicto*, could not have recovered the money from the bank, the trustee, to whom by virtue of the relation back of his title to the act of bankruptcy, the money really belonged, could recover it. *Caldecott, Ex parte* (4 Ch. D. 150), distinguished. *Wolverhampton Banking Company, Ex parte, Campbell, In re*, 14 Q. B. D. 32—D.

g. In Restraint of Trade.

i. General Principles.

Changes in Doctrine.—The changes in the doctrine of public policy and the authorities discussed. *Davies v. Davies*, 36 Ch. D. 359; 56 L. J., Ch. 962; 58 L. T. 209; 36 W. R. 86—C. A.

The old rule that the law does not allow an absolute covenant in restraint of trade is still binding. *Ib. per Cotton, L.J.*

Vagueness—"So far as the Law allows."—On a dissolution of partnership the retiring partner, who received a large sum of money, covenanted "to retire from the partnership; and, so far as the law allows, from the business, and not to trade, act, or deal in any way so as directly or indirectly to affect the continuing partners." The business had been carried on at Wolverhampton and in London. In an action by the survivor of the continuing partners and his assignees to restrain the retiring partner from carrying on a similar business in Middlesex:—Held, that the covenant to retire from the business so far as the law allows was too vague for the court to enforce. *Ib.*

ii. Reasonableness.

Customers—Partial Enforcement.—In an agreement for employment as a milk carrier, the servant undertook not to serve or interfere with any customer served or belonging at any time to the master, his successors or assigns:—Held, that, if on the construction of the undertaking it was not limited to interference with persons who were customers during the employment of the servant, the undertaking was severable, and capable of enforcement in respect of persons who were customers during the employment. *Baines v. Geary*, 35 Ch. D. 154; 56 L. J., Ch. 935; 56 L. T. 567; 36 W. R. 98; 51 J. P. 628—North, J.

Not to carry on any Business.—An agreement between a foreman cutter and general superintendent of a tailor's business and his master, contained a covenant that the former would not after quitting his master's service enter "into any engagement or be concerned in carrying on any business whatsoever" within a given period of time and limit of distance:—Held, that the covenant could not be construed as merely a covenant not to carry on the business of a tailor, but was void as being in general restraint of trade. *Baines v. Geary* (35 Ch. D. 155), discussed. *Baker v. Hedgcock*, 39 Ch. D. 520; 57 L. J., Ch. 889; 59 L. T. 361; 36 W. R. 840—Chitty, J.

Reasonable Limit of Space and Time.—The defendant was employed by the plaintiff, a tailor in Regent Street, as a cutter and fitter of wearing apparel. The defendant entered into an agreement with the plaintiff that, upon the termination of his employment for any cause, he would not carry on the business of a tailor within a circuit of ten miles of Charing Cross for the period of three years from such termination of employment. Some time afterwards the defendant left the plaintiff's employment, and set up the business of a tailor and outfitter within about two hundred yards of the plaintiff's premises. An application for an injunction to restrain the defendant having

been made, the defence was raised that the restriction imposed by the agreement upon the defendant was far in excess of what was required for the reasonable protection of the plaintiff in his business; and that the agreement was therefore invalid on the ground that it was contrary to public policy, as being in unreasonable restraint of trade:—Held, that the agreement was not unreasonable, either in point of space or in point of time, for a tailor like the plaintiff to require the defendant to enter into; that therefore the agreement was not invalid; and that the plaintiff was entitled to the injunction claimed. *Nicoll v. Beere*, 53 L. T. 659—Kay, J.

Limit of Space—Time Unlimited.—W. entered the service of C. as a shopman at weekly wages, and covenanted not to carry on business within one mile of the shop at any time thereafter. The business was afterwards moved to another shop close by, and sold by C. to J., together with the goodwill and beneficial interest thereof. W. then left the shop, and set up business within a mile of the old shop:—Held, that the covenant was not unreasonable, and endured for the life of W., though the original covenantee should cease to carry on business altogether, and that the covenant was not affected by the removal of the business to another shop near at hand, though it might have been otherwise if the business had been removed to quite a different neighbourhood. *Jacoby v. Whitmore*, 49 L. T. 335; 32 W. R. 18; 48 J. P. 325—C. A.

Where a defendant in an action had agreed to act as clerk and traveller for the plaintiff in the business of a wine and spirit merchant, carried on by him at Burton-on-Trent, and had further agreed not at any time thereafter, either alone or in partnership with, or as clerk, agent, or traveller to, any person or persons whomsoever, to carry on or conduct, or assist in carrying on or conducting, the trade or business of a wine and spirit merchant, or any branch thereof, within the distance of fifty miles from that town without the licence and consent of the plaintiff, the court held that the restriction imposed upon the defendant was not in excess of what was required for the reasonable protection of the plaintiff in his business; that the agreement was not invalid on the ground that it was contrary to public policy, as being in unreasonable restraint of trade, and that therefore the plaintiff was entitled to a perpetual injunction to restrain the defendant from a breach thereof. *Parsons v. Cotterell*, 56 L. T. 839; 51 J. P. 679—Kay, J.

No limit of Space—Time Limited.—A covenant not to carry on the business of a manufacturer for a period of five years under particular name or style is not void, as being a covenant in restraint of trade, notwithstanding that it may be unlimited in point of space. *Vernon v. Hallam*, 34 Ch. D. 748; 56 L. J., Ch. 115; 55 L. T. 676; 35 W. R. 156—Stirling, J.

Rule of Society not to employ Servants of other Members.—A society established for the protection of a particular trade contained a rule that no member should employ any traveller, carman, or outdoor employé who had left the service of another member without the consent in writing of his late employer till after the expiration of two years:—Held, that the rule was unreasonable, in restraint of trade, and void.

But, semble, a rule protecting the members against information gained by servants being improperly communicated to other members, if reasonably framed, would have been good. *Mineral Water Bottle Exchange Society v. Booth*, 36 Ch. D. 465; 57 L. T. 573; 36 W. R. 274—C. A.

iii. What Constitutes a Breach.

Condition in Bond—Evidence of Agreement—Injunction.—The defendant having been appointed by the plaintiffs their bank manager at Leeds, executed a bond in 1,000*l.* to the plaintiffs, conditioned to be void if the defendant, after quitting the plaintiffs' employ, should not enter into similar employ within the time and distance specified. The defendant having committed a breach of the condition, contended that the plaintiffs' only remedy was to recover the monetary penalty in the bond:—Held, that the condition of the bond was evidence of an agreement sufficient to sustain an injunction. *London and Yorkshire Bank v. Pritt*, 56 L. J., Ch. 987; 57 L. T. 875; 36 W. R. 135—Chitty, J.

No negative Covenant.—Where in breach of an agreement by the defendant to serve the plaintiff for fourteen years as manager of his business (which agreement contained no express negative covenants), the defendant left the plaintiff and started a similar business a few doors off:—Held, that the court had power to grant an injunction. *Jackson v. Astley*, 1 C. & E. 181—Pollock, B.

Agreement not to carry on the Profession of a Surgeon—Acting as Assistant.—M. became assistant to H. & P., surgeons at N., and entered into a bond which recited that he was taken into their employment on the terms "that he should not at any time set up or carry on the business or profession of a surgeon" in N., or within ten miles thereof. The condition of the bond was that M. "shall not at any time hereafter, directly or indirectly, and either alone or in partnership with or as assistant to any other person or persons, carry on the profession or business of a surgeon" in N., or within ten miles thereof. The partnership having been dissolved, both partners continued to practise in N., and H. engaged M. as his assistant at a salary. P. brought his action to restrain M. from acting as such:—Held, that there had been a breach of it, for that a person acting as a surgeon was carrying on the profession of a surgeon, although he only acted as salaried assistant to a surgeon who carried it on for his own benefit, and, therefore, that an injunction ought to be granted. *Allen v. Taylor* (19 W. R. 556) distinguished. *Palmer v. Mallet*, 36 Ch. D. 411; 57 L. J., Ch. 226; 58 L. T. 64; 36 W. R. 460—C. A.

Sale of Medical Practice—Covenant not to Enter into Competition.—An agreement for the sale of a medical practice provided that the vendor would not practise or reside within a given radius, or otherwise directly or indirectly enter into competition with the purchaser. The vendor was called in by patients resident within the radius, and visited them. He did not, however, solicit such patients, and they stated that

they would in no event have called in the purchaser:—Held, that the competition contemplated by the agreement was not confined to active competition, and that the acts of the vendor constituted an infringement of the covenant. *Rogers v. Drury*, 57 L. J., Ch. 504; 36 W. R. 496—Chitty, J.

Covenant not to "Engage in, or be in any way concerned," in a Business—Acting as Employé.—T., as trustee on behalf of a company about to be formed, purchased from the trustee in liquidation of H.'s affairs the business carried on by the latter, and by an agreement made between T., H., and the trustee, H. agreed with T., both personally and on behalf of the proposed company, that so long as the company carried on the business, H. would not "engage in, or be in any way concerned or interested, in any similar business within ten miles of the Royal Exchange, London." The company was subsequently formed, and whilst it was carrying on its business, H. became an employé of B. & Co., who were carrying on a similar business in London:—Held, that H. had committed a breach of his covenant. *Hill & Co. v. Hill*, 55 L. T. 769; 35 W. R. 137; 51 J. P. 246—Kekewich, J.

iv. Proceedings by Assignee to Enforce.

When Possible.—A covenant by one partner upon the dissolution of the partnership, not to trade, act, or deal, so as to directly or indirectly affect the continuing partners, was held to be personal to the continuing partners, and could not be sued upon by their assignees. *Davies v. Davies*, 36 Ch. D. 359; 56 L. J., Ch. 962; 58 L. T. 209; 36 W. R. 86—C. A.

A shopman at weekly wages covenanted with his employer not to carry on business within a mile from the shop at any time thereafter. The employer sold his business together with the goodwill and beneficial interest thereof to the plaintiff:—Held, that the covenant added to the value of the goodwill, and, therefore, was part of the goodwill and assignable with it, and did, in fact, pass by the sale of the goodwill and beneficial interest to the plaintiff so as to give him a right of action. *Jacoby v. Whitmore*, 49 L. T. 335; 32 W. R. 18; 48 J. P. 325—C. A.

IV. DISCHARGE AND BREACH OF CONTRACTS.

Breach—Landlord and Tenant—Right to Sue for, on Repudiation.—One who has agreed to take a furnished house is not bound to fulfil his contract if the house be infected with measles at the date fixed for the commencement of the tenancy. If in such a case the lessor sue for rent, he must show, to entitle him to succeed, that the house was in fact in a state fit for human occupation at the date fixed for the commencement of the term, notwithstanding a previous intimation by the tenant of his intention to repudiate the contract. *Bird v. Greville (Lord)*, 1 C. & E. 317—Field, J.

—Of School Rules by Parent—Right of Schoolmaster to refuse to complete his Contract.—The defendant's son was a pupil at the plain-

tiff's school, one of the rules of which—the defendant having notice of it—was that no "exeat," or permission to leave the school and remain away for one night, was allowed during Easter Term. During Easter Term the defendant requested that his son might be allowed to come home and remain for the night, which the plaintiff refused to allow; but subsequently, on the defendant repeating the request and sending a servant for the boy, the plaintiff allowed him to go home, writing to the defendant at the same time that he did so on the understanding that the boy returned the same night. On the boy reaching home, the defendant telegraphed to the plaintiff that it was not convenient to send the boy that day, but he could return the next morning, to which the plaintiff telegraphed in reply that unless the defendant's son returned that night he should not receive him back. In consequence of the last telegram the defendant did not send the boy back, and the present action was brought to recover the school fees due on the first day of Easter Term, of which term less than three weeks had expired when the boy left. The defendant paid 13*l.* into court with a denial of liability, and counter-claimed damages for breach of contract by the plaintiff:—Held, that the plaintiff's contract was to board, lodge, and educate the defendant's son for the term on the condition that he should be at liberty to enforce with regard to the boy the rules of the school, or such of them as were known to the defendant; that this condition having been broken by the defendant, the plaintiff had the right to refuse to complete his contract, and was consequently entitled to succeed in this action both on claim and counter-claim. *Price v. Wilkins*, 58 L. T. 680—Wills, J.

— **Sale of Goods.**—See SALE.

Repudiation before Time for Performance—Declaration of Inability to Perform—Election.

—In a lease of premises for a term of twenty-one years determinable by the lessee at the end of the first four years by a six months' notice, the lessor covenanted to rebuild the premises after the expiration of the first four years of the term upon a six months' notice from the lessee requiring him to do so. Before the expiration of the first four years of the term the lessor on many occasions told the lessee that he would be unable to procure the money for rebuilding the premises. The lessee, in consequence of this statement by the lessor, gave the requisite notice, under the provisions of the lease, to determine the term at the end of the first four years. After the determination of the lease he continued to occupy the premises for some months, paying rent to the lessor's mortgagees, on the chance, as he stated, of the lessor's procuring the money to rebuild. The lessor being, however, unable to rebuild the premises, the lessee claimed damages against him for breach of the contract to do so:—Held, that the covenant to rebuild never having been actually broken, because the lessee had before the time for its performance determined the term, he could not recover unless there had been a breach of contract by anticipation within the doctrine of *Hochster v. De la Tour* (2 E. & B. 678) and *Frost v. Knight* (7 L. R. Ex. 111), by reason of a wrongful repudiation of his covenant by the lessor before the time for perform-

ance; that what had been said by the lessor did not under the circumstances of the case amount to such a repudiation; and that, if it did, such repudiation before the time of performance arrived would not amount to a breach of the contract, unless the lessee elected to treat it as putting an end to the contract except for the purposes of an action for such breach, and the lessee had not under the circumstances so elected; and that he could not therefore maintain his claim. Quære, whether the doctrine of *Hochster v. De la Tour* (2 E. & B. 678), can be applicable to the case of a lease or other contract containing various stipulations where the whole contract cannot be treated as put an end to upon the wrongful repudiation of one of the stipulations of the contract by the promisor. *Johstone v. Milling*, 16 Q. B. D. 460; 55 L. J., Q. B. 162; 54 L. T. 629; 34 W. R. 238; 50 J. P. 694—C. A.

— **Monthly Deliveries—Non-payment for one Delivery.**—See *Mersey Steel and Iron Company v. Naylor*, ante, col. 477.

Measure of Damages—Payment to Settle Action.—A "boat-staging" or suspension platform, put up for the plaintiffs by the defendant under a contract between them, to enable the plaintiffs to paint a house, fell, through being insecurely fastened by the defendant, and hurt a painter in the employment of the plaintiffs. He brought an action under the Employers' Liability Act (43 & 44 Vict. c. 42) against the plaintiffs for injuries sustained in consequence of the defective state of the boat-staging. The plaintiffs settled the action by paying to the painter 125*l.*, and then sued the defendant for breach of his contract:—Held, that the defendant was liable under the contract; but that, inasmuch as the plaintiffs had employed a competent contractor to put up the boat-staging, and there was, on the facts, no evidence of negligence by the plaintiffs, they were not liable to their servant for the injury he had sustained, and therefore the money which they had paid to settle his action was not recoverable as damages from the defendant for his breach of contract. *Kiddle v. Lovett*, 16 Q. B. D. 605; 34 W. R. 518—D.

— **Indemnity—Costs when included.**—Under a covenant to indemnify against all actions and claims in respect of the covenants of a lease, costs properly incurred in reasonably defending an action brought for a breach of one of the covenants are recoverable as damages. *Murrell v. Fysh*, 1 C. & E. 80—Williams, J.

— **Not advancing Money as agreed.**—Where there is an agreement to lend money, and special damage results from the breach of that agreement, and a party is deprived of the opportunity of getting money elsewhere, substantial, and not merely nominal, damages ought to be awarded. *Manchester and Oldham Bank v. Cook*, 49 L. T. 674—D.

— **Notice of Purpose for which Goods sent.**—The plaintiff delivered a parcel at a receiving office of the defendants in London, addressed to "W. H. M., Stand 23, Show Ground, Lichfield, Staffordshire; van train." Nothing was said by the person who delivered the parcel at the receiving office as to the purpose for which it was

being sent to Lichfield, or to draw attention to the label:—Held, that the label was sufficient notice to the defendants that the goods were being sent to a show, and that the plaintiffs were entitled to recover damages for loss of profits and expenses incurred by the goods being delayed, and not being delivered at Lichfield in time for the show. *Jameson v. Midland Railway*, 60 L. T. 426—D.

— On Sale of Goods.]—See DAMAGES.

Payment.]—See PAYMENT.

Damages—Concurrent Contracts—Charges on Moneys payable under—Set-off.]—Under a contract for paving and maintaining V. Street between certain commissioners and a company, the commissioners were empowered to retain the cost of maintenance and to set it off against any money which might be payable by them to the company. The company, on the 15th of November, 1882, gave L. a letter of charge upon all their interest in the contract to secure a debt due from them to him. On the 9th of December, L. gave the commissioners notice of this charge, and later on the same day the company presented a petition for winding-up its affairs, after which the provisional liquidator was empowered to complete the contract subject to any prior charge in favour of L. On the 13th of January, 1883, the winding-up order was made. The commissioners claimed damages for non-fulfilment of the contract to maintain V. Street, and also four other streets under similar contracts, and they claimed to set off these sums against money due from them to the company:—Held, that the commissioners were not entitled to set-off against moneys due from them to the company under the contract relating to V. Street any damages to which they might be entitled for breaches of the other contracts. Held also, that the charge in favour of L. being given prior to the liquidation, the commissioners were not entitled to a set-off against L., but that they could set-off the damages against the liquidator under the mutual credit section of 32 & 33 Vict. c. 71. *Asphaltic Paving Company, In re, Lee and Chapman's case*, 30 Ch. D. 216; 54 L. J., Ch. 460; 53 L. T. 65; 33 W. R. 513—C. A.

CONTRACTOR.

Liability of Employer for Acts of Contractor or his Servants.]—See cases, post, sub tit. PRINCIPAL AND AGENT.

CONTRIBUTION.

Between Co-Sureties.]—See PRINCIPAL AND SURETY.

CONTRIBUTORY.

See COMPANY.

CONVERSION.

I. EQUITABLE CONVERSION.

II. OF GOODS.—See CRIMINAL LAW—TROYER.

1. EQUITABLE CONVERSION.

Discretionary power of Sale—Sale during existence of Contingent Interest.]—C., by will, devised real and personal estate to trustees upon trust for his two children, a son and daughter, in equal shares, and gave the trustees a power of sale at discretion. One half the daughter's share was settled by the will. On the marriage of the daughter, E. R. C., in 1865, a deed was executed appointing new trustees of the will, and declaring that they should stand possessed of the settled half of the daughter's share on the trusts of the will, and the unsettled half upon the trusts declared by a settlement of even date. By the settlement the unsettled share and certain other property were conveyed to the same trustees upon trust for the said E. R. C. (with no words of limitation) until her marriage, then upon trust to invest and to hold the investments upon the usual trusts in favour of her, her husband and children, with an ultimate trust for her, her executors, administrators, and assigns. At the date of the settlement a large part of the real estate devised by the will remained unsold. E. R. C. afterwards survived her husband and died, leaving an infant daughter who died without ever attaining a vested interest under the settlement. A part of the real estate was sold during E. R. C.'s life, and the residue during the life of her daughter, who had a contingent, though not a vested interest:—Held, that no conversion of the real estate devised by the will was effected by the settlement, but the whole having been sold while there was in existence an interest, though not a vested interest, under the trusts of the settlement, the whole property so sold, and not only that sold in E. R. C.'s lifetime, was converted, and must be taken by her personal representatives. *Sinclair's Settlement, In re, Crump v. Leicester*, 56 L. T. 83—North, J.

Compulsory Purchase of Land of Lunatic not so found.]—Sect. 7 of the Lands Clauses Consolidation Act, 1845, does not authorize a person of unsound mind to sell land to a company or public body who have statutory power to take it; the section only authorizes the committee of a lunatic to sell. A public body having given notice under their statutory powers to take land belonging to a lady of unsound mind not so found, the value of the land was ascertained by two surveyors, one appointed by an uncle of the lady, who purported to act on her behalf, and the other by the public body; the sum thus ascertained was paid into court, and the public body took possession of the land. The lady afterwards died intestate, being still of unsound mind, and her heir-at-law petitioned for payment of the money to him:—Held, that the land had never been converted into personalty, and that the heir was entitled to the money. *Flamank, Ex parte* (1 Sim. (N. S.) 260), dissented from. *Tugwell, In re*, 27 Ch. D. 309; 53 L. J., Ch. 1006; 51 L. T. 83; 33 W. R. 132—Pearson, J.

Parol Contract by Testator—Contract in writing by Residuary Devisee.]—A testator agreed verbally to sell land, and received a deposit. The residuary devisee contracted in writing to sell the land to the same purchaser at the same price, to be paid partly by the deposit :—Held, that the devisee had not adopted his testator's parol contract so as to effect a conversion relating back to the testator's lifetime. *Harrison, In re, Perry v. Spencer*, 34 Ch. D. 214 ; 56 L. J., Ch. 341 ; 56 L. T. 159 ; 35 W. R. 196—North, J.

Death of Vendor before Completion—Defective Title—Real Estate Devised on Trust for Sale.]—Testator (who married after 1834), by his will, gave all his real estate to trustees, on trust to convert and invest 1,000*l.* out of the proceeds of sale and pay the income to his widow for life, and then gave certain legacies, but did not dispose of the residuary proceeds of sale. The testator at the date of his death had contracted to sell certain lands for 3,000*l.* After his death the trustees found that no title could be made to part of the lands, and rescinded the contract. They then put up the lands to which they had a title for sale by auction, and sold them for 2,500*l.* to the same purchaser :—Held, that there was no conversion of the testator's real estate beyond the purposes declared by the will, and that the undisposed of proceeds of sale resulted to the heir. *Thomas, In re, Thomas v. Howell*, 34 Ch. D. 166 ; 56 L. J., Ch. 9 ; 55 L. T. 629—Kay, J.

Power of Sale discretionary—Conversion imperative.]—A testator gave an annuity to his wife, and he gave and bequeathed to his seven children all his real and personal estate after deducting the said annuity ; and after his wife's decease the annuity, together with all rents, interests, dividends and profits arising from his estate, to be divided between his seven children equally ; and he directed his executors to sell and convert into money his furniture, lands, houses, tenements, and other property whenever it should appear to their satisfaction that such sale would be for the benefit of his children, and all money arising from the sale to be invested for the benefit of his children :—Held, that the direction to convert was imperative, and operated from the death of the testator. *Raw, In re, Morris v. Griffiths*, 26 Ch. D. 601 ; 53 L. J., Ch. 1050 ; 51 L. T. 282 ; 32 W. R. 986—Pearson, J.

Power of Sale in Trustees—Order for Sale.]—An absolute order for sale made within the jurisdiction of the court in an administration suit operates as a conversion from the date of the order and before any sale has taken place. *Hyett v. Mekin*, 25 Ch. D. 735 ; 53 L. J., Ch. 241 ; 50 L. T. 54 ; 32 W. R. 513—Kay, J.

Appointment by Will.]—There is a distinction between a will made by a married woman under a power and when disposing of property in her own right as a feme sole. The power must be looked at to see in what character the property was held when disposed of by the testator, and where by virtue of the power it has been converted into personalty, she is in fact disposing of personalty. *Gunn, In Goods of*, 9 P. D. 242 ; 53 L. J., P. 107 ; 33 W. R. 169 ; 49 J. P. 72—Hannan, P.

Trust for Sale—Discretion to Postpone—Re-conversion.]—A testator devised his real estate upon trust, either immediately or at any time after his death as to his trustees should seem most expedient, to sell and to hold the proceeds in trust for his sons W., F., H., and G., if and when they should attain the age of twenty-one years, in equal shares. F. predeceased the testator, and his share therefore lapsed and devolved upon W., as heir-at-law of the testator. H. attained twenty-one but died intestate and unmarried, leaving his mother E. and his surviving brothers W. and G. his next-of-kin. G. attained twenty-one but died, having by his will given all his real and personal estate to W. W. was subsequently found a lunatic by inquisition, and remained of unsound mind until his death, intestate and without next-of-kin or heir-at-law. Letters of administration to his personal estate had been taken out by the Solicitor to the Treasury. The real estate devised by the testator remained unsold at the time of W.'s death, and an action was brought to ascertain the persons entitled thereto. The representatives of the trustees, as the persons upon whom the legal estate had devolved, contended that, as there had been conversion of the real estate into personalty, the Crown was not entitled through the Solicitor to the Treasury to come in and insist that the real estate should be treated as converted ; that there being an absolute discretion to postpone the sale for an indefinite period, that which was a trust had been cut down to a mere power of sale ; and that, as there had been a failure of the cestui que trust, the trustees were entitled to retain for their own benefit the property, or the undivided shares thereof, to which W. was entitled at his death :—Held that the trust for conversion was absolute, and had not been displaced by the discretion to postpone, inasmuch as the several parties interested had not at any time been all competent to agree to a re-conversion ; that the real estate must still be treated as personal estate ; and that the Solicitor to the Treasury, as administrator of the lunatic, did not stand in any different position to any other administrator, and was entitled to the beneficial interest of W. in the real estate. *Heathcote, In re, Gilbert v. Aviolet*, 58 L. T. 43 —Chitty, J. Affirmed 85 L. T. Journ. 120—C. A.

Election to take as Real Estate.]—A testator devised and bequeathed real and personal estate to trustees for his wife for life, and after death, as to one freehold house upon trust for one of his sons for life, as to another freehold house upon trust for his daughter for life, and as to a third freehold house upon trust for another son for life, and after their respective deaths to their issue respectively, and after the respective deaths of any without issue he directed his trustees to sell the house of such child and to pay the proceeds of sale to the survivors or the survivor of his three children, and until sale to pay the rents to the same persons or person, and he gave his residuary real and personal estate to such of his three children as should survive the widow. One of the sons predeceased the widow, a bachelor. The daughter survived her and died intestate in 1877, and all her property passed to her surviving brother as her sole next of kin. The houses were let to weekly tenants, and the surviving son, since

1877, received all the rents. He died in 1885, and shortly before his death he handed the title-deeds of the houses to a solicitor, directing that a gift of all his property should be made to a niece, but he died before a conveyance could be executed. The question then rose whether the will had effected a conversion of the realty, and, if so, whether the surviving son had elected to take the property as real estate:—Held, that there had been an out-and-out conversion, and that the son must be taken to have elected to take the houses as real estate. *Potter v. Dudeney*, 56 L. T. 395—Chitty, J.

A testator by his will gave his real estate and the residue of his personal estate to trustees, on trust to sell his real estate, and to convert and get in his residuary personal estate, and to stand possessed of the moneys arising from both, on trust to invest the same, and to pay the income to his wife during her life or widowhood, and, after her death or second marriage, upon trust to divide the trust funds equally between such of his children as should be living at his death, and the issue of such of them as might be then dead. The testator died in 1869. The wife and two infant children survived him. There was no issue of any deceased child. Both the children died before the wife, unmarried and intestate, the one who died last dying in 1876. The wife did not marry again, and she died in 1885 intestate. The only real estate of the testator was a house, of which he had in 1869 agreed to grant a lease for twenty years, with an option to the tenant to purchase the reversion at any time during the term. At the death of the widow this option had not been exercised, and the house had not been sold by the trustees. After the deaths of the children the widow continued in receipt of the rent of the house:—Held, that, by reason of the tenant's option to purchase the house, the widow's continued receipt of the rent was no evidence of an election by her to take the property as real estate, and that on her death it descended as personalty to her next of kin. *Gordon, In re* (6 Ch. D. 531) distinguished. *Lewis, In re, Forwell v. Lewis*, 30 Ch. D. 654; 55 L. J., Ch. 232; 53 L. T. 387; 34 W. R. 150—Pearson, J.

CONVEYANCE.

Fraudulent Conveyances.—See FRAUD.

Conveyancing and Law of Property Act, 1881.]

—See EXECUTOR AND ADMINISTRATOR—HUSBAND AND WIFE—MORTGAGE—VENDOR AND PURCHASER, &c.

CONVICTION.

See CRIMINAL LAW—JUSTICE OF THE PEACE.

COPYHOLDS.

Fines on Admission—Custom.—There is no general copyhold law that, in manors in which a fine is only payable on the first admittance of a tenant, a purchaser of several distinct copyhold tenements under one disposition—whether a will, or surrender, or otherwise—is entitled as of right to split his admittance, i.e., is entitled to compel the lord of the manor to admit him to any one or more of such several tenements, and to take admittance to the others at any subsequent time, as and when he pleases. A special custom in a manor, that a purchaser of several distinct copyhold tenements under one disposition, must take admittance to all at one and the same time, and pay one general fine in respect of all, is good. Such a special custom may be evidenced by a uniform course of practice or usage in the manor for a number of years, although it does not otherwise appear either on the court rolls, or in any custumal or other record of the manor. *Johnstone v. Spencer (Earl)*, 30 Ch. D. 581; 53 L. T. 502; 34 W. R. 10—North, J.

— **Improved Annual Value.**—A lord, who is entitled by the custom of the manor to a reasonable fine upon admission to a copyhold tenement, may demand and recover such fine by the description of the improved annual value for a certain number of years of the tenement to which the admittance relates, and without stating in money the precise amount of the fine. *Fraser v. Mason*, 11 Q. B. D. 574; 52 L. J., Q. B. 643; 49 L. T. 761; 32 W. R. 421—C. A.

— **Double Fine—Sale under Settled Land Act.**—A copyholder who had been admitted to the copyhold, to him and his heirs, died, leaving a will by which he devised it to trustees upon trust to pay the rents to his widow for life. Shortly after his death the widow sold the property under the powers of the Settled Land Act, 1882. The trustees had not been admitted. The lord of the manor claimed to be paid, in addition to the fine payable by a purchaser on admittance, the fine which would have been payable if the trustees had been admitted:—Held (dissentiente Fry, L.J.), that the lord could only claim one fine. *Naylor and Spendia's Contract, In re*, 34 Ch. D. 217; 56 L. J., Ch. 453; 56 L. T. 132; 35 W. R. 219—C. A.

— **Surrender—Assignment of Equitable Interest.**—The lord of the manor is entitled to a fine in respect only of a transmission of the legal estate in copyholds, and cannot claim a fine in respect of any devolution of the equitable title where the legal estate remains in the person who has been already admitted tenant on the roll. E., as customary heir of M., was in 1848 admitted as tenant on the rolls of a manor, in respect of copyholds which by M.'s will the trustees thereof were directed to sell. The trustees contracted to sell the copyholds to A., but before completion A. was married to X. Subsequently, in December, 1849, the copyholds were conveyed to the trustees of A.'s marriage settlement. E. joined in the conveyance and thereby covenanted to surrender to the uses of such settlement, and in pursuance of his covenant surrendered in May, 1850, to the use of

such persons as the trustees of A.'s settlement should appoint. Upon the death of X., A. became absolutely entitled to the copyholds, and by deed of 1853, which recited incorrectly that no surrender had been made by E., the trustees of the settlement granted, bargained, and sold the copyholds to A., and E. joined in this deed and covenanted to surrender to the use of A. The surrender was not acted upon, and by a settlement of 1854 on the second marriage of A. with Y., she purported to assign her equitable interest in the copyholds to E., F., and G. on trust for sale. A. died in 1856, leaving E., who had remained tenant on the rolls, her customary heir. E. survived F. and G., leaving executors on whom, under the Conveyancing Act, 1881, s. 30, his estate in the copyholds devolved; and they had been admitted. Three fines were claimed by the lord; 1. In respect of the quasi admittance of A. as appointed under the deed of 1853; 2. In respect of the quasi admittance upon A.'s death of E., as her customary heir; 3. In respect of the legal estate which devolved upon E.'s executors:—Held, that the deed of 1853 was a mere assignment of the equitable interest in the copyholds to A., and could not be construed as operating by appointment to transfer the legal estate from E. to A.; and accordingly that as the legal estate of E., the tenant on the roll, remained unaffected by the equitable devolutions of title, the only fine payable was in respect of the admittance of the statutory heirs of E.:—Held, also, that a covenant for value to surrender, though binding as between surrenderor and surrenderee, cannot be enforced by the lord, so as to enable him to compel a new admittance and a fine in respect thereof. *Hall v. Bromley*, 35 Ch. D. 642; 56 L. J., Ch. 722; 56 L. T. 683; 35 W. R. 659—C. A.

Customary Heiress of Devisee of Surviving Trustee—Right of Escheat.—A testatrix who died in 1851 devised her copyhold property to a trustee in trust to pay the rents and profits to J. King for life, and after her death to certain charitable purposes which were void under the Mortmain Acts. The testatrix died without heirs. The trustee named in the will refused the trust, and two trustees were appointed by order of the court in 1853, who were admitted upon the court rolls to hold upon the trusts of the will. One trustee died in 1873, and the surviving trustee, who died in 1877, devised his trust estate to two trustees, neither of whom was admitted to the copyholds. The survivor of these trustees made no devise of his trust estates, and died leaving his youngest daughter, Janet Hawkins, his customary heiress according to the custom of this manor. The tenant for life under the will died in 1883:—Held, that Janet Hawkins who claimed by escheat and under a resulting trust was entitled to be admitted as tenant to the copyhold property for her own benefit as against the lord of the manor. *Gallard v. Hawkins*, 27 Ch. D. 298; 53 L. J., Ch. 834; 51 L. T. 689; 33 W. R. 31—Pearson, J.

Enfranchisement—Acknowledgment of Right to produce Documents—Lands Clauses Act.—Copyhold land having been taken by a corporation under the powers of the Lands Clauses Act, and a draft conveyance from the copyholder being in the course of settlement, the corporation

applied to the lord of the manor, under s. 96, for enfranchisement upon certain terms, which were agreed to. In settling the draft enfranchisement deed, the corporation claimed to have from the lord and his trustee to uses an acknowledgment of the right of the corporation to production of the documents of title to the manor, and of the court rolls relating to the hereditaments enfranchised, and to delivery of copies thereof, and, also from both, an undertaking for the safe custody of the same:—Held, that the corporation were entitled to no more than an acknowledgment by the lord and his trustee of the right of the corporation to the production of the documents of title to the manor, and of the court rolls, so far as they related to the hereditaments enfranchised, and to delivery of copies thereof; and an undertaking by the lord alone for safe custody. *Agg-Gardner, In re*, 25 Ch. D. 600; 53 L. J., Ch. 347; 49 L. T. 804; 32 W. R. 356—V.-C. B.

Whether the corporation were entitled to so much as the above, *quære*. *Ib.*

Disentailing Deed—Disposition—Entry on Court Rolls.—A deed intended to operate as a disentailing assurance of copyholds must, in order to be operative, be a disposition and not a mere declaration of trust, and must be entered on the court rolls of the manor within six months of its execution. *Green v. Paterson*, 32 Ch. D. 95; 56 L. J., Ch. 181; 54 L. T. 738; 34 W. R. 724—C. A.

Devolution—Death of Sole Trustee between Conveyancing Act, 1881, and Copyhold Act, 1887.—The effect of s. 45 of the Copyhold Act, 1887, is to repeal entirely s. 30 of the Conveyancing and Law of Property Act, 1881, as regards copyholds, so that, if a sole trustee of copyholds had died between the commencement of the Conveyancing and Law of Property Act and the passing of the Copyhold Act, the legal estate in the copyholds, which, by virtue of s. 30, had on his death devolved upon his personal representatives, was on the passing of the Copyhold Act divested from them, and vested in his customary heir or devisee. But the validity of any disposition of the property made by the personal representatives before the passing of the Copyhold Act would be unaffected by that Act. *Mills' Trusts, In re*, 37 Ch. D. 312; 57 L. J., Ch. 466; 58 L. T. 620; 36 W. R. 393—North, J. Affirmed on other grounds, 40 Ch. D. 14; 60 L. T. 442; 37 W. R. 81—C. A.

Encroachment—Waste—Rent—Presumed Grant allowing Buildings.—In 1739 articles of agreement were entered into between the lord and freehold tenants of a manor, by the eighth clause of which it was agreed that no other part of the wastes of the said manor should at any time thereafter be enclosed or built upon, unless by the mutual consent of the lord of the manor for the time being, and of the greater part in number and value of the freehold tenants of the said manor, under their hands and seals; and in case of any improvements and enclosures by such consents as aforesaid, it was agreed that the same and all profits and advantages arising therefrom should belong to and be divided between the lord and freehold tenants in the proportions therein mentioned. The articles of agreement were confirmed by a private act of Parliament passed in the same year. Persons

were appointed by the lord and freeholders to receive the rents on their behalf, and books were kept showing how the rents were received and divided, in accordance with the provisions of the articles. An entry appeared in one of these books in 1803 that one R. paid a rent of 1*l.* 1*s.* in respect of certain premises which were there described as a stable; and it appeared from entries in the books that he continued to do so down to 1808, when the property then in tenancy was mentioned as held by D. at a yearly rent of 2*l.* 12*s.* 6*d.* In 1811 D. was entered as holding a coal warehouse at the rent of 4*l.* 10*s.* "now and in future." In 1813 D. paid the same rent in respect of a coal and corn warehouse, and that rent was paid by D. and his successors in title until just before this action was brought. In 1816 D. sold or mortgaged the property for 299*l.* to B., who subsequently re-conveyed it to him for the same amount. In 1829 D. conveyed the property by lease and re-lease to K. for 1,000*l.* He mortgaged it to S. by feoffment for 1,000*l.*, and subsequently became bankrupt, and the equity of redemption vested in his assignees. In 1836 the assignees and S. conveyed the property to J. S. for 1,440*l.* In 1838 J. S. leased the property to R. The property was described in the lease as part of the waste of the manor, and it was provided that the lessee was to pay 4*l.* 10*s.* per annum, and any future rent which might become payable, to the lord and freeholders. New buildings were from time to time built on the property. The defendant became entitled to the premises under the will of his father J. S. Questions having arisen as to the title to the property, the defendant claiming to be entitled in fee-simple, the lord and the freeholders brought this action to recover possession of it:—Held, that (1) a consent to the enclosure of the property in question, in accordance with clause 8 of the articles, might under the circumstances be fairly assumed, but the result of possession under such consent was that a tenancy from year to year was created; (2) that the feoffment by K. to S. in 1829 did not tortiously pass the fee to S.; (3) that there was no evidence that the tenants were under any misapprehension as to title, or had built under misapprehension, or that the lord or freeholders were aware of any such misapprehension of titles, and therefore the defendant was not entitled to equitable relief. *Weller v. Stone*, 54 L. J., Ch. 497; 53 L. T. 361; 33 W. R. 421—C. A.

— **Necessary Parties — Mining Lease — Lessor.**—In an action by a copyholder to restrain the working of coal under his land by A., who claimed to be entitled to do the acts complained of by virtue of a lease from B., the lord of the manor, B. was by amendment added as a defendant, on the allegation that he claimed the right by himself and his lessees to work the coal; that he justified the acts of A., and that he had received and claimed to be entitled to receive from A. rents and royalties in respect of such wrongful working. On summons by B. under Rules of Supreme Court, 1883, Ord. XXV. r. 4, that the amended statement of claim might be struck out as against him on the ground that it disclosed no reasonable cause of action against him, and that the action might be dismissed as against him:—Held, that the lessor had been properly added as a defendant. *Shafto v.*

Bolckow, Vaughan, and Co., 34 Ch. D. 725; 56 L. J., Ch. 735; 56 L. T. 608; 35 W. R. 562—Chitty, J.

COPYRIGHT.

Dramatic Piece—Infringement—Gratuitous Performance in Private Room.—The defendant and others joined in representing a dramatic piece in the board room of a hospital, without the consent of the proprietor of the copyright in the drama. The performance was merely for the entertainment of the nurses, attendants and others connected with the hospital, who were admitted free of charge:—Held, (Fry, L.J., dissenting) that the room where the drama was represented was not a place of public entertainment, and consequently that the defendant was not liable to damages or penalties under 3 & 4 Will. 4, c. 15, ss. 1, 2. *Duck v. Bates*, 13 Q. B. D. 843; 53 L. J., Q. B. 338; 50 L. T. 778; 32 W. R. 813; 48 J. P. 501—C. A.

Musical—Right of Representation—Absence of Consent in Writing.—By 3 & 4 Will. 4, c. 15, ss. 1 and 2, it is in substance provided that the author of any dramatic piece or entertainment, or the assignee of such author, shall have, as his own property, the sole liberty of representing such production, or causing it to be represented, at any place of dramatic entertainment during certain periods mentioned in the act, and shall be deemed the sole proprietor thereof, and that, if any person shall, during the continuance of such sole liberty as aforesaid, "contrary to the intent of this act, or right of the author or his assignee," represent such production, or cause it to be represented, without the consent in writing of the author or other proprietor, at any place of dramatic entertainment, every such offender shall be liable for each and every such representation (among other alternatives) to the payment of an amount not less than 40*s.* to the author or other proprietor. By 5 & 6 Vict., c. 45, ss. 20 and 21, the above provisions are extended to musical compositions, and it is provided that the sole liberty of representing dramatic pieces and musical compositions shall endure and be the property of the author and his assigns for the term in the Act provided for the duration of copyright in books.—The plaintiff was employed by the defendant, the proprietor of a music-hall, as the conductor of the orchestra, at a weekly salary, and had been in the habit of composing the music for ballets performed there, receiving payments of varying amounts from the defendant in respect of such compositions. The plaintiff composed the music for a Christmas ballet, to be performed at the defendant's music hall, but while the piece was running he threw up his engagement as conductor, and took away the musical score and band-parts necessary for the performance of the music. It was subsequently arranged orally between the plaintiff and the defendant that the plaintiff should give up the score and band-parts to the defendant in consideration of a payment of 20*l.* by the defendant. The defendant afterwards continued to perform the piece with the plaintiff's music, and the plaintiff brought an action to recover penalties

in respect of such subsequent performances. The jury found that the music composed for the ballet by the plaintiff was a substantial, independent, musical composition, and that the plaintiff had not sold his rights therein to the defendant:—Held, that, in the absence of any assignment or consent to the representation of the composition in writing given by the plaintiff, the performances were contrary to the right of the author, and the action was maintainable. *Shepherd v. Conquest* (17 C. B. 427) followed. *Eaton v. Lake*, 20 Q. B. D. 378; 57 L. J., Q. B. 227; 59 L. T. 100; 36 W. R. 277—C. A.

Pictures—Sale, after Registration, of Copies made before Registration.—The plaintiffs were the owners of a drawing which they entrusted in confidence to the defendant in Germany to produce certain copies. The defendant executed the work, and also made other copies for himself and sent them to England. Subsequently the plaintiffs registered their copyright in the drawing under 25 & 26 Vict. c. 68. After such registration the defendant, without the consent of the plaintiffs, sold the copies which he had made for himself and sent to England before the registration. In an action by the plaintiffs for an injunction and to recover penalties and damages, under the 25 & 26 Vict. c. 68, ss. 6 and 11:—Held, that the plaintiffs were entitled to an injunction and damages for breach of contract and good faith, and (dissentiente Lopes, L.J.) to an injunction, damages, and delivery of pirated copies under the statute, notwithstanding that by s. 4 no proprietor was to be entitled to the benefit of the Act until registration, and no action was to be sustainable in respect of anything done before registration; but were not entitled to penalties, on the ground that production abroad is not unlawful within the meaning of s. 6. *Tuck v. Priester*, 19 Q. B. D. 629; 56 L. J., Q. B. 553; 36 W. R. 93; 52 J. P. 213—C. A. Reversing 57 L. T. 110—D.

"Book"—What is—"Castle Album."—An album for holding photographs, with pictorial borders containing views of castles, with short descriptions attached, is not a "book" within 5 & 6 Vict., c. 45, s. 1, so as to be capable of obtaining copyright for the contents. *Schove v. Schmincké*, 33 Ch. D. 546; 55 L. J., Ch. 892; 55 L. T. 212; 34 W. R. 700—Chitty, J.

Barometer's Face.—The face of a barometer, displaying special letterpress, held not to be capable of registration under the Copyright Act, 1842, as not being, within s. 2, "a book separately published." *Davis v. Comitti*, 54 L. J., Ch. 419; 52 L. T. 539—Chitty, J.

Telegraphic Code for use of Agents compiled from Book of Words.—The plaintiff published "The Standard Telegram Code," a book of words selected from eight languages, for use in telegraphic transmissions of messages, and it was accompanied by figure cyphers for reference or private interpretation. The book was registered under the Copyright Act, 5 & 6 Vict. c. 45. The defendants bought a copy of the book, and compiled for their own use with its aid a new and independent work, as alleged, which was their own private telegraphic code, and they distributed copies of their book amongst their agents at home and abroad, but they had not printed their

book for sale or exportation:—Held, that the defendants had infringed the copyright of the plaintiff, and that a perpetual injunction must be granted. *Ager v. Peninsular and Oriental Steam Navigation Company*, 26 Ch. D. 637; 53 L. J., Ch. 589; 50 L. T. 477; 33 W. R. 116—Kay, J.

Public Lecture, Publication of Shorthand Notes of.—N., an author and a lecturer upon various scientific subjects, delivered from memory, though it was in manuscript, a lecture at the Working Men's College upon "The Dog as the Friend of Man." The audience were admitted to the room by tickets issued gratuitously by the committee of the college. P., the author of a system of shorthand writing, and the publisher of works intended for instruction in the art of shorthand writing, attended the lecture, and took notes, nearly verbatim, in shorthand, of it, and afterwards published the lecture in his monthly periodical, "The Phonographic Lecturer." On motion for an injunction to restrain the publication:—Held, that where a lecture of this kind is delivered to an audience limited and admitted by tickets, the understanding between the lecturer and the audience is that, whether the lecture has been committed to writing beforehand or not, the audience are quite at liberty to take the fullest notes for their own personal purposes, but they are not at liberty to use them afterwards for the purpose of publishing the lecture for profit; and the publication of the lecture in shorthand characters is not regarded as being different in any material sense from any other; and injunction accordingly. *Abermethy v. Hutchinson* (1 H. & T. 28) discussed. *Nicols v. Pitman*, 26 Ch. D. 374; 53 L. J., Ch. 552; 50 L. T. 254; 32 W. R. 631; 48 J. P. 549—Kay, J.

Lectures in Class-Room by Professor—Restraining Publication.—A professor of a university who delivers orally in his class-room lectures which are his own literary composition does not communicate such lectures to the whole world, so as to entitle any one to republish them without the permission of the author. *Caird v. Sime*, 12 App. Cas. 326; 57 L. J., P. C. 2; 57 L. T. 634; 36 W. R. 199—H. L. (Sc.).

The appellant, a professor of a Scottish university, delivered lectures in his class-room as part of his ordinary course to students of the university, who were admitted on payment of the prescribed fees;—Held (Lord FitzGerald dissenting), that such delivery of the lectures was not equivalent to a communication of them to the public at large, and that the appellant was entitled to restrain other persons from publishing them without his consent. *Id.*

Novel — Dramatization of — Multiplying Copies.—The defendant dramatized the novel, "Little Lord Fauntleroy," and caused his play to be performed on the stage. The infringement of copyright complained of was that, for the purpose of producing the play, the defendant made four copies of it, one for the Lord Chamberlain and three for the use of the performers, either in MS. or by the aid of a typewriter. Very considerable passages in the play were extracted almost verbatim from the novel. The defendant claimed the right to make more copies if it should be necessary to

enable him to give further representations of the play in London and elsewhere:—Held, that what had been done by the defendant constituted an infringement of the plaintiff's copyright, and that they were entitled to an injunction to restrain the defendant from printing or otherwise multiplying copies of this play containing any passages from the plaintiff's book:—Held, also, that all passages from the plaintiff's book in the four copies must be cancelled. *Warne v. Seebohm*, 39 Ch. D. 73; 57 L. J., Ch. 689; 58 L. T. 928; 36 W. R. 686—Stirling, J.

Newspaper, using Name.]—See TRADE.

Copyright in Designs.]—See TRADE.

Registration—"Publisher"—Who is.]—Registration of a copyright is bad, if the name entered as that of "the publisher" is not that of the first publisher. *Weldon v. Dicks* (10 Ch. D. 247) followed. *Coote v. Judd*, 23 Ch. 727; 53 L. J., Ch. 36; 48 L. T. 205; 31 W. R. 423—V.-C. B.

— **What may be.]—See supra.**

"Time of First Publication"—Proprietorship in Articles and Reports.]—To entitle the proprietor of a book or periodical to maintain an action for infringement of copyright, it is necessary that the entry on the register at Stationers' Hall, under s. 13 of the Copyright Act, 1842, should not only state the precise title of the work, but also the "time of first publication." It is not sufficient to enter the month and the year only; but the actual day of the month must be given, in order that it may be known when the term of forty-two years "from the first publication," allowed by s. 3 of that statute as the period of copyright, commenced and will terminate. To entitle the proprietor of a book or periodical to maintain an action for infringement of copyright in respect of articles, reports, or other contributions supplied to him by persons employed and paid by him for that purpose, he must, under s. 18 of the Act, prove that he has actually paid for such articles, reports, or other contributions. *Collingridge v. Emmott*, 57 L. T. 864—Kay, J.

— **Patent alleged.]—Where the date of the first publication of an illustrated catalogue, being a reprint with additions of catalogues duly registered in 1880 and 1882, was given on registration as the 22nd June, 1885:—Held, that it was a correct statement as to the first publication of the new pages, and that the description in the catalogue of the articles as "patent," subsequent to the expiration of the patent, on the 31st July, 1885, did not take away the plaintiff's copyright in the part of the catalogue which was correctly stated, and that the plaintiff was entitled to an injunction to prevent any further publication of books by the defendant, so far as they contained an infringement of the copyright of the plaintiff in his illustrated catalogue of Aug. 1880, or in the additions made to that catalogue in the edition of 1885. *Hayward v. Lely*, 56 L. T. 418—Kay, J.**

— **Non-registration of First Edition—Registration of Subsequent Edition—Reprint of Former Edition.]—The plaintiff in an action for**

infringement of copyright in a book, the first edition of which was published in November, 1881, had not, before commencing such action, registered at Stationers' Hall either the first or a second edition which he had subsequently published; but he had registered a third edition, which was in fact a reprint of the first edition, describing it in the entry as a third edition, and giving the time of the first publication as the 22nd of April, 1885, which was the date at which the third edition was published:—Held, that the plaintiff had not truly stated the time of the first publication of his book within the meaning of s. 13 of the Copyright Act, 1842, and consequently had not caused entry to be made of his book pursuant to the act, and was precluded by s. 24 from maintaining any action for infringement of copyright until he had made due and correct entry pursuant to s. 13. *Thomas v. Turner*, 33 Ch. D. 292; 56 L. J., Ch. 56; 55 L. T. 534; 35 W. R. 177—C. A.

Issue of Writ on the same day as Registration.]—The issue of a writ in an action for the infringement of a copyright on the same day, but subsequently to the registration of such copyright under the Copyright Act, 1842, sufficiently complies with s. 24 of that statute, so as to enable the person making the registration to sue in respect of the infringement. *Warne v. Lawrence*, 54 L. T. 371; 34 W. R. 452—Kay, J.

Objections to Registration—Sufficiency of Notice—Terms.]—A plaintiff in an action to restrain the infringement of his copyright in a catalogue put in evidence the entry of his copyright on the registry before the writ in the action was issued. On the plaintiff being cross-examined as to the validity of the registration, the objection was taken that the defendant had not raised in his pleadings any objection to the registration. In answer to that the defendant said that he had suggested the objection to registration in an affidavit filed before the date of the statement of claim on a motion for an interim injunction. On trial of the action:—Held, that the affidavit was not a sufficient notice of the objection, nor a compliance with s. 16 of the Copyright Act, 1842, but that the case was one where the court would allow the defendant to raise the objection by amendment on terms. The terms were, that the defendant was not to raise any objection to the plaintiff proving the registration made since the action was brought, or raise any objection on the ground that such registration was not made before action. *Hayward v. Lely*, 56 L. T. 418—Kay, J.

— **Non-delivery within the Time prescribed.]—In an action for infringement of copyright, where objections to the registration are not delivered within the prescribed time, the action may nevertheless be dismissed if a defect in the registration is brought out from the plaintiff's evidence. *Coote v. Judd*, supra.**

Rectification of Register—Person "aggrieved."]—Under 5 & 6 Vict. c. 45, s. 14, which gives power to make an order to vary an entry in the register of copyright under that act upon the application of any person who "shall deem himself aggrieved by any" such "entry," the court made an order varying an entry in a register of copyright upon

the application of the person who had caused the entry to be made. *Poulton, Ex parte*, 53 L. J., Q. B. 320; 32 W. R. 648—D.

Discovery in Actions for Breach of.]—See DISCOVERY.

CORNWALL.

Letters of Administration granted to Duke—Evidence.]—On motion for grant of letters of administration of an intestate's effects to His Royal Highness the Prince of Wales, as Duke of Cornwall, it is not necessary, if the facts are sufficiently set forth in the warrant, that they should be verified by affidavit. *Griffith, In the goods of*, 9 P. D. 63; 53 L. J., P. 30; 32 W. R. 524; 48 J. P. 312—Hannen, P.

CORONER.

Power to hold Inquest.]—A coroner has power to hold an inquest where he has reasonable suspicion that death is due to other causes than common illness. *Reg. v. Stephenson*, 13 Q. B. D. 331; 53 L. J., M. C. 176; 52 L. T. 267; 33 W. R. 44; 49 J. P. 486—C. C. R.

Preventing Inquest being held—Misdemeanour.]—It is a misdemeanour to destroy a dead body with intent to prevent an inquest in a case where a coroner has jurisdiction to hold one. *Ib.* S. P. *Reg. v. Price*, 12 Q. B. D. 247; 53 L. J., M. C. 51; 33 W. R. 45, n.; 15 Cox, C. C. 389—Stephen, J.

Quashing Inquisition—Irregularity.]—During an affray in which shots were fired by certain constables, A. was killed and B. and C. were mortally wounded by gunshots. A jury was summoned, pursuant to the precept of the coroner and sworn upon an inquest upon the body of A. After viewing the body the inquest was adjourned to a subsequent day. B. died before the day to which the inquest stood adjourned, and the jury sworn upon A.'s inquest were, by the direction of the coroner, summoned to hold an inquest upon B.; and upon C.'s death, which occurred two days later, the same jury proceeded to investigate the circumstances attending the deaths of the three persons, notwithstanding the protest of counsel who appeared for the constables:—Held, that the proceedings were irregular and the inquisition was quashed. *Mitchelstown Inquisition, In re*, 22 L. R., Ir. 279—Q. B. D.

After the jury retired, the coroner, upon being informed that they had agreed, but before their verdict was given, entered the room where they were in consultation and took their verdict in the room before returning into open court:—Held, that this was misconduct on the part of the coroner, and the inquisition was also quashed on this ground. *Ib.*

—Depositions will not be examined.]—On an application to quash a coroner's inquisition,

the court will not examine the depositions returned by the coroner on certiorari, for the purpose of inquiring whether the evidence was sufficient to support the verdict of the coroner's jury. *Ib.*

—Amendment—Insufficient Designation—Jurisdiction of Queen's Bench Division.]—By s. 20 of the Coroners Act, 1887, if in the opinion of the court having cognisance of the case an inquisition finds sufficiently the matters required to be found thereby, and where it charges a person with murder or manslaughter, sufficiently designates that person and the offence charged, the inquisition shall not be quashed for any defects, and the court may order the proper officer of the court to amend any defect. On a rule for a certiorari to bring up and quash an inquisition charging that "the directors of the Great Western Railway Company" did feloniously kill and slay G.:—Held, that the Queen's Bench Division had no power to amend the inquisition by sufficiently designating the directors by name, because the power to amend was limited by s. 20 to the court before whom the persons charged should be brought for trial; but that the jurisdiction of the Queen's Bench Division to quash the inquisition for the irregularity on the face of it was left untouched by that section. *Reg. v. Great Western Railway Directors*, 20 Q. B. D. 410; 57 L. J., M. C. 31; 58 L. T. 765; 36 W. R. 506; 52 J. P. 772—D.

Jurisdiction—Prison for County—Inquest on Prisoner.]—Notwithstanding the transfer of prisons to the Secretary of State by the Prison Act, 1877, a prison, as to which no rules have been made under s. 30 of the Act, and which at the commencement of the Prison Act, 1865, was a prison belonging to a county, is still the county prison, although locally situate within the limits of a city, and therefore the jurisdiction to hold inquests on prisoners dying in such prisons is in the coroner for the city, and such jurisdiction is not affected by s. 171, sub-s. 1, of the Municipal Corporations Act, 1882. *Reg. v. Robinson*, 19 Q. B. D. 322; 57 L. T. 275; 35 W. R. 843; 52 J. P. 22; 16 Cox, C. C. 287—D.

CORPORATIONS.

I. MUNICIPAL.

1. *The Franchise.*
2. *Elections.*
3. *Officers and their Resignation.*
4. *Bye-laws.*
5. *Borough Fund.*
6. *Rates.*

II. CORPORATIONS GENERALLY.

1. *Constitution and Election.*
2. *Contracts.*
3. *Liability for Torts.*

I. MUNICIPAL.

1. THE FRANCHISE.

Service Franchise.]—Occupation of a dwelling-house by virtue of an office, service, or em-

ployment within the meaning of the Representation of the People Act, 1884 (48 Vict. c. 3), s. 3, is no qualification for the municipal franchise. *M'Clean v. Pritchard*, 20 Q. B. D. 285; 58 L. T. 337; 36 W. R. 508; 52 J. P. 519; 1 Fox, 94—D.

Dwelling-house, Occupation of Part.]—Occupation of part of a dwelling-house, for the purposes of a private dwelling only, constitutes occupation of a "house" within ss. 9 and 31 of the Municipal Corporations Act, 1882, so as to confer the municipal franchise upon the occupier. *Greenway v. Bachelor*, *Aldridge's case*, 12 Q. B. D. 381; 53 L. J., Q. B. 180; 50 L. T. 272; 32 W. R. 319; 47 J. P. 792; 1 Colt, 317—D.

Power of Revising Barrister to Transfer Voter's Name from one Division to another.]—See ELECTION LAW.

2. ELECTIONS.

Qualification—Unqualified Person on Burgess Roll.]—The Municipal Corporations Act, 1882, s. 11, sub-s. 3, provides that every person shall be qualified to be elected and to be a councillor who is at the time of election qualified to elect to the office of councillor:—Held, that a person who, though not qualified to be a Burgess, had been enrolled on the Burgess roll and was therefore entitled to vote under s. 51 of the act, was not thereby qualified to be elected a councillor under s. 11, sub-s. 3. *Flintham v. Rowburgh*, 17 Q. B. D. 44; 55 L. J., Q. B. 472; 54 L. T. 797; 34 W. R. 543; 50 J. P. 311—D.

— Alderman to be Councillor.]—A person is not by reason of his being an alderman disqualified for election to the office of councillor, and by accepting the latter office he vacates the former. *Reg. v. Bangor (Mayor)*, 18 Q. B. D. 349; 56 L. J., Q. B. 326; 35 W. R. 158; 51 J. P. 51—C. A. See *S. C.* in *H. L.*, sub nom. *Pritchard v. Bangor (Mayor)*, infra.

— Composition with Creditors.]—S. served as town councillor for the St. T. Ward from 1877 to July 21, 1880, when he left at the office of the town clerk a notice of resignation, addressed to the mayor and council. No action was taken thereon by the council, and no fine paid or tendered by S.; S. did not sit in council or vote after the date of the notice. On the following day S. filed a petition for liquidation. In August a composition was accepted by his creditors. S. did not pay his debts in full. At an election of town councillor for the St. T. ward in November, 1884, S. was returned. The objection was then taken that S. was disqualified, he having been in liquidation when he was a member of the council, and not having paid 20s. in the pound:—Held, that the objection was valid. *Fletcher v. Saunders*, 49 J. P. 424—D.

— Duties of Returning Officer—Declaration of Election.]—Two candidates, R. and P., were nominated for the vacant office of councillor of one of the wards of a borough. P. objected to R.'s nomination on the ground that R. was disqualified, being an alderman of the borough whose term of office had not expired, but the

mayor disallowed the objection. Throughout the election P. insisted upon his objection, and claimed to be elected whatever the result of the poll might be. The votes having been counted showed a majority for R., and the returning officer read out the names and numbers to the mayor, who announced them in public. Having taken time to consider the objection the returning officer on the following day issued a public notice stating the number of votes given to each candidate, and the objection, and declaring P. to be duly elected. P. thereupon made and subscribed the declaration of acceptance of the office required by the Municipal Corporations Act, 1882, ss. 34, 35. R. subsequently made and subscribed a similar declaration:—Held, but without deciding whether an alderman is disqualified for election as councillor, that the returning officer had no jurisdiction to determine the question of disqualification, the proper method for determining that question being an election petition as provided by the Municipal Corporations Act, 1882, s. 87, and the duty of the returning officer being to count the votes and "forthwith to declare to be elected the candidate to whom the majority of votes have been given," as provided by s. 2 of the Ballot Act, 1872; that P. had not been declared to be elected; that the office was not full; and that he was not entitled to a mandamus to compel the mayor and corporation to receive his votes at their corporate meetings. *Reg. v. Coahs* (3 E. & B. 249) discussed. *Pritchard v. Bangor (Mayor)*, 13 App. Cas. 241; 57 L. J., Q. B. 313; 58 L. T. 502; 37 W. R. 103; 52 J. P. 564—H. L. (E.).

Nomination Paper—Signature of assenting

Burgess.]—By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), third schedule, Elections, part ii., rules as to nomination in election of councillors: 1. Every candidate for the office of councillor must be nominated in writing; 2. The writing must be subscribed in the case of a ward election by two burgesses of the ward as proposer and seconder, and by eight other burgesses of the ward as assenting to the nomination. A nomination paper at a ward election was subscribed "Edwin J. Hooper," "W. E. Waller," "R. Turner," by three of the assenting burgesses. Upon the Burgess roll were entered the names "Edwin John Hooper," "William E. Waller," and "Robert Turner," the numbers opposite these names on the Burgess roll being the same as those appearing opposite the signature of the assenting burgesses on the nomination paper:—Held, that the nomination paper had been duly subscribed by the assenting burgesses. *Bowden v. Besley*, 21 Q. B. D. 309; 57 L. J., Q. B. 473; 59 L. T. 219; 36 W. R. 889; 52 J. P. 536—D.

The provisions of sub-s. 2 of s. 1 of the Municipal Elections Act, 1875 (repealed by 45 & 46 Vict. c. 50), that "the nomination paper shall state the surname and other names of the person nominated," are satisfied if such paper contains an abbreviation of a christian name which is universally understood as meaning that name and none other; so that a nomination paper which contains the abbreviation "Wm." as meaning "William," is a sufficient statement of the christian name of the person nominated within the meaning of the sub-section. *Henry v. Armitage*, infra.

A nomination paper at an election of town

councillors was subscribed with the full and correct name of "Charles Arthur Burman," as an assenting burgess; but his name was erroneously entered upon the burgess roll as "Charles Burman" only:—Held, that the defect was not such as was remedied by 45 & 46 Vict. c. 50, s. 241, enacting that "no misnomer or inaccurate description of any person . . . named in any roll . . . required by this act shall hinder the full operation of this act with respect to that person . . . provided the description of that person . . . be such as to be commonly understood."—The words "commonly understood" in this proviso mean "commonly understood by any person comparing the nomination paper and the burgess roll." *Moorhouse v. Linney*, 15 Q. B. D. 273; 53 L. T. 343; 33 W. R. 704; 49 J. P. 471—D.

— "Situation of Property."—The provision of s. 1, sub-s. 2, of the Municipal Elections Act, 1875 (repealed by 45 & 46 Vict. c. 50), that "the nomination paper . . . shall be in the form No. 2 set forth in the schedule to the act, or to the like effect," is mandatory, and not directory; but a nomination paper signed by an enrolled burgess, which contains such a description of the property occupied by him at the time of subscribing such nomination paper as will enable a person to refer to the burgess roll to see whether the candidate is nominated by duly enrolled burgesses, is a sufficient compliance with the words of the section "to the like effect," even though the qualification of the burgess is in respect of a successive occupation. *Henry v. Armitage*, 12 Q. B. D. 257; 53 L. J., Q. B. 111; 50 L. T. 4; 32 W. R. 192; 48 J. P. 424—C. A.

Election of Aldermen—Voting Paper, Validity of.—By the Municipal Corporations Act, 1882, s. 60, sub-s. 4, any person entitled to vote at an election of aldermen may vote "by signing and personally delivering at the meeting to the chairman a voting paper containing the surnames and other names and places of abode and descriptions of the persons for whom he votes." A voting paper was delivered, commencing "I, the undersigned, A. B.," and ending with the signature "C. D.," and upon a petition against the return of the persons elected, the commissioner received evidence showing that the town clerk had inserted A. B.'s name, in order that the voting paper might be used by him, but by inadvertence it was handed to C. D., who signed and personally delivered it to the chairman without discovering the mistake:—Held, that the vote was valid, and that the commissioner was right in receiving evidence of the circumstances under which it was given. *Summers v. Moorhouse*, 13 Q. B. D. 388; 53 L. J., Q. B. 564; 51 L. T. 290; 32 W. R. 826; 48 J. P. 424—D.

In a case where the voting papers were not signed or personally delivered to the chairman, and did not contain the surnames and names of and the places of abode and descriptions of the persons for whom the votes were given, the court, in the exercise of the discretion given by s. 225 of the Municipal Corporations Act, 1882, granted a rule absolute in the first instance for a mandamus to hold a fresh election. *Reg. v. Wilton (Mayor)*, 34 W. R. 273—D.

— "Mayor elect" Voting.]—By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50),

s. 60 (2), the election of aldermen shall be held immediately after the election of the mayor; "(3) an outgoing alderman, although mayor elect, shall not vote." On the day appointed for the election of mayor and aldermen, an alderman was elected mayor, and thereupon made and subscribed a declaration in the form contained in the 8th schedule of the act. He then voted in the election of aldermen:—Held, that his vote was invalid, for at the time when he voted he had not ceased to be an "outgoing alderman" within s. 60 (sub-s. 3) of the act. *Hounsell v. Suttill*, 19 Q. B. D. 498; 56 L. J., Q. B. 502; 57 L. T. 102; 36 W. R. 127; 51 J. P. 440—D.

Illegal Practices—Application for Relief.]—In order to support an application under s. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, it will not be sufficient that notice of intention to make the application has been advertised in local papers, but such notice should be published in such a manner as will ensure a reasonable certainty that persons interested had notice; and it will also be insufficient in the affidavits upon which the application is made, merely to state that the act in respect of which relief is sought arose from inadvertence, and not from any want of good faith without showing some reasonable excuse for such inadvertence. *Perry, Ex parte*, 48 J. P. 824—D.

Four persons stood as candidates for election at the municipal election in the borough of Huntingdon, held on the 1st November, 1884. These persons employed a printer to print their bills and posters. A fortnight before the election Clark, one of the candidates, went to the printer, Wm. Goggs, and particularly drew his attention to s. 14 of the Municipal Elections Act, 1884. Goggs in his turn gave instructions to his workmen in accordance with the instructions received by him from Clark. On the 28th October Goggs printed, published, and posted certain posters on behalf of the four candidates (the applicants) which did not bear his name and address. When the omission was discovered he took steps to rectify it. A prosecution under the act was commenced against Clark and his colleagues, and Goggs the printer of the posters, but by consent the hearing of the summons before the magistrates was adjourned until an application was made to the court for an order excusing the applicants from the consequences of the omission. The applicants made their application under s. 20, and filed affidavits to the effect that the issuing of the posters, without the printer's name and address being on them, was due to inadvertence, and not to the want of good faith:—Held, that, under the circumstances, the applicants were entitled to an order excusing them from the consequences of the omission under s. 20. *Clark, Ex parte, Huntingdon Election, In re*, 52 L. T. 260—D.

— Time for.]—Where a candidate at a municipal election applied, under s. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, for relief against the consequences of an illegal practice, and it appeared that the applicant had been elected, and that a petition had been presented and was pending against his election, the court refused to entertain his application for relief, which was ordered to stand over until after the trial of the election petition. *Wilks, Ex parte*, 16 Q. B. D. 114;

55 L. J., Q. B. 576 ; 34 W. R. 273 ; 50 J. P. 487—D.

— **Return of Expenses—No Expenses incurred—Extension of Time.**—The return of expenses and the accompanying declaration which, under the Municipal Elections Act, 1884, every candidate is required to send to the town clerk within twenty-eight days of the election of a town councillor must be sent although no expenses may have been actually incurred by the candidate in and about the election. The Court will, upon satisfactory proof that the omission happened under such circumstances as to amount to an authorised excuse under the act, make an order that the return and declaration be made by the candidate notwithstanding the lapse of the prescribed statutory period for making them. *Robson, Ex parte*, 18 Q. B. D. 336 ; 55 L. T. 813 ; 35 W. R. 290 ; 51 J. P. 199—D.

— **Bills without Name and Address of Printer—Evidence of Agency.**—Upon an information against the appellant under s. 14 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, it was proved that the appellant was a candidate for a seat in the local board of Willesden ; that the respondent received from his own servant at his residence a printed address and letter having reference to the election, and purporting to be signed by the appellant, but without the printer's name and address thereon ; that this document was printed for publication by instructions conveyed to the printer in a letter from the appellant's brother, who resided with him ; and that the printer had debited the appellant with the cost of printing, but had not been paid. —Held, no evidence that the appellant "printed or caused to be printed" the document in question, within s. 14. *Bettesworth v. Allingham*, 16 Q. B. D. 44 ; 34 W. R. 296 ; 50 J. P. 55—D.

Placards or posters (also without the printer's name or address), printed by the instructions of one Ellis (who was advertised in a local newspaper as the chairman of a committee for promoting the election of the appellant, and who sent the "copy" to the printer), were proved to have been posted about the district at Ellis's expense. —Whether this was evidence of the printing and posting by an agent of the appellant, quære : but, the justices having convicted the appellant in one penalty for both the alleged offences, and the conviction being bad as to one of them : —Held, that it was bad altogether. *Id.*

Petition—Against some Candidates—Ground affecting Validity of Whole Election.—An election petition may be presented under the Municipal Corporations Act, 1882, s. 87, against some only of the persons returned at a municipal election, although the ground of the petition is one affecting the validity of the election as a whole ; and the court can on such petition declare the persons so petitioned against not to have been duly elected. *Line v. Warren*, 14 Q. B. D. 548 ; 54 L. J., Q. B. 291 ; 53 L. T. 446 ; 49 J. P. 516—C. A.

At a municipal election to fill four vacancies in the office of town councillor, A., B. and C. (the respondents) and D. were elected, and a petition was subsequently presented against the

election of A., B. and C. on the ground of the alleged improper allowance by the mayor of objections to the nomination papers of certain other candidates who were thereby prevented from going to the poll. An application by the respondents for an order to strike the petition off the file, on the ground that D., to whose election the same objection equally applied, was not made a respondent to the petition and that no relief could therefore be granted under it, as it did not prove that the election as a whole should be set aside : —Held (Lopes, J., diss.), that under the Municipal Corporations Act, 1882, a petition might be presented against the election of one or more of the individuals elected, and that it was not necessary to petition against all of them, or to seek to avoid the election as a whole. *Line v. Warren*, 51 L. T. 359 ; 48 J. P. 454—D.

— **Taking off File.**—Where it is clearly shown on the face of an election petition that no relief can be granted under it, the court has power, under the Act of 1884, to take it off the file. *Id.*

— **Time for Delivery of Particulars.**—In a municipal election petition the respondent applied for an order for delivery of particulars of the alleged corrupt practices : —Held, that, in the absence of exceptional circumstances, the petitioners should not be ordered to deliver particulars more than seven clear days before the hearing of the petition. *Lenham v. Barber*, 10 Q. B. D. 293 ; 52 L. J., Q. B. 312 ; 31 W. R. 428 ; 48 J. P. 23—D.

— **Leave to Withdraw—Reference to Arbitration.**—After a municipal election of aldermen at H., a petition was presented by an unsuccessful candidate, claiming that he was returned by a majority of lawful votes. The mayor of H., to save expense, induced the petitioner and the returned candidate to submit the question to arbitration. On the award being against the petitioner he asked leave to withdraw the petition, which the court allowed him to do. *Mallam v. Bean*, 51 J. P. 231—D.

3. OFFICERS AND THEIR RESIGNATION.

Town Councillor—Resignation—Power to Withdraw.—Under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 36, which enacts that a person elected to a corporate office may at any time, by writing signed by him and delivered to the town clerk, resign the office, on payment of the fine provided for non-acceptance thereof, the resignation is completed by the delivery of the writing to the town clerk and the payment of the fine, and cannot afterwards, even with the assent of the corporation, be withdrawn. *Reg. v. Wigan Corporation*, 14 Q. B. D. 908 ; 54 L. J., Q. B. 338 ; 52 L. T. 435 ; 33 W. R. 547 ; 49 J. P. 372—D.

Recorder representing County Authority under Highway Act.—*See* WAY.

4. BYE-LAWS.

Validity—Prohibition of Music in Street.—A bye-law made by the council of a borough

under s. 23 of the Municipal Corporations Act, 1882, provided that no person not being a member of her Majesty's army or auxiliary forces, acting under the orders of his commanding officer, should sound or play upon any musical instrument, in any of the streets in the borough on Sunday:—Held, that such bye-law was unreasonable and ultra vires, and therefore void. *Johnson v. Croydon (Mayor)*, 16 Q. B. D. 708; 55 L. J., M. C. 117; 54 L. T. 295; 50 J. P. 487—D.

Sect. 90 of the Municipal Corporations Act, 1835, gives powers to boroughs to make bye-laws for the good rule and government of the borough, and for the prevention of all such nuisances as are not already punishable in a summary way. Under these powers the city of Truro made the following bye-law: "Every person who shall sound or play upon any musical instrument, or sing or make any noise whatsoever in any street, or near any house within the said borough, after having been required by any householder resident in any street or house, or by any police constable, to desist from making such sounds or noises, either on account of any illness of any inmate of such house, or for any reasonable cause," &c. Edwin Gay was summoned before the justices of Truro, on the 13th October, 1883, and convicted by them of an offence against the above bye-law, and fined 2l. 2s. and costs. It was proved that Gay was a captain in the Salvation Army, and that on the morning of Sunday the 7th October, he was in Victoria Square, Truro, playing a concertina, and surrounded by a large crowd; that he was requested by the superintendent of police to desist from playing the concertina, but he refused to do so, the superintendent at the same time telling him that he had reasonable cause for asking him to desist, as several complaints had been made by the inhabitants. It was also proved that on many previous occasions the Salvation Army had marched through the streets, playing musical instruments, tambourines, and triangles; that they had been frequently cautioned and required to desist, as many complaints had been made of their proceedings. On a rule for a certiorari to remove the conviction into this court:—Held, that the bye-law was not unreasonable, and that the conviction thereunder ought to stand; also that there was reasonable cause for calling on the prosecutor to desist from playing. *Reg. v. Powell*, 51 L. T. 92; 48 J. P. 740—D.

A bye-law made by the town council of a borough under 5 & 6 Will. 4, c. 76, s. 90, provided that every person who in any street should sound or play upon any musical or noisy instrument, or should sing, recite, or preach in any street without having previously obtained a licence in writing from the mayor; and every person who, having obtained such licence, should fail to observe, or should act contrary to any of the conditions of such licence, should forfeit and pay a sum not exceeding 20s., and not less than 1s.:—Held, that the bye-law was unreasonable and ultra vires, and therefore void. *Munro v. Watson*, 57 L. T. 366; 51 J. P. 660—D.

—**Prohibition of Juvenile Street Vendors.**—The N. corporation made a bye-law that parents should be liable to a penalty if they suffered a child to be selling articles in the street after a certain hour:—Held, that the bye-law was in

excess of the powers given by the Municipal Corporations Act, 1882, as being too general and absolute, and void. *Macdonald v. Lochrane*, 51 J. P. 629—D.

5. BOROUGH FUND.

Application of—Jubilee Festivities.—A municipal corporation passed resolutions to the effect that pursuant to s. 15, sub-s. 4, of the Municipal Corporations Act, 1882, a certain sum should be paid to the mayor by way of remuneration, and that the mayor should be requested to take such steps as he might deem proper for the due celebration of Her Majesty's Jubilee. Some of the burgesses moved to restrain the corporation from applying any part of the borough fund for this purpose:—Held, that the provisions of the Municipal Corporations Act, 1882, had not been contravened, and that an interlocutory injunction would not be granted. *Att.-Gen. v. Blackburn (Corporation)*, 57 L. T. 385—Chitty, J.

Register of Owners and Proxies, whether necessary—Poll.—The town council of a borough is not bound, under the Public Health Act, 1875, sched. II, r. 19, to keep a register of owners and proxies for the purpose of taking a poll in the borough with respect to the application, under 35 & 36 Vict. c. 91, of the borough funds in opposing local and personal bills in parliament. *Ward v. Sheffield (Mayor)*, 19 Q. B. D. 22; 56 L. J., Q. B. 418—Cave, J.

6. RATES.

Precept to Overseers—Reduced Rate—Railway.—By a local improvement act "as to all rates made and levied by the municipal corporation of H., the N. Railway Company shall be assessed at one fourth of the net annual value." The H. corporation before and after the act obtained their borough and watch rates in parish S. by means of warrants addressed by the mayor to the overseers of S., ordering them to pay the several amounts required out of the poor rate, and the overseers assessed the ratepayers accordingly as in poor-rate valuations:—Held, that the H. corporation and not the overseers "made and levied" these watch and borough rates, and therefore that the N. railway were assessable in parish S. only at one-fourth the net annual value. *North-Eastern Railway v. Sutton Overseers*, 51 J. P. 165—D.

II. CORPORATIONS GENERALLY.

1. CONSTITUTION AND ELECTION.

Trade Corporation—Number of Assistants—Charter.—The charter of a corporation created for the purpose of regulating the trade of masonry in and about the city of London provided that "there shall or may be four-and-twenty or more of the said company according to the discretion of the master and wardens for the time being, in manner and form hereafter in these presents expressed, to be named and chosen, which shall be, and shall be called the assistants," and in case of vacancies in the post of assistants the charter

provided that "then and so often it shall and may be lawful to and for the master and wardens, and the remaining part of the assistants which shall then survive or remain, or any eight of them, at their wills and pleasures from time to time to choose and name one or more other or others of the said company, to be assistant or assistants:—Held, that it was obligatory on the corporation to always have at least twenty-four assistants. *Wells v. Masons' Company of London*, 1 C. & E. 521—Day, J.

Resolution restricting Power of Nomination—Ultra Vires.—By the 1 Geo. 4, c. 52 (one of the Acts regulating the port and harbour of Cork), s. 21, it was enacted that on the second Tuesday in June, or on some other day not more than ten days from the second Tuesday in June in each year, the four senior commissioners appointed under act, not being members of the Common Council of Cork, should go out of office as such commissioners, and four other commissioners should be chosen to supply their places by the mayor, sheriffs, and commonalty of the city of Cork, or the major part of them in their open court duly assembled, and which court the mayor of the said city for the time being shall, from time to time, cause to be held for such purpose giving six days' notice, at the least, of the time and place of holding the same, by advertisement in one or more of the public newspapers of the said city of Cork." The Council of the city of Cork, on the 7th July, 1882, passed the following resolution:—"That the standing order be adopted—"That on electing gentlemen to membership of public boards, or other honorary positions, all nominations thereto shall be made in writing signed by two members of the Council (as proposer and seconder), and delivered to the town clerk seven clear days before the day of election; that each nomination shall be confined to one candidate, and that no nomination shall be announced until all shall have been received and recorded, the names being then read out in the order in which the town clerk shall receive them." On a motion for a writ of quo warranto, to set aside the election of three persons as commissioners, under the 1 Geo. 4, c. 52, s. 4, on the ground that they had not been nominated seven clear days before the day of election, as required by the resolution of the 7th of July, 1882:—Held, that such resolution was ultra vires and invalid, as imposing upon the candidates for election a qualification not prescribed by the statute, and thus unduly restricting the class of persons eligible. *Reg. v. Downing*, 16 L. R., Ir. 501—Q. B. D.

Amotion of Member—Injunction.—A corporation, whether eleemosynary or otherwise, has power to amove a member for sufficient cause, and will not be restrained by injunction from holding an inquiry into the conduct of a member, and expelling him if it thinks fit. The remedy of a member aggrieved by such proceeding is by visitation or mandamus in the respective cases of eleemosynary and civil corporations. *Rew v. Richardson* (1 Burr. 537) followed. The same principle applies where the amoved person is also an officer of the corporation. *O'Grady v. Mercers' Hospital*, 19 L. R., Ir. 350—V. C.

2. CONTRACTS.

Not under Seal—Ultra Vires.—A highway board passed a resolution directing their clerk to take the necessary steps to oppose, on behalf of the board, a bill in Parliament which contained provisions contrary to the Railway Clauses Acts, and which would prejudicially affect certain of the highways within the district. In pursuance of such resolution the clerk to the board instructed the plaintiffs, a firm of solicitors, to oppose the bill. In an action by the plaintiffs to recover their costs of such opposition from the board:—Held, that the purpose for which they had been retained was not incidental to the purpose for which the highway board was incorporated, and that as they had not been retained under the seal of the board they had no right of action against the board. *Phelps v. Upton Snodsbury Highway Board*, 49 J. P. 408; 1 C. & E. 524—Lopes, J.

Seal affixed when Contract partly performed.—By s. 174 of the Public Health Act, 1875, every contract made by an urban authority whereof the value or amount exceeds 50*l.* shall be in writing and sealed with the common seal of such authority. The defendants, an urban authority, by contract not under seal employed the plaintiffs as engineers to perform certain work. The plaintiffs performed part of the work exceeding in value 50*l.*, and then required the defendants to affix their seal to the contract. This the defendants did, believing that it was for the benefit of the ratepayers of the district that the contract should be completed:—Held, that as part of the work was unperformed when the seal was affixed, and there was consideration for affixing it in the plaintiff's promise to complete the work, it was competent for the defendants to constitute the contract a good contract under seal, within s. 174, in respect of the work already done, and therefore that the plaintiffs were entitled to maintain their action for the value of that work. *Mellis v. Shirley Local Board*, 14 Q. B. D. 911; 54 L. J., Q. B. 403; 52 L. T. 544—Cave, J.

Contract with School Board—Seal.—See SCHOOL.

Borrowing Powers.—See COMPANY (BORROWING POWERS).

3. LIABILITY FOR TORTS.

Maintenance.—A corporation in liquidation, as distinct from the liquidator thereof, is incapable of maintenance. *Metropolitan Bank v. Pooley*, 10 App. Cas. 210; 54 L. J., Q. B. 449; 53 L. T. 163; 33 W. R. 709; 49 J. P. 756—H. L. (E.).

Malicious Prosecution.—An action for malicious prosecution does not lie against a corporation aggregate, a corporation aggregate being incapable of malice or motive. *Abrath v. North-Eastern Railway*, 11 App. Cas. 247; 55 L. J., Q. B. 457; 55 L. T. 63; 50 J. P. 659—Per Bramwell (Lord).

Negligence—Trinity House—Beacon.—The Trinity House was incorporated by charter in

the reign of Henry VIII., for the purpose, inter alia, of ordering and erecting lighthouses, beacons, and buoys. Its powers were extended by several charters and statutes, until it became the general lighthouse authority for England and Wales. By the Merchant Shipping Act, 1854, s. 389, the superintendence and management of all lighthouses, buoys, and beacons in England and Wales, and certain other places, were, with certain exceptions, vested in the Trinity House:—Held, that the Trinity House was not a department of State, so as to be exempt from liability for negligence of its servants. *Gilbert v. Trinity House Corporation*, 17 Q. B. D. 795; 56 L. J., Q. B. 85; 35 W. R. 30—D.

A beacon erected by and vested in the Trinity House, having been nearly destroyed, a stranger applied to the Trinity House, and obtained leave to remove the remains of it. He removed part of the remains, but left an iron stump standing up above a rock under the water. A vessel struck against the iron stump and was lost:—Held, that the Trinity House was liable. *Id.*

— **Harbour Commissioners.**]—The R., which was anchored in F. outer harbour, having to be beached in the inner harbour, S., the harbour-master, directed the master of the R. where to beach her. Before the R. left the outer harbour, S. came on board, although a Trinity House pilot was in the vessel, and when she had arrived near the place where she was to be beached gave directions as to the lowering of her anchor. The R. overran her anchor and grounded on it, sustaining damage. In an action against the harbour commissioners and S., the court found as a fact that there was negligence on the part of S., and that the place where the R. grounded was outside the jurisdiction of the harbour commissioners:—Held, that the duties of the harbour-master comprised directions as to the mooring and beaching of vessels; that by giving directions when he went on board, S. had resumed his functions as harbour-master, and that he and the commissioners were therefore liable for the damage done to the R. *The Rhosina*, or *Edwards v. Falmouth Harbour Commissioners*, 10 P. D. 131; 54 L. J., P. 72; 53 L. T. 30; 33 W. R. 794; 5 Asp. M. C. 46C—C. A.

By act of Parliament, 26 & 27 Vict. c. 89, the harbour of B. was vested in the defendants, the limits were defined, and the defendants had jurisdiction over the harbour of P. and the channel of P. beyond those limits, for the purpose of, inter alia, buoying "the said harbour and channel," but they were not to levy dues or rates beyond the harbour of B. By 42 & 43 Vict. c. 146, a moiety of the residue of light duties to which ships entering or leaving the harbour of P. contributed, was to be paid to the defendants, and to be applied by them in, inter alia, buoying and lighting the harbour and channel of P. A vessel was wrecked in the channel of P., which under the Wrecks Removal Act, 1877 (40 & 41 Vict. c. 16), s. 4, the defendants had power to, and did partially remove. The wreck not removed was not buoyed, and the plaintiff's vessel was in consequence wrecked:—Held, that the statutes imposed upon the defendants an obligation to remove the wreck from the channel, or to mark its position by buoys, and that, not having done so, they were liable in damages to the plaintiff. *Dormont v. Furness*

Railway Company, 11 Q. B. D. 496; 52 L. J., Q. B. 331; 49 L. T. 134; 47 J. P. 711; 5 Asp. M. C. 127—*Kay, J.* See also *Reg. v. Williams*, ante, col. 337.

COST-BOOK MINE.

Order for Inspection of Documents on Wind-up.]—See *West Devon Great Consols Mine*, *In re*, ante, col. 440.

COSTS.

I. GENERAL PRINCIPLES.

II. ORDER LXV.—JURISDICTION.

1. *Rule* 1, 520.
 - a. Trial by Jury, 520.
 - b. In other cases, 521.
2. *Rule* 11—*Delay*, 523.
3. *Rule* 12, 525.
4. *Rule* 23, 525.
5. *Jurisdiction in other cases*, 525.

III. PARTICULAR PERSONS.

1. *Persons suing in Formâ Pauperis*, 527.
2. *In other cases*, 528.

IV. SEVERAL PARTIES.

V. SEVERAL ISSUES.

VI. TAXATION OF COSTS.

1. *Between Party and Party*, 532.
 - a. Practice, 532.
 - b. What Costs allowed, 532.
 - i. Counsel—Fees, 532.
 - ii. Expenses of Evidence, 534.
 - iii. Writ and Interlocutory Proceedings, 535.
 - iv. Several Parties.—*See supra*, IV.
 - v. Several Issues.—*See supra*, V.
- c. Scale of Taxation, 536.
 - i. Higher or Lower Scale, 536.
 - ii. As between Solicitor and Client, 538.
 - iii. County Court Scale.—*See infra*, VII.
2. *Between Solicitor and Client*.—*See SOLICITOR*.

VII. COUNTY COURTS ACT.

VIII. INTEREST ON COSTS.

IX. SET-OFF.

X. MEANS OF RECOVERING.

XI. APPEAL FOR COSTS.

XII. ON APPEAL.—*See APPEAL*.

XIII. SECURITY FOR COSTS.

1. *Of Appeal*—See APPEAL.
2. *Of Appeal from County Court*—See COUNTY COURT (APPEAL).
3. *On Winding-up of Companies*—See COMPANY, XI., §, b.
4. *In other Cases*—See PRACTICE.

XIV. COURT FEES.—See PRACTICE.

XV. IN OTHER CASES.

On Discontinuance of Action.]—See PRACTICE.

On Confession of Defence.]—See PRACTICE.

Staying Proceedings on Non-payment.]—See PRACTICE.

On Payment into Court.]—See PRACTICE.

In Probate Cases.]—See WILL.

In Admiralty Cases.]—See SHIPPING.

In Administration Actions.]—See EXECUTOR AND ADMINISTRATOR.

In Bankruptcy Cases.]—See BANKRUPTCY.

In Inferior Courts.]—See COURT.

In County Court Cases.]—See COUNTY COURT.

Under Lands Clauses Act.]—See LANDS CLAUSES ACT.

In Actions by and against Infant.]—See INFANT.

In Actions by or against Trustees.]—See TRUST AND TRUSTEE.

In Actions by or against Executors.]—See EXECUTOR AND ADMINISTRATOR.

In Cases of Mortgage.]—See MORTGAGE.

Liability of Woman's Separate Estate for.]—See HUSBAND AND WIFE.

In Arbitrations.]—See ARBITRATION.

In Patent Cases.]—See PATENT.

Of Sheriff.]—See SHERIFF.

When Recoverable as Damages.]—See DAMAGES.

I. GENERAL PRINCIPLES.

Writ issued without Notice.]—Where plaintiffs in an action for infringement of copyright issued their writ without notice, and the defendant as soon as he understood the circumstances tried his best to undo the injury caused by the infringement:—Held, that the defendant must submit to the injunction and pay the costs. *Wittmann v. Oppenheim*, 27 Ch. D. 260; 54 L. J., Ch. 56; 50 L. T. 713; 32 W. R. 767—Pearson, J.

The fact that an action has been brought without a previous application to the defendant does not prevent the plaintiff from getting his costs of the action. *Goodhart v. Hyett*, 25 Ch. D. 182; 50 L. T. 95—North, J.

Offer to Compensate Plaintiff without Legal Proceedings.]—On the 12th June, 1886, one of the defendants' travellers received an order from Nutting, of Lavender Hill, for sixty dozen cardboard boxes, with labels bearing the words "Browne's Satin Polish for ladies' and children's boots and shoes, travelling bags, trunks, &c., manufactured by Browne, of Lavender Hill." On the 6th July, 1886, the plaintiff, the owner of a registered trade mark, 14,127, bearing the words "Browne's Satin Polish," issued a writ to restrain the infringement of his trade mark. On the 7th July, 1886, the defendants offered to compensate the plaintiff without the necessity of legal proceedings, and to destroy the labels, and comply with any reasonable request of the plaintiff. On the 16th July, the plaintiff moved for an injunction:—Held, that, notwithstanding the defendants' offer, the motion was not an unnecessary proceeding, and the defendants must pay the costs caused by what they had done. *Fennessy v. Day*, 55 L. T. 161—V. C. B.

II. ORDER LXV.—JURISDICTION.

1. RULE 1.

a. Trial by Jury.

Claim and Counter-claim—"Event."]—In an action tried with a jury, where the defendant counterclaims in respect of matters which could not be pleaded as set-off, and the plaintiff recovers a sum on his claim, and the defendant recovers on his counterclaim a sum exceeding that which the plaintiff recovers on his claim, the claim and counterclaim should, for the purpose of taxation of costs, be treated as separate and independent actions, and the costs in each taxed in favour of the successful party, subject to a deduction in respect of the costs of any issues on which he has not succeeded. In such a case it is immaterial, with respect to the taxation of costs, whether the judgment is drawn up in form for the plaintiff for the sum recovered on his claim, and for the defendant for the sum recovered on his counterclaim; or whether the judgment is given for the defendant for the balance under Ord. XXI. r. 17. *Shrapnel v. Laing*, 20 Q. B. D. 334; 57 L. J., Q. B. 195; 58 L. T. 705; 36 W. R. 297—C. A. See *Ryan v. Fraser*, post, col. 532.

Costs following Event—"Good Cause"—Claim admitted on Pleadings.]—The plaintiff claimed 78*l.* 15*s.* in respect of a quarter's rent of premises let furnished to the defendant. The defendant by his pleadings admitted the claim, but counter-claimed for a larger amount as damages in respect of the insanitary condition of the demised premises. The action was tried by a jury, who found for the defendant on the counterclaim with 17*l.* 16*s.* damages. The judge at the trial ordered that judgment should be entered for the plaintiffs for the amount of the claim with costs down to the date of the counterclaim, and that judgment should be entered for the defendant for 17*l.* 16*s.* on the counterclaim,

with the costs of the counterclaim, and subsequent thereto, including the costs of the trial:—Held, that the effect of the judge's order as regards costs was to prevent them from following the "event," and that in the absence of "good cause" he had no jurisdiction to make such order. *Wight v. Shaw*, 19 Q. B. D. 396; 36 W. R. 408—C. A.

"**Good Cause.**"—Where an action is tried with a jury the judge before whom it is tried has no jurisdiction under Ord. LXV. r. 1, to make an order by which the costs will not follow the event unless there exist "good cause" within the meaning of that rule, and consequently there is an appeal with respect to the existence of the facts necessary to give the judge jurisdiction to make such order. To be "good cause" within that rule there must be facts shewing that it would be more just not to allow the costs to follow the event, as for example, oppression or misconduct of either of the parties by which costs had been unnecessarily increased. The fact that the action is for the recovery of several closes of land, that the only defence is that the defendant is in possession, and that the verdict is for the plaintiff for some only of the closes claimed, does not by itself constitute "good cause" within Ord. LXV. r. 1, since the verdict in such a case is distributive, and the costs, if properly taxed, would be as on a finding by the jury on separate issues. *Jones v. Curling*, 13 Q. B. D. 262; 53 L. J., Q. B. 373; 50 L. T. 349; 32 W. R. 651—C. A.

Where, in an action for seducing a woman thirty-five years of age, it was proved that she had readily consented, and that the parties were very poor, and the jury having awarded only 10% damages, the judge who tried the case stated upon the face of his order the foregoing circumstances, and his own opinion that no greater amount of damages could have been reasonably given or expected, as "special cause," under s. 53 of the Irish Judicature Act, for depriving the plaintiff of his costs:—Held, that the facts did not constitute such "special cause," and that the plaintiff was entitled to his costs. *Wilson v. M'Mains*, 20 L. R., Ir. 582—C. A.

If from all the facts proved before a judge and jury it appears that the action was brought or conducted oppressively by the plaintiff, that constitutes "good cause" within Ord. LXV. r. 1, so as to enable the judge to interfere, and not only deprive a successful plaintiff of his costs, but also to order that he shall pay the defendant's costs. If "good cause" exists the court will decline to consider whether the judge has exercised his discretion rightly or not. *Williams v. Ward*, 55 L. J., Q. B. 566—C. A.

—**Appeal from Judge's Order.**—Where an action is tried with a jury the exercise of the judge's jurisdiction as to costs under Ord. LXV. r. 1, was not intended by the legislature to be subject to any appeal. *Husley v. West London Extension Railway*, 17 Q. B. D. 373; 55 L. J., Q. B. 506—Lord Coleridge, C.J. See *S. C.* in H. L., 14 App. Cas. 26; 58 L. J., Q. B. 305; 60 L. T. 642; 37 W. R. 625.

b. In other Cases.

Judgment for Defendant on Counter-claim against Third Party—Discretion.—In an action

by landlord against tenant for rent, the defendant brought a counter-claim against the plaintiff and third parties for illegal distress. The judge before whom the case was tried without a jury gave judgment for the plaintiff on the claim and the counter-claim, but for the defendant against the third parties for 2l. 5s. "with such costs as the defendant would be entitled to by law":—Held, that as the case had been tried without a jury, the costs were by Ord. LXV. r. 1, in the discretion of the judge, and there having been no exercise of such discretion in favour of the defendant as against the third parties, the defendant was not "entitled by law" to costs. *Levin v. Trimming*, 21 Q. B. D. 230; 59 L. T. 511; 37 W. R. 16—D.

Double Costs—Discretion.—Ord. LXV. r. 1, does not apply to costs which are given by a statute as a matter of right. Thus, in an action brought for anything done in pursuance of 8 & 9 Vict. c. 100, a successful defendant is entitled to double costs as a matter of right. *Hasker v. Wood*, 54 L. J., Q. B. 419; 33 W. R. 697—C. A.

Action remitted to County Court for Trial.—Where an action has been ordered to be tried in a county court under 19 & 20 Vict. c. 108, s. 26, and has been so tried there, the High Court retains its power under Ord. LXV. r. 1, of dealing with the costs of the action, notwithstanding r. 4 of that order, and the absence in the registrar's certificate of any expression of opinion by the county court judge as provided for by that rule. *Emery or Emery v. Sandes*, 14 Q. B. D. 6; 54 L. J., Q. B. 82; 51 L. T. 641; 33 W. R. 187—C. A.

Application for payment of Funds out of Court.—The Commissioners of Works and Public Buildings compulsorily took, under 3 & 4 Vict. c. 87, and 9 & 10 Vict. c. 34, certain lands, and paid the purchase-money or compensation into court. Neither of these acts contained any provision for the payment by the Commissioners of the costs of applications for payment out. Upon a petition for payment out of a fund by the persons entitled thereto:—Held, that the Lands Clauses Consolidation Act, 1845, was not incorporated in the Acts 3 & 4 Vict. c. 87, and 9 & 10 Vict. c. 34, and that rule 1 of Ord. LXV. did not give the court power to order the payment of costs where before the Judicature Act it would not have had jurisdiction to do so. *Mercers' Company, Ex parte* (10 Ch. D. 481) questioned; *Garnett v. Bradley* (3 App. Cas. 944) distinguished; *Foster v. Great Western Railway* (8 Q. B. D. 515) followed; *Cherry's Settled Estates, In re* (4 De G. F. & J. 332) approved; and dicta in *Wood's Estates, In re* (31 Ch. D. 607) dissented from. *Mills' Estate, In re*, 34 Ch. D. 24; 56 L. J., Ch. 60; 55 L. T. 465; 35 W. R. 65; 51 J. P. 151—C. A.

The court has power, by virtue of the general discretionary powers conferred by Ord. LXV., to order that the costs of a petition for the payment out of the court, to a person absolutely entitled, of a fund paid into court by a company in respect of lands taken under the compulsory powers of a special act, be paid by the company, although the special act is prior to the Lands Clauses Consolidation Act, 1845, and contains no provision as to such costs. *Lee and Heming-*

way, *In re*, 24 Ch. D. 669; 49 L. T. 155; 32 W. R. 226—North, J.

Petition under Trustee Act.]—Whether under the Judicature Acts and the Orders of 1883, Ord. LXV. r. 1, the court has jurisdiction to order a respondent to a petition under the Trustee Act, 1850, to pay costs, *quære*. *Knight's Will or Trusts, In re*, 26 Ch. D. 82; 50 L. T. 550; 32 W. R. 417—C. A. S. C., cor. Pearson, J., 53 L. J., Ch. 223.

Administration Action by Residuary Legatee—Pending Cause.]—Ord. LXV. r. 1, of the Rules of the Supreme Court, 1883, directing that the costs of all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or a judge, applies, in the case of causes and matters pending on the 24th of October, 1883, when those rules came into operation, only to the costs of proceedings taken on and after that day; and the costs incurred in proceedings taken in such causes and matters before that day, although not adjudicated upon until afterwards, are not within that rule. In an action for administration by one of several residuary legatees, all the proceedings except those on subsequent further consideration were taken before Ord. LXV. r. 1, came into operation, though the costs were not adjudicated upon until the order on further consideration, which was made afterwards:—Held, that an appeal would lie as to the costs of such prior, though not as to the costs of such subsequent, proceedings. *Farrow v. Austin* (18 Ch. D. 58) followed. *McClellan, In re, McClellan v. McClellan*, 29 Ch. D. 495; 54 L. J., Ch. 659; 52 L. T. 741; 33 W. R. 888—C. A.

Action dismissed for want of Prosecution.]—The statutable right of a defendant to the costs of an action in the Chancery Division which had been dismissed for want of prosecution was repealed by 42 & 43 Vict. c. 59, which repeals so much of 4 & 5 Anne, c. 3, as gives such costs, and though the practice in accordance with such statutable right, and as regulated by Ord. XXXIII. r. 10, of the Chancery Consolidation Orders of 1860, was preserved by s. 4 of 42 & 43 Vict. c. 59, yet Ord. LXV. r. 1, of the rules of 1883, has changed such practice, so that the costs of a defendant where such action has been dismissed for want of prosecution are now in the discretion of the judge, and therefore his order as to such costs is by s. 49 of the Judicature Act, 1873, not subject to appeal. *Snelling v. Pulling*, 29 Ch. D. 85; 52 L. T. 335; 33 W. R. 449—C. A.

2. RULE 11—DELAY.

Reference to Taxing-master to Inquire into Delay.]—Where very considerable delay had occurred in proceedings under a decree in an administration suit which, in the opinion of the court, ought to be accounted for, the court, in exercise of the powers afforded by Ord. LXV. r. 11, of the Rules of Court, 1883, ordered that, in the taxation of the costs, the matter be referred specially to the taxing-master, and he be directed to inquire into the cause of the delay, to make such disallowance of costs in respect thereof as he might think fit, and to call upon the solicitors

engaged in the conduct of the case to show cause why that disallowance should not be made. *Furness v. Davis*, 51 L. T. 854; 33 W. R. 320—Kay, J.

Costs incurred before Rules of 1883—Payment of Costs out of Fund.]—The powers given by Ord. LXV. r. 11, of disallowing costs improperly incurred, or rendered fruitless by undue delay, are not confined to delay and costs taking place and incurred after the Orders of 1883 came into operation, but extend to all costs incurred in an action pending when the orders came into operation, which costs had not been already adjudicated upon; and these powers may be exercised by the judge of his own motion without any request from any of the parties. The rule extends to cases where in the ordinary course the costs are paid out of a fund, and is not confined to disallowing costs as between the solicitor and his client who has to pay them. *Brown v. Burdett*, 37 Ch. D. 207; 58 L. T. 571; 36 W. R. 225—C. A.

Orders were made before 1883 in an administration action, directing taxation of the costs of the action, but not containing any direction for their payment, nor any declaration how they were to be paid:—Held, that this was not such an adjudication as to the costs as would prevent the judge who had finally to dispose of them from exercising any powers which he had as to them under or apart from the general orders, and that he had jurisdiction to direct an inquiry under Ord. LXV. r. 11. *Id.*

An action was begun on the 19th April, 1882, by a person who had bought a share in an estate for 55%, asking that the trusts of the will of a testator might be carried into execution, and his real and personal estate administered by the court, and that all proper accounts and inquiries might be taken and made, and directions given. No allegation was made in it of any kind of misconduct on the part of the trustees. The claim showed that the widow of the testator, who by the will was tenant for life of all the real and personal estate, was still living; there was no doubt as to who were the persons ultimately entitled. On the 17th March, 1883, the usual judgment for administration was pronounced, and numerous accounts and inquiries were ordered to be taken and made. One inquiry, as to certain investments, was not asked by the pleadings, or indeed until after the hearing on further consideration. On the 23rd Aug., 1887, the chief clerk filed his certificate. The court of first instance held, that no benefit having resulted to the estate from the action, and the action being an idle and vexatious proceeding, the plaintiff was not entitled to his costs out of the estate; that the plaintiff must pay all the costs of the action since Ord. LXV. r. 1, of the Rules of Court came into operation on the 24th Oct., 1883. The costs would be taxed, and the taxing-master should have regard to Ord. LXV. r. 11, to see what costs (if any) had been fruitless, or had been occasioned by this delay. On appeal from so much of the order as related to costs incurred before the Rules of 1883 came into operation:—Held, that though the general delay could not be attributed to the plaintiff, he had, by taking the inquiry as to investments, and thus throwing the matter into chambers and causing expense, been guilty of such improper conduct as gave the judge a

discretion to make him pay the costs, and that with this discretion the court would not interfere. *Ormston, In re, Goldring v. Lancaster*, 59 L. T. 594—C. A. Affirming 36 W. R. 216—Kay, J.

3. RULE 12.

Reference—Costs to abide event—Less than £50 recovered—High Court Scale.—An action of contract was referred by consent, the costs to abide the event of the award, and judgment on the award to be entered in the High Court. The arbitrator found for the plaintiff for a sum less than 50l. and judgment was entered accordingly:—Held, that a judge at chambers had jurisdiction under Ord. LXV. r. 12 to order the plaintiff's costs to be taxed on the High Court scale. *Hyde v. Beardsley*, 18 Q. B. D. 244; 56 L. J., Q. B. 81; 57 L. T. 802; 35 W. R. 140—D.

4. RULE 23.

Sum in gross in lieu of Taxed Costs.—A contingent legacy to an infant was paid into court by the executor of the will of the testatrix under the Legacy Duty Act. A summons was then taken out by the guardian of the infant, asking that the income of the legacy might be paid to him until the infant should attain twenty-one. An originating summons was also taken out by the next of kin of the testatrix, claiming the income during the minority of the infant on the ground that it was undisposed of by the will. The two summonses were heard together before the judge in chambers, when he decided that the income until the infant should attain twenty-one was undisposed of, and that the next of kin were entitled to it. The executor's solicitor asked that his cost of attendance, amounting to about 13l., might be allowed out of the income. The judge considered the attendance of the executor's solicitor unnecessary, and declined to allow more than a fixed sum for costs, to be determined by the chief clerk. The chief clerk, without attempting to tax the bill, but acting upon what the judge had said, allowed the sum of 3 guineas. The matter was again referred to the judge, who confirmed the order of the chief clerk. A motion was accordingly made to vary that order:—Held, that rule 23 of Order LXV. of the Rules of Court, 1883, seemed to apply to the case; but that, in any event, the court had power in such a case as the present to limit the amount of costs to be allowed. *Walters, In re, Moore v. Bemrose*, 58 L. T. 101—Kay, J.

5. JURISDICTION IN OTHER CASES.

Delegation of Discretion.—Where a court or judge is expressly given a discretion as to costs, the exercise of such discretion cannot be delegated. *Lambton v. Parkinson*, 35 W. R. 545—D.

Case stated under 20 & 21 Vict. c. 43—Respondent not appearing.—A successful appellant in a case stated by justices is entitled to his costs though the respondent does not appear to support the judgment of the justices. *Shepherd v. Folland*, 49 J. P. 165—D. *S. P. Greenbank v. Sanderson*, 49 J. P. 40—D.

— Remitted for Amendment but not re-

turned.]—A case having been stated by justices under 20 & 21 Vict. c. 43, and remitted to them for an amended statement, but not returned within the proper time, and therefore abandoned:—Held, that the court still had jurisdiction to order the appellant to pay the respondent's costs. *Crowther v. Boult*, 13 Q. B. D. 680; 32 W. R. 150; 49 J. P. 135—D.

No Notice given.—A case having been stated under 20 & 21 Vict. c. 43, the case was lodged, but no notice was given to the respondent of the appeal:—Held, that though the appeal could not be heard, costs could be given against the appellant. *South Dublin Union Guardians v. Jones*, 12 L. R., Ir. 358—Ex. D.

County Palatine Court—Particulars of Objections.—In an action in the court of the County Palatine to restrain infringement of a patent, the defendants delivered particulars of objection. At the trial the judge held the patent invalid for an objection appearing on the face of it, and dismissed the action with costs, stating his opinion that the defendants ought to have the costs of the witnesses brought up to support their particulars of objection, though they had not been called, as the plaintiffs virtually had been non-suited. On taxation the registrar disallowed these costs, but the Vice-Chancellor held that they must be allowed. The plaintiffs appealed:—Held, that neither Lord Cairns' Act (21 & 22 Vict. c. 27) nor Sir J. Rolt's Act (25 & 26 Vict. c. 42) made it obligatory on a court of equity to follow the rule as to costs of particulars of objections laid down by the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), s. 43, and that the rule which applied to courts having no discretion as to costs ought not to be followed by analogy by a court which had discretion as to costs; that the Vice-Chancellor had therefore power to give these costs, and that they must be allowed. *Parnell v. Mort*, 29 Ch. D. 325; 53 L. T. 186; 33 W. R. 481—C. A.

Where Concurrent Jurisdiction.—An action was commenced in the Chancery Division claiming relief which might have been given on a summary proceeding in the Probate Division:—Held, that although the plaintiff was entitled to the relief claimed, no costs should be allowed on either side. *Blackett v. Blackett*, 51 L. T. 427—North, J.

District Registry—Administration Action—Taxing Officer.—The court can, in its discretion, order the taxation of costs in an administration action, commenced and prosecuted in a district registry, to be made by the district registrar. The term "taxing officer" in rr. 3, 11, and 12 of Supreme Court Funds Rules, 1884, these rules being read in conjunction with Ord. LXV. r. 27, sub-s. 43, of Rules of Supreme Court, 1883, includes "district registrar," where the court has directed taxation to be made by that officer, and the paymaster is bound to act on the certificate of taxation of a district registrar, when the court, in the exercise of its discretion, has directed taxation in the district registry. The court, however, following *Day v. Whittaker* (6 Ch. D. 731), will not, except under very special circumstances, direct the costs of an action commenced in a district registry to be taxed otherwise than by a taxing-master of the Chancery Division. *Wilson*

In re, Wilson v. Alltree, 27 Ch. D. 242; 53 L. J., Ch. 989; 32 W. R. 897—Chitty, J.

Payment out of Fund in Court—Costs disallowed by Master.]—Where a contributory of a company was ordered to pay a certain sum of money to the liquidator, the contributory took out a summons to stay execution pending an appeal, and a stay of execution was ordered upon the terms of his paying the money and 50l. for costs into court, no order being made as to the costs of the summons to stay. The appeal was dismissed with costs, but no reference was made as to the costs of the summons to stay, and the taxing-master disallowed the costs of that summons. On summons to review the taxation:—Held, that the contributory was ordered to pay the 50l. into court to satisfy such costs as the court should think he ought to pay, and that the costs of the summons to stay, being caused by the appeal, must be paid out of the 50l. in court, and that the court had jurisdiction at any time to make such order. *Brighton Livery Stables Company, In re*, 52 L. T. 745—V.-C. B.

Costs incurred in ascertaining Partner's Share.]—By articles of partnership between three partners, on the death of any partner the survivors were entitled to take his share at a valuation. One of the partners having died, his executrix brought her action to have it declared that the goodwill was to be included in the valuation, and to have the value of the deceased partner's share in the assets ascertained. A decree was made declaring that the goodwill must be valued as part of the assets, and directing accounts. The chief clerk made his general certificate, finding (inter alia) that two specified leaseholds belonging to the partnership were of no value. The plaintiff took out a summons to vary the certificate by estimating these leaseholds as worth a considerable sum. The summons was adjourned into court, and Bacon, V.-C., refused to vary the certificate, but ordered the costs of both parties to be paid out of the estate. The defendants appealed:—Held, that it was within the discretion of the court to order all costs reasonably incurred in ascertaining the sum to be paid out of the fund, and that an appeal would not lie. *Butcher v. Pooler*, 24 Ch. D. 273; 52 L. J., Ch. 930; 49 L. T. 573; 32 W. R. 305—C. A.

To order Shorthand Note on Taxation.]—See *Hilleary and Taylor, In re*, post, col. 532.

To order Taxation as between Solicitor and Client.]—See *Andrews v. Barnes*, post, col. 538.

III. PARTICULAR PERSONS.

1. PERSONS SUING IN FORMÂ PAUPERIS.

Successful Plaintiff — Taxation.]—Under Ord. XVI. rr. 24, 25, 26, 27, 31, a successful plaintiff in an action in formâ pauperis tried before a judge and jury is entitled, upon taxation as against the defendant, to costs out of pocket only, and cannot be allowed anything for remuneration to his solicitor or fees to counsel. *Carson v. Pickersgill*, 14 Q. B. D. 859; 54 L. J., Q. B. 484; 52 L. T. 950; 33 W. R. 589; 49 J. P. 612—C. A.

Right to appear in Person.]—The rules of Ord. XVI. do not impose any obligation upon a party who has obtained leave to sue in formâ pauperis to have counsel or solicitor assigned to him to conduct his case, and he is therefore entitled to appear in person where neither counsel nor solicitor have been assigned. *Tucker v. Collinson*, or *Cotterell*, 16 Q. B. D. 562; 55 L. J., Q. B. 224; 54 L. T. 263; 34 W. R. 354—C. A.

See also PRACTICE (PARTIES).

2. IN OTHER CASES.

Judge, when Jurisdiction Impeached.]—Where a county court judge appeared to a rule to show cause why he should not hear and determine an action remitted to him, and the rule was discharged; in an application for costs:—Held, that as it is not usual for a judge to be represented, unless the whole jurisdiction of his court is in question, he could not be allowed his costs. *Reg. v. Stonor*, 50 L. T. 99—D.

Costs against Third Persons on Certiorari.]—A party who attempts to carry on litigation under cover of the protection usually afforded to justices of the peace may be ordered to pay the costs. *Reg. v. Wheatley*, 34 W. R. 257—D.

Where Solicitor a Party.]—Where an action is brought against a solicitor, who defends it in person and obtains judgment, he is entitled upon taxation to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary. *London Scottish Benefit Society v. Chorley*, 13 Q. B. D. 872; 53 L. J., Q. B. 551; 51 L. T. 100; 32 W. R. 781—C. A.

Where one of a body of mortgagees is a solicitor, and acts as such in enforcing the security, he is entitled to charge profit costs against the mortgagor, whether the mortgagees are trustees or not. *Donaldson, In re*, 27 Ch. D. 544; 54 L. J., Ch. 151; 51 L. T. 622—V.-C. B.

Where Solicitor an Executor or Trustee.]—See post, SOLICITOR.

Comptroller—Trade Mark—Registration.]—The court has no jurisdiction to make the comptroller pay the costs of a successful application to register a trade mark, though it will not order the applicant to pay the comptroller's costs. *Leaf's Trade Mark, In re*, 33 Ch. D. 477; 55 L. J., Ch. 740; 55 L. T. 254; 35 W. R. 99—V.-C. B.

IV. SEVERAL PARTIES.

Joinder of Plaintiffs—Separate Causes of Action.]—Two plaintiffs joined in one action, claiming for separate and distinct causes of action. The case was referred, with power to the arbitrator to enter judgment, the costs of the cause to abide the event. The arbitrator found in favour of one plaintiff, and against the other, and entered judgment accordingly. On an application to review taxation of costs:—Held, that the successful plaintiff was entitled to recover from the defendant the whole of his general costs of the action, and the defendant

was only entitled to recover from the unsuccessful plaintiff the costs occasioned by joining such plaintiff. *Gort (Viscount) v. Rowney*, 17 Q. B. D. 625; 55 L. J., Q. B. 541; 54 L. T. 817; 34 W. R. 696—C. A.

Defendants appearing Separately—Separate Sets of Costs.—Two sets of defendants joined in delivering a defence, and appeared by the same solicitor, but were represented by separate counsel at the trial, when the action was dismissed with costs. The taxing-master allowed one set of costs only in respect of counsel, on the ground that the difference in the defences was not sufficiently material to justify appearance by separate counsel.—Held, on motion to vary the certificate, that the question was not one for the discretion of the taxing-master; and the court being of opinion that the defendants had in fact different cases by way of defence, remitted the certificate to the taxing-master on the ground that the defendants were justified in appearing by separate counsel. *Ager v. Blacklock*, 56 L. T. 890—Kekewich, J.

An action to set aside a sale of a life interest to the defendants on the ground of fraud was dismissed by the House of Lords with costs (11 App. Cas. 232), and their lordships directed that the taxing-master should consider whether any of the defendants who appeared separately had sufficient reason for severing in their defences, and if and in so far as it should appear they had not, the taxing-master was to allow only one set of costs, or only as many sets of costs as he should think right. The taxing-master allowed a separate set of costs to each of the six defendants, they having all appeared separately.—Held, that the House of Lords had delegated the decision of the question as to how many sets of costs should be allowed to the taxing-master, and, unless it was shown that he had not exercised his discretion, his decision could not be appealed from. *Boswell v. Coakes*, 36 Ch. D. 444; 58 L. T. 97; 36 W. R. 209—C. A.

—One Defendant raising different Defence.—After judgment against joint tortfeasors, where one of the defendants has severed after defence and added pleas without the consent of the other, the general costs of the action and trial should be taxed against both defendants jointly, but the costs of and incidental to the additional pleas against the defendant raising them. *Shumm v. Dixon*, 22 Q. B. D. 99; 59 L. T. 892; 37 W. R. 92—D. Affirmed 22 Q. B. D. 529; 58 L. J., Q. B. 183; 60 L. T. 560; 37 W. R. 457—C. A.

Costs against Individual Members of Corporation.—The corporation of Dublin desired to change the name of a street; in an action by householders for an injunction to restrain the corporation from effecting the change.—Held, that the corporation were not empowered to alter the name where such alteration would be injurious to the householders, and costs were awarded against certain members of the corporation who had taken an active part in passing the resolution to effect the intended change, and who had been named special defendants in the action. *Anderson v. Dublin Corporation*, 15 L. R., Ir. 410—V.-C.

Body against whom Prohibition sought—Two Sets of Costs.—The Local Government Board moved to discharge a conditional order for a prohibition obtained against them by the Kingstown commissioners to prohibit them from conducting an inquiry as to the propriety of making certain provisional orders. The Dublin corporation had presented a memorial on which the inquiry was founded, praying that the Board would order certain local acts to be amended.—Held, that as the Board had no power to do what the corporation asked, as they were acting in a quasi legislative capacity, and prohibition would not lie against them; and as they were justified in coming before the court to obtain a decision as to their powers, costs must be granted them against both the corporation and the commissioners. *Kingstown Commissioners, Ex parte, Local Government Board, In re*, 16 L. R., Ir 150—Ex. D.

V. SEVERAL ISSUES.

Reference—"Costs to abide Event"—Each Party in part Successful.—A plaintiff having claimed for goods sold and delivered, and for commission, and the defendants having counter-claimed for moneys collected by the plaintiff on the defendants' account and for work and labour, the action was referred to an arbitrator under an order of reference whereby "the costs of the cause, and the costs of the reference and award, shall abide the event." The arbitrator found the issues on the claim in favour of the plaintiff, and awarded him a sum of money in respect thereof, and found the issues on the counter-claim in favour of the defendants, and awarded to them a sum of money in respect thereof. After deducting the sum found for the plaintiff from the sum found for the defendants, a balance of 97% was due to the defendants.—Held, that the word "event" in the order of reference must be construed distributively, and that judgment must be entered for the defendants, who were entitled to the costs of the action, reference, and award, but that the plaintiff was entitled to the costs of the issues found in his favour. *Baines v. Bromley*, 6 Q. B. D. 691 explained. *Lund v. Campbell*, 14 Q. B. D. 821; 54 L. J., Q. B. 281; 53 L. T. 900; 33 W. R. 510—C. A.

In an action the defendants denied all the allegations of the statement of claim, and, as an alternative defence, paid a sum of money into court in satisfaction of the plaintiff's claim. This sum the plaintiff did not accept. The cause was referred, the costs of the cause, reference, and award to abide the event. The arbitrator found all the issues, except one as to special damage, in favour of the plaintiff; and he also found that the money paid into court was enough to satisfy the plaintiff's claim in respect of the subject-matters of the action.—Held, that the defendants were entitled to the general costs of the action and award, and to the costs of the issues found in their favour; but that the plaintiff was entitled to the costs of the issues on which he had succeeded, for that the costs ought in such a case to be taxed in the same manner as though the action had been tried out in the ordinary course of law. *Goutard v. Carr*, 53 L. J., Q. B. 55; 32 W. R. 242—C. A.

Where an action is referred to an arbitrator,

"the costs of the said cause, of the reference, and of the award to abide the event," and the plaintiff is successful on his claim, and the defendant on his counter-claim, the amount recovered by the plaintiff exceeding the amount recovered by the defendant on his counter-claim, the defendant is entitled to the costs of the issues on which he is successful, notwithstanding that the subject-matter of the claim and counter-claim is the same. *Pearson v. Ripley*, 50 L. T. 629; 32 W. R. 463—D.

On a reference to arbitration, the costs "to abide the event," the word "event" means the event of the whole action, and where the plaintiff is substantially successful in the action he is entitled to the general costs of the action, and the defendant only to the costs of those issues on which he has been successful, notwithstanding that on the reference the defendant has recovered more upon his counterclaim than the plaintiff on his claim, and that the success of the plaintiff on the whole action is due to the defendant having paid money into court prior to the reference. *Waring v. Pearman*, 50 L. T. 633; 32 W. R. 429—D.

An action and all matters in difference were referred, the costs of the cause, reference, and award to abide the event:—Held, that the word "event" must be construed distributively; and that upon an award by the arbitrator deciding in the plaintiff's favour upon the claim, but in the defendant's favour upon a matter in difference not raised in the action, the plaintiff was entitled to the costs of the action and the defendant to the costs of the matter on which he had succeeded. *Hawke v. Brear*, 14 Q. B. D. 841; 54 L. J., Q. B. 315; 52 L. T. 432; 33 W. R. 613—D.

— **Plaintiff recovering less than £20.**—In an action of contract the defendant counter-claimed. By the award of a special referee it was found that the plaintiffs were entitled on their claim to 13*l.* 12*s.* 6*d.*, and that the defendant was entitled on the counter-claim to 63*l.* 8*s.* 6*d.*:—Held, that by reason of the provisions of the 5th section of the County Courts Act, 1867, the plaintiffs were not entitled to the costs of the issues found for them on the claim. *Lund v. Campbell* (supra), distinguished. *Ahrbecker v. Ahrbecket v. Frost*, 17 Q. B. D. 606; 55 L. J., Q. B. 477; 55 L. T. 264; 34 W. R. 789—D.

Trial by Jury—Claim and Counter-claim.—In an action brought for a liquidated demand of 25*l.* for work and labour, the defendant pleaded a cross-liquidated demand as a counter-claim, and the jury found for the plaintiff on the statement of claim for 22*l.* 8*s.* 6*d.*, and for the defendant on the counter-claim of 9*l.* 13*s.*, and the judge at the trial directed judgment to be entered for the plaintiff for 12*l.* 15*s.* 6*d.*, with his costs. The taxing-master allowed the defendant full costs, and on motion to review his taxation, the Exchequer Division declared the plaintiff entitled to his full costs, and directed judgment to be entered that the plaintiff do recover from the defendant 22*l.* 8*s.* 6*d.* in respect of the cause of action in the statement of claim, with costs, and that the defendant do recover from the plaintiff 9*l.* 13*s.* in respect of the cause of action in the counter-claim, with costs; that the said sums and costs so recovered should be

set off, and the party in whose favour there should be a balance should recover from the other such balance:—Held, that one judgment should be entered for the plaintiff for 12*l.* 15*s.* 6*d.*, and that the plaintiff having recovered less than 20*l.* was entitled to no costs. In such a case a true set-off is not deprived of its real character of a defence by being described and pleaded as a counter-claim. *Ryan v. Fraser*, 16 L. R., Ir. 253—C. A. And see ante, col. 520.

Action for Recovery of Land.—Where, in an action for the recovery of land, the plaintiff has succeeded as to certain definite closes, and the defendant has succeeded as to other closes, although there was only one demise, the verdict is to be entered distributively, and the case treated as if there were separate issues. The plaintiff therefore will get the general costs of the action and the costs of the issues found for him, and the defendant the costs of those issues on which he was successful. *Jones v. Curling*, 13 Q. B. D. 262; 53 L. J., Q. B. 373; 50 L. T. 349; 32 W. R. 651—C. A.

VI. TAXATION OF COSTS.

1. BETWEEN PARTY AND PARTY.

a. Practice.

Objections must be raised in Writing.—Where a party in objecting to the taxation of his bill took various objections which were overruled by the taxing-master:—Held, that on a summons to vary the certificate he could not raise any points not set forth in his written objections. *Nation, In re, Nation v. Hamilton*, 57 L. T. 648—Kay, J.

Jurisdiction to order Shorthand Note to be taken.—A taxing-master, a chief clerk, or even a judge, has no jurisdiction to order shorthand notes of the evidence to be taken; but where, in a case of a lengthy and complicated nature, the taxing-master had suggested that a shorthand note of the evidence before him should be taken, and the parties had acceded to that suggestion and had acted upon it, and each side had employed a separate shorthand-writer, the court held that under the special circumstances of the case the taxing-master was right in directing the unsuccessful party to pay one half of the costs of the shorthand notes. *Hilleary and Taylor, In re*, 36 Ch. D. 262; 56 L. J., Ch. 758; 56 L. T. 867; 35 W. R. 705—C. A.

Taxation by District Registrar.—See *Wilson, In re*, ante, col. 527.

b. What Costs Allowed.

i. Counsel—Fees.

Three Counsel—Junior Counsel called within Bar.—Before the trial of an action the junior counsel for the plaintiff was called within the bar; at the trial, which lasted eight days, three counsel were engaged, viz. a leading Queen's counsel, the Queen's counsel who had formerly been junior in the case, and a junior. The judge decided in the plaintiff's favour. The taxing-master disallowed the fees of the leading Queen's counsel:—Held, that the taxing-master had exercised his discretion rightly, as the case was

not one in which it was essentially necessary for the purpose of doing justice between the parties, that the plaintiff should employ three counsel. *Parish v. Poole*, 34 W. R. 365—North, J.

— **Amount claimed.**—A collision occurred between the P. and the M., in consequence of which the P. also collided with the D., doing damage to the latter to the extent of 2,700*l.* The P. and the D. commenced actions against the M.; but the D. stood by until the P.'s action was decided. Three counsel were employed in the action on behalf of the D.:—Held, that, considering the amount of the damage, the allowance of the costs of three counsel was not unreasonable. *The Mammoth*, 9 P. D. 126; 53 L. J., P. 70; 51 L. T. 459; 33 W. R. 172; 5 Asp. M. C. 289—Butt, J.

— **Number of Counsel—Arbitration.**—There is no universal rule that in an arbitration the fees of one counsel only can be allowed. *Orient Steam Navigation Company v. Ocean Marine Insurance Company*, 35 W. R. 771—D.

— **Amount of Counsel's Fees.**—In an action for damage by collision, where the damage to one vessel amounted to 20,000*l.*, and to the other vessel to 2,000*l.*, three counsel were instructed on behalf of the plaintiffs, and the fees marked on their briefs were respectively seventy-five guineas, fifty guineas, and thirty guineas, and the registrar on taxation reduced these fees to sixty guineas, forty guineas, and twenty-seven guineas. The court, on appeal from the taxation, allowed the original fees, holding that they were proper fees in a case of that magnitude. *The City of Lucknow*, 51 L. T. 907; 5 Asp. M. C. 340—Butt, J.

— **Fees—Settlement of Writ—Joinder of Issue.**—The taxing officer has discretionary power to allow, as between party and party, fees to counsel on (a) settlement of writ of summons, (b) settlement of reply, though the latter is simply a joinder of issue on the preceding pleading. *Tisdall v. Richardson*, 20 L. R., Ir. 199—Ex. D.

— **Refresher Fees.**—Under Ord. LXV. r. 27 (48), the taxing-master has a discretion in the special circumstances of the case to disallow refresher fees. *Smith v. Wills*, 53 L. T. 386; 34 W. R. 30—Pearson, J.

The trial of an action with witnesses occupied four whole days and about three hours on a fifth day. Subsequently, at the request of the judge, the action was re-heard and evidence given on one point, when the previous judgment was adhered to; this further hearing occupied substantially the whole day. The taxing-master allowed refreshers for the 2nd, 3rd, 4th, and 5th days, but refused to allow refreshers for the re-hearing on the ground that the case had occupied less than five hours on the fifth day:—Held, that the taxing-master ought to have allowed refreshers for the sixth day, and that Ord. LXV. rule 27, sub-rule 48, did not prevent him from doing so. *Boswell v. Coaks*, 35 W. R. 711—North, J. Affirmed 36 Ch. D. 444; 58 L. T. 97—C. A.

— **Argument in Court of Appeal.**—An action was tried before a judge without a jury, and the verdict and judgment were for the

plaintiffs. The defendants appealed to the Court of Appeal, in which court the argument lasted for four days, and the Court of Appeal reversed the decision of the judge, and gave judgment for the defendants with costs. On taxation of the costs of the arguments in the Court of Appeal the master refused to allow certain refresher fees to the defendants' counsel in respect of three of the days occupied in arguing in the Court of Appeal, on the ground that he had no jurisdiction to allow them, as Ord. LXV. r. 27, sub-r. 48, provided for the allowance of refreshers only when a trial was had with *vivâ voce* evidence. The defendant appealed:—Held, that the master had a discretion, and such arguments were included in the work performed within sub-r. 30 of the same order, and that the matter ought to go back to him to allow the refresher fees if he saw fit to do so. *Svensden v. Wallace*, 16 Q. B. D. 27; 55 L. J., Q. B. 65; 53 L. T. 565; 34 W. R. 151—D.

Where the hearing of an appeal from the Chancery Division occupies more than one day, the taxing-master has a discretion to allow additional fees to counsel, in the shape of a daily allowance or otherwise, though no *vivâ voce* evidence has been adduced before the Court of Appeal, such fees not being treated as refreshers in the sense in which refreshers are dealt with on taxation as fixed sums, but as an allowance by way of addition to the original fees, on the ground that such fees have by miscalculation been fixed too low. This discretion, however, is to be exercised with jealousy, since there is not in such a case the same difficulty in fixing the proper fee at first as there is in cases where oral evidence is adduced, the probability of a case lasting long in argument being a matter which ought to be taken into account at the time of delivering the brief. *Svensden v. Wallace* (16 Q. B. D. 27) explained. *Easton v. London Joint Stock Bank*, 38 Ch. D. 25; 57 L. J., Ch. 329; 58 L. T. 364; 36 W. R. 375—C. A.

ii. Expenses of Evidence.

— **Transfer of Action—Costs of Correspondence before Motion.**—On the hearing of an opposed motion for the transfer of an action from one judge of the Chancery Division to another, the Lord Chancellor made an order directing the transfer, and that the respondent should pay the costs of the motion. Before the notice of motion was given, the moving party wrote to the respondent asking whether he would consent to the transfer, which he refused to do. In taxing the costs under the order of the Lord Chancellor, the taxing-master disallowed the costs of this correspondence. On summons to review the taxation:—Held, that the taxing-master was right. *Norton v. Fenwick*, 54 L. J., Ch. 632; 52 L. T. 341—Kay, J.

— **Inspection of Documents.**—As between party and party, no costs can be allowed in respect of notices to inspect documents, or of attendance for the purpose of inspecting documents, at the office of the solicitor to whose client the documents belong. The discretion given to the taxing-master by Ord. LXV. r. 27 (17)—repeated from Rules of Supreme Court, 1875 (Costs), schedule, r. 15—only applies to taxation of costs as between solicitor and client. *Wick-*

stead v. Biggs, 54 L. J., Ch. 967; 52 L. T. 428—Pearson, J.

Shorthand Notes.—Shorthand writer's notes on a reference are as a general rule properly disallowed on taxation. *Autothreptic Steam Boiler Company, In re*, 59 L. T. 632—D.

— **On Appeal.**—See **APPEAL**.

Prints of Record in another Action.—A collision occurred between the P. and the M., in consequence of which the P. also collided with the D. The P. and the D. commenced actions against the M.; but the D. stood by until the P.'s action was decided. In the P.'s action the M. was found alone to blame. Prints of the evidence taken in the P.'s action were obtained by the solicitors for the D. from the solicitors for the P., and were used in the action by the D. against the M.:—Held, that the solicitors for the D. were entitled to charge the defendants 3d. per folio for the prints of the record. *The Mammoth*, 9 P. D. 126; 53 L. J., P. 70; 51 L. T. 459; 53 W. R. 172; 5 Asp. M. C. 289—Butt, J.

Perusals—Exhibits.—The costs of perusals of exhibits to affidavits are not allowed on taxation under the Rules of Court, August, 1875 (Costs), Ord. VI., without a special direction to the taxing-master, who by the form of order has liberty to allow a special charge for perusal and consideration of the exhibits, the amount of such charge, if any, to be in his discretion. *De Rosaz, In re, Rymer v. De Rosaz*, 24 Ch. D. 684; 53 L. J., Ch. 448; 49 L. T. 133—North, J.

Preparation for Trial—Discontinuance before Notice of Trial.—By Ord. LXV. r. 27, special allowances in respect of (sub-rule 9) "such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence," shall apply to all taxations in the Supreme Court:—Held, that under this rule a master had a discretion to allow charges and expenses properly incurred by the defendant in procuring evidence where the plaintiff, having given no notice of trial, subsequently discontinued the action. *Windham v. Bainton*, 21 Q. B. D. 199; 57 L. J., Q. B. 519; 36 W. R. 832—D.

Detaining Witnesses on Shore.—Semble, the cost of detaining witnesses on shore may be allowed, although such witnesses are not called. This is a matter in the discretion of the registrar. *The City of Lucknow*, 51 L. T. 907; 5 Asp., M. C. 340—Butt, J.

iii. *Writ and Interlocutory Proceedings.*

Tender of Debt after Issue of Writ.—A defendant cannot escape paying the cost of a writ of summons by tendering the amount sued for without costs before service, but after issue of the writ. *O'Malley v. Kilmallock Union*, 22 L. R., Ir. 326—Ex.

Judgment on Admissions in Pleading—Motion or Summons.—In an action to restrain the publication of a trade circular, the defendants by their defence offered to submit to a perpetual injunction (in the terms of an interim

injunction which had been previously granted), "to be obtained on a summons issued for that purpose." The plaintiffs set the action down for trial on motion for judgment on the admissions in the pleadings, and delivered to the defendants a copy of minutes of the proposed judgment, which was identical with the judgment to which the defendants had offered to submit:—Held, that, under the circumstances, the plaintiffs ought to have proceeded by summons in chambers, and that, consequently, they would only be allowed the costs which they would have properly incurred if they had proceeded by summons. *London Steam Dyeing Company v. Digby*, 57 L. J., Ch. 505; 58 L. T. 724; 36 W. R. 497—North, J.

Motion adjourned to Trial.—When a motion in an action is adjourned or stands over until the trial of the action, at which judgment is obtained by one of the parties with costs against the other party, the costs of the motion are allowed to the successful party on taxation, without special direction in the judgment. *Gosnell v. Bishop*, 38 Ch. D. 385; 57 L. J., Ch. 642; 36 W. R. 505—Kekewich, J.

Application for Interim Injunction.—An order made on notice and continuing an injunction with costs will, in the absence of special directions to the contrary, include the costs of an interim injunction previously obtained on an ex parte application. *Blakey v. Hall*, 56 L. J., Ch. 568; 56 L. T. 400; 35 W. R. 592—Chitty, J.

c. *Scale of Taxation.*

i. *Higher or Lower Scale.*

Pending Proceedings.—Ord. LXV. r. 9, does not apply to an action pending at the commencement of the new rules; and, according to the former practice, the question whether costs shall be allowed on the higher or the lower scale is a matter for the taxing-master. *Edgington v. Fitzmaurice*, 32 W. R. 848—Denman, J.

Amount at Stake.—The court will not allow costs on the "higher scale" unless special circumstances of urgency or difficulty are shewn. The amount at stake in an action is not of itself a sufficient reason for such allowance. *The Horace*, 9 P. D. 86; 53 L. J., P. 64; 50 L. T. 595; 32 W. R. 755; 5 Asp., M. C. 218—Hannen, P.

On a petition for the appointment of new trustees, the amount of the fund alone does not constitute a "special ground arising out of the nature and importance or the difficulty or urgency of the case" for ordering costs on the higher scale within Ord. LXV. r. 9. *Spettigue's Trusts, In re*, 32 W. R. 385—Pearson, J.

Scientific Witnesses.—Costs on the higher scale should be allowed in patent cases where scientific witnesses are necessarily called. *Elington v. Clark*, 58 L. T. 818—C. A.

Intricacy.—Where the nature and intricacy of a case render it necessary, costs on the higher scale may be allowed. *Farrar v. Farrars*, 59 L. T. 619—Chitty, J.

Manner in which Case conducted.—In con-

sidering whether the costs of a cause shall be awarded upon the higher scale, the court will have regard to the importance of the questions in issue in the action, and also as to the manner in which the case has been prepared and conducted at the trial. *Davies v. Davies*, 36 Ch. D. 359; 56 L. J., Ch. 481; 56 L. T. 401; 35 W. R. 697—Kekewich, J.

Although a case as presented to the court may not be of special "difficulty" within the meaning of Ord. XLV. r. 9, leave will be given to the taxing-master to tax all or any part of the costs on the higher scale, if it appears on such taxation that the difficulty was removed by the expenditure of time, money, and learned industry. *Fraser v. Brescia Steam Tramways Company*, 56 L. T. 771—Kekewich, J.

Special Knowledge.—Where a case is one requiring special knowledge on the part of those concerned in it, it is one of those exceptional cases in which costs on the higher scale ought to be allowed. *Moseley v. Victoria Rubber Co.*, 57 L. T. 142—Chitty, J.

Witnesses examined in Court—Long Arguments.—Costs should be allowed on the higher scale whenever witnesses are properly brought into court and a good deal of time is necessarily occupied in the argument. *Lydney and Wigpool Iron Ore Company v. Bird*, 31 Ch. D. 328; 55 L. J., Ch. 383; 54 L. T. 242; 34 W. R. 437—Pearson, J.

Importance and Difficulty.—An action for the establishment of a right of great pecuniary value, and involving difficult questions of fact and law, was heard at great length on five days, and judgment was given in favour of the plaintiff. The principal defendant appealed. The appeal was argued on four days and judgment reserved. Ultimately the decision was reversed, and the action dismissed with costs:—Held, that, although the case was important and difficult, the court could not say that there were special grounds arising out of its importance and difficulty which would warrant giving costs on the higher scale. *Williamson v. North Staffordshire Railway*, 32 Ch. D. 399; 55 L. J., Ch. 938; 55 L. T. 452—C. A.

In a summons under the Settled Land Act, 1882, to obtain the direction of the court as to sale of certain settled estates and the disposal of the purchase-money, the court, on account of the difficulty of the case, allowed the costs of the application on the higher scale. *Chaytor's Settled Estate Act, In re*, 25 Ch. D. 651; 50 L. T. 88; 32 W. R. 517—Pearson, J. See also *Davies v. Davies*, and *The Horace*, supra.

Injunctions.—In the case of an interlocutory injunction, the court refused to make an order that the costs should be allowed on the higher scale, though an important question was raised. *Grafton v. Watson*, 51 L. T. 141—C. A.

A submission to a perpetual injunction with costs by a defendant in an action for the infringement of a trade-mark does not afford a special ground upon which the court will direct taxation of the costs upon the higher scale under the provisions of Ord. LXV. r. 9. *Hudson v. Osgerby*, 50 L. T. 323; 32 W. R. 566—Pearson, J.

An injunction was granted restraining a dis-

trict board of works from erecting posts by the side of public footpaths so as to interfere with the due enjoyment of the plaintiff's market, but costs on the higher scale were refused. *Horner v. Whitechapel Board of Works*, 54 L. J., Ch. 151—V.-C. B.

Salvage Action.—Salvage services were rendered by the steamship G. to the steamship R. and her cargo under a towage agreement which made no reference to cargo. Salvage was awarded in respect of ship and freight, but in a second salvage action in personam against the owners to recover salvage for services to the cargo:—Held, that there was no liability on the owners to pay salvage for the cargo, but that costs on the higher scale could not be awarded them, as there were no exceptional circumstances in the case. *The Raisby, Cardiff Steamship Company v. Barwick*, 53 L. T. 56; 5 Asp. M. C. 473—Hannen, P.

ii. As between Solicitor and Client.

Jurisdiction to Order.—The Court of Chancery formerly had, and the High Court of Justice now has, in matters of equitable jurisdiction, a general discretionary power to give costs as between solicitor and client. Whether the High Court has the same power in matters of common law jurisdiction, quære. *Cockburn v. Edwards* (18 Ch. D. 449) questioned. *Mordue v. Palmer* (6 L. R., Ch. 22) approved. *Andrews v. Barnes*, 39 Ch. D. 133; 57 L. J., Ch. 694; 58 L. T. 748; 36 W. R. 705; 53 J. P. 4—C. A.

An action was brought by the vicar and churchwardens of a parish to recover from the defendants a fund of small amount which had been handed over to them upon trust for a charitable purpose connected with the parish, but, as the plaintiffs alleged, upon a condition which had become incapable of fulfilment. The plaintiffs failed to make out their case. The court, in dismissing the action, being of opinion that it had been brought wholly without justification, ordered the plaintiffs to pay the costs of the defendants as between solicitor and client; and the Court of Appeal refused to interfere with the judgment. *Id.*

iii. County Court Scale.—See *infra*, VII.

VII. COUNTY COURTS ACT.

Recovery of less than £20—Discretion as to Quantum.—Order LXV., r. 1, has given a judge complete discretion, not only as to the incidence, but also as to the quantum, of the costs of an action in the Superior Court. Consequently, the costs of suit, which a judge at chambers may, by rule or order, allow a plaintiff, under s. 5 of the County Courts Act, 1867, are not confined to Superior Court costs, but may be costs on the County Court scale. *Neaves v. Spooner*, 58 L. T. 164; 36 W. R. 257—C. A.

— **Where Solicitor is Plaintiff.**—S. 5 of the County Courts Act, 1867, which deprives plaintiffs in actions commenced in the High Court of costs if less than 20% in contract, or 10% in tort, is recovered, applies to an action in which a solicitor is plaintiff. *Blair v. Eisler*,

21 Q. B. D. 185; 57 L. J., Q. B. 512; 59 L. T. 337; 36 W. R. 767—D.

— **Claim on Contract and Counter-claim.**—In an action of contract the defendant counter-claimed. By the award of a special referee it was found that the plaintiffs were entitled on their claim to 13l. 12s. 6d., and that the defendant was entitled on the counter-claim to 63l. 8s. 6d.:—Held, that by reason of the provisions of the 5th section of the County Courts Act, 1867, the plaintiffs were not entitled to the costs of the issues found for them on the claim. *Lund v. Campbell* (14 Q. B. D. 821), distinguished. *Ahrbecker v. Ahrbecker v. Frost*, 17 Q. B. D. 606; 55 L. J., Q. B. 477; 55 L. T. 264; 34 W. R. 789—D. See *Ryan v. Fraser*, ante, col. 532.

— **Less than £50 recovered "in the Action."**—An action on a partnership account was by consent referred to an arbitrator. The terms of reference were that "all matters in difference between the parties in the action" were to be referred, and that "the costs of the action" should abide the award. Subsequently to this order of reference, the parties agreed to submit to the arbitrator a further matter of account outside the action. The arbitrator awarded 40l. to the plaintiff on his claim, and found that a further sum of 14l. 2s. was due to him on the subsequent account:—Held, that the plaintiff had recovered "in the action" less than 50l., and therefore came under the provisions of Ord. LXV. r. 12, of the Rules of 1883, whereby the costs recoverable were limited to county court costs in actions of contract where less than 50l. is recovered, unless by leave of the court the High Court scale is allowed. *Emmett v. Heyes*, 36 W. R. 237—D.

— **Reference—Costs to abide event—High Court Scale.**—An action of contract was referred by consent, the costs to abide the event of the award, and judgment on the award to be entered in the High Court. The arbitrator found for the plaintiff for a sum less than 50l. and judgment was entered accordingly:—Held, that a judge at chambers had jurisdiction under Ord. LXV. r. 12 to order the plaintiff's costs to be taxed on the High Court scale. *Hyde v. Beardsley*, 18 Q. B. D. 244; 56 L. J., Q. B. 81; 57 L. T. 802; 35 W. R. 140—D.

— **Breach of Promise of Marriage.**—By Ord. LXV. r. 12, in actions founded on contract in which the plaintiff recovers by judgment or otherwise a sum (exclusive of costs) not exceeding 50l., he shall be entitled to no more costs than he would have been entitled to had he brought his action in a county court, unless the court or a judge otherwise orders:—Held, that this rule does not apply to actions which could not have been brought in a county court. *Saywood v. Cross*, 14 Q. B. D. 53; 54 L. J., Q. B. 17; 51 L. T. 601; 33 W. R. 135—D.

— **Counter-claim against Third Party.**—Semble, that when a counter-claim is against a person not a party to the action, s. 24, sub-s. 3, of the Judicature Act, 1883, and Order XXI. rr. 11, 12, 13, 14, do not render s. 5 of the County Courts Act, 1867, applicable to such a counter-claim. *Lewin v. Trimming*, 21 Q. B. D. 230; 59 L. T. 511; 37 W. R. 16—D.

— **Foreclosure Action.**—In an action to foreclose a mortgage for 65l., where both plaintiff and defendant resided at the same place:—Held, that the plaintiff was entitled only to such costs as he would have obtained in the county court. *Simons v. McAdam* (6 L. R., Eq. 324) followed. *Crozier v. Dowsett*, 31 Ch. D. 67; 55 L. J., Ch. 210; 53 L. T. 592; 34 W. R. 267—V.-C. B.

VIII. INTEREST ON COSTS.

— **From what Time Running.**—By a judgment delivered before the Rules of the Supreme Court, 1883, came into operation, an action was dismissed and the plaintiff was ordered to pay the costs, but the judgment contained no direction as to the date from which interest on the costs was to run. Taxation took place, and the taxing-master's certificate was made after the Rules of 1883 had come into operation:—Held, that the Rules of 1883 applied to the taxation proceedings and therefore that interest on the costs ran, not from the date of the taxing-master's certificate as the Rules of 1875 provided, but from the date of the judgment as the form No. 1, Appendix H. to the Rules of the Supreme Court, 1883, directs. *Boswell v. Coaks*, 57 L. J., Ch. 101; 57 L. T. 742; 36 W. R. 65—C. A.

Where costs are given by a judgment and taxed, interest on such costs is payable, not from the date of the taxing-master's certificate but from the date of the judgment. *London Wharfing Company, In re*, 54 L. J., Ch. 1137; 53 L. T. 112; 33 W. R. 836—Chitty, J.

— **Rate.**—As a general rule, in the absence of any special order, interest at the rate of 4l. per cent. per annum is payable on the costs of an action from the date of the judgment. *Landowners' West of England Drainage Company v. Ashford*, 33 W. R. 41—Pearson, J.

IX. SET-OFF.

— **Cross-Judgments in distinct Actions.**—Whether r. 14 of Ord. LXV. of the Rules of Court, 1883, does or does not apply to the case of cross-judgments in distinct actions between the same parties, the allowing a set-off for damages or costs between parties is a matter in the discretion of the court. *Edwards v. Hope*, 14 Q. B. D. 922; 54 L. J., Q. B. 379; 53 L. T. 69; 33 W. R. 672—C. A.

X. MEANS OF RECOVERING.

— **Injunction—Motion—Proceeding to Trial for Costs.**—Where upon an interlocutory motion in an action the plaintiff obtains the relief which he seeks, he is bound to make an application to the defendant to have the costs disposed of on motion, and unless he does so is precluded from having the extra costs occasioned by going on to trial. But if the defendant refuses to allow the matter to be disposed of on motion, or if there is any question remaining open between the parties to be decided, the case cannot be so dealt with. *Sonnenschein v. Barnard*, 57 L. T. 712—Stirling, J.

XI. APPEAL FOR COSTS.

Trial by Jury—"Good Cause" not shewn.]—

In an action for the recovery of several closes of land the jury gave a verdict for the plaintiff for about half the land claimed, and for the defendant for the remainder. The judge before whom the action was tried ordered that the costs of both parties should be added together, divided equally, and that each party should pay half the total thus arrived at:—Held, that an appeal could be brought from this order, for that good cause must exist before the jurisdiction to make the order could arise, and that whether facts did or did not exist which would constitute good cause could be the subject of an appeal. *Jones v. Curling*, 13 Q. B. D. 262; 53 L. J., Q. B. 373; 50 L. T. 349; 32 W. R. 651—C. A.

No Jurisdiction to Order Payment.]—Where a master has exceeded his jurisdiction by ordering one party to pay the costs of the action on an interpleader summons, an appeal will lie. *Hanson v. Maddox*, 12 Q. B. D. 100; 53 L. J., Q. B. 67; 50 L. T. 123; 32 W. R. 183—D.

Appellant failing on Questions of Substance.]

—Unless the appellant can succeed on the questions of substance he cannot ask the Court of Appeal to review the question of costs. There is no fixed rule of law on this point. The rule is that inasmuch as costs are not the subject of appeal, unless a substantial variation is made in the order appealed from, the fact that a substantial question has been raised will not of itself be enough to allow the question of costs to be gone into on the appeal. *Games v. Bonnor*, 54 L. J., Ch. 517; 33 W. R. 64—Per L. C.

Order on Solicitor personally to Pay Costs.]

—An order that the costs of an application at chambers on behalf of a client shall be paid by his solicitor personally is not within the Judicature Act, 1873, s. 49, and therefore is subject to appeal without leave. *Bradford, In re*, 15 Q. B. D. 635; 53 L. J., Q. B. 65; 50 L. T. 170; 32 W. R. 238—C. A.

Appeal by Mortgagor after Allowance of Costs to Mortgagee.]—Although a mortgagee who has been deprived of his costs on the ground of misconduct may appeal from the order of the judge, yet if the judge, notwithstanding charges of misconduct, allows a mortgagee his costs, the mortgagor has no right of appeal; because the fact of the misconduct, if proved, would bring the costs within the discretion of the judge. *Charles v. Jones*, 33 Ch. D. 80; 56 L. J., Ch. 161; 55 L. T. 331; 35 W. R. 88—C. A.

Order depriving Trustee of Costs.]—A trustee may appeal from an order depriving him of costs on the ground of misconduct, notwithstanding r. 1 of Ord. LXV. *Knight's Trusts or Will, In re*, 26 Ch. D. 82; 50 L. T. 550; 32 W. R. 417—C. A.

Administration Action by Residuary Legatee

—**Pending Cause.]—**Order LXV. r. 1, of the Rules of the Supreme Court, 1883, directing that the costs of all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or a judge, applies, in the case of causes

and matters pending on the 24th of October, 1883, when those rules came into operation, only to the costs of proceedings taken on and after that day; and the costs incurred in proceedings taken in such causes and matters before that day, although not adjudicated upon until afterwards, are not within that rule. In an action for administration by one of several residuary legatees, all the proceedings except those on subsequent further consideration were taken before Ord. LXV. r. 1, came into operation, though the costs were not adjudicated upon until the order on further consideration, which was made afterwards:—Held, that an appeal would lie as to the costs of such prior, though not as to the costs of such subsequent, proceedings. *Farrow v. Austin* (18 Ch. D. 58) followed. *McClellan, In re, McClellan v. McClellan*, 29 Ch. D. 495; 54 L. J., Ch. 659; 52 L. T. 741; 33 W. R. 888—C. A.

Administration Action—Costs out of Fund.]

—An action was brought by a married woman and her infant children by their next friend against a trustee an executor, asking for administration of the trusts of a will and settlement, and for accounts of the principal and income of the trust property, making charges of misconduct against the defendant and seeking to charge him with the costs of the action. At the trial an order was made for administering the trusts, with special inquiries as to the alleged acts of misconduct. On taking the accounts it appeared that the defendant had before action given a correct account of the capital, but that in the accounts he had rendered of the income he had not accounted for nearly so much as he ought. The special cases of misconduct alleged against him were not substantiated. The Court ordered the plaintiffs' costs relating to the income account, and the defendant's costs of the rest of the action, to be taxed and set off against each other. The plaintiffs appealed, asking that their costs or at all events those incurred before the Rules of 1883, except those ordered to be paid by the defendant, might be paid out of the trust property:—Held, that the order was not appealable, for that the costs of a hostile action, seeking to charge the defendants with costs on the ground of acts of misconduct, were not within the old rule of the Court of Chancery that the plaintiff in an administration action was entitled to costs out of the fund unless there were special grounds for depriving him of them, but were in the discretion of the judge. *Williams v. Jones*, 34 Ch. D. 120; 56 L. J., Ch. 1014; 56 L. T. 68—C. A.

—Order on Defendant Executor to pay Costs.]

—The decision of a judge of the High Court of Justice, ordering a defendant executor to pay the costs of an administration action, on the ground that he has caused litigation by refusing to furnish accounts, is subject to appeal. L. and P. were the executors appointed by the will of X., who died in May, 1883. P. proved the will in June, 1883. On the 20th May, 1884, the solicitor of L. wrote a letter to P., saying that L. had instructed him to take out administration to the estate as joint executor with P., and asking P. to furnish accounts. On the 31st May, 1884, the same solicitor wrote another letter to P., asking for a reply to his former letter. Neither letter contained any threat of litigation. P. denied

that he had received either letter, and there was no strict evidence that either letter was posted. On the 2nd July, 1884, L. proved the will, and on the 9th August, 1884, P. was served with the writ in an administration action brought by L. No threat of litigation had been made in the meantime. The judge deprived P. of his costs, and ordered him to pay the costs of the action:—Held, on appeal (further evidence having been admitted), that no misconduct had been established, and that P. was entitled to his costs. *Pugh, In re, Lewis v. Pritchard*, 57 L. T. 858—C. A.

Contempt of Court—Order to pay Costs.]—

The power of a judge to order payment of costs in cases where an application is made to commit a person for contempt of court depends on the question whether or not the contempt has been committed, and therefore where on such an application an order has been made that the person shall pay costs of the application, an appeal from such an order is not an appeal for costs only. *Emmerson, In re, Rawlings v. Emmerson*, 57 L. J., p. 1—C. A.

Defendant ordered to pay Costs of Unsuccessful Claim.]—

By articles of partnership between three partners, on the death of any partner the survivors were entitled to take his share at a valuation. One of the partners having died, his executrix brought her action to have it declared that the goodwill was to be included in the valuation, and to have the value of the deceased partner's share in the assets ascertained. A decree was made declaring that the goodwill must be valued as part of the assets, and directing accounts. The chief clerk made his general certificate, finding (inter alia) that two specified leaseholds belonging to the partnership were of no value. The plaintiff took out a summons to vary the certificate by estimating these leaseholds as worth a considerable sum. The summons was adjourned into court, and Bacon, V.-C., refused to vary the certificate, but ordered the costs of both parties to be paid out of the estate. The defendants appealed:—Held, that the case did not come within the rule in *Foster v. Great Western Railway* (8 Q. B. D. 25, 515), viz., that the court cannot make a successful defendant pay the costs of a plaintiff who has wholly failed; but that it was within the discretion of the court to order all costs reasonably incurred in ascertaining the sum to be paid out of the fund, and that an appeal would not lie. *Butcher v. Pooler*, 24 Ch. D. 273; 52 L. J., Ch. 930; 49 L. T. 573; 32 W. R. 305—C. A.

References in Admiralty Court.]—By Ord. LXV. r. 1, the costs of all proceedings are in the discretion of the court, and therefore the general rule of practice in the Admiralty Court as to the costs of references, viz., that when more than a fourth is struck off a claim each party pays his own costs, and when more than a third the claimant pays the other party's costs, may be appealed against and is wrong, and the court must exercise its discretion according to the circumstances of each particular case. *The Friedeberg*, 10 P. D. 112; 55 L. J., P. 75; 52 L. T. 837; 33 W. R. 687; 5 Asp. M. C. 426—C. A.

Action dismissed for want of Prosecution.]—The statutable right of a defendant to the costs

of an action in the Chancery Division which had been dismissed for want of prosecution was repealed by 42 & 43 Vict. c. 59, which repeals so much of 4 & 5 Anne, c. 3, as gives such costs, and though the practice in accordance with such statutable right, and as regulated by Ord. XXXIII. r. 10, of the Chancery Consolidation Orders of 1860, was preserved by s. 4 of 42 & 43 Vict. c. 59, yet Ord. LXV. r. 1, of the rules of 1883 has changed such practice, so that the costs of a defendant where such action has been dismissed for want of prosecution are now in the discretion of the judge, and therefore his order as to such costs is by s. 49 of the Judicature Act, 1873, not subject to appeal. *Snelling v. Pulling*, 29 Ch. D. 85; 52 L. T. 335; 33 W. R. 449—C. A.

Breach of Injunction—Order as to Costs.]—

When the jurisdiction of a judge to inflict costs on a party arises from his being guilty of a breach of an injunction or other misconduct, an appeal lies as to costs, although the judge makes no order except that the party shall pay costs. *Stevens v. Metropolitan District Railway*, 29 Ch. D. 60; 52 L. T. 832—C. A.

Special Leave—Interfering with Discretion.]

—Where an appeal from an order as to costs which are left by law to the discretion of the judge is brought by leave of the judge under the 49th section of the Judicature Act, 1873, the Court of Appeal will still have regard to the discretion of the judge, and will not overrule his order unless there has been a disregard of principle or misapprehension of facts. *Gilbert, In re, Gilbert v. Huddleston*, 28 Ch. D. 549; 54 L. J., Ch. 751; 52 L. T. 8; 33 W. R. 832—C. A.

COUNCILLOR.

See CORPORATION.

COUNSEL.

See BARRISTER.

COUNTER-CLAIM.

See PRACTICE AND PLEADING.

COUNTY.

Rate—Liability of Borough—Main Roads.]—

By a local act, passed in 1874, the limits of the borough of Middlesbrough were extended, and all lands, &c., within the extended area, and all persons in respect of the same, were exempted "from all county rates, save only in respect of

the purposes for which any county rates are now leviable within the existing borough;” and the act further provided that the urban sanitary authority should be liable to the maintenance and repair of all streets and roads, being public highways within the extended area, and that the inhabitants should not, in respect of any lands, &c. within that area, be liable to any payment in respect of the making or repairing of any highway beyond the limits thereof. At the time of the passing of the act general county rates were leviable within the existing borough for all purposes for which general county rates could be levied in any part of the riding, but those purposes did not include the maintenance of any main or other roads outside the limits of the borough. By s. 13 of the Highways and Locomotives (Amendment) Act, 1878, any road which has ceased to be a turnpike road in manner described by the act, shall be deemed to be a “main road,” and one-half of the expense incurred by the highway authority in the maintenance of such road shall, as to every part thereof within any highway area, be contributed out of the county rate:—Held, that the provisions of the local act did not exempt the inhabitants of the extended area of the borough from liability to pay county rates, under s. 13 of the Highways and Locomotives (Amendment) Act, 1878, in respect of the maintenance of main roads outside the limits of the extended area. *Middlesborough Overseers v. Yorkshire (N.R.) Justices*, 12 Q. B. D. 239; 32 W. R. 671—C. A.

— **Borough with Separate Court of Quarter Sessions.**—The parish of R. was subject to the jurisdiction of quarter sessions of S., but not to those of the county in which it was situate. In 1878 R., with a part of the county called the “added area” was put under commissioners for paving, &c., by a local act, which provided that if a charter were granted to the whole district, the quarter sessions of S. should have jurisdiction over the “added area,” and that the “added area” should cease to be liable to county rates. In 1884 a charter was granted, which incorporated the whole district as the borough of R.:—Held, that the borough of R. was a borough having a separate court of quarter sessions, and that the “added area” was no longer liable to county rates. A separate court of quarter sessions in s. 150 of the Municipal Corporations Act, 1882, means a court separate from that of the county. *St. Lawrence (Overseers) v. Kent JJ.*, 51 J. P. 262—D.

Liability to pay Superannuation of Prison Officers.—See PRISONS.

Liability for Repair of Main Roads.—See WAY.

County Vote.—See ELECTION LAW.

COUNTY COURT.

1. *Officers*, 546.
2. *Jurisdiction and Power of*, 547.
3. *Actions remitted to*.
 - a. In what cases, 550.
 - b. Practice after Action remitted, 552.

4. *Transfer from County Court*, 554.
5. *Practice*.
 - a. In General, 554.
 - b. Costs, 556.
6. *Appeal*.
 - a. In what Cases, 557.
 - b. Mode of and time for, 559.
 - c. Practice, 560.

1. OFFICERS.

High Bailiff—Fees—Possession Money.]—

Where a claim is made to goods taken in execution by the high bailiff of a county court, and the execution creditor sends notice, under Ord. XXVII. r. 1, of the County Court Rules, 1886, of his admission of the claim to the high bailiff, who withdraws from possession, the judge of the county court has power to award possession money up to the time of the receipt of such notice to the high bailiff, and the high bailiff can recover such possession-money from the execution creditor by action in the county court, if the judge in the exercise of his discretion is of opinion that the circumstances of the case are such that possession-money ought to be awarded. *Thomas v. Peek*, 20 Q. B. D. 727; 57 L. J., Q. B. 497; 36 W. R. 606—D.

— Foreign District—Jurisdiction of Judge of Court out of which Warrant originally issued.]—

—See *Reg. v. Shropshire County Court Judge*, post, col. 548.

— Warrant addressed to—Executed by Clerk—Effect of.]—

A warrant of arrest issued in an action in rem, instituted for collision, in the City of London Court, and directed to the high bailiff of the said court and others the bailiffs thereof, is not duly executed if executed by a clerk in the bailiff's office who is not a bailiff, and hence the master of the vessel so arrested is not guilty of contempt of court in removing her. *The Palomares*, 52 L. T. 57; 5 Asp. M. C. 343—D.

Semble, if the warrant had been addressed to the clerk as an officer of the court, it might, under the provisions of the County Courts Admiralty Jurisdiction Act, 1868, s. 23, have been duly served by him. *Ib.*

— **Illegal Seizure—Ratification.**—Where, on a claim being made to goods seized by mistake by a bailiff, the execution creditor does not direct the bailiff to give up the goods to the claimant, but appears and contests his title in interpleader proceedings:—Held, no evidence of a ratification by the execution creditor of the bailiff's detention. *Toppin v. Buckerfield*, 1 C. & E. 157—Cave, J.

Assault on Bailiff—Execution of Duty.]—C., being under-bailiff of county courts, was left on certain premises in execution of a warrant to levy on goods of D. Having no refreshment provided for him, he went out to a public-house, a mile distant, and took his warrant with him. On his return he was assaulted by D., to prevent his re-entry:—Held, that C. was in the execution of his duty in returning, and that D. was liable to be convicted under 9 & 10 Vict. c. 95, s. 114. *Coffin v. Dyke*, 48 J. P. 757—D.

Non-liability of Registrar and Bailiff acting under Warrant.]—S. 19 of 13 & 14 Vict. c. 61, and s. 6 of 15 & 16 Vict. c. 54, protect the registrar of a county court and the bailiff and his

assistants from liability to be sued in an action for seizing the goods of a party under a warrant of the court signed by the registrar and under the seal of the court, even assuming that the judge had no jurisdiction to make the order upon which the warrant is founded. *Aspey v. Jones*, 54 L. J., Q. B. 98; 33 W. R. 217—C. A.

Section 6 of 15 & 16 Vict. c. 54 also affords a like protection to any person who acts under a warrant so issued. *Id.*

2. JURISDICTION AND POWER OF.

Ejectment—Determination of Tenancy—“Legal Notice to quit.”—By s. 50 of the County Courts Act, 1856, jurisdiction in ejectment is given to the county courts in cases where neither the rent nor the value of the premises exceeds 50*l.* a year, and the tenant's term and interest “shall have expired, or shall have been determined either by the landlord or the tenant by a legal notice to quit.”—The plaintiff let to the defendant a house for three years at a rent of 3*l.* 6*s.* 8*d.* a month, payable monthly; the agreement of tenancy contained a power of re-entry on non-payment of any part of the rent for twenty-one days after the day of payment, or in case of the breach or non-performance of any of the conditions in the agreement. A month's rent having been in arrear for more than twenty-one days, the plaintiff gave the defendant notice to quit at the end of the next month of the term, alleging as breaches non-payment of rent and a breach of a condition in the agreement:—Held, that a “legal notice to quit” must be taken to mean the notice to quit required by law and not one depending on the express stipulation of the parties; that the tenancy had not, therefore, been determined within the meaning of the section, and that an action to recover possession of the premises could not be brought in the county court. *Friend v. Shaw*, 20 Q. B. D. 374; 57 L. J., Q. B. 225; 58 L. T. 89; 36 W. R. 236; 52 J. P. 438—D.

“Agreement for Sale, Purchase, or Lease of any Property” —Footpath.—A plaintiff was entered in a county court claiming specific performance of an agreement that the plaintiff should have the free and exclusive use of a footpath, and that the defendant would not grant permission to any other person to use it, and also claiming damages for an alleged breach of the agreement:—Held, on rule for prohibition, that the agreement was not “for the sale, purchase, or lease of any property” within the meaning of s. 9 of the County Courts Act, 1867, and that prohibition must therefore issue as to the claim for specific performance, but that the action must proceed as to the claim for damages. *Reg. v. Westmoreland County Court Judge*, 58 L. T. 417; 36 W. R. 477—D.

Title to Lands—Apportionment of Rent.—By the County Courts Act, 1867, s. 12, jurisdiction is given to the county courts “to try any action in which the title to hereditaments shall come in question where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of twenty pounds by the year.” The plaintiff was the lessee of certain premises at an

annual rental of 56*l.*, including a party-wall which separated his house from that of the defendant, who denied the plaintiff's title to the wall, and committed a trespass upon it:—Held, that inasmuch as the only portion of the premises the title to which was in dispute was under the annual value of 20*l.*, the county court had jurisdiction to try the action. *Stolworthy v. Powell*, 55 L. J., Q. B. 228; 54 L. T. 795—D.

Detinue—Order for delivery of Specific Chattel.—In an action of detinue brought in the county court, the county court judge has jurisdiction to make an order for the delivery by the defendant of the specific chattel wrongfully detained, without giving him the option of paying its assessed value as an alternative. *Winfield v. Boothroyd*, 54 L. T. 574; 34 W. R. 501—D.

Delivery up of Deposit Note for over £50.—The plaintiff brought an action in a county court for the delivery up to him of a deposit note for 65*l.* which was detained by the defendants. Upon an objection as to the jurisdiction:—Held, that, the value to the plaintiff of the deposit note being merely the amount represented by the cost and trouble he would be put to in proving his title to the money in the event of the note being withheld, the county court had jurisdiction to try the case. *Clegg v. Baretta*, 56 L. T. 775—D.

Warrant of Execution—Goods in Foreign District—Negligence of High Bailiff.—The jurisdiction given by s. 115 of the County Courts Act, 1846, to a county court judge, enabling him to order a bailiff to compensate a plaintiff who has suffered damage by his neglect, connivance, or omission in levying an execution can only be exercised by him against the bailiffs of his own court. Execution was issued in a county court, and the warrant was sent for execution to a foreign county court, and the high bailiff of such court was guilty of negligence in levying under it:—Held, that the judge of the home court had no power under s. 115 to order the high bailiff of the foreign court to pay damages to the plaintiff, who had been injured by his negligence, and that the high bailiff was entitled to a prohibition. *Reg. v. Shropshire County Court Judge, or Rogers*, 20 Q. B. D. 242; 57 L. J., Q. B. 143; 58 L. T. 86; 36 W. R. 476—D.

In Bankruptcy.—See BANKRUPTCY (JURISDICTION).

—Committal of Witness.—A county court judge sitting in bankruptcy summoned a person to attend and give evidence under s. 96 of the Bankruptcy Act, 1869; this summons was disobeyed, and the judge thereupon made an order for the committal of the person so summoned:—Held, that the remedy for disobedience to the summons was not confined to that prescribed by s. 96, but that the judge had power, under s. 66 (which gives judges of county courts, for the purposes of the act, all the powers and jurisdiction of judges of the High Court of Chancery), to make the order for committal. *Reg. v. Croydon County Court Judge*, 13 Q. B. D. 963; 53 L. J., Q. B. 545; 51 L. T. 102; 33 W. R. 68—C. A.

In case of Applications for New Trials.]—See post, cols. 555, 556.

Committal Order under Debtors Act—"Open Court."—By s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), orders for committal of defaulting debtors must be made by a county court judge in open court. *Kenyon v. Eastwood*, 57 L. J., Q. B. 455—D.

A county court judge sat, for the purpose of hearing summonses for committal under the provisions of s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), and for all business except jury cases, in a small room which he also used at other times as his private room; it communicated with a larger room, where was the usual raised bench and jury-box, by a door which was kept open during the hearing of these summonses, and the names of the parties were, if necessary, called in the larger room. The public had access to the smaller room as well as the larger.—Held, that orders for committal made under these circumstances were not made in open court, and that they could not be enforced. *Ib.*

— **Form of Order—Prohibition.]—**On the hearing of a judgment summons in a county court the judge committed the defendant but suspended the order. The only written document which had been drawn up was in the books of the county court, in the form given in the schedule to the County Court Rules, 1886, among the forms of books which, by Ord. II. r. 2, the registrar is directed to keep, headed "Book H.—Summonses for Commitment, Interpleader, and Minutes of Orders thereon." The defendant applied for a prohibition on the ground that the order did not show on its face the ground on which it was issued, as required by s. 5, sub-s. 1 (a), of the Debtors Act, 1869.—Held, that the Minute of the order in Book H. (which did not show on its face the ground on which the order was issued) was not the order within the meaning of the Debtors Act, but that, as the order, if it were afterwards drawn up as directed by Ord. XXV. r. 33, of the County Court Rules, 1886, would sufficiently comply with the act, the application for a prohibition must be refused. *Harris v. Slater*, 21 Q. B. D. 359; 57 L. J., Q. B. 539; 37 W. R. 56—D.

— **Jurisdiction to make second Order on Cancellation of first.]—**A defendant in a county court having made default in payment of 20*l.* due under a judgment, an order was made to commit him to prison. He was, however, never arrested nor imprisoned under the order, which according to Ord. XXV. r. 33, of the County Court Rules, 1886, expired when a year had elapsed from its date.—Held, upon motion for prohibition, that as no arrest nor imprisonment had ever taken place upon this order before its expiration, and as the defendant was still in default, the county court judge had power to make a second order of commitment. *Reg. v. Stonor or Brompton County Court Judge*, 57 L. J., Q. B. 510; 59 L. T. 669—D.

— **Judgment in Superior Court.]—**A county court judge has power to enforce the order or judgment of the High Court, where the High Court has made no order for payment by instalments, by directing payment by instalments of the amount due under such order or judgment,

and to commit the debtor in default. But where the High Court has made an order for payment by instalments the county court has no power to vary that order. *Addington, Ex parte, Ives, In re*, 16 Q. B. D. 665; 55 L. J., Q. B. 246; 54 L. T. 877; 34 W. R. 593; 3 M. B. R. 83—Cave, J.

Contempt of Court—Wilful Insult—Sentence before Warrant.]—A warrant for the committal to prison of a person guilty of a wilful insult during the sitting of a county court, issued at the rising of the court, is regular, although the judge orally sentenced him to pay a fine, with imprisonment in default, and the sentence was entered in the registrar's book. *Reg. v. Staffordshire County Court Judge or Jordan*, 57 L. J., Q. B. 483; 36 W. R. 796—C. A. Affirming 36 W. R. 589—D.

— **Form of Order—Particulars should be stated.]—**An order was made in an action in a county court upon one Harris, as acting manager of a certain partnership fund, to pay into court within fourteen days the sum of 65*l.* odd, and to deliver up certain documents. Harris did deliver up the documents, but failed to pay in the money, whereupon an order of committal was made out by the county court judge, on the ground that Harris, in his fiduciary position had been guilty of contempt of court by neglecting to obey the previous order. The committal order merely recited the terms of the original order, and did not specify any particular breach.—Held, that it was immaterial whether the process of committal was by an order of committal or a writ of attachment, since the distinction no longer existed in chancery practice, according to *Harvey v. Harvey* (26 Ch. D. 644); but that the above order was bad for uncertainty, since it did not specify in what particular Harris was guilty of contempt, so as to enable him to purge such contempt. *Reg. v. Lambeth County Court Judge*, 36 W. R. 475—D.

In Admiralty.]—See SHIPPING (JURISDICTION).

Over Friendly Societies.]—See FRIENDLY SOCIETY.

3. ACTIONS REMITTED TO.

a. In what Cases.

Counter-claim for unliquidated Damages.]—Where an action has been remitted under 19 & 20 Vict. c. 108, s. 26, by consent of the defendant, to the county court for trial, and the defendant has appeared in the county court, a writ of prohibition will not be granted, even though there be a counter-claim for unliquidated damages. *Moufflet v. Washburn*, 54 L. T. 16—D.

An action, although for a sum not exceeding 50*l.*, cannot be remitted under 19 & 20 Vict. c. 108, s. 26, to the county court for trial if there is a counter-claim for unliquidated damages. *Mackay v. Bamister*, 16 Q. B. D. 174; 55 L. J., Q. B. 106; 53 L. T. 567; 34 W. R. 121—D.

Reduction of Claim below £50 by Payment or admitted Set-off.]—By 30 & 31 Vict. c. 142 (County Courts Act, 1867), s. 7, where in any action of contract brought in any of the superior

courts of common law the claim indorsed on the writ does not exceed 50*l.*, or "where such claim, though it originally exceeded fifty pounds, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding fifty pounds," the defendant may apply to a judge at chambers who may order the action to be tried in the county court:—Held, that the section applies where a payment or set-off reducing the claim below 50*l.* appears on the writ to be admitted by the plaintiff, although such payment or set-off is not also admitted by the defendant. *Percival v. Pedley*, 18 Q. B. D. 635; 35 W. R. 566—D.

An action for a liquidated demand exceeding 50*l.* cannot be remitted to the county court, though the amount of the claim has been reduced below that sum by payment made before service, but after the issuing of the writ of summons. *Donohoe v. Donohoe*, 16 L. R., Ir. 135—Ex. D.

Payment by the defendant of part of the plaintiff's claim pursuant to a judgment under Ord. XIV. r. 4, is a reduction of such claim within s. 26 of the County Courts Act, 1856, and when the claim is reduced by such payment to a sum not exceeding 50*l.*, the action may be remitted to a county court for trial. *Gray v. Hopper*, 21 Q. B. D. 246; 57 L. J., Q. B. 505; 59 L. T. 286; 36 W. R. 746—C. A.

A plaintiff claimed for 220*l.* The defendant denied the claim in toto, and counter-claimed for 203*l.* The plaintiff admitted the counter-claim and applied to a judge at chambers for the remittal of the cause to the county court under s. 26 of 19 & 20 Vict. c. 108, as for a claim not exceeding 17*l.*, and obtained an order therefor:—Held, that the judge was right in remitting the action, inasmuch as the amount in dispute did not exceed 50*l.*, and that the fact that the defendant "counter-claimed" for the amount due to him did not prevent the amount being treated as a "set-off" against the plaintiff's claim under s. 18 of the Judicature Act, 1884. *Lewis v. Lewis*, 20 Q. B. D. 56; 57 L. J., Q. B. 38; 57 L. T. 715; 36 W. R. 63—D.

Action of Tort—Slander—30 & 31 Vict. c. 142, s. 10.—Notwithstanding the provisions of s. 67 of the Judicature Act, 1873, which applies the provisions of s. 10 of the County Courts Act, 1867, to "all actions in the High Court in which any relief is sought which can be given in a county court," there is still jurisdiction, under s. 10 of the County Courts Act, 1867, to remit an action for slander to a county court for trial. *Stokes v. Stokes*, 19 Q. B. D. 419; 56 L. J., Q. B. 494; 36 W. R. 28—C. A. Affirming 56 L. T. 712—D.

Power to make Order without Affidavit.—The High Court has no jurisdiction to remit an action of tort to the county court under s. 10 of the 30 & 31 Vict. c. 142, without an affidavit under such section as to the plaintiff's want of means. *Reg. v. Marylebone County Court Judge*, 50 L. T. 97—D.

Security for Costs—"Visible Means."—By the term "visible means," as used in s. 10 of the County Courts Act, 1867, is intended such means as could fairly be ascertained by a reasonable person in the position of the defendant. On the filing of the affidavit the jurisdiction of the judge arises, and he is to satisfy himself not

merely whether the plaintiff has any "visible means," but whether he has any means at all of paying the costs, and the judge has a judicial discretion whether he will make the order. On an application under the above section, it appeared from the affidavit that the defendant was in possession of certain property of the plaintiff under a claim for rent for 5,929*l.*; that the plaintiff had no property upon which an execution under a judgment for 2,404*l.* could be levied; that his furniture had been sold under an execution, and that he had assigned his property for the benefit of his creditors. It also appeared that the plaintiff was being employed as a colliery manager at a weekly wage of 4*l.*, the employment being determinable on three months' notice, or on payment of three months' salary in lieu of notice, or without notice in the event of wilful misconduct:—Held, that whether or not the salary could be attached, the plaintiff had no substantial means of paying the costs of the action in the event of the verdict being for the defendant, and that an order was rightly made under s. 10. *Counsel v. Garvie* (Ir. R. 5 C. L. 74) considered. *Lea v. Parker*, 13 Q. B. D. 835; 54 L. J., Q. B. 38; 33 W. R. 101—C. A.

Appearance entered by one Defendant—Motion to remit by another Defendant.—A writ was issued against A. as sole defendant in an action of tort, and served upon him; and an appearance was entered by A., requiring a statement of claim. Subsequently the plaintiff obtained leave to amend the writ by adding B. as a co-defendant in the action, and the writ, so amended, was served upon B. B., within the prescribed period (eight days), moved that in default of the plaintiff giving security for costs, the action should be remitted to the Civil Bill Court in which the defendants were described in the writ as residing, grounding the motion on the usual affidavit, that the plaintiff had no visible means:—Held, that in default of the plaintiff giving security for costs the action should be remitted; but that such security should be given for the costs of the defendant B. only. *Fagan v. Monks*, 20 L. R., Ir. 1—C. A.

b. Practice after Action Remitted.

Delay in Lodging Writ and Order.—Where an action is remitted to the county court under 30 & 31 Vict. c. 142, s. 10, and the plaintiff does not lodge the original writ and the order with the registrar of the county court, the proper course for the defendant to pursue is to apply by summons at chambers to compel the plaintiff either to proceed with the action or abandon it. The county court judge cannot refuse to hear the action on the ground that there has been delay in lodging the writ and order with the registrar. *Driscoll v. King*, 49 L. T. 599; S. C., nom. *Reg. v. Holroyd*, 32 W. R. 370—D.

Transfer from Chancery Division.—Where an order was made transferring an action commenced in the Chancery Division to a county court, and the plaintiff failed to enter the action in the county court:—Held, on motion by the defendant, that the superior court had jurisdiction to vary the order of transfer by directing

the plaintiff within one week from service of this order to lodge the necessary documents with the registrar of the county court to complete the transfer, the costs to be in the discretion of the county court. *David v. Howe*, 27 Ch. D. 533; 53 L. J., Ch. 1053; 50 L. T. 753; 32 W. R. 844—V.-C. B.

Power of County Court Judge to add Defendant.—Where an action has been remitted for trial in the county court under s. 10 of the County Courts Act, 1867, the county court judge has no power to add a defendant without his consent. *Mulleneisen v. Coulson*, 20 Q. B. D. 667; 57 L. J., Q. B. 334; 36 W. R. 524—D.

Costs—Power of High Court over.—An action in which the defendant paid money into court was ordered to be tried in a county court. At the trial the judge found that the plaintiff was entitled to recover for certain work done, and determined the rate at which the work was to be paid for, leaving it to the registrar to ascertain the amount due by calculation. The result was that the plaintiff recovered 2s. 3d. beyond the sum paid into court. The county court judge expressed no opinion on the question of costs. The defendant applied to a divisional court for an order that the plaintiff should pay to the defendant his costs of the action, or that each party should pay his own costs. The court held, that they had no jurisdiction to make an order, and refused the application. On appeal, held, that the words "subject to the provisions of the principal act and these rules" in Ord. LXV. r. 4, incorporated the provision in r. 1, that costs shall be in the discretion of the court or judge, and therefore the court had jurisdiction. Order made, that the plaintiff should recover costs only up to the time of payment into court, and each party should pay his own costs of the trial. *Emery or Emery v. Sandes*, 14 Q. B. D. 6; 54 L. J., Q. B. 82; 51 L. T. 641; 33 W. R. 187—C. A.

Appeal—New Trial—19 & 20 Vict. c. 108, s. 26.—Rules 3 and 4 of Ord. XXXIX. of the Rules of the Supreme Court, 1883, have no application to motions for new trial in actions remitted to the county court for trial under 19 & 20 Vict. c. 108, s. 26. *Pritchard v. Pritchard*, 14 Q. B. D. 55; 54 L. J., Q. B. 30; 51 L. T. 859; 33 W. R. 198—D.

In such actions a motion for new trial must still be made within the time limited by the old practice. *Id.*

Order LIX., r. 9, does not apply to cases in which the issues in an action are remitted to a county court for trial under 19 & 20 Vict. c. 108, s. 26. In such cases, therefore, an application for a new trial must still be by motion for a rule nisi under the old practice. *Hughes v. Finney*, 19 Q. B. D. 522; 56 L. J., Q. B. 643; 35 W. R. 807; 51 J. P. 582—D.

Where an action has been remitted for trial to a county court under 19 & 20 Vict. c. 108, s. 26, and has been tried by a judge without a jury, the application for a new trial must continue to be made to a divisional court. *Swansea Co-operative Building Society v. Davies*, 12 Q. B. D. 21; 53 L. J., Q. B. 64; 49 L. T. 603; 32 W. R. 185—D.

4. TRANSFER FROM COUNTY COURT.

Employers' Liability Act — Removal into Superior Court.—S. 39 of the County Courts Act, 1856, entitles the defendant "in any action of tort" where the claim exceeds 5*l.* to a stay of proceedings upon certain conditions as to giving security for the amount claimed, and the costs of trial in one of the superior courts of common law:—Held, that this section was intended to apply only to actions which could be brought either in one of the superior courts or in a county court, and therefore did not apply to an action under the Employers' Liability Act, 1880, which by s. 6 of that act must be brought in a county court. *Reg. v. City of London Court Judge or Claxton v. Lucas*, 14 Q. B. D. 905; 54 L. J., Q. B. 330; 52 L. T. 537; 33 W. R. 700—C. A. Affirming 49 J. P. 407—D.

An action to recover damages for personal injuries occasioned through the negligence of a fellow servant of the plaintiff's having been brought in the county court, under the Employers' Liability Act, 1880, the plaintiff obtained a conditional order to have it removed into a superior court, the plaintiff's wages were 60*l.* a-year, and he claimed 180*l.* damages. There was medical evidence showing that he had sustained serious and permanent injury, and it was admitted that more than 50*l.* might reasonably be awarded; but there were not any other special circumstances shown in support of the application:—Held, that the county court would have power to award damages exceeding 50*l.*, and for any amount within the statutory limit of three years' wages, and per Dowse, B. (diss. Andrews, J.), that no sufficient grounds were shown for the removal of the action from the county court. *McEvoy v. Waterford Steamship Company*, 16 L. R., Ir. 291—Ex. D.

In an action commenced in the civil bill court to recover damages for the death of the plaintiff's late husband, who had died from injuries sustained while employed as second mate and pilot on board a steamer of the defendants, and also in superintendence of the loading and discharging of cargo, the plaintiff applied to move the action into the superior court:—Held, that it did not sufficiently appear from the plaintiff's affidavit, which described the employment of the deceased as above stated, that the deceased was a workman within the meaning of the Employers' Liability Act, 1880, and that the application should therefore be refused. It lies upon the party making such application to show distinctly that the case comes within the statute. *Hanrahan v. Limerick Steamship Company*, 18 L. R., Ir. 135—Ex. D.

5. PRACTICE.

a. In General.

Payment into Court with Denial of Liability.—The defendant in an action in a county court paid money into court, stating at the same time in a memorandum addressed to the registrar that the payment was made "without prejudice to the defendant's defence to this action and while denying the plaintiff's cause of action":—Held, that the payment into court was not an admission of liability, and that the defendant was entitled to dispute his liability at the hearing. *Harper v. Davis*, 19 Q. B. D. 170; 56 L. J., Q. B. 444; 36 W. R. 77—D.

The County Court Rules, 1886, embody the results of the decision in *Berdan v. Greenwood* (3 Ex. D. 251), and apart from the notice the defendant was entitled to pay money into court and afterwards to dispute his liability at the hearing. *Id.*—Per Wills, J.

Administration Order—Right to.]—A person interested in the estate of a deceased person is not entitled as of right to an administration order in a county court, the combined effect of Ord. VI. r. 6, and Ord. XXII. r. 11, of the County Court Rules, 1886, being to place the granting of such order within the discretion of the county court judge. *Pearson v. Pearson*, 56 L. T. 445—D.

Solicitor—Right of Audience—Examination of Debtor.]—The Bankruptcy Act, 1883, s. 17, sub-s. 4, enacts with reference to the public examination of the debtor under that act, "that any creditor who has tendered a proof, or his representative authorized in writing, may question the debtor concerning his affairs, and the causes of his failure":—Held, that a solicitor who appears at a bankruptcy court for a creditor who has tendered a proof, is the creditor's representative within the meaning of that sub-section, and is therefore not entitled so to question the debtor without being authorized in writing, and producing his authority if required by the court to do so. *Reg. v. Greenwich County Court (Registrar)*, 15 Q. B. D. 54; 54 L. J., Q. B. 392; 53 L. T. 902; 33 W. R. 671; 2 M. B. R. 175—C. A.

Notice of Demand of Jury—Fifteen Clear Days before "Return-day."]—Under Ord. XXXIX. (b), r. 4, of the County Court Rules, 1875, notice of demand for a jury in actions brought under the Employers' Liability Act, 1880, must be given to the registrar of the court "fifteen clear days at least before the return-day":—Held, that "return-day" in the above rule meant the day originally fixed for the hearing as distinguished from the day of actual hearing. *Reg. v. Leeds County Court (Registrar)*, 16 Q. B. D. 691; 55 L. J., Q. B. 365; 54 L. T. 873; 34 W. R. 487—D.

New Trial—Jurisdiction to hear Case when Notice insufficient.]—Ord. XXVIII. r. 1, of the County Court Rules, 1875, provides that a person applying for a new trial in a county court shall give the opposite party seven clear days' notice in writing of his intention so to apply. A notice was given by the defendant to the plaintiffs by letter on the 8th November, stating that he would apply on the 12th November for a new trial. The plaintiffs refused to accept this notice as being too short, and did not attend at the hearing on the 12th. The fact that the plaintiffs objected to the notice was brought before the judge, who, however, made an order for a new trial. The plaintiffs applied for a prohibition to restrain the judge from hearing the case on the new trial:—Held, that a prohibition ought not to be granted, as the proper proceeding to have been adopted would have been to have made an application to the judge to set aside the order for a new trial as irregular. *Jones (Trustees) v. Gittins*, 51 L. T. 599—D.

Refusal—Leave to make Fresh Application—Jurisdiction.]—A county court judge who,

on the verdict of a jury being given at the trial of an action, hears an application for a new trial and refuses to grant it on the grounds then assigned, but gives leave to the applicant to make another application at a later date on fresh materials, is not *functus officio* with respect to the action so as to have no jurisdiction to entertain the second application and grant a new trial if he thinks fit. *Great Northern Railway v. Mossop* (17 C. B. 130), distinguished. *Mowon v. London Tramways Company*, or *Reg. v. Greenwich County Court Judge*, 60 L. T. 248; 37 W. R. 132—C. A. Affirming 57 L. J., Q. B. 446—D.

Misconduct of Jury—Evidence of—Prohibition.]—Prohibition will not lie where a county court judge has granted a new trial on the ground of the misconduct of the jury, although there was no evidence to warrant him in so doing if the subject of the action and the application for a new trial were within his competence and jurisdiction. *Id.*

Judgment Debt—Interest.]—A county court judgment debt does not carry interest under 1 & 2 Vict. c. 110, s. 17. *Reg. v. Essex County Court Judge*, 18 Q. B. D. 704; 56 L. J., Q. B. 315; 57 L. T. 643; 35 W. R. 511; 51 J. P. 549—C. A.

Judgment—Effect of, on Trial in High Court for same Cause of Action.]—See ESTOPPEL.

b. Costs.

Equitable Jurisdiction—Discretion—Administration Action.]—A county court judge is not bound by the rule in equity which prevailed before the Judicature Acts,—that the plaintiff in an administration suit, properly brought, was entitled to his costs out of the estate. The judge has, by virtue of 9 & 10 Vict. c. 95, s. 88, and 28 & 29 Vict. c. 99, s. 21, an absolute discretion over such costs, and may therefore order the plaintiff to pay the costs of the action, and no appeal will lie against his order. *Cooper v. Busbridge* (16 L. T. 5) discussed. *Plumb v. Craker*, 16 Q. B. D. 40; 55 L. J., Q. B. 116; 55 L. T. 404—D.

Certificate on Higher Scale—Grounds for giving.]—In awarding costs on the higher scale to a successful party under s. 5 of the County Courts Salaries Act, 1882, it is not sufficient for the judge to certify that the action involved a question of character:—*Quære*, whether the court will inquire into the sufficiency of the grounds of a certificate so framed. *Reg. v. City of London Court Judge*, 18 Q. B. D. 105; 56 L. J., Q. B. 79; 55 L. T. 736; 35 W. R. 123—D.

A certificate under s. 5 should follow the language of the section. *Id.*—Per Stephen, J.

A county court judge has no power to order costs to be taxed on the 100% scale when there is a less amount claimed in the action, unless he certify that the action involved some novel or difficult point of law, or that the question litigated was of importance to some class or body of persons or of general or public interest. The reservation of the powers, rights, and privileges of the judge of the City of London Court in s. 35 of the County Court Act, 1867, does not confer upon

him any greater power over costs than that given to judges of county courts. *Howard v. Graves*, 52 L. T. 858—D.

Taxation—Scale of Costs in Actions under £10.]

—The Appendix to the County Court Rules, 1886, contains a scale of costs as between solicitor and client where the amount recovered exceeds 2*l.* and does not exceed 10*l.*, and provides that no other costs are to be allowed where the amount claimed does not exceed 10*l.*, unless the judge certifies under s. 5 of the County Courts (Costs and Salaries) Act, 1882. The plaintiff having commenced an action in a county court for 10*l.*, consulted solicitors with reference to it, who after taking various steps to investigate the claim recommended a settlement, which the plaintiff refused to accept. The solicitors then returned the papers to the plaintiff, who proceeded with the action in person :—Held, that upon the taxation of the solicitors' bill for the services rendered by them, it was a question for the master whether the solicitors had, in fact, acted in the conduct of the action, and that if they appeared to have so acted, they could recover no other costs than those specified in the appendix. *Emanuel and Company, In re* (9 Q. B. D. 408) considered. *Dod, Longstaffe and Company, In re, Lamond, Ex parte*, 21 Q. B. D. 242; 57 L. J., Q. B. 503; 59 L. T. 467—D.

—Costs of Returning Officer at Elections.]—

See ELECTION LAW.

6. APPEAL.

a. In what Cases.

Application to Superior Court for Rule—

“**[Party.]**”—Query, whether a solicitor, when his right of audience has been denied to him, is “a party,” within the meaning of s. 43 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), and is therefore entitled to apply to the superior court for a rule to compel the county court judge to give him audience. *Reg. v. Greenwich County Court (Registrar)*, ante, col. 555.

In Remitted Actions.]—See cases, ante, col. 553.

Interlocutory Proceeding—New Trial.]—

A motion for a new trial before a county court judge is an interlocutory proceeding from which no appeal lies to the Divisional Court. *Jacobs v. Dawkes*, 56 L. J., Q. B. 446; 56 L. T. 919; 35 W. R. 649—D. See also *McHardy v. Liptrott*, post, col. 559.

No appeal lies from the decision of a county court judge refusing to grant a new trial when applied for on the ground solely of the verdict being against the weight of evidence. *Wilton v. Leeds Forge Valley Company*, 32 W. R. 461—D.

Equitable Jurisdiction.]—An appeal lies from an order made in an interlocutory proceeding, by a judge of a county court, by virtue of the equitable jurisdiction conferred by the County Courts Act, 1865. *Jonas v. Long*, 20 Q. B. D. 564; 57 L. J., Q. B. 298; 58 L. T. 787; 36 W. R. 315; 52 J. P. 468—C. A.

Interpleader—Amount not exceeding £20.]—

An appeal does not lie, even by leave of the judge,

from the decision of the county court in proceedings in interpleader, where neither the money claimed, nor the value of the goods or chattels claimed, or of the proceeds thereof, exceeds 20*l.* *Collis v. Lewis*, 20 Q. B. D. 202; 57 L. J., Q. B. 167; 57 L. T. 716; 36 W. R. 472—D.

—Less Amount than £20 deposited.]—Where in an interpleader proceeding in a county court the claimant deposits the amount of the value of the goods claimed as fixed by appraisal under s. 72 of the County Courts Act, 1856, he cannot, if the amount so deposited be less than 20*l.*, claim to appeal under s. 68 of the act on the ground that the value of the goods was over 20*l.*, and that a less amount was deposited because it was sufficient to satisfy the execution creditor's judgment. *White v. Milne*, 58 L. T. 225—D.

—Costs of Interpleader.]—In an interpleader proceeding on the application of the sheriff, the claimant, if successful, is entitled to recover as costs from the execution creditor the sheriff's charges subsequent to the interpleader order. The incidence of such charges is a matter of law and a proper subject of appeal from a county court to the High Court under the County Courts Act, 1850 (13 & 14 Vict. c. 61), s. 14. *Goodman v. Blake*, 19 Q. B. D. 77; 57 L. T. 494—D.

Decision under Agricultural Holdings Act.]—

An appeal lies from a decision of a county court judge in the matter of a dispute heard and determined by him under s. 46 of the Agricultural Holdings Act, 1883, under the general powers of appeal contained in s. 13 of the County Courts Act, 1867. *Hammer v. King*, 57 L. T. 367; 51 J. P. 804—D.

Friendly Society—Rules.]—In the case of an unregistered society under s. 30, sub-s. 10, of the Act of 1875 (explained by 42 Vict. c. 9), the right of appeal to a county court or court of summary jurisdiction overrides any rules of the society to the contrary. *Knowles v. Booth*, 32 W. R. 432—D.

—“Application to County Court.”]—By s. 22 of the Friendly Societies Act, 1875, disputes between members of a friendly society and the society or its officers are to be decided in manner directed by the rules of the society, and by sub-s. (d), “where the rules contain no direction as to disputes, or where no decision is made on a dispute within forty days after application to the society for a reference under its rules, the member or person aggrieved may apply either to the county court, or to a court of summary jurisdiction, which may hear and determine the matter in dispute” :—Held, that the application to the county court contemplated by sub-s. (d) must be taken to be an application in the form of an action commenced in the county court, and not a reference to the county court judge sitting as an arbitrator, and that there was an appeal from the decision upon such application to the High Court. *Wilkinson v. Jagger*, 20 Q. B. D. 423; 57 L. J., Q. B. 254; 58 L. T. 487; 36 W. R. 169; 52 J. P. 533—D.

“Determination of the Court”—Judgment pro formâ.]—A divisional court has no jurisdiction to hear a motion to set aside a judgment

entered by a county court judge pro forma in order to expedite an appeal, such entry of judgment not being a determination or direction of a county court within the meaning of the 14th section of 13 & 14 Vict. c. 61. *Chapman v. Withers*, 58 L. T. 24—D.

Committal for Contempt.—The superior court will decline to exercise any appellate jurisdiction over the county court in matters of fine or committal for contempt, except where there is no reasonable evidence of any contempt having been committed, and the liberty of the subject requires protection. *Reg. v. Jordan*, 36 W. R. 589—D.

To Court of Appeal in Admiralty Matter.—*See SHIPPING.*

b. Mode of and Time for.

Appeal by Motion—Appeal by Special Case abolished.—All appeals from county courts to the Queen's Bench Division of the High Court must, since the Crown Office Rules, 1886 (Ord. LIX. rr. 10 et seq.), be by notice of motion, notwithstanding the 13 & 14 Vict. c. 61, ss. 14, 15, which gave an appeal by special case. *Reg. v. Kettle*, 17 Q. B. D. 761; 55 L. J., Q. B. 470; 54 L. T. 875; 34 W. R. 776—D.

— **Before Crown Office Rules, 1886.**—An appeal from the decision of a county court judge should be by motion ex parte in the first instance, under the County Courts Act, 1875, s. 6, and not by giving notice of motion under Ord. XXXIX. r. 3. *Shapcott v. Chappell* (12 Q. B. D. 58) questioned. *Mathews v. Ovey*, 13 Q. B. D. 403; 53 L. J., Q. B. 439; 50 L. T. 776—C. A.

The provisions of Ord. XXXIX. r. 6, apply to motions for new trials in county court cases made on appeal under the provisions of the County Court Act, 1875 (38 & 39 Vict. c. 50), s. 6. A new trial will not be granted in such a case, on the ground of the improper rejection of evidence, unless some substantial wrong or miscarriage has been occasioned. *Shapcott v. Chappell*, 12 Q. B. D. 58; 53 L. J., Q. B. 77; 32 W. R. 183—D.

Time for—From Judgment not from Refusal of New Trial.—In an action tried in the county court an appeal will not lie against the decision of the county court judge on an application for a new trial; so that the time within which the unsuccessful party in the county court may appeal to the Queen's Bench Division begins to run from the date of the judgment at the trial, and not from the date of the judge's decision on the application for a new trial. *McHardy v. Liptrott*, 19 Q. B. D. 151; 56 L. J., Q. B. 459—D.

Where an application for a new trial was made to a county court judge within two days of the original trial, and he took a fortnight to consider and then refused to grant a new trial, and a rule nisi for a new trial was obtained from the High Court within two days of such refusal:—Held, that such rule was obtained out of time, as the eight days for appealing began to run from the day of the original trial, and not from the refusal of the county court judge. *Morris v. Lowe*, 34 W. R. 45—D.

— **From Verdict not from Judgment.**—When the finding of a jury in a county court is

complained of, the twenty-one days within which an appeal may be entered is to be calculated from the time when the verdict was given although the judgment upon it was not given until a subsequent day. *Rawnsley v. Lancashire and Yorkshire Railway*, 35 W. R. 771—D.

c. Practice.

Security for Costs.—The plaintiff, an infant, brought an action in the county court, and sued by his next friend. Judgment was given for the defendants with costs, but they were unable to obtain payment owing to the next friend's insolvency. The plaintiff appealed from the judgment. On an application by the defendants for an order that the next friend should give security for the costs of the appeal:—Held, that by Rules of Supreme Court, 1883, Ord. LIX., r. 17, which applies the provisions of Ord. LVIII., r. 15, to appeals from county courts, there was power to make an order, and as the next friend was insolvent, and was prosecuting the appeal for the benefit of another person, she must give security. *Swain v. Follows*, 18 Q. B. D. 585; 56 L. J., Q. B. 310; 56 L. T. 335; 35 W. R. 408—D.

Leave of Judge—Discretion as to Terms.—A county court judge having given a defendant leave to appeal, but subject to a condition that he should pay the plaintiff's costs of the appeal in any event, and should also, in case the appeal was unsuccessful, pay the costs of the trial upon the higher scale,—the divisional court held that it had no power to interfere with the discretion vested in him by 30 & 31 Vict. c. 142, s. 13. *Goodes v. Cluff*, 13 Q. B. D. 694—D.

Power of High Court to enter Judgment.—In an appeal from a county court in an action for damages, the court has power to give judgment for the plaintiff for the sum claimed, if satisfied, upon the whole of the evidence before the county court judge, that judgment ought to be so entered, although judgment had been given by the county court judge for the defendant. *King v. Oxford Co-operative Society*, 51 L. T. 94—D.

COURT.

- I. LIVERPOOL COURT OF PASSAGE, 561.
- II. PALATINE COURT OF LANCASTER, 561.
- III. SALFORD HUNDRED COURT, 563.
- IV. STANNARIES COURT, 563.
- V. IN OTHER CASES.
 1. *Of Appeal.*—*See APPEAL.*
 2. *Of Admiralty.*—*See SHIPPING.*
 3. *Of Bankruptcy.*—*See BANKRUPTCY.*
 4. *County Court.*—*See COUNTY COURT.*
 5. *Of Divorce.*—*See HUSBAND AND WIFE.*
 6. *Of Probate.*—*See WILL.*
 7. *Mayor's Court.*—*See MAYOR'S COURT.*

I. LIVERPOOL COURT OF PASSAGE.

Power to make Rules—Rule ordering Security for Costs.—By 6 & 7 Will. 4, c. 135, s. 4, the assessor of the Liverpool Court of Passage may make rules and regulations concerning the practice and costs of the court. The assessor made a rule that in frivolous and vexatious actions the registrar should have power to order the plaintiff to give security for the defendant's costs:—Held, that the statute did not give power to make such a rule, and the rule was invalid. *Reg. v. Liverpool Mayor*, 18 Q. B. D. 510; 56 L. J., Q. B. 413; 56 L. T. 314; 35 W. R. 475—D.

Jurisdiction in Interpleader.—The rules of the Court of Passage do not give that court the jurisdiction in interpleader contained in Ord. LVII. r. 8, of the rules of the Supreme Court, 1883, and even if rules had been framed to that effect they could not give such a jurisdiction, as they would be in that respect *ultra vires*. The power to decide summarily without consent questions in interpleader is not a "rule of law" within the meaning of s. 91 of the Judicature Act, 1873. *Speers v. Daggers*, 1 C. & E. 503—Wills, J.

Protection of Officers.—Officers of the court are not protected in the case of process executed under an interpleader order made without jurisdiction, though good on the face of it, if such order was obtained on their own application. The relief or remedy, the power to grant which is conferred on superior courts by s. 89 of the Judicature Act, 1873, only refers to the relief and remedies to be administered in the action, and as the result of the action, and not to an incidental and extraneous proceeding arising out of the levy of execution, such as interpleader. *Id.*

II. PALATINE COURT OF LANCASTER.

Administration—Intestacy—Grant De bonis non to Nominee of Duchy.—Where an intestate had died leaving no known relatives, and his estate had been partly administered by his widow, who died leaving a will, the court made a grant de bonis non to the nominee of the Duchy of Lancaster, who was the residuary legatee of the widow. *Award, In goods of*, 11 P. D. 75; 56 L. T. 673—Hannen, P.

Costs—Patent Action—Power over.—At the trial of an action in the Palatine Court to restrain the infringement of a patent, the Vice-Chancellor held that the patent was invalid in consequence of a claim being made which was bad, and dismissed the action with costs. The defendant had delivered particulars of objections, and the Vice-Chancellor stated that he was of opinion that the defendants should have the costs of their witnesses who attended to support the particulars of objections, though they had not been called. On taxation, the registrar disallowed these costs, but the Vice-Chancellor overruled his objection:—Held, that the discretion of the Court of Chancery and the Palatine Court with reference to costs was not taken away by Lord Cairns' Act and Sir John Bolt's Act in the cases which those acts enabled

those courts to try, and that these courts ought not to follow by analogy a rule which applied to courts having no discretion as to costs, and therefore the Vice-Chancellor had power to give these costs of the particulars of objections to the defendant without a certificate under s. 43 of the Patent Law Amendment Act, 1852. *Parnell v. Mort*, 29 Ch. D. 325; 53 L. T. 186; 33 W. R. 481—C. A.

Refreshers—Copies of Correspondence.—The amount of the refreshers allowed to counsel in cases in the Palatine Court is in the discretion of the taxing-master, and he is not bound by Ord. LXV. r. 27, sub-s. 48, of the rules of the Supreme Court. Where a case depended very much on the terms used in correspondence conducted in French between the plaintiffs inter se and the defendants inter se, the court refused to overrule the decision of the judge who heard the case, affirming the decision of the taxing-master, allowing the costs of copies of the correspondence in French as well as of the English translation for the use of counsel. *Ebrard v. Gassier*, 55 L. T. 741—C. A.

Judgment by Default—Setting aside.—According to the true construction of Ord. XXXIII. r. 21, of the rules of the Palatine Court of Lancaster, a party against whom judgment has been given by default must make application to set it aside within six days if the court be then sitting, and, if it be not then sitting, on the next day on which the court shall be sitting to hear such motions. An application for extension of time by a party who desires to apply to set aside a judgment made against him by default, may be made at the time when he makes the application to set aside the judgment, if the action is still pending. *Bradshaw v. Warlow*, 32 Ch. D. 403; 55 L. J., Ch. 852; 54 L. T. 438; 34 W. R. 557—C. A.

Service of Writ out of Jurisdiction—Leave to Issue.—Ord. II. r. 4, of the Chancery of Lancaster Rules, which provides that "no writ of summons for service out of the jurisdiction . . . shall be issued without the leave of the court or Vice-Chancellor," applies to all writs for service out of the jurisdiction of the Palatine Court, whether the person to be served is or is not within the jurisdiction of the High Court. Accordingly, leave of the Vice-Chancellor, or Court, of the County Palatine for issue of the writ out of the jurisdiction must be obtained before making application to the Court of Appeal under 17 & 18 Vict. c. 82, s. 8, for leave to serve the writ upon a person out of the jurisdiction of the Palatine Court, but within the jurisdiction of the High Court. *Walker v. Dodds*, 37 Ch. D. 188; 57 L. J., Ch. 206; 58 L. T. 291; 36 W. R. 133—C. A.

Fund paid in under Trustee Relief Act—Transfer to Chancery Division.—A fund had been paid by trustees into the Court of Chancery of the County Palatine of Lancaster under the Trustee Relief Act. A person claiming to be entitled to the fund, and to whom notice of the payment in had been given, resided out of the jurisdiction of that court, and applied to the Court of Appeal under s. 8 of 17 & 18 Vict. c. 82, for a transfer of the matter to the Chancery Division of the High Court, and a

transfer of the fund to the Paymaster-General. No step had been taken by the applicant in the Palatine Court:—Held, that the applicant was not a “party proceeding” in the matter within the meaning of the section, and that the court had no jurisdiction to order the fund to be transferred. *Heywood, In re*, 58 L. T. 292—C. A.

III. SALFORD HUNDRED COURT.

Jurisdiction—Omitting to plead to.—S. 7 of the Salford Hundred Court of Record Act, 1868, enacts that “no defendant shall be permitted to object to the jurisdiction of the court otherwise than by special plea, and, if the want of jurisdiction be not so pleaded, the court shall have jurisdiction for all purposes”:—Held, that the defendant, against whom judgment had been recovered in the Salford Hundred Court, he not having pleaded to the jurisdiction, could not have a writ of prohibition on the ground of want of jurisdiction, inasmuch as the above-mentioned section, under the circumstances, conferred jurisdiction on the Salford Hundred Court. *Oram v. Brearey* (2 Ex. D. 346), overruled. *Chadwick v. Ball*, 14 Q. B. D. 855; 54 L. J., Q. B. 396; 52 L. T. 949—C. A.

IV. STANNARIES COURT.

Appeal from Order of Vice-Warden—Deposit by Appellant as Security.—Notwithstanding that the appellate jurisdiction of the Lord Warden of the Stannaries has, by the Judicature Act, 1873, been transferred to the Court of Appeal, the requirements of the Stannaries Act, 1869, s. 32, as to the deposit by the appellant of 20*l.* in the hands of the Registrar of the Stannaries Court prior to appealing, are still in force. *West Devon Great Consols Mine, In re*, 38 Ch. D. 51; 57 L. J., Ch. 850; 58 L. T. 61; 36 W. R. 342—C. A.

Winding-up—Order for Inspection of Documents.—The practice of the Stannaries Court is the same as that of the High Court of Justice, that the mere fact of a petition is not enough to justify an order for inspection of books. But if grounds are shown, the petition may properly be ordered to stand over to allow the petitioner to enforce his right as a shareholder to inspection. The right of inspection under the 22nd section of the Stannaries Act, 1855, is personal to the shareholder, and does not extend to his solicitors or agents. *West Devon Great Consols Mine, In re*, 27 Ch. D. 106; 51 L. T. 841; 32 W. R. 890—C. A.

COURT FEES.

See PRACTICE.

In Bankruptcy.—See BANKRUPTCY.

COVENANT.

Whether Independent.—Covenants in a separation deed, by which respectively the

husband has covenanted to pay an annuity to a trustee for the wife, and the trustee has covenanted that the wife shall not molest the husband, must be construed as independent covenants in the absence of any express terms making them dependent, and therefore a breach of the covenant that a wife shall not molest the husband, is not an answer to an action for the annuity. *Fearon v. Aylesford (Earl)*, 14 Q. B. D. 792; 54 L. J., Q. B. 33; 52 L. T. 954; 33 W. R. 331; 49 J. P. 596—C. A.

In Conveyances.—See VENDOR AND PURCHASER.

In Leases.—See LANDLORD AND TENANT.

In Mortgages.—See MORTGAGE.

In Deeds.—See DEED AND BOND.

CREMATION.

Whether a Misdemeanour.—To burn a dead body, instead of burying it, is not a misdemeanour, unless it is so done as to amount to a public nuisance. If an inquest ought to be held upon a dead body, it is a misdemeanour so to dispose of the body as to prevent the coroner from holding the inquest. *Reg. v. Price*, 12 Q. B. D. 247; 53 L. J., M. C. 51; 33 W. R. 45 n.; 15 Cox, C. C. 389—Stephen, J. S. P. *Reg. v. Stephenson*, 13 Q. B. D. 331; 53 L. J., M. C. 176; 52 L. T. 267; 33 W. R. 44; 49 J. P. 486—C. C. R.

CRIMINAL LAW.

I. PERSONS, LIABILITY OF, 565.

II. OFFENCES.

1. *Abduction of Women and Children.*—See *infra*, 20, b.
2. *Adulteration of Food and Drink.*—See HEALTH.
3. *Assault.*—See *infra*, 20, c.
4. *Bankruptcy Act, Offences against.*—See BANKRUPTCY.
5. *Bigamy*, 566.
6. *Conspiracy*, 566.
7. *Defamation.*—See DEFAMATION.
8. *Disorderly House.*—See DISORDERLY HOUSE.
9. *Elections—Corrupt Practices.*—See ELECTION LAW.
10. *Embezzlement by Clerks or Servants*, 567.
11. *Embezzlement and Frauds by Agents, Brokers and Trustees*, 568.
12. *False Pretences*, 569.
13. *Falsification of Accounts*, 572.
14. *Felony and Felons*, 573.
15. *Forgery*, 574.
16. *Larceny and Receivers*, 574.
17. *Libel.*—See DEFAMATION.

18. *Lunatics, Ill-treatment of.* — See *infra*, 20, d.
19. *Misdemeanours*, 578.
20. *Murder, Manslaughter and Offences against the Person.*
 - a. Murder and Manslaughter, 578.
 - b. Offences against Women and Children, 580.
 - c. Assaults and Wounding, 582.
 - d. Ill-treatment of Lunatics, 583.
21. *Obscenity and Indecency*, 583.
22. *Perjury*, 583.
23. *Property, Offences as to*, 584.
24. *Railways*, 585.
25. *Rape and Offences against Women and Children.*—See *supra*, 20, b.
26. *Sanitary Laws.*—See *HEALTH*.
27. *Sedition*, 585.
28. *Treason-Felony*, 586.
29. *Unlawful Assembly*, 586.
30. *Vagrants and Vagrancy.* — See *VAGRANT*.

III. JURISDICTION, PRACTICE AND PROCEDURE.

1. *Jurisdiction*, 586.
2. *Indictment*, 587.
3. *Evidence*, 588.
4. *Trial*, 591.
5. *Bail*, 594.
6. *Error*, 594.
7. *New Trial*, 594.
8. *Prisoners*, 594.

I. PERSONS, LIABILITY OF.

Mens rea.]—I do not think that the maxim as to the mens rea has so wide an application as it is sometimes considered to have. In old times, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now to apply the maxim generally to all statutes, and it is necessary to look at the object of each act to see whether and how far knowledge is of the essence of the offence created. *Cundy v. Lezocq*, 13 Q. B. D. 207; 53 L. J., M. C. 125; 51 L. T. 265; 32 W. R. 769; 48 J. P. 599—Per Stephen, J.

Husband and Wife—Coercion.]—Upon an indictment for highway robbery with violence D. and his wife were found guilty, the jury finding as to the wife that she had acted under the compulsion of her husband:—Held, that as to the wife the verdict amounted to one of not guilty. *Reg. v. Dykes*, 15 Cox, C. C. 771—Stephen, J.

— **Evidence, Admissibility.**]—See *post*, col. 590.

Drunkards.]—See *Reg. v. Doherty*, *post*, col. 579.

II. OFFENCES.

1. **ABDUCTION OF WOMEN AND CHILDREN.**—See *infra*, 20, b.
2. **ADULTERATION OF FOOD AND DRINK.**—See *HEALTH*.

3. **ASSAULT.**—See *infra*, 20, c.

4. **BANKRUPTCY ACT, OFFENCES AGAINST.**—See *BANKRUPTCY*.

5. BIGAMY.

Evidence—Marriage *primâ facie* Illegal.]—On a trial for bigamy two certificates were produced, one purporting to be the certificate of the marriage, in 1843, of the first wife to A. prior to the marriage with the prisoner in 1875; the other purporting to be a certificate of the death of A. in 1880, subsequent to the marriage with the prisoner:—Held, that as *primâ facie* the marriage with the prisoner was illegal, the so-called first wife could give evidence on the trial of the accused. *Reg. v. Ayley*, 15 Cox, C. C. 328—Kerr, Commissioner.

Proof of First Marriage.]—Where the proof of marriage is supported by a copy of the certificate and evidence that the prisoner cohabited with a person of the same name immediately afterwards:—Held, that in the absence of witnesses of the marriage, or some further evidence, the proof was insufficient. *Reg. v. Simpson*, 15 Cox, C. C. 323—Com. Serj.

In charges of bigamy it is incumbent upon the prosecution to prove the validity of the first marriage. Where, therefore, the first marriage has been contracted without the due publication of banns required by 4 Geo. IV. c. 76, the prosecution, in order to show that the case is not within the statute, must prove that the want of due publication was unknown to one of the parties previously to the marriage in accordance with *Re v. Wroton* (4 B. & Ad. 640). *Reg. v. Kay*, 16 Cox, C. C. 292—Huddleston, B.

The prisoner went through the form of marriage with a woman whose surname was Abel. In order to conceal the fact, he published her banns in the surname of Anderson, but, except that she signed the register in the name of Anderson, there was no evidence to show that she knew of the misdescription until after the solemnisation of the marriage. Subsequently, and during her lifetime, the prisoner went through the ceremony of marriage with another woman:—Held, that as in order to render a marriage invalid within 4 Geo. IV. c. 76, s. 22, it must be contracted by both parties with a knowledge that no due publication of banns had taken place, it was incumbent on the prosecution to show that one of the parties was unaware of the misdescription, and that there was no evidence of such want of knowledge. *Ib.*

6. CONSPIRACY.

Indictment against Two—Acquittal or Conviction of both.]—Where two persons are indicted for conspiring together, and they are tried together, both must be acquitted or both convicted. *Reg. v. Manning*, 12 Q. B. D. 241; 53 L. J., M. C. 85; 51 L. T. 121; 32 W. R. 720; 48 J. P. 536—D.

Existence of—Evidence of Criminal Object.]—See *Reg. v. Deasy*, *post*, col. 586.

Conspiracy and Protection of Property—In-

timidation.]—An intimation conveyed in a letter to an employer that his shop would be picketed, in language so threatening as "to make such employer afraid," amounts to "intimidation" within the meaning of s. 7, sub-s. 1, of the Conspiracy and Protection of Property Act, 1875; whether the picketing amounts to an unlawful watching or besetting within sub-s. 4 or not. *Judge v. Bennett*, 36 W. R. 103; 52 J. P. 247—D.

7. DEFAMATION.—*See* DEFAMATION.

8. DISORDERLY HOUSE.—*See* DISORDERLY HOUSE.

9. ELECTIONS — CORRUPT PRACTICES.
—*See* ELECTION LAW.

10. EMBEZZLEMENT BY CLERKS OR SERVANTS.

Clerk or Servant—Assistant Overseer.]—Upon an indictment under 24 & 25 Vict. c. 95, s. 68, for embezzlement by a clerk or servant, it is necessary to prove that the prisoner was appointed or employed to collect or receive money for his employer. C., having been nominated by the inhabitants of a township as an assistant overseer, and the nomination not specifying as one of the duties he was to perform the duty of collecting or receiving money:—Held, that inasmuch as under 59 Geo. 4, c. 12, s. 7, an assistant overseer can only be appointed by justices for such purposes as are specified in the nomination, C. could not be convicted of embezzling rates collected by him as a clerk or servant of the inhabitants within the meaning of 24 & 25 Vict. c. 95, s. 68. *Reg. v. Coley*, 56 L. T. 747; 51 J. P. 710; 16 Cox, C. C. 226—C. C. R.

Moneys of "Copartnership".—Association not for Purposes of Gain.]—An association having for its object, not the acquisition of gain, but the spiritual and mental improvement of its members, is not a "copartnership," within the meaning of the term as used in 31 & 32 Vict. c. 116, s. 1. Consequently a member of such an association who has embezzled moneys belonging to it cannot be convicted under the above-mentioned act of embezzling the moneys of a "copartnership." *Reg. v. Robson*, 16 Q. B. D. 137; 55 L. J., M. C. 55; 53 L. T. 823; 34 W. R. 276; 50 J. P. 488; 15 Cox, C. C. 772—C. C. R.

Separate Charges included in one Indictment—Evidence of Motive and Intention.]—An indictment charged a prisoner with having as a booking clerk of certain steamship owners embezzled the moneys of his masters on three separate occasions, the charges being contained in three counts of the same indictment. In support of the first count, it was proved, amongst other things, that the prisoner received money for the carriage of animals by steamer which it was his duty to pay over to his masters' cashier; in support of the second count, that he was supplied with a number of tickets for issue to passengers by his masters' steamers, which purported to be numbered consecutively, but were not examined before they

were delivered to him. The tickets were tied up in bundles, and were in the prisoner's charge, he alone having a key of the case in which they were kept. Certain tickets, bearing numbers corresponding to the numbers of certain of the tickets in one of the bundles delivered to the prisoner, assuming such bundle to have been complete, were put in evidence, which tickets were stamped in a manner similar to other tickets which the prisoner had issued to passengers by one of the steamers, and which were notched as they would have been had they been used by passengers on board such steamer, and evidence was given that the prisoner had not handed over to the cashier any money in respect of such tickets. Evidence was also given in support of the third count, but upon this count the jury found the prisoner not guilty, while they convicted him upon the first and second counts. The jury were directed, as to the first count, that they might take into consideration the evidence given as to the prisoner's conduct in relation to the matters charged in the second and third counts; and as to the second count, that if they were of opinion, from the whole of the evidence that the prisoner had issued the tickets for money in the ordinary way, and taken the money he had received for his own use, making false entries in his books to conceal it, they might find him guilty:—Held, that the jury were justified in presuming from the evidence in support of the second count that the prisoner had issued tickets and received money for them, which he had appropriated; and that they were at liberty, in order to arrive at a conclusion upon any one of the charges, to take into consideration the evidence given in support of the other charges, notwithstanding the fact that upon one of such charges they found a verdict of not guilty. *Reg. v. Stephens*, 58 L. T. 776; 52 J. P. 823; 16 Cox, C. C. 387—C. C. R.

11. EMBEZZLEMENT AND FRAUDS BY AGENTS, BROKERS, AND TRUSTEES.

Money intrusted for Specific Purpose—Conversion of Money by Stockbroker.]—On the 2nd November, 1885, W., by letter instructed the prisoner, a stockbroker, to buy for him on the following day certain stock at 90, to hold for a rise, the time to close to be left open, and inclosed a cheque for 21½ 5s. "for cover and commission." On the 3rd November the stock specified was at 91½, and the prisoner paid the cheque into his bank without purchasing, and subsequently spent the money for his own use, the balance standing to his credit at his banker's on the 14th November being only 8½. Upon a case reserved at the trial of an indictment under 24 & 25 Vict. c. 96, s. 75, which charged the prisoner for that he having been entrusted as a broker and agent with a security for the payment of money, with a direction in writing to apply it for a specific purpose, in violation of good faith, and contrary to the terms of such direction, converted to his own use such security:—Held, that the prisoner was merely the agent of W. to hold and apply the money for which the cheque was sent for a specific purpose, and that he was rightly convicted under the circumstances of having converted the cheque to his own use, as charged in the indictment. *Reg. v. Cronmire*,

54 L. T. 580; 51 J. P. 104; 16 Cox, C. C. 42—C. C. R.

Agent—Direction in Writing—Vendee of Goods.]—B. agreed to purchase corn from S. and T. at a certain price, and received delivery orders for the same. Before actually taking delivery, B. signed an undertaking directed to S. and T. to the following effect:—"In consideration of your delivering to me the Indian corn bought this day, I hereby undertake to hand you the proceeds of the same as and when received, and to hold myself responsible for deficiency should there be any." B. subsequently sold the corn and appropriated the proceeds to his own use:—Held, that B. was not an agent but the vendee of the goods, and that s. 75 of 24 & 25 Vict. c. 96, did not apply. *Reg. v. Bredin*, 15 Cox, C. C. 412—Butt, J.

"Or other Agent."]—In 24 & 25 Vict. c. 69, s. 75,—which enacts that whosoever, having been intrusted as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith and contrary to the object or purpose for which such chattel, security, &c., was intrusted to him, sell, negotiate, &c., or in any manner convert to his own use or benefit such chattel or security, shall be guilty of a misdemeanour—the words "or other agent" apply to persons whose occupation is similar to those enumerated in the section, and do not include any ordinary agent who may from time to time be intrusted with valuable securities.—Where, therefore, the prisoner, who was not a banker, merchant, broker, or attorney, was employed by the prosecutors, who were railway contractors, to procure for them a contract for the construction of a foreign railway, and was charged under s. 75 with having misappropriated valuable securities with which the prosecutors had intrusted him in the course of his employment:—Held, that the facts disclosed no offence within the meaning of the section, and that the prisoner was not liable to be committed with a view to his extradition. *Reg. v. Portugal or De Portugal, In re*, 16 Q. B. D. 487; 55 L. J., Q. B. 567; 34 W. R. 42; 50 J. P. 501—D.

By Trustee.]—T., a fruit broker, applied to his bankers for an advance as against certain goods which had been consigned to him and were then at sea, he depositing with them the indorsed bills of lading. Before making the advance the bankers required him to sign a letter of hypothecation, by which he undertook to hold the goods in trust for the bankers, and to hand over to them the proceeds, "as and when received," to the amount of the advance:—Held, that this letter contained a declaration of an express trust, such as would make the giver of it a trustee of the proceeds within the meaning of s. 80 of the Larceny Act, and his appropriation of them to his own use an offence against that section. *Reg. v. Townshend*, 15 Cox, C. C. 466—Day, J.

12. FALSE PRETENCES.

Word Competition—Advertisement containing False Statement of Fact.]—The following adver-

tisement was inserted by the prisoner in a newspaper, viz.: "Barnardo.—2*l.*, 1*l.*, 10*s.*, for most words from Barnardo. No single letters to be used. All others in heavy black type from Nuttall's 1886 Dict. Proceeds to go to Dr. Barnardo's Home for Destitute Children. Alphabetical lists, with 1*s.* 3*d.*, to Rev. A. Brient, Holt, Trowbridge, Wilts, by March 5. Result 8th." No such person as the Rev. A. Brient existed at the address given, and sums of money which certain persons were induced to send in the belief that a bonâ fide competition was indicated by the advertisement, were received and appropriated by the prisoner:—Held, that the advertisement was capable of the construction put upon it in the indictment; that it was intended to convey the impression that there was a person named A. Brient, living at Holt, Trowbridge, in the county of Wilts, who was a minister of religion, and that he had instituted a bonâ fide competition, and had made arrangements to present prizes to the successful competitors, and to give the proceeds derived from the entrance fees of competitors, after deducting the prizes, to a charitable institution; and that it was a question for the jury whether the persons who had sent the moneys, with the obtaining which the prisoner was charged, had sent them acting under that impression. *Reg. v. Randell*, 57 L. T. 718; 52 J. P. 359; 16 Cox, C. C. 335—C. C. R.

Sale of Farm Stock subject to Bill of Sale—Onus of Proof of Consent.]—S. was tenant of a farm, over all the live and dead stock on which, and all other live and dead farm stock which at any time thereafter should be in or about the premises, he had granted a bill of sale. In the ordinary course of business S. would have been at liberty to sell stock on the farm, but two months after the granting of the bill of sale he sold all the farm stock which was upon the farm, without anything being said as to the ownership of the stock, or as to the existence of the bill of sale. No evidence was given by S. at the trial of an indictment against him for false pretences to prove that he had obtained the leave of the bill of sale holder to the selling of the stock in question:—Held, that the onus lay upon S. of proving that he had leave to sell the stock, and not upon the prosecution; that S. had by the act of selling the stock represented himself as being the absolute owner thereof; and that the prosecutor had paid for the stock in the belief that S. had authority to sell the same, and was guilty of the offence of obtaining money by false pretences. *Reg. v. Sampson*, 52 L. T. 772; 49 J. P. 807—C. C. R.

Proof of Falsity—Evidence.]—The defendant, who was agent to an insurance company, and whose business it was to collect the annual premiums from persons insured in the company, collected from one Vellam, in 1883, the annual premium then due for renewal of Vellam's policy of life assurance. The defendant did not account to the company for this premium, but appropriated it, and notified to the company that Vellam had failed to renew his policy. The company thereupon treated the policy as lapsed. On the 7th of April, 1884, the defendant called on Vellam for his annual premium as usual. Vellam was unable to pay the amount on that day, and requested the defendant to call later.

The defendant came again on the 21st of April, and received from Vellam a sum of money on account of the annual premium. It was for obtaining this amount that the defendant was indicted, the indictment charging that by falsely pretending to Vellam that his policy was then in full force, and that the current year's premium thereon was then due and payable, and that he the defendant was then authorised to receive the same, he induced Vellam to pay the amount. On the 21st of April the days of grace within which the premium had to be paid had expired. Vellam was aware of this, but the defendant told him that the payment would be effectual:—Held, by Lord Coleridge, C. J., Huddleston, B., and Mathew, J., that there was evidence for the jury in support of the indictment. Held, by Grove, J., and Manisty, J., that there was no evidence to go to the jury in support of the indictment, for that the company were bound by the receipt of their agent in 1883, and consequently the policy did not then lapse, and the defendant made no false pretence in representing it to be in full force; and, further, that as at the time when Vellam paid the premium in 1884 he knew that the days of grace had expired, the defendant did not obtain the amount from him on the false pretences alleged in the indictment. *Reg. v. Powell*, 54 L. J., M. C. 26; 51 L. T. 713; 49 J. P. 183; 15 Cox, C. C. 568—C. C. R.

Proof that Goods or Money parted with on Faith of Pretence.]—On an indictment for obtaining goods by false pretences, the false pretence charged and proved being that the prisoner was daughter of a lady of the same name, residing at a certain place, there being no evidence that the goods were not delivered to the prisoner before her name and address were asked for:—Held, that there was no sufficient evidence to sustain the indictment, it being essential on a prosecution for obtaining goods by false pretences to prove that the goods were delivered on the faith of the false pretence charged. *Reg. v. Jones*, 50 L. T. 726; 48 J. P. 616; 15 Cox, C. C. 475—C. C. R.

H. offered drapery stock to R. for a sum, stating it was all right, and not encumbered, and R. paid the money and took possession. It was discovered that a third party held a bill of sale for double the sum paid, and he entered and seized the stock. H. being indicted for obtaining money under false pretences:—Held, by Coleridge, C. J., Pollock, B., and Lopes, J. (diss. Denman and Manisty, J.J.) that the conviction must be quashed, inasmuch as it did not sufficiently appear that the money was parted with in consequence of the false pretence. *Reg. v. Hazlewood*, 48 J. P. 151—C. C. R.

The prisoner went to the house of the prosecutrix and requested to be taken in as a lodger. After having lodged with her for a day or two, he stated that he had come from another lodging where he had left some of his clothes, and requested to be furnished with board as well as lodging, for which he promised to pay. The prosecutrix, believing his statement as to his clothes, agreed to supply him, and did supply him, with meat and drink as a boarder. A few days after the prisoner decamped without paying for his accommodation. At the trial of an indictment for obtaining goods by false pretences the jury were directed that they must be satisfied

that the pretence was false; that it was acted on by the prosecutrix in supplying the articles in question; and that it was made by the prisoner with intent to defraud. The jury having found a verdict of guilty, the question was reserved for the court, whether upon the facts the prisoner was entitled to an acquittal:—Held, that the direction was substantially accurate; that upon the evidence the jury might fairly infer that the prosecutrix had acted on what she believed; and that from the facts stated it was to be inferred that the jury meant she so acted because she believed to be true, the statement of the prisoner, which was in fact false. *Reg. v. Burton*, 54 L. T. 765; 16 Cox, C. C. 62—C. C. R.

Obtaining Credit by—Sufficiency of Indictment—Renewal of Bill of Exchange.]—In an indictment for incurring a debt or liability whereby credit was obtained under false pretences or by means of fraud under s. 13, sub-s. 1, of the Debtors Act, 1869, it is unnecessary to specify the false pretences or fraud under or by means of which the credit was obtained, s. 19 of the Act rendering it sufficient to state the substance of the offence in the words of the Act, or as near thereto as circumstances admit. The renewal of a bill of exchange obtained under false pretences or by means of fraud is an incurring a debt or liability whereby credit is obtained within the meaning of sub-s. 1 of s. 13 of the Debtors Act, 1869. *Reg. v. Pierce*, 56 L. J., M. C. 85; 56 L. T. 532; 51 J. P. 790; 16 Cox, C. C. 213—C. C. R.

Venue.]—H. wrote and posted at N. in England a letter, addressed to G. at a place out of England, containing a false pretence, by means of which he fraudulently induced G. to transmit to N. a draft for 150*l.* which he there cashed:—Held, by the court, that there was jurisdiction to try H. at N., that the pretence was made at N., where also the money obtained by means of it was received. *Reg. v. Holmes*, 12 Q. B. D. 23; 53 L. J., M. C. 37; 49 L. T. 540; 32 W. R. 372; 15 Cox, C. C. 343—C. C. R.

Contract Induced by—Conviction—Revesting of Property—Sale in Market overt.]—The owner of goods, induced by fraud, parted with them under a voluntary contract of sale which vested the property in the fraudulent purchasers. The goods were then sold in market overt to a purchaser without notice of the fraud. The fraudulent purchasers were afterwards, upon the prosecution of the original owner, convicted of obtaining the goods by false pretences. The judge before whom the prisoners were tried refused to make an order of restitution:—Held, that under 24 & 25 Vict. c. 96, s. 100, the property in the goods revested in the original owner upon conviction, and that he was entitled to recover them from the innocent purchaser. *Moyce v. Newington* (4 Q. B. D. 32) overruled. *Bentley v. Vilmont*, 12 App. Cas. 471; 57 L. J., Q. B. 18; 57 L. T. 854; 36 W. R. 481; 52 J. P. 63—H. L. (E.).

13. FALSIFICATION OF ACCOUNTS.

Making and concurring in making False Entry—False Memorandum copied into Cash-book.]—B., a collector in the employment of N.,

collected on the 22nd February from Sheppard 8l. 14s. 10d. due to N. The ordinary course of business was for B., at the end of each day, to account to E., N.'s cash clerk, for moneys collected during the day, E.'s duty being to enter payments accounted for by B. in the cash-book. On the evening of the 22nd February B. gave E. a slip of paper on which he had written, "Sheppard, on account, 5l.," which E. copied into the cash-book, believing it represented the whole amount collected by B. from Sheppard.—Held, that B. was rightly convicted under s. 1 of the Falsification of Accounts Act, 1875. *Reg. v. Butt*, 51 L. T. 607; 49 J. P. 233; 15 Cox, C. C. 564—C. C. R.

14. FELONY AND FELONS.

Death caused by Act done in Committing Felony.]—*See Reg. v. Serné*, post, col. 579.

Indictment for Compounding—Who may be guilty of.]—An indictment for compounding a felony need not allege that the defendant desisted from prosecuting the felon. The offence of compounding a larceny may be committed by a person other than the owner of the goods stolen or a material witness for the prosecution. *Reg. v. Burgess*, 16 Q. B. D. 141; 55 L. J., M. C. 97; 53 L. T. 918; 34 W. R. 306; 50 J. P. 520; 15 Cox, C. C. 779—C. C. R.

Action whether maintainable where Felony disclosed.]—In an action for the seduction of the plaintiff's daughter a paragraph of the statement of claim alleged that the defendant administered noxious drugs to the daughter for the purpose of procuring abortion:—Held, that the paragraph could not be struck out as disclosing a felony for which the defendant ought to have been prosecuted, inasmuch as the plaintiff was not the person upon whom the felonious act was committed, and had no duty to prosecute. *Appleby v. Franklin*, 17 Q. B. D. 93; 55 L. J., Q. B. 129; 54 L. T. 135; 34 W. R. 231; 50 J. P. 359—D.

Action by Felon—Effect of Felony on acquiring Property.]—A testatrix by her will, dated in July, 1869, devised and bequeathed all her real and personal estate to T. K. in trust for her sister M. C. for life, and after her decease upon trust to pay to or permit H. C. D. to receive the interest for his life, but if he should become bankrupt, or publicly insolvent, or should compound with his creditors, or should assign or incur his interest under the trust, or any part thereof, or should otherwise by his own act, or by operation of law, be deprived of the absolute personal enjoyment of the same interest, or any part thereof, then, and in either of such cases, the trust in favour of H. C. D. should be void, and T. K. should thenceforth apply the interest for the maintenance, education, and support of the children of H. C. D. The testatrix died in 1871, and M. C. died in 1881. In July, 1878, H. C. D. was convicted of felony, and sentenced to ten years' penal servitude. Before the expiration of his sentence he obtained a ticket-of-leave, and commenced this action for the administration of the estate of testatrix, and claimed the arrears of interest:—Held, that, under s. 30 of the Act 33 & 34 Vict. c. 23, he could commence

the action. Held, also, that he had not been deprived of the actual enjoyment of the life interest by any operation of law; and that he was entitled to all arrears of interest. *Dash, In re, Darley v. King*, 57 L. T. 219—Chitty, J.

15. FORGERY.

Uttering Bonds Received Abroad by Post—Dealing with Proceeds in England.]—A company in Brussels received on 4th January a letter from N. & Co., a firm in London, containing a number of foreign bonds for negotiation. They accordingly on the 5th January sent to N. & Co., by post a cheque for 1,500l. On 6th January the cheque was paid into a bank in London by T., the only person known at N. & Co.'s offices, to the account of N. & Co.; and on 7th January cheques drawn by N. & Co. were presented at such bank by T., who received 1,495l. in respect thereof. On the 12th January F., who was an associate of T., endeavoured to telegraph, under an assumed name, a sum of money from London to Stockholm, but was too late to do so. Upon an indictment which charged F. and T. with having forged and uttered the bonds with intent to defraud:—Held, that it was a question for the jury whether there was sufficient evidence of the forged bonds having been posted in this country; and that, if they were satisfied that there was sufficient evidence, they could find both the prisoners guilty of uttering the forged bonds upon the indictment. *Reg. v. Finkelstein*, 16 Cox, C. C. 107—Com. Serj.

Effect of Forged Transfer of Stock.]—*See ante*, col. 389.

Effect of forged Certificates of Shares.]—*See ante*, col. 394.

16. LARCENY AND RECEIVERS.

Water in Pipes, whether the Subject of.]—Water supplied by a water company to a consumer, and standing in his pipes, may be the subject of larceny at common law. *Ferens v. O'Brien*, 11 Q. B. D. 21; 52 L. J., M. C. 70; 31 W. R. 463; 47 J. P. 472; 15 Cox, C. C. 332—D.

"Taking" — Automatic Box — Dropping in Disc instead of Penny.]—Against the wall of a public passage was fixed what is known as an "automatic box," the property of a company. In such box was a slit of sufficient size to admit a penny piece, and in the centre of one of its sides was a projecting button or knob. The box was so constructed that, upon a penny piece being dropped into the slit and the knob being pushed in, a cigarette would be ejected from the box on to a ledge which projected from it. Upon the box were the following inscriptions: "Only pennies, not half-pennies;" "To obtain an Egyptian Beauties cigarette place a penny in the box and push the knob as far as it will go." The prisoners went to the entrance of the passage, and one of them dropped into the slit in the box a brass disc about the size and shape of a penny, and thereby obtained a cigarette, which he took to the other prisoners:—Held, that the prisoners were guilty of larceny. *Reg. v. Hands*, 56 L. T. 370; 52 J. P. 24; 16 Cox, C. C. 188—C. C. R.

Taking invito domino—Delivery of Chattel under common Mistake.]—The prisoner asked the prosecutor for the loan of a shilling. The prosecutor gave the prisoner a sovereign believing it to be a shilling, and the prisoner took the coin under the same belief. Some time afterwards he discovered that the coin was a sovereign, and then and there fraudulently appropriated it to his own use. The prisoner was convicted of larceny of the sovereign:—Held, that the prisoner had not been guilty of larceny as a bailee; but the Court being equally divided as to whether the prisoner had been guilty of larceny at common law, the conviction stood. *Reg. v. Ashwell*, 16 Q. B. D. 190; 55 J. J., M. C. 65; 53 L. T. 773; 34 W. R. 297; 50 J. P. 181; 16 Cox, C. C. 1—C. C. R.

The old rule of law that the innocent receipt of a chattel, coupled with its subsequent fraudulent appropriation, does not amount to larceny, is not affected by the decision in *Reg. v. Ashwell*, supra. That case distinguished and discussed. *Reg. v. Flowers*, 16 Q. B. D. 643; 55 L. J., M. C. 179; 54 L. T. 547; 34 W. R. 367; 50 J. P. 648; 16 Cox, C. C. 33—C. C. R.

By Trick—Ringing the Changes.]—The two prisoners by a series of tricks fraudulently induced a barmaid to pay over money of her master to them, without having received from him in return the proper change; the barmaid had no authority to pay over money without receiving the proper change, and had no intention of or knowledge that she was so doing:—Held, that the prisoners were properly convicted of larceny. *Reg. v. Hollis*, 12 Q. B. D. 25; 53 L. J., M. C. 38; 49 L. T. 572; 32 W. R. 372; 48 J. P. 120; 15 Cox, C. C. 345—C. C. R.

— Money deposited to abide event of Wager.]—The prisoner was at a race-meeting offering to lay odds against different horses. He made a bet with the prosecutor laying odds against a particular horse, and the money for which the prosecutor backed the horse was deposited with the prisoner. The prosecutor admitted that he would have been satisfied if he did not receive back the same coins. The horse won, but the prisoner went away with the money, and afterwards when the prosecutor met him he denied that he had made the bet. The prisoner was convicted of larceny, and a case was reserved, the question being whether there was any evidence to be left to the jury:—Held, that as it appeared that the prosecutor parted with his money with the intention that in the event of the horse winning it should be repaid, while the prisoner obtained possession of the money fraudulently, never intending to repay it in any event, there was no contract by which the property in the money could pass, and therefore there was evidence of larceny by a trick. *Reg. v. Buckmaster*, 20 Q. B. D. 182; 57 L. J., M. C. 25; 57 L. T. 720; 36 W. R. 701; 52 J. P. 358; 16 Cox, C. C. 339—C. C. R.

By Bailee—Fraudulent Conversion—Evidence of Intent.]—Prisoner, a travelling watchmaker, on two separate occasions received from different persons watches which he was to repair. One of the watches was pledged by the prisoner in November, 1886, and the other before Christmas in that year. Upon pledging the first watch the

prisoner stated that he only wanted the money for which he pledged it temporarily. And upon pledging the second watch, he requested the person with whom he pledged it not to part with it, as it was not his property. Upon an indictment under 24 & 25 Vict. c. 96, s. 3, for the fraudulent conversion of the watches by the prisoner while a bailee thereof:—Held, that there was some evidence of a fraudulent conversion, i.e., an intention on the part of the prisoner to deprive the prosecutors permanently of their property, there being no evidence that any effort had been made by the prisoner to redeem the watches; and he never having shown any intention beyond the statements referred to, of so doing. *Reg. v. Wynn*, 56 L. T. 749; 52 J. P. 55; 16 Cox, C. C. 231—C. C. R.

— Infant, Bailment to.]—An infant over fourteen years of age fraudulently converted to his own use goods which had been delivered to him by the owner under an agreement for the hire of the same:—Held, that he was rightly convicted of larceny as a bailee of the goods under 24 & 25 Vict. c. 96, s. 3. *Reg. v. McDonald*, 15 Q. B. D. 323; 52 L. T. 583; 33 W. R. 735; 49 J. P. 695; 15 Cox, C. C. 757—C. C. R.

— Bailment of Money.]—A prisoner was convicted of larceny under the following circumstances:—The prosecutor gave a mare of his into the care of the prisoner, telling him that it was to be sold on the next Wednesday. On the next Wednesday the prosecutor did not go himself to sell his mare, but sent his wife, who went to where the prisoner was and saw him riding the mare about a horse fair, and sell her to a third party, and receive on such sale some money. The prosecutor's wife after such sale asked the prisoner to give her the money, saying she would pay his expenses. This the prisoner declined to do, and eventually he absconded with the money and without accounting:—Held (Stephen, J., dissenting), that there was evidence that the prisoner was a bailee of the money thus paid to him, and that the conviction could be supported. *Reg. v. Banks*, 13 Q. B. D. 29; 53 L. J., M. C. 132; 50 L. T. 427; 32 W. R. 722; 48 J. P. 470; 15 Cox, C. C. 450—C. C. R. See also *Reg. v. Ashwell*, supra.

Fraudulent Appropriation by Agents, Brokers, and Trustees.]—See ante, cols. 568, 569.

Receiving Stolen Goods—Evidence—Guilty Knowledge.]—Upon the trial of a prisoner for receiving stolen property with a guilty knowledge, evidence was admitted that shortly before the stealing of the property in question he had been in possession of other stolen property of a similar character, though he had parted with the possession of such other property before the date of the stealing of the property charged in the indictment:—Held, that such evidence was inadmissible, and did not fall within the words of s. 19 of the Prevention of Crimes Act, 1871. *Reg. v. Carter*, 12 Q. B. D. 522; 53 L. J., M. C. 96; 50 L. T. 432, 596; 32 W. R. 663; 48 J. P. 456; 15 Cox, C. C. 448—C. C. R.

— Account given by Prisoner—Evidence to Negative.]—On an indictment for receiving

goods, knowing them to have been stolen, the prisoner's account being that he had purchased them of a tradesman in the same town, other circumstances in the case tending to negative it, though the tradesman was not called for the prosecution:—Held, that it was not necessary to call him on the part of the prosecution, there being other circumstances in the case from which the jury might fairly infer the falsehood of the prisoner's story. *Reg. v. Ritson*, 50 L. T. 727; 48 J. P. 630; 15 Cox, C. C. 478—C. C. R.

Restitution Order—Proceeds—Jurisdiction.]

—The court before whom a person charged with larceny is tried has jurisdiction, under 24 & 25 Vict. c. 96, s. 100, on his conviction to order restitution to the original owner of the proceeds of the stolen property in the hands of the convict or his agent. *Reg. v. Central Criminal Court JJ.*, 18 Q. B. D. 314; 56 L. J., M. C. 25; 56 L. T. 352; 35 W. R. 243; 51 J. P. 229; 16 Cox, C. C. 196—C. A.

—Revesting of Property—Sale in Market Overt to innocent Purchaser.]

—The owner of goods, induced by fraud, parted with them under a voluntary contract of sale which vested the property in the fraudulent purchasers. The goods were then sold in market overt to a purchaser without notice of the fraud. The fraudulent purchasers were afterwards, upon the prosecution of the original owner, convicted of obtaining the goods by false pretences. The judge before whom the prisoners were tried refused to make an order of restitution:—Held, that under 24 & 25 Vict. c. 96, s. 100, the property in the goods revested in the original owner upon conviction, and that he was entitled to recover them from the innocent purchaser. *Moyce v. Newington* (4 Q. B. D. 32) overruled. *Bentley v. Vilmont*, 12 App. Cas. 471; 57 L. J., Q. B. 18; 57 L. T. 854; 36 W. R. 481; 52 J. P. 68—H. L. (E.).

Sale in Market Overt—Stolen Goods.]—The defendants were public sales-masters, and transacted their business in a legally established cattle market, where a market overt for the sale of cattle and sheep was held once a week. A number of sheep, which had been stolen from the plaintiff, were brought on a market day to the stand of the defendants by the thief, who employed the defendants to sell the sheep for him. The defendants, in ignorance of the theft, placed the sheep in their stand, and sold and delivered them to a purchaser, by whom they were removed:—Held, that the defendants were liable to the plaintiff in an action of trover for the value of the sheep. *Delaney v. Wallis*, 13 L. R., Ir. 31; 15 Cox, C. C. 525—C. A., and see preceding case.

Goods purchased with Stolen Money.]—The plaintiff had stolen money of the defendant and was prosecuted by him for so doing, but was acquitted on a technical ground. The plaintiff had, previously to the prosecution, converted the money into goods. These were in the house of the prosecutor, and detained by him as being the proceeds of the money stolen by him. The plaintiff brought an action in the county court for return of some of the goods and for damages for the conversion of others of them:—Held,

that the county court judge was right in giving judgment for the defendant. *Cattley v. Loundes*, 34 W. R. 139—D.

17. LIBEL.—See DEFAMATION.

18. LUNATICS, ILL-TREATMENT OF.—See post, col. 583.

19. MISDEMEANOURS.

Obstructing Coroner—Burning Dead Body.]

It is a misdemeanour to burn or otherwise dispose of a dead body, with intent thereby to prevent the holding upon such body of an intended coroner's inquest, and so to obstruct a coroner in the execution of his duty, in a case where the inquest is one which the coroner has jurisdiction to hold. *Reg. v. Stephenson*, 13 Q. B. D. 331; 53 L. J., M. C. 176; 52 L. T. 267; 33 W. R. 44; 49 J. P. 486—C. C. R.

To burn a dead body, instead of burying it, is not a misdemeanour, unless it is so done as to amount to a public nuisance. If an inquest ought to be held upon a dead body, it is a misdemeanour to dispose of the body so as to prevent the coroner from holding the inquest. *Reg. v. Price*, 12 Q. B. D. 247; 53 L. J., M. C. 51; 33 W. R. 45 n.; 15 Cox, C. C. 389—Stephen, J.

20. MURDER, MANSLAUGHTER, AND OFFENCES AGAINST THE PERSON.

a. Murder and Manslaughter.

Agreement to Commit Suicide.]—If two persons enter into an agreement to commit suicide together, and the means employed to produce death prove fatal to one only, the survivor is guilty of murder. *Reg. v. Jessop*, 16 Cox, C. C. 204—Field, J.

Reasonable Belief of Necessity.]—Under circumstances which might have induced the belief that a man was cutting the throat of his wife, their son shot and killed his father. On the trial of the son for murder:—Held, that if the accused had reasonable grounds for believing and honestly believed that his act was necessary for the defence of his mother, the homicide was excusable. *Reg. v. Rose*, 15 Cox, C. C. 540—Lopes, J.

Extreme Necessity.]—A man who, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder; although at the time of the act he is in such circumstances that he believes and has reasonable ground for believing that it affords the only chance of preserving his life. At the trial of an indictment for murder it appeared, upon a special verdict, that the prisoners D. and S., seamen, and the deceased, a boy between seventeen and eighteen, were cast away in a storm on the high seas, and compelled to put into an open boat; that the boat was drifting on the ocean, and was probably more than 1,000 miles from land; that on the eighteenth day, when they had been seven days without food

and five without water, D. proposed to S. that lots should be cast who should be put to death to save the rest, and that they afterwards thought it would be better to kill the boy that their lives should be saved; that on the twentieth day D., with the assent of S., killed the boy, and both S. and D. fed on his flesh for four days; that at the time of the act there was no sail in sight nor any reasonable prospect of relief; that under these circumstances there appeared to the prisoners every probability that unless they then or very soon fed upon the boy, or one of themselves, they would die of starvation:—Held, that upon these facts, there was no proof of any such necessity as could justify the prisoners in killing the boy, and that they were guilty of murder. *Reg. v. Dudley*, 14 Q. B. D. 273, 560; 54 L. J., M. C. 32; 52 L. T. 107; 33 W. R. 347; 49 J. P. 69; 15 Cox, C. C. 624—C. C. R.

Death caused by Act known to be dangerous to Life.—If a person causes death by an act known to be in itself eminently dangerous to life he is guilty of murder. *Reg. v. Serné*, 16 Cox, C. C. 311—Stephen, J.

Death caused by Act done in committing Felony.—Quære, whether the rule, that an act done in the commission of a felony which causes death is in all cases murder, is not stated too broadly; and whether it should not be confined to felonious acts dangerous to life. *Id.*

Malice Aforethought—Drunkeness.—To do an act with malice aforethought means to do a cruel act voluntarily; and anybody who intentionally inflicts grievous bodily harm on another, intending to do bodily harm, is guilty of murder if he causes death. The intention of the party guilty of murder being an element of the crime itself, the fact that a man was intoxicated at the time he caused the death of another may be taken into consideration by the jury in considering whether he formed the intention necessary to constitute the crime of murder. *Reg. v. Doherty*, 16 Cox, C. C. 306—Stephen, J.

Manslaughter—Negligence.—Manslaughter by negligence occurs when a person in doing anything dangerous in itself, or having charge of anything dangerous in itself, conducts himself in regard to it in such a careless manner as to be guilty of culpable negligence. *Id.*

Neglect of Duty—Refusal of Medical Assistance.—The law imposes upon relieving officers the duty and obligation, in cases where bonâ fide applications are made to them for medical assistance by destitute persons in cases of sudden and urgent necessity, to give such assistance promptly, so that the mischief may be dealt with at an early stage. Where an application is made to a relieving officer for medical assistance in a case of emergency, and death or bodily harm results from a refusal to grant such assistance, it is no answer to an indictment against the relieving officer for manslaughter or for causing bodily harm that the applicant was in employment for wages or other hire or remuneration, if at the time the application was made the applicant was, in fact, destitute of the means of providing independent medical assistance. *Reg. v. Curtis*, 15 Cox, C. C. 746—Hawkins, J.

Evidence of other Deaths with same Symptoms—Accident or Design.—F. and H. were jointly charged upon an indictment for the murder of the husband of H., with causing his death by the administration of arsenic. Evidence having been given that the deceased had died from arsenic, and had been attended by the prisoners:—Held, that it was competent for the prosecution to tender evidence of other cases of persons who had died from arsenic, and to whom the prisoners had access, exhibiting exactly similar symptoms before death to those of the case under consideration, for the purpose of showing that this particular death arose from arsenical poisoning—not accidentally taken, but designedly administered by someone. Such evidence, however, is not admissible for the purpose of establishing motives; though the fact that the evidence offered may tend indirectly to that end is no ground for its exclusion. The true principle on which the admissibility of all such evidence rests is that laid down in *Reg. v. Geering* (18 L. J., M. C. 215). *Reg. v. Winslow* (8 Cox, C. C. 397) commented on and disapproved. *Reg. v. Flannagan*, 15 Cox, C. C. 403—Butt, J.

b. Offences against Women and Children.

Rape—Consent obtained by Fraud.—Where a married woman consented to the prisoner having connexion with her under the impression that he was her husband:—Held, that the prisoner was guilty of rape. *Reg. v. Barrow* (1 L. R., C. C. 156) not followed. *Reg. v. Dee*, 14 L. R., Ir. 468; 15 Cox, C. C. 579—C. C. R. And see now 48 & 49 Vict. c. 69, s. 4.

Attempt to Commit—Evidence of previous Connexion.—On the trial of an indictment charging an assault with intent to rape, if the prosecutrix, in answer to cross-examination, denies having voluntarily had connexion with the prisoner prior to the alleged assault, evidence to contradict her by proving such prior connexion is admissible on his behalf. *Reg. v. Riley*, 18 Q. B. D. 481; 56 L. J., M. C. 52; 56 L. T. 371; 35 W. R. 382; 16 Cox, C. C. 191—C. C. R.

Abduction of Child—Evidence.—The prisoner, being indicted under the 24 & 25 Vict. c. 100, s. 56, for that she did, feloniously and unlawfully, by fraud, detain a child, under the age of fourteen, with intent to deprive the mother of the possession of her—the evidence being that the child had been in the service of the prisoner, and was missing and could not be discovered; and that she gave different accounts of what had become of the child, but implying that the prisoner had given her up to some third persons; and there being no evidence that the child was still in her actual custody, nor, indeed, any evidence where she was:—Held, that upon the principle of *Jones v. Dowle* (9 M. & W. 19), the prisoner was rightly convicted; because, whether her stories were all utterly false, and the child was secreted by herself, or whether they were so far true, and the child was in the actual custody of some third parties, to whom she had wrongfully delivered her, it was equally true that she unlawfully detained the child by fraud. *Reg. v. Johnson*, 50 L. T. 759; 48 J. P. 759; 15 Cox, C. C. 481—C. C. R.

Abduction of Girls under Eighteen—“Taking or causing to be taken.”]—Where a girl, under the age of eighteen, has not been taken against her will out of the possession of her father or mother, or of the person having the lawful care or charge of her, it is necessary, in order to convict a person charged with an offence under s. 7 of the Criminal Law Amendment Act, 1885 (48 and 49 Vict. c. 69), in respect of such girl, to prove that the girl left such possession in consequence of persuasions, inducements, or blandishments held out to her by the prisoner. *Reg. v. Henkers*, 16 Cox, C. C. 257—Com. Serj.

— **Knowledge of Prisoner.**]—Where a person is charged with abducting a girl under eighteen, it is a sufficient defence if at the moment of taking her out of lawful custody he had reasonable cause to believe that she was of the age of eighteen, though he did not inquire as to her age until after he had taken her out of such lawful custody, but before abduction was complete. *Reg. v. Packer*, 16 Cox, C. C. 57—Pollock, B.

— **Possession of Father.**]—It is a question for the jury whether at the time of the alleged abduction the girl was in the possession of her father. *Reg. v. Mace*, 50 J. P. 776—Grant-ham, J.

Upon an indictment under 48 & 49 Vict. c. 69, s. 7, for taking or causing to be taken a girl out of the possession of her father, it was proved that at the time the alleged offence was committed the girl was employed as a barnmaid at a distance from her father's house:—Held, that she was under the lawful charge of her employer, and not in the possession of her father, and that, therefore, the prisoner could not be convicted of the offence with which he was charged. *Reg. v. Henkers*, supra.

Unlawful Intercourse with Girl under Fourteen—Evidence of Prisoner on Oath.]—A prisoner was charged under 48 and 49 Vict. c. 69, s. 5, with having had unlawful intercourse with a girl under the age of fourteen. When before the justices, he gave evidence on oath:—Held, that at the trial his statement, as made on oath, might be put in without his consent, and might be used for or against him; and that on the charge above mentioned, the prisoner might be found guilty of an attempt to commit the offence, the case being within the provisions of the 14 & 15 Vict. c. 100, s. 9. *Reg. v. Adams*, 50 J. P. 136—Stephen, J.

Indictment for carnally knowing Girl under Thirteen—Unsworn Evidence—Conviction for Indecent Assault.]—The prisoner was indicted under the Criminal Law Amendment Act, 1885 (48 and 49 Vict. c. 69), s. 4, for unlawfully and carnally knowing a girl under the age of thirteen years. The child, not understanding the nature of an oath, gave her evidence under the above section without being sworn. The jury acquitted the prisoner of the charge under s. 4, but, by virtue of the power given to them in s. 9, found him guilty of an indecent assault. Apart from the girl's testimony the evidence was insufficient to support the conviction. The act contains no provision rendering unsworn evidence admissible on an indictment for indecent assault:—Held, that the conviction was right. *Reg. v. Wealand*,

20 Q. B. D. 827; 57 L. J., M. C. 44; 58 L. T. 782; 36 W. R. 576; 52 J. P. 582—C. C. R.

Indictment for Indecent Assault and Common Assault—Evidence of Prisoner—Conviction for Common Assault only.]—The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 20, renders a person charged with an indecent assault a competent witness on the hearing of such charge, but does not apply to a charge of common assault. The prisoner was tried on an indictment containing two counts, one for an indecent assault, and another for a common assault, and, on the hearing, gave evidence on oath in his defence. He was acquitted of the charge of indecent assault, but convicted of the common assault:—Held, that his evidence being legally admissible, the conviction was right. *Reg. v. Owen*, 20 Q. B. D. 829; 57 L. J., M. C. 46; 58 L. T. 780; 36 W. R. 575; 52 J. P. 582; 16 Cox, C. C. 397—C. C. R.

Suffering Girl under Sixteen to be on Premises for Purpose of being carnally known.]—The prisoner was convicted under the 6th section of the Criminal Law Amendment Act, 1885, of knowingly suffering a girl under sixteen to be on premises for the purpose mentioned in that section. The girl in question was the prisoner's daughter, and the premises in respect of which the charge was made were her home where she resided with the prisoner:—Held, that, notwithstanding the above-mentioned circumstances, the conviction was good. *Reg. v. Webster*, 16 Q. B. D. 134; 55 L. J., M. C. 63; 53 L. T. 824; 34 W. R. 324; 50 J. P. 456; 15 Cox, C. C. 775—C. C. R.

c. Assaults and Wounding.

Malice—Blow aimed at one Person accidentally wounding another.]—The prisoner, in striking at a man, struck and wounded a woman beside him. At the trial of an indictment against the prisoner under 24 & 25 Vict. c. 100, s. 20, for unlawfully and maliciously wounding her, the jury found that the blow was unlawful and malicious, and did, in fact, wound her, but that the striking of her was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected. The prisoner was convicted:—Held (distinguishing *Reg. v. Pemberton*, 2 L. R., C. C. 119), that the conviction was right. *Reg. v. Latimer*, 17 Q. B. D. 359; 55 L. J., M. C. 135; 54 L. T. 768; 51 J. P. 184; 16 Cox, C. C. 70—C. C. R.

Assault—Communication of Disease.]—The prisoner, knowing that he was suffering from gonorrhoea, communicated the disease to his wife. He was convicted of “unlawfully and maliciously inflicting grievous bodily harm” and of an “assault occasioning actual bodily harm”:—Held, by a majority of the court, that the conviction was wrong. *Reg. v. Clarence*, 22 Q. B. D. 23; 58 L. J., M. C. 10; 59 L. T. 780; 37 W. R. 166; 53 J. P. 149; 16 Cox, C. C. 511—C. C. R.

— **On County Court Bailiff.**]—See COUNTY COURT (OFFICERS).

Jurisdiction of Magistrate—Claim of Right.]—A person making a bona fide claim of right to
U 2

be present as one of the public in a law court at the hearing of a suit, is not justified in committing an assault upon a police constable and an official who endeavour to remove him. Such a claim of right does not oust the jurisdiction of the magistrate who has to try the charge of assault, and he may refuse to allow cross-examination and to admit evidence in respect of such a claim. *Reg. v. Eardley*, 49 J. P. 551—D.

— **Complaint by Party aggrieved.**—A court of summary jurisdiction has no power to convict of a common assault unless the party aggrieved, or some one on his behalf, complains of the assault, with a view to the adjudication of the court upon it. *Nicholson v. Booth*, 57 L. J., M. C. 43; 58 L. T. 187; 52 J. P. 662; 16 Cox, C. C. 373—D.

d. Ill-treatment of Lunatics.

By Parent—Person "having the Care or Charge" of.—The parents of a lunatic, who resides with them under their care, are persons "having the care or charge" of a lunatic within the meaning of 16 & 17 Vict. c. 96, s. 9, and may be convicted under that section for ill-treating such lunatic. *Reg. v. Rundle* (1 Dear. & Pearce, 482) questioned. *Buchanan v. Hardy*, 18 Q. B. D. 486; 56 L. J., M. C. 42; 35 W. R. 453; 51 J. P. 741—D.

21. OBSCENITY AND INDECENCY.

Indecent Exposure — Public Place.—The prisoner was convicted of indecently exposing his person to divers subjects of the Queen in a certain public place. Upon evidence showing that the place in question was out of sight of the public footpath, but was a place to which the prisoner had gone with several little girls, though without any legal right to go there, and was a place to which persons were in the habit of going without having any strict legal right so to do, and that persons so going were never in any way hindered or interfered with:—Held, that the conviction was correct, and that the jury were justified in finding that the place was public. *Reg. v. Wellard*, 14 Q. B. D. 63; 54 L. J., M. C. 14; 51 L. T. 604; 33 W. R. 156; 49 J. P. 296; 15 Cox, C. C. 559—C. C. R.

Seem, that the offence may be indictable if committed before divers subjects of the realm, even if the place be not public. *Ib.*

22. PERJURY.

Examination before Court of Bankruptcy—Presence of Judge or Registrar.—The prisoner was convicted of perjury alleged to have been committed in an examination by "the court" under s. 27 of the Bankruptcy Act, 1883. It appeared that he was summoned under s. 27 before a county court having jurisdiction in bankruptcy. The oath was administered to the prisoner in court by the registrar. The registrar remained in court. The examination of the prisoner, in the course of which the answers in question were given, took place in a room used for examinations in the absence of the registrar:—Held, that there had been no valid examina-

tion by "the court" within s. 27, and that the conviction must be quashed. *Reg. v. Lloyd*, 19 Q. B. D. 213; 56 L. J., M. C. 119; 56 L. T. 750; 35 W. R. 653; 52 J. P. 86; 16 Cox, C. C. 235—C. C. R.

Evidence true as to one Occasion attributed to another Occasion—Sufficiency of Indictment.]

—H., an inspector of nuisances for the borough of S., was convicted of perjury on an indictment which alleged that, upon the hearing of an information against G. for exposing for sale a number of rabbits which were unfit for the food of man, contrary to the Public Health Act, 1875, it was a material question whether H. had duly inspected and examined the carcasses of the rabbits, and whether such carcasses had appeared to him to be unfit for the food of man before and at the time when he seized the same under the provisions of the Public Health Act. The indictment then alleged that H. falsely swore (amongst other things) that he had examined critically every rabbit, and set out the evidence giving the details of such examination; and further alleged that H. did not in truth examine the rabbits in the manner sworn. It appeared that upon two occasions subsequently to the time of seizure, when he had merely made a cursory examination, sufficient, however, to entitle him to seize the rabbits, he had examined them as he had sworn he had. It also appeared that, at the time of the seizure, the rabbits were, in fact, unfit for the food of man:—Held, that, as the indictment did not allege that the evidence was given with reference to the time of seizure, and since the evidence, if taken with reference to the other occasions upon which examinations were made, was perfectly true, all the allegations might be true without H. having sworn falsely, and that, therefore, no offence was disclosed upon the indictment. *Reg. v. Hadfield*, 55 L. T. 783; 51 J. P. 344; 16 Cox, C. C. 148—C. C. R.

Proof of Proceedings — Non-production of Record.]

—On the trial of a prisoner for perjury, the indictment preferred at the trial at which the alleged perjury was committed is not sufficient proof of the proceedings in that court; there must be either the record of the trial, or a certificate of it under 14 & 15 Vict. c. 100, s. 22. *Reg. v. Coles*, 16 Cox, C. C. 165—Stephen, J.

23. PROPERTY, OFFENCES AS TO.

Malicious Damage—Playing Football.—In playing football, B. trespassed on a grass field, and the justices convicted him of unlawfully and maliciously doing damage, with intent to destroy grass for the food of beasts:—Held, that the conviction was wrong, for neither 24 & 25 Vict. c. 97, s. 24, nor s. 52 applied to damage which was only nominal, and not done with intent to damage. *Elvey v. Lytle*, 50 J. P. 308—D.

— Mushrooms growing in a Wild State.]

—In order to constitute the offence of wilfully or maliciously committing damage, injury, or spoil to or upon any real property under s. 52 of the Malicious Injury to Property Act, 1861, there must be proof of actual damage to the realty itself, and mere damage to uncultivated roots or plants growing upon the realty is insufficient to

justify a conviction.—The respondent gathered mushrooms in a field belonging to the appellants. They were of value to the latter, but they grew spontaneously, and were entirely uncultivated. No damage was done by the respondent to the grass or the hedges:—Held, that, upon the above facts, the respondent had not been guilty of an offence within s. 52 of the act. *Gardner v. Mansbridge*, 19 Q. B. D. 217; 57 L. T. 265; 35 W. R. 809; 51 J. P. 612; 16 Cox, C. C. 281—D.

— **Overhanging Tree—Cutting off Blossom.**—B.'s chestnut tree overhung his land, and also part of the highway immediately in front of H.'s grounds, and boys threw stones at the blossoms, which broke H.'s windows:—Held, that H. was properly convicted, under 24 & 25 Vict. c. 97, s. 52, for wilfully damaging B.'s tree by cutting off the blossoms at the top of the tree, and that H. showed no claim of right or other legal defence for the trespass. *Hamilton v. Bone*, 52 J. P. 726—D.

Conspiracy and Protection of Property.—An intimation conveyed in a letter to an employer that his shop would be picketed, in language so threatening as "to make such employer afraid," amounts to "intimidation" within the meaning of s. 7, sub-s. 1, of the Conspiracy and Protection of Property Act, 1875; whether the picketing amounts to an unlawful watching or besetting within sub-s. 4 or not. *Judge v. Bennett*, 36 W. R. 103; 52 J. P. 257—D.

24. RAILWAYS.

Trespassing on.—See RAILWAY.

25. RAPE AND OFFENCES AGAINST WOMEN AND CHILDREN.—See supra, 20, b.

26. SANITARY LAWS.—See HEALTH.

27. SEDITION.

Seditious Libel—Intent—Question for Jury.—An intention to excite ill-will between different classes of her Majesty's subjects may be a seditious intention; whether or not it is so in any particular case, must be decided upon by the jury after taking into consideration all the circumstances of the case. Sedition embraces everything, whether by word, deed, or writing, which is calculated to disturb the tranquillity of the state, and lead ignorant persons to endeavour to subvert the government and laws of the empire. *Reg. v. Burns*, 16 Cox, C. C. 355—Cave, J.

Natural Consequences of Words Spoken—Assisting at Meeting.—Where in a prosecution for uttering seditious words with intent to incite to riot, it is proved that previously to the happening of a riot seditious words were spoken, it is a question for the jury whether or not such rioting was directly or indirectly attributable to the seditious words proved to have been spoken. A meeting lawfully convened may become an unlawful meeting if during its course seditious

words are spoken of such a nature as to produce a breach of the peace. And those who do anything to assist the speakers in producing upon the audience the natural effect of their words will be guilty of uttering seditious words as well as those who spoke the words. *Id.*

28. TREASON-FELONY.

Purpose of Instrument—Evidence—Burden of Proof.—D. and others were charged under the Treason-Felony Act, 11 & 12 Vict. c. 12, s. 3, with being in the possession of certain instruments and explosive materials, with intent to use them for the purpose of carrying out the objects of certain treasonable combinations existing in the United Kingdom and abroad:—Held, that, for the purpose of showing such intent, evidence might be given showing that the only known use hitherto made of such instruments and explosive compounds had been in causing destructive explosions to property; and that the fact of some of those explosions having happened out of the jurisdiction of the court did not affect the admissibility of the evidence. *Reg. v. Deasy*, 15 Cox, C. C. 334—Stephen, J.

Held, also, that for the purpose of showing a treasonable object, evidence might be given of the existence, down to a period nearly approaching the date of the alleged acts, in the country from which the explosives and instruments were brought, of a treasonable conspiracy having for its object the alteration of the existing form of government by violent means, although such evidence did not establish that the prisoners were members of, or directly connected with, such conspiracy. Though the general rule is that the prosecution must make out intent, there may be circumstances under which the burden of proof is shifted to the other side. *Id.*

29. UNLAWFUL ASSEMBLY.

What is.—See *O'Kelly v. Harvey*, sub tit. JUSTICE OF THE PEACE.

30. VAGRANTS AND VAGRANCY.—

See VAGRANT.

III. JURISDICTION, PRACTICE AND PROCEDURE.

1. JURISDICTION.

Commissions of General Gaol Delivery.—The general authority given by the commission of general gaol delivery to justices of assize to deliver the gaols of all manner of prisoners found therein, confers no jurisdiction over prisoners directed by statute to be dealt with by the court of general or quarter sessions, though found within the prison of the county. A commitment, therefore, of such a prisoner to the assizes will be bad, and will entitle the prisoner to his discharge from custody. The effect of the Home Office Circular of March, 1883, on the form of commitments. *Reg. v. Ward*, 15 Cox, C. C. 321—West, Q. C., Commissioner.

Second Arrest on Same Charge—Res judicata.]

—L. was charged with night poaching under 9 Geo. 4, c. 69, and in course of cross-examination of prosecutor's witnesses, the justices considered he had been illegally arrested, and discharged him. L. was again summoned for the same offence on the same facts, when the justices held that they had no jurisdiction, as the former discharge was *res judicata*:—Held, that the justices were right. *Reg. v. Brakenridge*, 48 J. P. 293—D.

Central Criminal Court—Mandamus.]—

Mandamus will not lie to the judges and justices of the Central Criminal Court. The recorder of London, upon the trial and conviction of a prisoner charged with larceny, having refused to order (under 24 & 25 Vict. c. 96, s. 100) the person with whom stolen property was pledged to restore it to the prosecutor, the Queen's Bench Division refused to grant a mandamus directed to "the judges and justices of the Central Criminal Court," to compel the recorder to make such order. *Reg. v. Central Criminal Court JJ.*, 11 Q. B. D. 479; 52 L. J., M. C. 121; 15 Cox, C. C. 325—D.

2. INDICTMENT.**"Against the form of the Statute"—Omission**

—Corporation.]—An indictment against a corporation, which in the absence of a statute would not be liable to be indicted, for non-repair of a highway, is bad unless it concludes "against the form of the statute," and the objection is fatal even after verdict. *Reg. v. Poole (Mayor)*, 19 Q. B. D. 602, 683; 56 L. J., M. C. 131; 57 L. T. 485; 36 W. R. 239; 52 J. P. 84; 16 Cox, C. C. 323—D.

Election Law—Corrupt Practice—Description

of Offence—Aider by Verdict.]—The prisoner was tried and convicted upon an indictment which alleged that at an election for members of parliament for the borough of Ipswich, holden on 25th of November, 1885, he was guilty of corrupt practices against the form of the statute in that case made and provided. It was proved at the trial that he had promised money to two voters to induce them to vote. After verdict the objection was taken by the prisoner's counsel that the indictment was bad, because it did not sufficiently describe the nature of the offence with which the prisoner was charged:—Held (by Lord Coleridge, C.J., and Field and Mathew, JJ., Denman and Day, JJ., dissenting), that, if the indictment were defective, the defect was cured after verdict. By Lord Coleridge, C.J., and Denman, Mathew and Day, JJ., the indictment was defective, and on application before verdict might have been quashed. By Denman and Day, JJ., the defect in the indictment was not cured after verdict. By Field, J., semble, the indictment was good by virtue of 26 & 27 Vict. c. 29, s. 6, and 46 & 47 Vict. c. 51, s. 53. *Reg. v. Stroulger*, 17 Q. B. D. 327; 55 L. J., M. C. 137; 55 L. T. 122; 34 W. R. 719; 51 J. P. 278; 16 Cox, C. C. 86—C. C. R.

An indictment under the Corrupt Practices Act, 1883, which merely charges the defendant with being guilty of a corrupt practice at an election, but does not specifically allege against

him what that corrupt practice was, is bad for generality. *Reg. v. Norton*, 16 Cox, C. C. 59—Pollock, B.

3. EVIDENCE.**Production of fresh Evidence—Effect of.]—**

The production of fresh evidence on behalf of the prosecution (not known or forthcoming at the preliminary investigation, and not, previously to the trial, communicated to the other side) may be ground for a postponement of the trial, if it appears necessary to justice. *Reg. v. Flannagan*, 15 Cox, C. C. 403—Butt, J.

Confessions—Inducement.]—

The prisoners H. and C. were taken into their master's (the prosecutor) room, where there were two policemen. The prosecutor said, "I presume you know who these gentlemen are?" H. said, "Yes." The prosecutor then said to H., "I know what has been going on between you and C. for some time; you had better speak the truth." H. then made a confession:—Held, that the confession was not admissible in evidence. *Reg. v. Hatts*, 49 L. T. 780; 48 J. P. 248—C. C. R.

A confession made by a prisoner at the request of his uncle in the audience of, and according to the advice of a police sergeant, is not admissible in evidence. *Reg. v. Jones*, 49 J. P. 728—Manisty, J.

Depositions, Admissibility of.]—

A deposition taken under 11 & 12 Vict. c. 42, s. 17, was admitted in evidence, though it appeared that the proceedings had been conducted in the English language, and that the prisoner and the deceased understood English imperfectly. *Id.*

—Notice of Intention to take.]—

The 6th section of the 30 & 31 Vict. c. 35, provides in cases of indictable offences for the taking of the statements on oath or affirmation of persons dangerously ill and not likely to recover, and for the reading of the same in evidence under certain circumstances, "provided it be proved to the satisfaction of the court (inter alia) that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence:—Held (Day, J., dissenting), that the notice intended by the section is a notice in writing, and that such a statement was inadmissible against a prisoner where he had only had oral notice of the intention to take the same, although he was present when the statement was made. *Reg. v. Shurmer*, 17 Q. B. D. 323; 55 L. J., M. C. 163; 55 L. T. 126; 34 W. R. 656; 50 J. P. 743—C. C. R.

—Statement of Witness too young to be

Sworn.]—On a charge preferred under s. 4 of the Criminal Law Amendment Act, 1885, for carnally knowing a girl under the age of thirteen years, the magistrates before whom the preliminary investigation took place, being of opinion that the prosecutrix did not understand the nature of an oath, received as evidence her unsworn statement (as provided for by the 4th section of the act), and signed and returned her statement so made, with the depositions, to the assizes. At the trial it was proposed, after proving that the prosecutrix was so ill as to be

unable to travel or to attend to give evidence at the assizes, to tender in evidence her statement so made before the magistrates, as being a deposition within the meaning of s. 17 of the 11 & 12 Vict. c. 42:—Held, that s. 17 of the 11 & 12 Vict. c. 42, only applies to depositions taken upon oath or affirmation, and that, although a false statement made under the circumstances of this case might subject the prosecutrix to a prosecution for perjury (as provided for by s. 4 of the Criminal Law Amendment Act, 1885), it was not a deposition "taken as aforesaid," i.e., on oath or affirmation within the meaning of s. 17 of the 11 & 12 Vict. c. 42—so as to render it admissible as evidence in the absence of the prosecutrix. *Reg. v. Prunty*, 16 Cox, C. C. 344—Cave, J.

Dying Declaration—Consciousness of impending Death.]—The deceased, shortly after the wound had been given which caused her death, made a statement, in the prisoner's absence, as to the cause of her injuries. She was in fact dying at the time she made the statement. Two witnesses swore she was conscious at the time. The doctor, who arrived before she made the statement, swore that she was unconscious from the moment of his arrival, but that there might have been intervals of consciousness before death. The statement was made during the doctor's absence from the room:—Held, that the statement was not admissible in evidence as a dying declaration, as it was uncertain whether the deceased was conscious of impending death or in fact conscious at all, at the time she made the statement. *Reg. v. Smith*, 16 Cox, C. C. 170—Hawkins, J.

— Informal.]—A deposition had been made by a deceased person in the presence of a justice and the prisoner, and in expectation of death. It appeared that the several sheets of paper upon which the clerk wrote down the deposition had not been fastened together at the time the justice signed the last sheet, which was the only one he signed:—Held, that though it might not be either a dying declaration or a deposition, the clerk might give the statement in evidence. *Reg. v. Mann*, 49 J. P. 743—Denman, J.

Privilege of Witnesses.]—See EVIDENCE.

Under Criminal Law Amendment Act, 1885.]—See ante, cols. 581, 582.

Admissions—Proceedings against Newspaper Proprietor—Proof of Facts stated therein.]—A confession, admission, or statement, although extra judicial, if made by a person charged with a crime is sufficient without independent proof of the commission of the crime to sustain a conviction. Where, therefore, it was a crime to publish with a view to promote the objects of an illegal association, a notice of the calling together of any meeting of such association, or of the members of it as such members, or of the proceedings at such meeting, and in proceedings before a magistrate against the proprietor and publisher of a newspaper, a copy of his paper, containing a report of proceedings at a meeting, together with statements which tended to show that the meeting was a meeting of members of the illegal association as such members, was put in evidence, and the magistrate was satisfied that

the report and the statement were published with a view to promote the objects of the association:—Held, that the newspaper was sufficient evidence against the proprietor and publisher in itself from which the magistrate might infer that such a meeting had been held, and upon which he would have been justified in convicting the defendant. *Reg. v. Sullivan*, 16 Cox, C. C. 347—Ir. Ex. D.

Of other Offences, when admissible.]—See *Reg. v. Stephens*, ante, col. 568; and *Reg. v. Flannagan*, ante, col. 580.

Previous Conviction—When to be Proved.]—Where a person is indicted for night poaching after two previous convictions, the previous convictions should not be proved until the jury find a verdict on the facts of the case. *Reg. v. Woodfield*, 16 Cox, C. C. 314—Hawkins, J.

Disclosure in Compulsory Proceedings—Hearsay Evidence—Rumour no Evidence of Knowledge.]—Evidence of A. that B. had told him that C. had committed an offence, is inadmissible as any evidence whatever of the knowledge of B. as to the fact of C. having committed the offence; and it is therefore inadmissible as evidence of an offence, disclosed by a bankrupt in his examination in bankruptcy, having been disclosed previously to such examination, so as to disentitle the bankrupt to the protection of the proviso to s. 85 of the 24 & 25 Vict. c. 96. Evidence of the fact of a rumour is no evidence of the knowledge of a particular individual, and is not within any of the exceptions to the rule which excludes the reception of hearsay evidence. *Reg. v. Gunnell*, 55 L. T. 786; 51 J. P. 279; 16 Cox, C. C. 154—C. C. R.

Husband and Wife—Larceny by Wife.]—Upon the trial of a married woman, jointly with another person, for larceny of the property of her husband, the husband was called as a witness against his wife:—Held (Stephen, J., doubting), that the evidence of the husband was improperly received, and that the conviction which had taken place founded upon it was bad as against both prisoners. *Reg. v. Brittleton*, 12 Q. B. D. 266; 53 L. J., M. C. 83; 50 L. T. 276; 32 W. R. 463; 48 J. P. 295; 15 Cox, C. C. 431—C. C. R.

— Offence against Licensing Laws by Wife.]—S., a wife, was licensed to sell liquors, and her husband told the constable that he took some spirits away to B.'s house, where they were raffled for and then were consumed, and he brought back the proceeds, and put the money in S.'s room, and she duly received it. The justices having convicted S. of selling at B.'s house, not being licensed to do so:—Held, that as S., being a competent witness, did not contradict the husband's account, there was some evidence to support the conviction. *Seagar v. White*, 48 J. P. 436—D.

— Statement of Wife in presence of Husband.]—Upon the trial of a prisoner for feloniously receiving stolen property, a list of the stolen articles which the prisoner, who was a marine store dealer, had bought, was received in evidence, in order to show that he had bought at an under value. The circumstances under which

the list was written were as follows:—A police-constable asked the prisoner to consider when he had bought the stolen property, to which the prisoner replied that his wife should make out a list of it, and on the next day the prisoner's wife, in her husband's presence, handed to another constable the list tendered in evidence, saying in her husband's hearing, "This is a list of what we bought, and what we gave for them." The question reserved was whether such list was properly admitted in evidence:—Held, by the court, that the list was clearly admissible in evidence. *Reg. v. Mallory*, 13 Q. B. D. 33; 53 L. J., M. C. 134; 50 L. T. 429; 32 W. R. 721; 48 J. P. 487; 15 Cox, C. C. 456—C. C. R.

Secondary Evidence.—Proof of Destruction.—Notice to Produce.—O. ordered animals, bought at a market in the county of S., to be forwarded to T., in the county of C. A form of certificate was there given to the drover, who showed it in course of the journey to railway porters and others at two places in the county of C., but it was destroyed by order of O. On O. being charged for uttering a false certificate, and notice to produce the original being served:—Held, that the justices at T. were right in receiving secondary evidence of the certificate. *Oakey v. Stretton*, 48 J. P. 709—D.

— Proof of Telegram sent by Prisoner.—Where in a criminal case it is sought to give in evidence the contents of a telegram sent by the prisoner to a witness, it is absolutely necessary that the original message handed to the post-office should be produced, or proof given that it is destroyed, and the copy received by a witness cannot be given in evidence until it is proved that the original cannot be produced. *Reg. v. Regan*, 16 Cox, C. C. 203—Field, J.

Evidence of previous Connexion between Prosecutrix and Prisoner.—Rape.—On the trial of an indictment charging an assault with intent to rape, if the prosecutrix, in answer to cross-examination, denies having voluntarily had connexion with the prisoner prior to the alleged assault, evidence to contradict her by proving such prior connexion is admissible on his behalf. *Reg. v. Riley*, 18 Q. B. D. 481; 56 L. J., M. C. 52; 56 L. T. 371; 35 W. R. 382; 16 Cox, C. C. 191—C. C. R.

Effect of Misreception of, at Trial.—In a criminal trial, if any evidence not legally admissible against the prisoner is left to the jury, and they find him guilty, the conviction is bad; and this notwithstanding that there was other evidence before them properly admitted, and sufficient to warrant a conviction. *Reg. v. Gibson*, 18 Q. B. D. 537; 56 L. J., M. C. 49; 56 L. T. 367; 35 W. R. 411; 51 J. P. 742; 16 Cox, C. C. 181—C. C. R. See *Reg. v. Brittleton*, ante, col. 590.

4. TRIAL.

Postponement.—Fresh Evidence.—See *Reg. v. Flannagan*, ante, col. 588.

Venue.—Obtaining Credit in Ireland.—A person may be indicted in England for having, whilst resident therein, obtained credit within the meaning of s. 31 of the Bankruptcy Act,

1883, from a person resident in Ireland at the time such credit was obtained. *Reg. v. Peters*, 16 Q. B. D. 636; 55 L. J., M. C. 173; 54 L. T. 545; 34 W. R. 399; 50 J. P. 631; 16 Cox, C. C. 36—C. C. R.

— Obtaining Money by False Pretences.—See *Reg. v. Holmes*, ante, col. 572.

Prisoner's Statement.—Defence by Counsel.—A prisoner, defended by counsel, may make a statement to the jury, provided he does so before the speech of counsel for the defence. *Reg. v. Masters*, 50 J. P. 104—Stephen, J.

The Prisoners' Counsel Act, 1837, does not deprive prisoners of the right of making a statement to the jury in cases of felony; they may, if they wish to do so, make a statement to the jury before the court is addressed by their counsel, which statement will, however, give the Crown a right of reply. *Reg. v. Doherty*, 16 Cox, C. C. 306—Stephen, J.

— Counsel.—Witness called by Prisoner.—Upon the trial of a prisoner who is defended by counsel (in accordance with the opinion of the majority of the judges), the prisoner, after his counsel's address to the jury, will be allowed to make a statement of facts to the jury. But when it is proposed to call witnesses for the prisoner, it will not be competent for him to make any statement to the jury in addition to his counsel's address. *Reg. v. Millhouse*, 15 Cox, C. C. 622—Coleridge, C. J.

Right of Reply.—Several Prisoners, some calling Witnesses.—Where several prisoners were indicted jointly, and some of them called witnesses, but others did not:—Held, that the Crown had a right of reply to the counsel for those prisoners who called witnesses, but that the counsel for the prisoners who called no witnesses, had a right to address the jury last. *Reg. v. Burns*, 16 Cox, C. C. 195—Day and Wills, JJ.

Fourmen were indicted for having assaulted the prosecutor with intent to do him grievous bodily harm; one of the prisoners called witnesses in his defence to prove an alibi; no witnesses were called on behalf of the other prisoners. Counsel for the prosecution claimed a general right of reply:—Held, that there was no general right of reply, and that the most convenient course would be for counsel for the prosecution to sum up the case generally, and reply on the evidence called by one prisoner, before the counsel for the other prisoners addressed the jury. *Reg. v. Kain*, 15 Cox, C. C. 388—Stephen, J.

— Statement by Prisoner.—See *Reg. v. Doherty*, supra.

Special Verdict.—Jurors' Prayer.—The conservators of the river T. having indicted the local board of S., as the rural sanitary authority, for having, in contravention of s. 63 of the Thames Navigation Act, 1866, "caused or, without lawful excuse, suffered," sewage matter to flow into the said river T. within their district, in connexion with which certain points of law were necessarily involved:—Held, that the proper course to follow was to take a special verdict (prepared by both sides) from the jury, after formal evidence of the matters alleged in

the special verdict had been given, and the points of law arising therein should be subsequently discussed by the court. *Reg. v. Staines Local Board*, 52 J. P. 215—Huddleston, B.

Proceedings before Justices.—*See* JUSTICE OF THE PEACE.

Fine, Amount of—Fine to be Commensurate with Offence.—Where, on conviction of a corporation upon an indictment removed by certiorari into the Crown side of the Queen's Bench Division, a fine is to be imposed, the fine is only to be commensurate with the offence committed, and the court in apportioning the fine will not take into consideration the amount of the costs incurred by the prosecution. *Reg. v. London and North Western Railway*, 58 L. T. 771; 52 J. P. 821—D.

Prosecution by Individual—Independent Prosecution by Police—Costs.—Where the principal person interested in prosecuting a prisoner is desirous of conducting the prosecution, he is entitled to do so, and to be allowed the costs of the prosecution. In a case of aggravated assault by a prisoner on his wife, the wife retained a solicitor to prosecute her husband. In pursuance of this retainer, the solicitor prepared and delivered a brief to counsel at the assizes with instructions to conduct the prosecution. A constable of the county had been bound over by recognizances to prosecute, and the clerk to the magistrates, as was the usual custom, prepared and delivered a brief to counsel to prosecute:—Held, that the conduct of the prosecution should not be taken out of the hands of the person principally interested if that person wished to undertake it. *Reg. v. Yates* (7 Cox, C. C. 361) distinguished. *Reg. v. Bushell*, 52 J. P. 136; 16 Cox, C. C. 367—Coleridge, C. J.

Treasury Prosecution—Local Solicitors—Liability to Account.—When local solicitors are retained by the Treasury, to conduct prosecutions on their behalf, such local solicitors are agents for the Treasury, and are therefore bound to account to the Treasury for any sums of money received in respect of costs, and to pay over to the Treasury the difference between the sums so received as costs and the sum allowed them on taxation. *Parkinson, In re*, 56 L. T. 715—D.

Costs—Acquittal of Defendant—Order against Public Prosecutor.—Where a criminal prosecution has been instituted, undertaken or carried on by the public prosecutor, he stands by virtue of 42 & 43 Vict. c. 22, s. 7, in the same position with regard to costs as a private prosecutor. Where, therefore, upon an indictment preferred in compliance with s. 2 of the Vexatious Indictments Act (22 & 23 Vict. c. 17), a true bill is found, and the prosecution is then undertaken by the public prosecutor, and the defendant is acquitted, the court has power, under 30 & 31 Vict. c. 35, s. 2, to make an order for payment to the defendant of the costs to which he has been put, and in the exercise of its discretion will not be guided by the reasons which induced the public prosecutor to undertake the case. *Reg. v. Stubbs*, 16 Cox, C. C. 219—Recorder of London.

5. BAIL.

Contract to Indemnify—Recovery back of Money.—A contract is illegal, whereby a defendant in a criminal case, who has been ordered to find bail for his good behaviour during a specified period, deposits money with his surety upon the terms that the money is to be retained by the surety during the specified period for his own protection against the defendant's default, and at the expiration of that period is to be returned. *Herman v. Jeuchner or Zeuchner*, 15 Q. B. D. 561; 54 L. J., Q. B. 340; 53 L. T. 94; 33 W. R. 606; 49 J. P. 502—C. A. Reversing 1 C. & E. 364—Stephen, J.

6. ERROR.

Vexatious Indictments Act.—Error will not lie for non-compliance with the Vexatious Indictments Act. *Boaler v. Reg.*, 57 L. J., M. C. 85; 59 L. T. 554; 16 Cox, C. C. 488—D.

7. NEW TRIAL.

Indictment for Non-Repair of Bridge.—*See* WAY.

8. PRISONERS.

Money found on Prisoner not Debt due from Police.—Money in the possession of a prisoner which is taken possession of by the police upon his apprehension, and retained by them after his conviction, does not render the police debtors to the prisoner, and is not a debt which can be attached under garnishee proceedings. *Bice v. Jarvis*, 49 J. P. 264—D.

Taking Possession of Goods by Police.—The police have power under a warrant for the arrest of a person charged with stealing goods to take possession of the goods for the purposes of the prosecution. A person therefore is justified in refusing to hand over goods to one claiming to be the owner, if such person has been entrusted with them by the police, who have taken possession of them under such circumstances. *Tyler v. London and South Western Railway*, 1 C. & E. 285—Huddleston, B.

Peace officers when arresting persons under a warrant, are empowered to take and detain evidence of crime, whether the crime charged is treason, felony, or misdemeanour. *Dillon v. O'Brien*, 20 L. R., Ir. 300; 16 Cox, C. C. 245—Ex. D.

Habeas Corpus ad Testificandum—Prisoner desiring to argue Case.—Pending the argument of a case in the Court of Appeal, the appellant, who proposed to appear and argue in person, was sentenced to imprisonment in respect of a charge of libel:—Held, that the court had no power under the circumstances to award a writ of habeas corpus to bring the appellant before the court with a view to her arguing her appeal, as the provisions of 44 Geo. 3, c. 102, had no application to such a case. *Weidon v. Neal*, 15 Q. B. D. 471; 54 L. J., Q. B. 399; 33 W. R. 581—D.

Treatment and Confinement of Prisoners in Prison.—*See* PRISON.

CROPS.

Bills of Sale—Registration.—See **BILLS OF SALE.**

CROWN.

Prerogative—Execution for Debt—Distress.—Where claims of the Crown and of a subject as creditors come into competition, the prerogative right of the Crown to priority is not limited to proceedings by writ of extent, but equally attaches in proceedings by distress, although the distress put in by the Crown be subsequent in date to that of the subject, provided the distress put in by the subject has not been completely executed by actual sale. *Attorney-General v. Leonard*, 38 Ch. D. 622; 57 L. J., Ch. 860; 59 L. T. 624; 37 W. R. 24—Chitty, J.

—**Debtor to Crown—Priority.**—Letter-receivers were in the habit, with the sanction of the Postmaster-General, of paying moneys received on account of the Post-office into a bank to their private account, together with their own moneys, and of drawing cheques both for their own purposes and for payment to the Post-office. The bank had notice that their customers were letter-receivers, and drew cheques for Post-office purposes. The bank having gone into liquidation:—Held, that the Postmaster-General, on behalf of the Crown, was entitled to payment in priority over other creditors of the bank of the balance due upon the letter-receivers' accounts in respect of Post-office moneys. *Rea v. Ward* (2 Ex. 301, n.) followed. *West London Commercial Bank, In re*, 38 Ch. D. 364; 57 L. J., Ch. 925; 59 L. T. 296—Chitty, J.

—**Effect of Statute on.**—Section 150 of the Bankruptcy Act, 1883, enacting that, save as therein provided, the provisions of that act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge, shall bind the Crown, does not by virtue of the Judicature Act, 1875, s. 10, operate as an incorporation in the Companies Act, 1862, of a similar provision so as in a winding-up to bar the Crown of its prerogative of priority of payment over all creditors. *Oriental Bank Corporation, In re, The Crown, Ex parte*, 28 Ch. D. 643; 54 L. J., Ch. 327; 52 L. T. 172—Chitty, J.

The Victorian Statute, Crown Liability and Remedies Act, 1865 (28 Vict. No. 241), s. 17, does not affect the prerogative of the Crown when suing in this country. *Id. See Exchange Bank of Canada v. Reg.*, ante, col. 323.

Disclaimer binding on Crown.—The provisions of s. 55 of the Bankruptcy Act, 1883, as to the disclaimer of onerous property, are "provisions relating to the remedies against the property of a debtor" within the meaning of s. 150 of that Act, and are therefore binding upon the Crown. *Commissioners of Woods and*

Forests, Ex parte, Thomas, In re, or Thomas, Ex parte, Trotter, In re, 21 Q. B. D. 380; 57 L. J., Q. B. 574; 59 L. T. 447; 36 W. R. 735; 5 M. B. R. 209—D.

Commissioners of Works and Public Buildings.—By 18 & 19 Vict. c. 95, the Commissioners of Works and Public Buildings are incorporated and empowered to take land compulsorily for the purpose of building public offices:—Held, that the commissioners do not represent the Crown. *Wood's Estate, In re, Commissioners of Works and Public Buildings, Ex parte*, 31 Ch. D. 607; 55 L. J., Ch. 488; 54 L. T. 145; 34 W. R. 375—C. A.

Lands Clauses Act—Payment out of Court.—A railway company, under the powers of its act, gave notice to a lord of the manor to take a piece of land on the seashore, which he claimed as part of the waste of his manor. The purchase-money was assessed by arbitration, but an adverse claim having been made by the Crown, the company paid the purchase-money into court under the 76th section of the Lands Clauses Act. The Crown filed an information against the lord of the manor claiming the land, together with other land, as part of the foreshore. The lord of the manor having filed a petition for payment of the purchase-money to him:—Held, that as the Crown could not be brought before the court under the Lands Clauses Act to contest the claim of the petitioner, the petition ought to stand over till the information had been heard. *Lowestoft (Manor of), In re, Reeve, Ex parte*, 24 Ch. D. 253; 52 L. J., Ch. 912; 49 L. T. 523; 32 W. R. 309—C. A.

Election Law—Right of Soldiers to Vote.—Officers and non-commissioned officers in her Majesty's service had resided in quarters in blocks of barrack buildings. In each block officers of superior rank to the claimants also resided; the commanding officer occupying a separate dwelling within the barrack enclosure. The claimants' quarters were liable to inspection by superior officers, and the claimants themselves were subject to many disciplinary regulations:—Held, that the appellants were servants of the Crown, and not of their superior officers; that the Crown, if affected by the Representation of the People Act, 1884, was mentioned therein; that they were to be deemed inhabitant occupiers of their quarters, and that no person under whom they "served in their office, service, or employment," resided in the same dwelling-house, within the meaning of s. 3 of that act. *Atkinson v. Collard*, 16 Q. B. D. 254; 55 L. J., Q. B. 18; 53 L. T. 670; 34 W. R. 75; 50 J. P. 23; 1 Colt. 375—D.

And see further, post, **ELECTION LAW.**

Waiver of Forfeiture—Proof of.—A forfeiture may be waived by the Crown as well as by private individuals, and such waiver may be proved by similar evidence, e.g., by the continued acceptance of the Crown rent in respect of a market after conduct which would give the Crown a right to forfeit a grant. *Middleton (Lord) v. Power*, 19 L. R., Ir. 1—V. C.

Treasury Prosecution by Local Solicitors—Liability to Account.—See *Parkinson, In re*, ante, col. 593.

Right to grant Fishery to Subject—Exclusion of Owner of Soil.]—The Crown can hold a river-bed throughout a manor and the fishery in the river flowing over the same as parcel of the manor, and may grant the manor with the river-bed and fishery to a subject, and the subject may grant the banks of the river with reservation of the river-bed and fishery. *Devonshire (Duke of) v. Pattinson*, 20 Q. B. D. 263 ; 57 L. J., Q. B. 189 ; 58 L. T. 392 ; 52 J. P. 276—C. A.

Rights of Surety—Crown Debt—Priority.]—A surety to the Crown, who has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of his principal's estate. *Churchill (Lord), In re, Manisty v. Churchill*, 39 Ch. D. 174 ; 59 L. T. 597 ; 36 W. R. 805—North, J.

Right to Trial at Bar—Change of Venue.]—By the Crown Suits Act, 1865, s. 46, where in any cause in which the attorney-general is entitled on behalf of the Crown to demand as of right a trial at bar he states to the court that he waives that right, "the court on the application of the attorney-general shall change the venue to any county he may select":—Held, that an action under 39 & 40 Vict. c. 80, s. 10, against the secretary of the Board of Trade, to recover damages for the detention of a ship for survey without reasonable and probable cause, is within the above section, that the attorney-general is entitled to demand as of right a trial at bar in such an action, and that the court is bound on his waiving that right to change the venue to any county wherein he elects to have the action tried. *Dixon v. Farrer*, 18 Q. B. D. 43 ; 56 L. J., Q. B. 53 ; 55 L. T. 578 ; 35 W. R. 95 ; 6 Asp. M. C. 52—C. A.

Petition of Right—Damages for Breach of Contract by the Crown.]—It is settled law that a petition of right will lie for damages resulting from a breach of contract by the Crown. *Thomas v. Reg.* (10 L. R., Q. B. 31), and *Feather v. Reg.* (6 B. & S. 293), approved. It is immaterial whether the breach is occasioned by the acts or by the omissions of the Crown officials. *Windsor and Annapolis Railway Company v. Reg.*, 11 App. Cas. 607 ; 55 L. J., P. C. 41 ; 55 L. T. 271 ; 51 J. P. 260—P. C.

— **Repayment of Income Tax.]**—A land company paid debenture interest in excess of the assessments under schedule A., deducted income tax from the interest, and returned the whole amount deducted for assessment under schedule D.:—Held, that a petition of right did not lie to obtain repayment of the sum paid under schedule D. *Holborn Viaduct Land Company v. Reg.*, 52 J. P. 341—Stephen, J.

Right to sue Crown.]—See cases, ante, cols. 318, 332, 337.

Crown Lands.]—See cases, ante, cols. 317, 320.

CRUELTY.

1. *To Animals.*—See ANIMALS.
2. *In Divorce Cases.*—See HUSBAND AND WIFE.

CURATE.

See ECCLESIASTICAL LAW.

CUSTODY OF CHILDREN.

See INFANT.

CUSTOM.

As to Remuneration of Surveyors.]—See ARCHITECT.

As to Bills of Lading.]—See SHIPPING (BILLS OF LADING).

As to Lighterage.]—See SHIPPING (DEMURRAGE).

As to Charter-parties.]—See SHIPPING (CHARTER-PARTY).

As to Sale of Goods.]—See SALE.

As to Liability of Principal or Agent.]—See PRINCIPAL AND AGENT.

Of Lloyds.]—See INSURANCE (MARINE).

Admissibility to Explain Contract.]—See EVIDENCE.

CUSTOMS.

Annuity Fund—Interest of Subscriber—"Nominee"—Nomination of a Person as Trustee.]—On the construction of the Act 56 Geo. III. c. lxxiii., by which the Customs Annuity and Benevolent Fund was established, and of the rules made under the authority of that act:—Held, that in appointing a "nominee" of a subscriber's interest in the fund the directors ought to be informed for what purpose the nominee is appointed and to whom the money is

to be paid. This may be done by the instrument appointing the nominee or by some other instrument signed by the subscriber, or by his will. Semble, a "nominee" may be a person who is intended to take as a trustee for others. *Urquhart v. Butterfield*, 37 Ch. D. 357; 57 L. J., Ch. 521; 57 L. T. 780; 36 W. R. 376—C. A.

A subscriber to the fund became lunatic while in Scotland, where he died. He made a will before he became insane giving his property to legatees, but making no allusion to his interest in the fund. A curator was appointed by the Scotch Court of Session, and proved the will. The Court of Session made an order appointing the curator nominee of the subscriber's interest in the fund, "for behoof of the legatees under his will," and the directors of the fund admitted him on those terms. The directors admitted that the order had the same effect as if the subscriber, being sane, had made the nomination:—Held, that the order was a sufficient appointment of the nominee, and a declaration of the persons for whose benefit the sum insured was to be paid; and that the directors were bound to pay the money to the curator. *Ib.*

Customs and Excise.—See REVENUE.

DAMAGES.

I. GENERAL PRINCIPLES.

II. JURISDICTION TO REDUCE.—See PRACTICE (NEW TRIAL).

III. IN PARTICULAR CASES.

1. *Penalty or Liquidated Damages.*—See PENALTY.
2. *Damages or Injunction.*—See INJUNCTION.
3. *In Actions for Specific Performance.*—See SPECIFIC PERFORMANCE.
4. *Breach of Warranty of Authority.*—See PRINCIPAL AND AGENT.
5. *Infringement of Patent.*—See PATENT.
6. *Under Lord Campbell's Act.*—See NEGLIGENCE.
7. *In Actions for Wrongful Dismissal.*—See MASTER AND SERVANT.
8. *Action for Waste against Tenant.*—See LANDLORD AND TENANT.
9. *Action against Tenant for Breach of Covenant.*—See LANDLORD AND TENANT.
10. *Over-issue of Debenture Stock.*—See COMPANY (DEBENTURES).
11. *Non-delivery of Cargo.*—See SHIPPING (CARGO).
12. *Dishonour of Bill of Exchange.*—See BILLS OF EXCHANGE.
13. *Detention of Stock.*—See DETINUE.
14. *In Actions of Trover.*—See TROVER.
15. *Misrepresentations in Prospectus.*—See COMPANY (PROSPECTUS).
16. *Actions of Damage—Collision.*—See SHIPPING (COLLISION).

I. GENERAL PRINCIPLES.

Natural and Reasonable Result—Negligence—Nervous Shock.—Damages in a case of negligent collision must be the natural and reasonable result of the defendants' act; damages for a nervous shock or mental injury caused by fright at an impending collision are too remote. *The Notting Hill* (9 P. D. 105) approved. *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222; 57 L. J., P. C. 69; 58 L. T. 390; 37 W. R. 129; 52 J. P. 500—P. C.

Where a gate-keeper of a railway company negligently invited the plaintiffs to drive over a level crossing when it was dangerous to do so, and the jury, although an actual collision with a train was avoided, nevertheless assessed damages for physical and mental injuries occasioned by the fright:—Held, that the verdict could not be sustained, and that judgment must be entered for the defendants. *Quære*, whether proof of "impact" was necessary to maintain the action. *Ib.*

—Injury to Property by Flood—Injury to Reversion.—Owing to the negligence of the defendants a building estate belonging to the plaintiff was overflowed by a flood. Part of the land was covered with houses (A) which were in the plaintiff's possession. Another part was covered with houses (B) erected by builders under building leases. Other parts were the subject of building agreements under which houses (C) were in course of erection, and the plaintiff was bound to make and had made advances to the builders on the security of the property. The remainder of the land (D) was vacant, and in the plaintiff's possession. The amount of damages to which the plaintiff was entitled was referred to a special referee. In respect of (A) the referee allowed as damages (1) the expense of repairing the houses, and the rent during the period of repairs; (2) the loss arising from the reduced rental for four years in consequence of the prejudice against the neighbourhood caused by the flood. As to (B), he found that there was no injury which would last to the end of the leases, but he allowed a sum for depreciation of the selling value of the landlord's interest, in consequence of the houses being worth less to let. As to (C), he deducted the value of the houses when repaired and completed, less the expense of repairing and completing them, from the amount advanced, and awarded this difference to the plaintiff for depreciation of mortgage securities. As to (D), he gave three months of an estimated rent for delay in letting:—Held, that (A) (2) must be disallowed, for the loss of rental arising from the prejudice against the neighbourhood caused by the flood was not the natural result of or directly caused by the flood, and was not a legitimate ground for giving damages: That the sum allowed in respect of (B) must also be disallowed, for that a reversion can only recover damages where the injury to the property is permanent, so that it will continue to affect it when the reversion comes into possession, and he is not entitled to damages in respect of a temporary injury, on the ground that it affects the present saleable value of his reversion: That the sum given for depreciation of mortgage securities (C) must be disallowed, and an inquiry directed with the view of ascertaining to what extent the flood had made those houses a less sufficient security

for the plaintiff's advances than they were before. *Rust v. Victoria Graving Dock Company*, 36 Ch. D. 113; 56 L. T. 216; 35 W. R. 673—C. A.

Agreement to enter into Agreement with Third Party.]—An agreement was made between F. and W. that W. would enter into an agreement with F.'s landlord, O., for a lease at a given rent for such term and subject to such covenants as O. should approve, and that F. upon such lease being granted would surrender his lease. W. refused to carry out this agreement:—Held, that F. was entitled to damages from W. for breach of the agreement. *Foster v. Wheeler*, 38 Ch. D. 130; 57 L. J., Ch. 871; 59 L. T. 15; 37 W. R. 40—C. A.

Not advancing Money as agreed.]—Where there is an agreement to lend money, and special damage results from the breach of that agreement, and the party is deprived of the opportunity of getting money elsewhere, substantial, and not merely nominal, damages ought to be awarded. *Manchester and Oldham Bank v. Cook*, 49 L. T. 674—D.

Sale of Goods—Breach of Warranty.]—On a sale of seed potatoes, the potatoes were of an inferior quality to that warranted:—Held, that the purchaser was entitled to the difference in value between the crop actually produced and the crop that would have been produced if the warranty had been complied with, if it were a reasonable thing for the purchaser to plant the seed without examination. *Wagstaff v. Short-horn Dairy Company*, 1 C. & E. 324—Cave, J.

Market Price—Profits.]—The ordinary rule as to the measure of damages in case of breach of contract to accept a manufactured article, applies equally in the case of an unmanufactured article. Where, therefore, in the case of an unmanufactured article, there is a market price at the date of breach, the profits that would have arisen from the contract, and the losses sustained through its breach, cannot be considered as elements of the damage. *Tredgar Iron and Coal Company v. Gielgud*, 1 C. & E. 27—Field, J.

No Market—Sub-sale.]—In an action for damages for non-delivery of goods, where the same class of goods is not obtainable in the market at the place of delivery, the price on a sub-sale by a purchaser is evidence of the value of the goods, and the amount by which such price on sub-sale exceeds the contract price may be recovered as damages, although the seller at the time of the contract had no notice of the sub-sale. *Stroud v. Austin*, 1 C. & E. 119—Cave, J.

Loss of Market.]—The defendants advertised that they would convey fish from London to Boulogne at certain through rates by their special tidal train and passenger boat, "wind, weather, and tide permitting." A consignment of fish intended for the Paris market (of which fact the defendants had notice) was delivered by the plaintiffs in London to the defendants, to be forwarded to Boulogne. Owing to rough weather, it was not put on board the passenger boat at Folkestone, but was sent on by a cargo

boat which arrived at Boulogne too late for the train to Paris. It was delayed at Boulogne for twenty-four hours, and deteriorated, and was put up for sale in the Paris market a day late:—Held, that there was no absolute undertaking to carry the fish by any particular train and boat, and that, if the defendants under the circumstances had used all reasonable care to deliver the fish with the utmost possible despatch, they had discharged their obligation, and that damages could not be given for the loss of the market in Paris. *Hawes v. South-Eastern Railway*, 54 L. J., Q. B. 174; 52 L. T. 514—D.

A ship having been damaged by collision with another ship, the owners of cargo on the former claimed damages from the owners of the latter ship. The cargo-owners claimed, inter alia, for damages in respect of the loss of market in consequence of a portion of the cargo having been delayed in its arrival at the port of destination:—Held, that loss of market was too remote a consequence to be considered as an element of damage, and that there was no difference in the principles as to remoteness of damage, whether the damages are claimed in contract or in tort. *The Notting Hill*, 9 P. D. 105; 53 L. J., P. 56; 51 L. T. 66; 32 W. R. 764; 5 Asp. M. C. 241—C. A.

The defendant, the master of the steamer "Carbis Bay," lying at Wilmington, signed bills of lading for 400 bales of cotton "shipped on board the 'Carbis Bay'" for Liverpool. In consequence of insufficient room only 165 bales could be shipped, and the defendant directed the remaining 235 bales to be shipped on board the steamer "Wylö," then lying in the same port, bound for Liverpool. The "Carbis Bay" arrived at Liverpool on the 26th of October, and the "Wylö" on the 29th of October, and both cargoes were delivered to the plaintiffs, who were indorsees of the bills of lading. Between the 26th and the 29th of October a fall in the price of cotton took place, and the plaintiffs sued the defendant for the loss thereby occasioned:—Held, that on the 26th of October the plaintiffs had a right of action against the defendant for non-delivery, that the measure of damages was the market price of cotton on that day, and that the subsequent delivery of the cotton ex "Wylö" could only be taken into account in reduction of damages. *Smith v. Tregarthen*, 56 L. J., Q. B. 437; 57 L. T. 58; 35 W. R. 665; 6 Asp. M. C. 137—D.

No Notice of Special Contract.]—Section 26 of the Companies Act, 1867, is for the protection of a transferor of shares in a registered company, and enables him to compel the company to register the transfer in case the transferee fails to do so. But the section has made no alteration as regards the ordinary contract for the sale of shares in a company, under which a transferor, in consideration of the price of such shares, is bound to execute a valid transfer and hand the certificates to the transferee, whilst the transferee is bound to get the transfer registered. The plaintiff, under an alleged agreement that certain shares which he held in a company should be taken by one L. in payment of a debt due from him to L., if such shares were registered, executed a valid transfer of the same and handed the certificates to L. The plaintiff applied to the company under s. 26 of the Com-

panies Act, 1867, to register the transfer, but they refused to do so upon the ground that he was indebted to them. The question of his indebtedness was decided in his favour in an action between him and the company, and the transfer was subsequently registered. The company had no notice of the alleged agreement between the plaintiff and L., the transfer being expressed to have been executed for a nominal sum. The market value of the shares having fallen considerably between the date when the transfer was executed and that at which it was actually registered, the plaintiff sought to recover damages from the company for their wrongful refusal to register the transfer:—Held, that the plaintiff was only entitled to recover nominal damages, as the company had received no notice of the alleged agreement between him and L., and also because he had suffered no damage either in respect of calls or otherwise from the refusal of the company to register the transfer. *Skinner v. City of London Marine Insurance Corporation*, 14 Q. B. D. 882; 54 L. J., Q. B. 437; 53 L. T. 191; 33 W. R. 628—C. A.

Purchase for Specific Purpose.—[On breach of contract by the seller to deliver an article obviously valueless if used for the purpose for which such an article is ordinarily used, the buyer is entitled to recover damages based on the value of the article if used for the specific purpose for which the buyer bought it, although such specific purpose were unknown to the seller at the time of the sale. Such value may be ascertained by considering the net annual profits to be obtained from such specific use of the article. *De Mattos v. Great Eastern Steamship Company*, 1 C. & E. 489—Stephen, J.

Notice of Purpose for which Goods sent.—[The plaintiff delivered a parcel at a receiving office of the defendants in London, addressed to "W. H. M., Stand 23, Show Ground, Lichfield, Staffordshire; van train." Nothing was said by the person who delivered the parcel at the receiving office as to the purpose for which it was being sent to Lichfield, or to draw attention to the label:—Held, that the label was sufficient notice to the defendants that the goods were being sent to a show, and that the plaintiffs were entitled to recover damages for loss of profits and expenses incurred by the goods being delayed, and not delivered at Lichfield in time for the show. *Jameson v. Midland Railway*, 50 L. T. 426—D.

A parcel of samples was delivered to the defendants, a railway company, to be forwarded to the plaintiffs. By the negligence of the defendants, who had notice that the parcel contained samples, it was delayed on the way until the season at which the samples could be used for procuring orders had elapsed, and they had in consequence become valueless. The plaintiffs could not have procured similar samples in the market. In an action for the non-delivery in a reasonable time:—Held, that the plaintiffs were entitled to recover as damages the value to them of the samples at the time when they should have been delivered. *Schulze v. Great Eastern Railway*, 19 Q. B. D. 80; 56 L. J., Q. B. 442; 57 L. T. 438; 35 W. R. 683—C. A.

Money paid to Settle Action.—[A "boat-

staging" or suspension platform, put up for the plaintiffs by the defendant under a contract between them, to enable the plaintiffs to paint a house, fell, through being insecurely fastened by the defendant, and hurt a painter in the employment of the plaintiffs. He brought an action under the Employers' Liability Act (43 & 44 Vict. c. 42) against the plaintiffs for injuries sustained in consequence of the defective state of the boat-staging. The plaintiffs settled the action by paying to the painter 125*l.*, and then sued the defendant for breach of his contract:—Held, that the defendant was liable under the contract; but that, inasmuch as the plaintiffs had employed a competent contractor to put up the boat-staging, and there was, on the facts, no evidence of negligence by the plaintiffs, they were not liable to their servant for the injury he had sustained, and therefore the money which they had paid to settle his action was not recoverable as damages from the defendant for his breach of contract. *Kiddle v. Lovett*, 16 Q. B. D. 605; 34 W. R. 518—D.

Notice of Sub-sale—Profits—Costs of Action by Sub-vendee.—[The defendants contracted with the plaintiff to deliver goods to him of a particular shape and description at certain prices and by instalments at different times. When the contract was made the defendants knew that, except as to price, it corresponded with and was substantially the same as a contract which the plaintiff had entered into with a French customer of his, and that it was made in order to enable the plaintiff to fulfil such last-mentioned contract. The defendants broke their contract, and there being no market for goods of the description contracted for, the plaintiff's customer obtained damages against him in the French court to the amount of 28*l.*:—Held, in an action against the defendants for their breach of contract, that the plaintiff was not only entitled to recover as damages the amount of profit he would have made had he been able to fulfil his contract with his customer, but also damages in respect of his liability to such customer, and that in estimating such last-mentioned damages the 28*l.* which the French court had given might be treated as not an unreasonable amount at which such damages might be assessed. *Elbinger Actien-Gesellschaft v. Armstrong* (9 L. R., Q. B. 473) approved of. *Grébert-Borgnis v. Nugent*, 15 Q. B. D. 85; 54 L. J., Q. B. 511—C. A. Affirming 1 C. & E. 337—Denman, J.

The defendant contracted for the sale of coal of a particular description to the plaintiffs, knowing that they were buying such coal for the purpose of re-selling it as coal of the same description. The plaintiffs did so re-sell the coal. The coal delivered by the defendant to the plaintiffs under the contract and by them delivered to their sub-vendees did not answer such description, but this could not be ascertained by inspection of the coal, and only became apparent upon its use by the sub-vendees. The sub-vendees thereupon brought an action for breach of contract against the plaintiffs. The plaintiffs gave notice of the action to the defendants, who, however, repudiated all liability, insisting that the coal was according to contract. The plaintiffs defended the action against them, but at the trial the verdict was that the coal was not according to contract, and the sub-vendees accordingly recovered damages from

the plaintiffs. The plaintiffs thereupon sued the defendant for breach of contract, claiming as damages the amount of the damages recovered from them in the action by their sub-vendees, and the costs which had been incurred in such action. The defendant paid the amount of the damages in the previous action into court, but denied his liability in respect of the costs:—Held, that, the defence of the previous action being, under the circumstances, reasonable, the costs incurred by the plaintiffs as defendants in such action were recoverable under the rule in *Hadley v. Baxendale* (9 Ex. 341), as being damages which might reasonably be supposed to have been in the contemplation of the parties, at the time when they made the contract, as the probable result of a breach of it. *Baxendale v. London, Chatham and Dover Railway* (10 L. R., Ex. 35) discussed and distinguished. *Hammond v. Bussey*, 20 Q. B. D. 79; 57 L. J., Q. B. 58—C. A. See also *Stroud v. Austin*, ante, col. 601.

Indemnity—Costs of Action.—Under a covenant to indemnify against all actions and claims in respect of the covenants of a lease, costs properly incurred in reasonably defending an action brought for a breach of one of the covenants are recoverable as damages. *Murrell v. Fysh*, 1 C. & E. 80—Williams, J.

DANCING.

See DISORDERLY HOUSE.

DEATH.

Change of Parties by Death.—See PRACTICE.

Evidence of Death.—See INSURANCE.

Presumption of Law as to.—See EVIDENCE.

DEBENTURE.

See COMPANY.

DEBTORS ACT.

I. COMMITTAL IN DEFAULT OF PAYMENT.

1. *In what Cases*, 606.

2. *Jurisdiction and Practice*, 607.

II. PERSONS IN FIDUCIARY CAPACITY, 609.

III. ARREST OF PERSON ABOUT TO QUIT ENGLAND, 612.

IV. JUDGE'S ORDER BY CONSENT, 612.

V. OBTAINING CREDIT BY FRAUD, 613.

I. COMMITTAL IN DEFAULT OF PAYMENT.

1. IN WHAT CASES.

Married Woman—Judgment against Separate Estate.—A married woman cannot be committed to prison under s. 5 of the Debtors Act, 1869, for non-payment of a judgment debt recovered against her, payable out of her separate estate, under s. 1, sub-s. 2, of the Married Women's Property Act, 1882. Form of order upon such a judgment. *Scott v. Morley*, 20 Q. B. D. 120; 57 L. J., Q. B. 43; 57 L. T. 919; 36 W. R. 67; 52 J. P. 230; 4 M. B. R. 286—C. A.

Where an order was made that a married woman should pay by instalments the amount of a judgment against her, out of her separate estate not subject to restraint in anticipation, or which, being so subject, was liable to execution under s. 19 of the Married Women's Property Act, 1882, the court, upon her default in payment of the instalments, made an order for committal. *Johnstone v. Browne*, 20 L. R., Ir. 443—Ex. D.

If in the judgment execution is limited to separate estate which she is not restrained from anticipating, quære, whether s. 5 of the Debtors Act, 1869, applies at all. *Meager v. Pellew*, infra.

Separate Estate with Restraint on Anticipation.—Judgment for a debt and costs was recovered against a married woman, execution being, by the terms of the judgment, limited to her separate property not subject to any restraint upon anticipation, unless by reason of the Married Women's Property Act, 1882, such property should be liable to execution notwithstanding such restraint. Upon an application for an order of committal against her under s. 5 of the Debtors Act, 1869, the only evidence of her ability to pay was, that since the date of the judgment she had received sufficient income of separate property subject to a restraint upon anticipation:—Held, that no order could be made against her upon that evidence, because s. 5 did not apply to the judgment. *Draycott v. Darracott v. Harrison*, 17 Q. B. D. 147; 34 W. R. 546—D.

An order, under the Debtors Act, for payment by instalments, will not be made against a married woman whose only separate estate is subject to restraint on anticipation, even though, since the date of the judgment against her, she has received income of the separate estate. *Morgan v. Eyre*, 20 L. R., Ir. 541—Q. B. D.

Upon a judgment summons issued under s. 5 of the Debtors Act, 1869, against a married woman who has only separate estate which she is restrained from anticipating, an order for payment cannot be made unless it is shown that, since the date of the judgment, she has received some of her separate income. *Meager v. Pellew*,

or *Meager, Ex parte, Pellow, In re*, 14 Q. B. D. 973; 53 L. T. 67; 33 W. R. 573—C. A.

Alimony—Committal for Default in Payment.]—Arrears of payments of alimony payable by a husband by virtue of an order of the Divorce Court made under s. 1 of the act 29 & 30 Vict. c. 32, constitute a debt enforceable under s. 5 of the Debtors Act, 1869. *Linton v. Linton*, or *Linton, Ex parte, Linton, In re*, 15 Q. B. D. 239; 54 L. J., Q. B. 529; 52 L. T. 782; 33 W. R. 714; 49 J. P. 597—C. A.

Where in an order for payment of alimony, the periods for payment are specified, an absolute order for an attachment under the Debtors Act may be made, without any preliminary order for payment by instalments. *Daly v. Daly*, 17 L. R., Ir. 372—Mat.

— **Payment by Instalments.]**—On January 30, 1888, an order for alimony pendente lite, and on February 1, 1888, an order for permanent alimony, was made in the Probate and Divorce Division. The sum of 130*l.* being due under these orders, a judgment summons in respect thereof was issued by the wife:—Held, that a receiving order in lieu of committal could not be made by the court against the husband under s. 5 of the Debtors Act, 1869, and that an order directing payment by monthly instalments of 10*l.* should be made. *Otway, Ex parte, Otway, In re*, 58 L. T. 885; 36 W. R. 698; 5 M. B. R. 115—Cave, J.

Damages—Non-payment in Divorce Matter.]—The court having ordered damages to be paid into the registry, and proceedings in default being impracticable, as there was no one to institute them, the court ordered the damages to be paid to the petitioner, he undertaking to pay them into court. *Gyte v. Gyte*, 10 P. D. 185; 34 W. R. 47—Hannen, P.

Security for Costs in Divorce Matter.]—Notwithstanding the provisions of the Debtors Act, 1869, a husband is liable to attachment if he does not find security for his wife's costs of suit. *Lynch v. Lynch*, 10 P. D. 183; 54 L. J., P. 93; 34 W. R. 47—Hannen, P.

Non-payment of Costs.]—A respondent being in contempt for non-obedience of an order for restitution of conjugal rights, the petitioner applied for a writ of attachment against him:—Held, that the writ could not issue for non-payment of costs. *Weldon v. Weldon*, 54 L. J., P. 60; 52 L. T. 233; 33 W. R. 427; 49 J. P. 517—C. A. Affirming 10 P. D. 72—Hannen, P.

2. JURISDICTION AND PRACTICE.

Affidavit of Means and Denial of Satisfaction of Debt.]—Upon an application to commit to prison under the Debtors Act (Ireland), 1872, s. 6, for non-payment of instalments previously ordered to be paid, there must be an affidavit showing that at the time of such application the debtor is still in a position to pay the instalments. *Davis v. Simmonds*, 14 L. R., Ir. 364—Q. B. D.

Where a party desires to enforce by commitment in the High Court a judgment of a competent court, he need not file an affidavit in

denial of satisfaction. *Nicholson, Ex parte, Stone, In re*, 1 M. B. R. 177—Cave, J.

"The Means to Pay."]—For the purpose of determining whether a judgment debtor has had "the means to pay" the judgment debt, with the view of making an order for his committal under sub-s. 2 of s. 5 of the Debtors Act, 1869, money derived from a gift may be taken into account. It is not necessary that the "means to pay" should have been derived from the debtor's earnings, or from a fixed income. *Koster, Ex parte, Park, In re*, or *Koster v. Park*, 14 Q. B. D. 597; 54 L. J., Q. B. 389; 52 L. T. 946; 33 W. R. 606; 2 M. B. R. 35—Per Cotton and Lindley, L.JJ.

Ability only to Pay part.]—Where a person from whom money is due within the meaning of s. 5 of the Debtors Act, 1869, has means to pay part only of the sum due, and has failed to pay that part, a court is not precluded from making an order under the section by reason only that he is unable to pay the entire sum. *Fryer, Ex parte, Fryer, In re*, 17 Q. B. D. 718; 55 L. J., Q. B. 478; 55 L. T. 276; 34 W. R. 766; 3 M. B. R. 231—C. A.

Past Default or Anticipatory Order.]—Judgment having been recovered against a defendant in a county court an order for payment of 20*l.* was made. The defendant having made default in payment thereof a judgment summons was taken out, and the judge having heard evidence and being satisfied as to the defendant's means made an order to commit him to prison for ten days, but directed that the warrant should be suspended if the debtor paid instalments of 4*l.* a month, the first payment to be made in fourteen days:—Held, that the order was in reality an order for commitment in respect of the past default in payment of the 20*l.*, and not an anticipatory order for commitment in respect of any future default; and that this being so the order was valid under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5. *Stonor v. Fovle*, 13 App. Cas. 20; 57 L. J., Q. B. 387; 58 L. T. 1; 36 W. R. 742; 52 J. P. 228—H. L. (E.).

Order, how made in County Court.]—See COUNTY COURT (JURISDICTION).

Jurisdiction to make second Order on Cancellation of first.]—A defendant in a county court having made default in payment of 20*l.* due under a judgment, an order was made to commit him to prison. He was, however, never arrested nor imprisoned under the order, which, according to Ord. XXV. r. 33 of the County Court Rules, 1886, expired when a year had elapsed from its date:—Held, upon motion for prohibition, that as no arrest nor imprisonment had ever taken place upon this order before its expiration, and as the defendant was still in default, the county court judge had power to make a second order of commitment. *Reg. v. Stonor or Brompton County Court Judge*, 57 L. J., Q. B. 510; 59 L. T. 669—D.

Judgment in Superior Court—Jurisdiction of County Court Judge.]—A county court judge has power to enforce the order or judgment of the High Court, where the High Court has made no order for payment by instalments, by

directing payment by instalments of the amount due under such order or judgment, and to commit the debtor in default. But where the High Court has made an order for payment by instalments the county court has no power to vary that order. *Addington, Ex parte, Ives, In re*, 16 Q. B. D. 665; 55 L. J., Q. B. 246; 54 L. T. 877; 34 W. R. 593; 3 M. B. R. 83—Cave, J.

The plaintiff in an action in the High Court obtained an order for payment of costs by the defendant, who agreed to pay by instalments. The defendant having failed to pay, the plaintiff applied to the judge of the county court of the district in which the defendant resided for an order under s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62) for payment by instalments, and, upon the judge refusing to make the order upon the ground that he had no jurisdiction, applied to the bankruptcy judge in chambers:—Held, that the county court judge had jurisdiction to make the order asked for. *Washer v. Elliott* (1 C. P. D. 169) explained. *Ib.*

Appeal from High Court.—By the operation of the Bankruptcy Act, 1883, s. 103, the jurisdiction and powers under the Debtors Act, 1869, s. 5, formerly vested in the High Court, are assigned to, and are to be exercised by the judge to whom bankruptcy business is assigned. By s. 104, an appeal is given in bankruptcy matters from the order of the High Court to the Court of Appeal. An appeal from an order of the judge to whom bankruptcy business is assigned upon an application under s. 5 of the Debtors Act, 1869, therefore, now lies to the Court of Appeal, and not to a Divisional Court. *Genese, Ex parte, Lascelles, In re*, 53 L. J., Q. B. 578; 32 W. R. 794; 1 M. B. R. 183—D.

Effect of Receiving Order—Arrest.—Having regard to the terms of s. 9 of the Bankruptcy Act, 1883, as to the effect of a receiving order in protecting a debtor from arrest, the order must be deemed to have been "made" on the day it was pronounced, and therefore as protecting the debtor as from that day. Therefore, where a debtor had been arrested under an order of the Chancery Division made after the date of a receiving order pronounced before, but not drawn up and signed by the registrar until after the arrest, he was ordered to be discharged, notwithstanding that he had by his counsel submitted to the order of attachment. *Manning, In re*, 30 Ch. D. 480; 55 L. J., Ch. 613; 54 L. T. 33; 34 W. R. 111—C. A.

After a commitment order had been issued by the Mayor's Court in London against a judgment debtor for default in payment of an instalment of the judgment debt, a receiving order was made against him under s. 9 of the Bankruptcy Act, 1883:—Held, that the commitment order was not a process for contempt of court, but to enforce payment of a debt provable in the bankruptcy, and that after the making of the receiving order the debtor was privileged from arrest. *Official Receiver, Ex parte, Ryley, In re*, 15 Q. B. D. 329; 54 L. J., Q. B. 420; 33 W. R. 656; 2 M. B. R. 171—Cave, J.

II. PERSONS IN A FIDUCIARY CAPACITY.

Periods to be Considered.—To ascertain whether a person ordered to pay and making

default fills the character of (a) trustee, (b) person acting in a fiduciary capacity, or (c) solicitor, within the exception of the Debtors Act, 1869, s. 4, sub-ss. 3 and 4, three periods may possibly be material—namely, (1) when the act on which the order was founded was done, (2) when the order was made, (3) when the default was committed—in cases (a) and (b) the period to be looked at is the first; in case (c), if not the first, at the latest the second period. Per Fry, L. J., in cases (a), (b), and (c), the proper period is the first. *Strong, In re*, 32 Ch. D. 342; 55 L. J., Ch. 553; 55 L. T. 3; 34 W. R. 614; 51 J. P. 6—C. A.

Defaulting Trustee—Admission made by mere Debtor.—By an order of June, 1878, compromising an action brought to recover from B. moneys which he had borrowed from A. at interest, B. "by his counsel admitting that the principal sum in his hands claimed in the action amounted to —£—," it was ordered in effect that he should hold 1,7. 0l., part thereof, on certain trusts, and should be at liberty to retain it during the life of C., paying interest for it, and liberty was given to apply for payment of the principal and interest if default was made in payment of interest. Default having been made, B. in 1887 was ordered to pay the money into court, and on his failing to do so, leave to issue an attachment was applied for. He deposed that when the order of 1878 was made he had not in his hands any money or investments representing the sum owing from him or any part thereof:—Held, that although B. up to the order of 1878 was only a debtor and not a trustee, he must, having regard to his admission, be held upon the making of that order, to have had the money in his hands as trustee—that he therefore came within the exception in s. 4, sub-s. 3, of the Debtors Act, 1869, and was liable to attachment for non-payment. *Preston v. Etherington*, 37 Ch. D. 104; 57 L. J., Ch. 176; 58 L. T. 318; 36 W. R. 49—C. A.

Receiver and Manager—Administration Action—No Means.—A member of parliament was appointed receiver and manager of the business of a testator in an administration action, but was afterwards discharged and ordered to pass his accounts and pay the balance due from him into court. Subsequently an order was made by which he was directed to pay a certain sum found due from him into court. A motion to attach him for default in payment was made; but on payment of part of the sum due from him, the motion stood over by arrangement. On the motion coming on for hearing, he made an affidavit to the effect that the amount paid was raised by a friend; that he had no means, and if a writ of attachment were issued against him he should be unable to pay:—Held, that he was liable to imprisonment as a person acting in a fiduciary capacity within s. 4, sub-s. 3, of the Debtors Act, 1869; that it was not a case in which the court would refuse to attach, acting on the discretion given it by the Debtors Act, 1878, s. 1. *Gent, In re, Gent-Davis v. Harris*, 40 Ch. D. 190; 58 L. J., Ch. 162; 60 L. T. 355; 37 W. R. 151—North, J.

Member of Parliament.—Parliamentary privilege has no application to a case under s. 4,

sub-s. 3, of the Debtors Act, 1869, and therefore a member of parliament may be imprisoned. *Id.*

Solicitor.—A solicitor received money belonging to a client, and paid it in to his own banking account. Afterwards an order directing him to pay the money to the client was made by the court. After the making of this order the client signed an agreement to accept payment by instalments. Default was made in payment of the instalments, and a further order for payment was made. This order having been disobeyed, an order for attachment against the solicitor was made. No order had been made calling on the solicitor to answer affidavits, but the matter had been referred to the master, who had reported that the money was due to the client:—Held, that the case was within the fourth exception in 32 & 33 Vict. c. 62, s. 4, and therefore the solicitor was liable to imprisonment, and the order of attachment was rightly made, and must be restored. *Dudley, In re, Monct, Ex parte*, 12 Q. B. D. 44; 53 L. J., Q. B. 16; 49 L. T. 737; 32 W. R. 264—C. A.

—**Town Agent of Country Solicitor.**—A solicitor, the London agent of a country solicitor, made default in payment of a sum ordered to be paid by him in an action for an account of his agency:—Held, that the defendant was liable to imprisonment under s. 4, sub-s. 3, of the Debtors Act, 1869, as a person acting in a fiduciary capacity, but not liable under s. 4, sub-s. 4, as a solicitor ordered to pay in his capacity of officer to the court. *Litchfield v. Jones*, 36 Ch. D. 530; 57 L. J., Ch. 100; 58 L. T. 20; 36 W. R. 397—North, J.

Auctioneer—Money received from Sale.—An auctioneer is a person acting in a fiduciary capacity within the meaning of the Debtors Act, 1869, s. 4, sub-s. 3, and if he makes default in payment of the money produced by the sale of goods entrusted to him for sale when ordered to pay it by a Court of Equity he is liable to attachment, whether he still holds the money or has parted with it. *Crowther v. Elgood*, 34 Ch. D. 691; 56 L. J., Ch. 416; 56 L. T. 415; 35 W. R. 369—C. A.

Order on Administratrix to Pay over to Executor.—Letters of administration had been granted to the widow of a deceased person upon the suggestion of intestacy, and she had received a sum of money, part of the deceased's property. The letters of administration were subsequently called in, in an action propounding a will of the deceased, and in that action she was ordered to pay the sum of money to the administrator pending suit, which order she had not obeyed:—Held, that she was not protected by the Debtors Act, 1869, and therefore was liable to attachment. *Tinnuchi v. Smart*, 10 P. D. 184; 54 L. J., P. 92; 34 W. R. 46—Butt, J.

Defaulting Executor—Possession or Control—Principal and Interest.—An executor making default in payment of a sum of money found due from him in an administration action, and which he has been ordered to pay into court, is within the third exception to s. 4 of the Debtors Act, 1869, notwithstanding that the sum consists

of a debt which had been owing to the testator during his life, if the executor had been in a fiduciary relation to the testator in respect thereof. But it must be shown that the money ordered to be paid in had been in the executor's possession or under his control. Therefore, where the order directs payment of a sum composed of principal and interest not distinguished, an attachment cannot be issued because so much of the sum as represents interest cannot be said to have been in his possession or under his control. *Hickey, In re, Hickey v. Colmer*, 55 L. T. 588; 35 W. R. 53—Kay, J.

Application for Writ by Person not in position of Cestui que Trust.—The special remedy afforded by the Debtors Act, 1869, in respect of default in payment by a trustee, is a remedy intended to be given only as between trustee and cestui que trust, and is not a remedy for a mere creditor, where the person against whom the remedy is sought to be asserted is not a trustee for such creditor. *Firmin, In re, London and County Banking Company v. Firmin*, 57 L. T. 45—Kay, J.

Appeal from Discretion of Judge.—When a judge on an application for leave to issue a writ of attachment against a trustee, makes an order for attachment in the exercise of the discretion given to him by the Debtors Act, 1878, the Court of Appeal will not interfere on the merits. *Preston v. Etherington*, supra.

III. ARREST OF PERSON ABOUT TO QUIT ENGLAND.

Debt payable in futuro—Default by Trustee.—An order was made that a trustee should within seven days after service of the order pay to his cestui que trust, the plaintiff, a sum found due to him by the chief clerk's certificate. The plaintiff could not find the trustee so as to serve the order, and applied for a writ of ne exeat on the ground that the trustee was about to go out of the jurisdiction:—Held, that the case did not fall within the third exception in s. 4 of the Debtors Act, 1869, the trustee not being in default, as the order only directed payment after service and had not been served, and that as the debt was not now due and payable a writ of ne exeat could not be granted. *Colverson v. Bloomfield*, 29 Ch. D. 341; 54 L. J., Ch. 817; 52 L. T. 478; 33 W. R. 889—C. A.

IV. JUDGE'S ORDER BY CONSENT.

What is.—An order made by consent at the trial of an action on a promissory note, that the defence be withdrawn, and that the defendant do pay to the plaintiff a specified sum and taxed costs:—Held, not to be a "judge's order made by consent" within s. 27 of the Debtors Act, 1869. *Lennox, Ex parte, Lennox, In re*, 16 Q. B. D. 315; 55 L. J., Q. B. 45; 54 L. T. 452; 34 W. R. 51—C. A.

Failure to file Order—Judgment not void as against Judgment Debtor.—The 27th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62), pro-

vides that a judge's order for judgment made by consent of the defendant in a personal action shall be filed in the Court of Queen's Bench in the manner required by the section within twenty-one days after the making thereof, "otherwise the order and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be void."—Held, that the effect of non-compliance with the requirements of the section is only to render such an order and judgment void as against the creditors of such defendant, but not as against himself; and, therefore, that a defendant who had consented to such an order could not get the judgment signed upon it set aside on the ground that the order had not been filed in accordance with the section. *Gowan v. Wright*, 18 Q. B. D. 201; 56 L. J., Q. B. 131; 35 W. R. 297—C. A.

Where a judgment obtained by consent is void for non-compliance with the provisions of 32 & 33 Vict. c. 62, s. 27, the court will refuse to grant leave to issue execution upon and in pursuance of Ord. XLII. r. 23. The defendant against whom the judgment is sought to be issued is not estopped from setting up the invalidity of the judgment merely on the ground that it had not been set aside. *Jones v. Jaggard*, 54 L. T. 731—D. But see preceding case.

— **Payment by Garnishee under void Judgment.**—The defendant in an action consented to a judge's order for judgment against him, which was accordingly signed, and, a garnishee order having been made upon the judgment, the garnishee paid the debt attached to the judgment creditors, before the expiration of twenty-one days from the date of the making of the judge's order. The order was not filed as required by s. 27 of the Debtors Act, 1869. The defendant subsequently committed an act of bankruptcy, and was thereupon adjudged bankrupt:—Held, that, although the moneys attached under the judgment had already been paid to the judgment creditors before the act of bankruptcy, nevertheless, the judgment being avoided by failure to file the judge's order, the trustee in bankruptcy was entitled to recover from the judgment creditors the amount paid to them by the garnishee as money received to his use. *Brown, Ex parte, Smith, In re*, 20 Q. B. D. 321; 57 L. J., Q. B. 212; 36 W. R. 403—C. A.

— **Bankruptcy Notice.**—Where a creditor in whose favour a judgment has been entered up by consent omits to file the judge's order in accordance with s. 27 of the Debtors Act, 1869, he is nevertheless entitled to serve the debtor with a bankruptcy notice founded on such judgment. *Guest, Ex parte, Russell, In re*, 37 W. R. 21; 5 M. B. R. 258—C. A.

V. OBTAINING CREDIT BY FRAUD.

Sufficiency of Indictment.—See *Reg. v. Pierce*, ante, col. 572.

DEBTOR'S SUMMONS.

See BANKRUPTCY.

DEBTS.

Assignment of.]—See ASSIGNMENT.

Attachment of.]—See ATTACHMENT.

Payment of.]—See PAYMENT.

DECEIT.

See FRAUD.

Misrepresentation in Prospectus.]—See COMPANY (PROSPECTUS).

DECIDED CASES.

Weekly Notes.]—The Court of Appeal does not allow the Weekly Notes to be read as an authority. *Pooley's Trustee v. Whetham*, 33 Ch. D. 77—Per Cotton, L. J.

Case in the "Times"—Verification by Affidavit.]—It was proposed on the hearing of a case in the Court of Appeal to refer to a report of a case from the "Times," but it was only allowed to be read after having been verified by an affidavit of the barrister who had acted as the "Times" reporter. *Walter v. Emmott*, 54 L. J., Ch. 1061, n.—C. A.

Citing Text-books.]—It is to my mind much to be regretted, and it is a regret which I believe every judge on the bench shares, that text-books are more and more quoted in court—I mean of course text-books by living authors—and some judges have gone so far as to say that they shall not be quoted. *Union Bank v. Munster*, 37 Ch. D. 51; 57 L. J., Ch. 124; 57 L. T. 877; 52 J. P. 453—Kekewich, J.

House of Lords Decision on English Case—Effect on Scotch Case.]—A decision of this House in an English case ought to be held conclusive in Scotland as well as England, as to the questions of English law and English jurisdiction which it determined. It cannot, of course, conclude any question of Scottish law, or as to the jurisdiction of any Scottish court in Scotland. So far as it may proceed upon principles of general jurisprudence, it ought to have weight in Scotland; as a similar judgment of this House on a Scotch appeal ought to have weight in England. *Ewing v. Orr-Ewing*, 10 App. Cas. 499; 53 L. T. 826—Per Lord Selborne, L. C.

Binding Character of Decisions of Court of Session.]—A decision of the court of session in Scotland is not binding upon a divisional court in England, not being a court of co-ordinate jurisdiction; and the inconvenience which might result from a difference between English and Scotch courts on the construction of an act of

Parliament will not prevent the English court from differing from such previous decision. *Morgan v. London General Omnibus Company*, 12 Q. B. D. 201; 50 L. T. 687; 32 W. R. 416—D.

Binding Character of Decisions of Privy Council.—It is true that the decisions of the Privy Council are not theoretically binding on the High Court; but in case of mercantile and admiralty law, where the same principles are professedly followed in the colonies and in this country, it is, to say the least, highly undesirable that there should be any conflict between the decisions of the Judicial Committee and those of the High Court or Courts of Appeal in this country. *The City of Chester*, 9 P. D. 207; 53 L. J., P. 103; 51 L. T. 485; 33 W. R. 111; 5 Asp. M. C. 320—Per Lindley, L.J.

Binding Character of old Decisions.—Where a decision has been frequently questioned, though not overruled, the fact that it has stood for twelve years without being authoritatively overruled, does not bind a court of error to follow it. *Pearson v. Pearson*, 27 Ch. D. 145; 54 L. J., Ch. 32; 51 L. T. 311; 32 W. R. 1006—Per Baggallay, L.J.

Where there has been a deliberate unappealed decision of a court with regard to the effect of a condition in a common form of contract which has become known to all persons who have to deal with such matters, and has been acted on for eighteen years, it has always been the legal practice, even of courts of error, to follow such decisions, even though they would not, perhaps, have given the same decision had the case come originally before them. *Palmer v. Johnson*, 13 Q. B. D. 355; 53 L. J., Q. B. 348; 51 L. T. 211; 33 W. R. 36—Per Brett, M.R.

Where documents are in daily use in mercantile affairs, without any substantial difference in form from time to time, it is most material that the construction which was given to them years ago, and which has from that time been accepted in the courts of law, and in the mercantile world, should not be in the least altered, because all subsequent contracts have been made on the faith of the decisions. Therefore, whether one thinks that one would oneself have come to the same conclusion as the judges did in the beginning is immaterial. One ought to adhere strictly to the construction which has been put upon such documents. *Pandorf v. Hamilton*, 17 Q. B. D. 674; 55 L. J., Q. B. 546; 55 L. T. 499; 35 W. R. 70; 6 Asp. M. C. 44—Per Esher, (Lord), M.R.

If the question were doubtful I should hesitate very long before I laid down a different rule of construction in relation to sections of the Wills Act which have had for many years a particular construction given to them; because it is impossible to say how many persons may have acted upon the faith that that construction was correct and rested the disposal of their property upon that belief. Of course if it were clear that the construction put by the courts upon the sections was wrong, it would be our duty, disregarding the result, to express a contrary opinion. *Airey v. Bower*, 12 App. Cas. 269; 56 L. J., Ch. 742; 56 L. T. 409; 35 W. R. 657—Per Herschell (Lord).

— **Rule of Procedure.**—Where a judgment contains a decision on a rule of procedure which

has thus been brought before the public, the profession, and the legislature, and remained undisturbed for many years, and has been acted upon and dealt with in statutes and rules of court, even if I dissented from it, I should hesitate to overrule it. *Fraser v. Elwin-perger*, 12 Q. B. D. 318; 53 L. J., Q. B. 73—Per Brett, M.R.

— **Jurisdiction.**—The rule that governs us in not overruling decisions of many years' standing, on which persons may have acted in making contracts or otherwise, does not apply to a decision as to the jurisdiction of another court, and there is no reason why at any distance of time a superior court should not overrule it. *Reg. v. Edwards*, 13 Q. B. D. 586; 53 L. J., M. C. 149; 51 L. T. 586—Per Lord Esher, M.R.

Binding Character of old Dicta.—If, even in the absence of any judicial decision, a dictum in law has been accepted and has entered into contracts and dealings, so that, by not following it, I should be actually disturbing anything which had been done in former times over and over again on the faith of this dictum, I should feel myself bound by it. *Rosher, In re, Rosher v. Rosher*, 26 Ch. D. 821; 53 L. J., Ch. 722; 51 L. T. 785; 32 W. R. 825—Pearson, J.

— **Examination by Judge of Practice in his Court.**—I do not think that a judge would wish any statement which he may have made in the course of a case, merely obiter and casually, to be treated as necessarily being an authority on the subject in question; but when a judge has thought it necessary for the purpose of a case to make a deliberate examination of the practice of his court, and to state such practice, I do not think the authority of such statement can be got rid of merely by arguing that it was not really necessary for the actual decision of the case. *Cox, Ex parte*, 20 Q. B. D. 19; 57 L. J., Q. B. 103; 58 L. T. 323; 36 W. R. 213; 52 J. P. 484—Per Lord Esher, M.R.

Binding Character of Decisions of Lord Chancellor on Court of Appeal.—Although the decision of a Lord Chancellor given before the Judicature Act may be overruled by the Court of Appeal, yet such a course ought only to be taken exceptionally, and in a very strong case. So rarely is that done that practically the decisions of a Lord Chancellor and the old Lords Justices are considered as binding on the Court of Appeal. *Watts, In re, Cornford v. Elliott*, 29 Ch. D. 953; 55 L. J., Ch. 332; 53 L. T. 426; 33 W. R. 885—Per Cotton, L.J. *S. P., Gard v. Commissioners of Sewers*, 28 Ch. D. 509; 54 L. J., Ch. 707; 52 L. T. 830—Per Baggallay, L.J.

Conflicting Decisions of different Lord Chancellors.—When we have conflicting decisions of two Lord Chancellors the decision of the subsequent Lord Chancellor is entitled to the greater weight, because the subsequent Lord Chancellor could overrule the decision of the prior Lord Chancellor. *Henty v. Wrey*, 21 Ch. D. 332; 53 L. J., Ch. 674; 47 L. T. 231; 30 W. R. 850—Per Jessel, M.R.

Power of Full Court of Appeal to overrule Decisions of Smaller Number.—The Court of

Appeal is one composed of six members, and if at any time a decision of a lesser number is called in question, and a difficulty arises about the accuracy of it, I think this court is entitled, sitting as a full court, to decide whether we will follow or not the decision arrived at by the smaller number. *Kelly v. Kellond*, 20 Q. B. D. 572; 57 L. J., Q. B. 330; 58 L. T. 263; 36 W. R. 363—Per Lord Esher, M.R.

Decision in Court of Appeal when Court equally divided.—It was the custom for each of the Courts in Westminster Hall to hold itself bound by a previous decision of itself or of a court of co-ordinate jurisdiction. But there is no statute or common law rule by which one court is bound to abide by the decision of another of equal rank; it does so simply from what may be called the comity of judges. In the same way, there is no common law or statutory rule to oblige a court to bow to its own decisions; it does so again on the grounds of judicial comity. But when a court is equally divided this comity does not exist, for there is no authority of the court as such, and those who follow must choose one of the two adverse opinions. *The Vera Cruz*, 9 P. D. 96; 53 L. J., P. 33; 51 L. T. 104; 32 W. R. 783; 5 Asp. M. C. 270—Per Brett, M.R.

Decisions of Courts of Co-ordinate Jurisdiction.—Where there is power to appeal the courts are bound by the decisions of courts of co-ordinate jurisdiction. *Casson v. Churchley*, 53 L. J., Q. B. 335; 50 L. T. 568—D. See preceding case.

According to the comity of judicial tribunals in this country, one court of co-ordinate jurisdiction should not, in a case in which there is an appeal, differ from another court of co-ordinate jurisdiction. *Palmer v. Johnson*, 13 Q. B. D. 355; 53 L. J., Q. B. 348; 51 L. T. 211; 33 W. R. 36—Per Brett, M. R.

DECLARATION.

See CRIMINAL LAW (PRACTICE).

DEED AND BOND.

I. FORM AND CONTENTS.

1. *Execution*, 618.
2. *Alterations*, 619.
3. *Construction*, 619.
4. *Setting aside and Rectifying Deeds*, 623.
5. *Consideration*.—See CONTRACT.
6. *Evidence to Explain*.—See EVIDENCE.

II. REGISTRATION OF DEEDS, 627.

III. ACTIONS ON DEEDS, 629.

IV. PARTICULAR DEEDS.

1. *Title Deeds*, 629.
2. *Composition Deed*.—See BANKRUPTCY.
3. *Power of Attorney*.—See POWER OF ATTORNEY.

V. PROCEEDINGS ON BONDS, 630.

I. FORM AND CONTENTS.

1. EXECUTION.

Effect of Note appended to Signature.—Not every attempt by a form of execution to restrain the full operation of a deed can be treated as a non-execution of it. Where a deed of assignment by debtors to a trustee for the benefit of all creditors who should execute the deed was executed by the plaintiffs, who appended a note that they executed only in respect of certain claims scheduled to the deed and amounting to \$73,531, and it appeared that subsequently thereto they received a sum of money from the trustee by virtue of their execution of the deed:—Held, that the plaintiffs were bound. The note did not amount to a refusal to execute; and the plaintiffs having received payment under the deed could not be heard to repudiate it, and deny their execution. *Wilkinson v. Anglo-Californian Gold Mining Company* (18 Q. B. 728) held to be inapplicable. *Yarmouth Exchange Bank v. Blethen*, 10 App. Cas. 293; 54 L. J., P. C. 27; 53 L. T. 537; 33 W. R. 801—P. C.

Of Counterpart presumed.—D. in 1824, agreed with S. for the purchase of an estate, and that the purchase-deed should contain a covenant by D. that he, his heirs and assigns, would pay to S., his executors, administrators, and assigns, the sum of 6s. for each chaldron of coals gotten out of the estate and shipped for sale. The purchase-deed was subsequently executed by S., but not by D. D., however, entered upon the land, and he and his devisees and their assigns enjoyed the property. Coal was also got and shipped for sale:—Held, that the execution by D. of a counterpart of the deed containing the covenant must be presumed, and that the words "shipped for sale" in the deed meant coal actually shipped for sale. *Witham v. Vane*, 32 W. R. 617—H. L. (E.). Reversing, 44 L. T. 718—C. A.

Absence of Seal.—The absence of a seal from deeds of reconveyance which were not proved to have ever been sealed renders them invalid. *Sandilands, In re* (6 L. R., C. P. 411) considered. *National Provincial Bank v. Jackson*, 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597—C. A.

Evidence of Sealing and Delivery.—A. deposited with B., his stockbroker, the certificates of shares in the Balkis Consolidated Company, and executed a blank transfer to secure the balance of his current account. The articles of the company required that transfers of shares should be made by deed. Shortly afterwards B. filled up the blank transfer with the name of L. as transferee, and deposited the shares with L. as security for money borrowed, as he alleged, in pursuance of the general directions of A. Later on B. closed A.'s account and sold the shares. L., who was willing that the purchase should be completed, applied to the company to register the transfer to himself. In the meanwhile A., who had disputed B.'s account, had given the company notice not to register. L. now moved, under the Companies Act, 1862, s. 35, to rectify the register by inserting his name. On production of the transfer it appeared that it contained no seal or wafer

in the place of a seal, but only a mark on the paper of the place where the seal ought to be. The transfer was witnessed by B.'s clerk as having been signed, sealed, and delivered by A., but the attesting witness did not make any affidavit, and the evidence of A. and B. as to whether A. put his finger on the seal or not was contradictory:—Held, that no order could be made on the motion; that L. could have no right to be registered unless A. were estopped from denying that the transfer to L. was good, and this estoppel could only arise if the document delivered to L. were *prima facie* complete; that it was not complete in the absence of a seal unless it was shown that it had been sealed, and for this the evidence was insufficient. *Balkis Consolidated Company, In re*, 58 L. T. 300; 36 W. R. 392—North, J.

Proof of.]—See EVIDENCE.

Order by Court to execute.]—An order may be made on a party to an action to execute a conveyance of lands directed to be sold in such action, although the conveyance has not been settled in chambers. *Dougherty v. Teaz*, 21 L. R., Ir. 379—V. C.

The Probate Division has jurisdiction under s. 14 of the Judicature Act, 1884, in the event of any person neglecting or refusing to obey its order to execute a deed, to direct its execution by any other person whom it may nominate for the purpose. *Howarth v. Howarth*, 11 P. D. 95; 55 L. J., P. 49; 55 L. T. 303; 34 W. R. 633—C. A. Affirming 50 J. P. 376—Hannen, P.

Where a defendant refused to obey an order, directing her to execute a mortgage, the judge appointed his chief clerk to execute it under s. 14 of the Judicature Act, 1884. *Edwards, In re, Owen v. Edwards*, 33 W. R. 578—Pearson, J.

2. ALTERATIONS.

Effect of.]—What alterations in a document invalidate it, considered. *Love v. Fox*, 12 App. Cas. 206; 56 L. J., Q. B. 480; 56 L. T. 406; 36 W. R. 25; 51 J. P. 468—H. L. (E.)

3. CONSTRUCTION.

General Words.]—General words, although introduced for the purpose of sweeping into the assurance everything which has been omitted by mistake, apply *prima facie* only to things *eiusdem generis* with those specifically enumerated. *Crompton v. Jarrett*, 30 Ch. D. 298; 54 L. J., Ch. 1109; 53 L. T. 603; 33 W. R. 913—C. A.

— Right of Way.]—A railway company purchased under the powers of their act, a piece of land on which was a stable. By the conveyance to the company the premises were granted together with all "rights, members or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel, or member thereof." The vendor had many years previously made a private road from the highway to the stable over his own land for his own convenience, and had used it ever since. The soil of this road was not conveyed to the company and no express mention of it was made in the conveyance:—Held, that a right of way passed to the company

under the general words of the conveyance. *Bayley v. Great Western Railway*, 26 Ch. D. 434; 51 L. T. 337—C. A.

Conveyance of Land with Reservation.]—Where the owner conveys land to a person, reserving the "liberty of working the coal" in those lands, he must be taken to have reserved the estate of coal (unless there are clear words in the deed qualifying that right of property) with which he stands vested at the date of the conveyance. *Hamilton (Duke) v. Dunlop*, 10 App. Cas. 813—H. L. (Sc.)

Implied Condition—Effect of Specific Condition.]—Where in any document a general condition would be implied, if there is inserted a specific and limited condition, it must be assumed that such specific and limited condition was meant to take the place of the general condition. *Goas, Ex parte, Clement, In re*, 3 M. B. R. 153—C. A.

Implied Covenant to keep up Patent—Assignment—Lapse.]—On the sale of a patent by the patentees to a limited company a deed of assignment was executed by the parties, by which after a recital that the patentees had agreed to sell the patent to the company for 250*l.*, "and for the other considerations therein appearing," the patentees assigned the patent to the company absolutely; and after covenants for title by the patentees, including a covenant for quiet enjoyment of the patent "during the term subsisting therein," the company covenanted to pay to the patentees a royalty for every article "which should be manufactured or sold by the company" under the patent "while subsisting," and also a proportion of the profits arising from the manufacture or sale, and from licences granted for the manufacture or sale of articles to be manufactured under the patent "while subsisting." The deed contained no express covenant by the company to keep the patent on foot, or to manufacture or sell articles under the patent. On the expiration of the first four years of the patent the company duly paid the first renewal fee under the Patents, Designs, and Trade-marks Act, 1883, but on the expiration of the fifth year they, through inadvertence, omitted to pay the second renewal fee within the time required by the act and the rules thereunder, and consequently the patent lapsed. After an ineffectual attempt to obtain a private Act of Parliament to revive the patent, the company passed resolutions for a voluntary winding-up, and the patentees thereupon sent in a claim for damages for the loss, through the lapse of the patent, of the royalties reserved by the assignment, contending that a covenant to keep the patent on foot should be implied in the assignment:—Held, that no such covenant could be implied; and that, even if it could, the patentees could not obtain more than nominal damages, the company being under no obligation, either express or implied, to manufacture the patented articles, and being no longer able to carry on business. The doctrine of implying covenants in deeds discussed. *Railway and Electric Appliances Company, In re*, 38 Ch. D. 597; 57 L. J., Ch. 1027; 59 L. T. 22; 36 W. R. 730—Kay, J.

Striking out Words—"In or near."]—Where

the right was granted to hold a market "in sine juxta" a certain place:—Held, that it was contrary to a canon of construction of a grant or other document, which confers a right to strike out words unless it is absolutely necessary to do so; and that the grant must be taken to be of a right to hold the market in or near the place in question, that is, of a market without metes and bounds. *Attorney-General v. Horner*, 14 Q. B. D. 254; 54 L. J., Q. B. 227; 33 W. R. 93; 49 J. P. 326—Per Lord Esher, M.R.

Fortius contra Proferentem.—See MAXIMS.

Grant of Land adjoining River—Bed of River ad medium filum—Presumption rebuttable.—

The presumption that, by a conveyance describing the land thereby conveyed as bounded by a river, it is intended that the bed of the river, usque ad medium filum, should pass, may be rebutted by proof of surrounding circumstances in relation to the property in question which negative the possibility of such having been the intention. The owners of a manor by conveyances made respectively in 1767 and 1846 granted to purchasers pieces of riparian land fronting a river, the bed of which formed parcel of the manor. It was proved that, prior to the earliest of the conveyances, a fishery in the river fronting the lands conveyed had for a very long time back been from time to time let to tenants by the lords of the manor as a separate tenement, distinct from the riparian closes; and that at the date of the conveyances in 1846 such fishery was actually under lease to tenants. The grantees under the before-mentioned conveyances, and their successors in title, had, until the acts complained of in the action, never claimed or exercised any right of fishing over the bed of the river by virtue of any right of soil or otherwise, but the owners of the manor or their tenants of the fishery had always fished without interruption:—Held, that under the circumstances the conveyances ought not to be construed as passing any portion of the bed of the river to the grantees. *Devonshire (Duke) v. Pattinson*, 20 Q. B. D. 263; 57 L. J., Q. B. 189; 58 L. T. 392; 52 J. P. 276—C. A.

Through the presumption that a grant of land described as bounded by an inland river passes the adjoining half of the bed of the river may be rebutted by circumstances which show that the parties must have intended it not to pass, it will not be rebutted, because subsequent circumstances, not contemplated at the time of the grant, show it to have been very disadvantageous to the grantor to have parted with the half bed, and if contemplated, would probably have induced him to reserve it; nor is the presumption excluded by the fact that the grantor was owner of both banks of the river. *Micklethwait v. Newlay Bridge Company*, 33 Ch. D. 133; 55 L. T. 336; 51 J. P. 132—C. A.

M. being entitled to lands on both sides of a river, sold and conveyed to L. a piece of land, the dimensions of which were minutely given in the conveyance, and which was therein stated to contain 7,752 square yards, and to be bounded on the north by the river, and to be delineated on the plan drawn on the deed, and thereon coloured pink. The dimensions and colouring extended only up to the southern edge of the river, and if half the bed had been included the area would have been 10,031 square yards instead

of 7,752. The deed contained various reservations for the benefit of M., but contained nothing express to show whether the half of the bed was intended to pass or not. M. was at the time owner of a private bridge close by, from which he received tolls. Thirty years afterwards a bridge was projected to cross the river from L.'s land. The plaintiffs, who had succeeded to all M.'s property in the neighbourhood, brought their action to restrain the making the new bridge. If the grant to L. passed half the bed, no part of the new bridge would be over land of the plaintiffs:—Held, that the presumption that the grant included half the bed was not rebutted, and that an injunction could not be granted on the ground that the erection of the bridge would be a trespass. *Ib.*

Parcels—Description—General Words—Copyholds passing with Freeholds.—A mortgage was expressed to comprise by way of grant in fee "all and every the estate, right, title, property, and interest of the mortgagor of and in all and every those two fields or parcels of land, containing together about twenty-two acres or thereabouts, situate at and abutting upon the main road at" H., and "bounded upon one side by" B. Lane, "and also of and in all and every other, if any, the lands, hereditaments, and premises at H. aforesaid of, in, or to which the mortgagor hath any estate, right, title, property, or interest." All of the mortgagor's property at H. was freehold, except a strip of land of about three-quarters of an acre which lay between the freeholds and B. Lane, and which was of copyhold tenure:—Held, that the copyhold strip passed under the general words and was included in the mortgage. *Rooke v. Kensington* (2 Kay & J. 753), and *Crompton v. Jarratt* (30 Ch. D. 298), distinguished. *Semble*, having regard to the position of the property and the description in the deed, the copyhold strip was included in the parcels themselves. *Early v. Rathbone*, 57 L. J., Ch. 652; 58 L. T. 517—Kekewich, J.

Inconsistency between Recitals and Operative Part—General Words.—A marriage settlement contained a recital that the land intended to be dealt with was subject to a certain charge, and to a term of 1,500 years. The operative part of the deed referred to a schedule in which certain lands situate in four townships in the county of Durham, and subject to this charge, were particularly described. The operative part also contained general words referring to all other lands belonging to the settlor in these townships. The settlor at the time of the settlement was entitled to other lands in two of these townships of about the same value as the scheduled property, but subject to a different set of charges to those mentioned in the recitals:—Held, that these last lands did not pass by the deed, and that the operation of the general words was confined to the lands which were subject to the charges mentioned in the recitals. *Durham (Earl), In re, Grey (Earl) v. Durham (Earl)*, 57 L. T. 164—Stirling, J.

Recital limiting Operative Part.—The operative part of a power of attorney appointed X. and Y. to be the attorneys of the plaintiff without in terms limiting the duration of their powers, but it was preceded by a recital that the

plaintiff was going abroad, and was desirous of appointing attorneys to act for him during his absence:—Held, that the recital controlled the generality of the operative part of the instrument, and limited the exercise of the powers of the attorneys to the period of the plaintiff's absence from this country. *Danby v. Cutts*, 29 Ch. D. 500; 54 L. J., Ch. 577; 52 L. T. 401; 33 W. R. 559—Kay, J.

Covenant running with Land—Covenant to Repair and Maintain Road.—The doctrine in *Tulk v. Mchay* (2 Ph. 774) is limited to restrictive stipulations, and will not be extended so as to bind in equity a purchaser taking with notice of a covenant to expend money on repairs or otherwise which does not run with the land at law. Semble, that the burden of a covenant (not involving a grant) never runs with the land at law, except as between landlord and tenant. *Cooke v. Chilcott* (3 Ch. D. 694) overruled on this point. *Morland v. Cooke* (6 L. R., Eq. 252) explained. *Holmes v. Buckley* (1 Eq. C. Ab. 27) discussed. Consideration of the circumstances under which a covenant will be held to touch or concern the land of the covenantee so that the benefit may run with the land. *Austerberry v. Oldham Corporation*, 29 Ch. D. 750; 55 L. J., Ch. 633; 53 L. T. 543; 33 W. R. 807; 49 J. P. 532—C. A.

A. by deed conveyed for value to trustees in fee a piece of land as part of the site of a road intended to be made and maintained by the trustees under the provisions of a contemporaneous trust deed (being a deed of settlement for the benefit of a joint stock company established to raise the necessary capital for making the road); and in the conveyance the trustees covenanted with A., his heirs and assigns, that they, the trustees, their heirs and assigns, would make the road and at all times keep it in repair, and allow the use of it by the public subject to tolls. The piece of land so conveyed was bounded on both sides by other lands belonging to A. The trustees duly made the road, which afforded the necessary access to A.'s adjoining lands. A. afterwards sold his adjoining lands to the plaintiff, and the trustees sold the road to the defendants, both parties taking with notice of the covenant to repair:—Held, that the plaintiff could not enforce the covenant against the defendants. *Id.*

Equitable Estate in Fee—Words of Inheritance.—An equitable estate in fee could not be created by a deed executed before the Conveyancing and Law of Property Amendment Act, 1881 (44 & 45 Vict. c. 41), without words of inheritance. *Meyler v. Meyler*, 11 L. R., Ir. 522—V.-C.

4. SETTING ASIDE AND RECTIFYING DEEDS.

Originating Summons.—The validity of a release can be determined on an originating summons under Ord. LV. r. 3, which asks also for the administration of the estate of a deceased testator, even when it is admitted that administration is not wanted. *Garnett, In re, Gandy v. Macaulay*, 50 L. T. 172; 32 W. R. 474—V.-C. B.

Rectification and Specific Performance in

same Action.—Since the Judicature Act, 1873, the court has jurisdiction (in any case in which the Statute of Frauds is not a bar), in one and the same action to rectify a written agreement, upon parol evidence of mistake, and to order the agreement as rectified to be specifically performed. *Olley v. Fisher*, 34 Ch. D. 367; 56 L. J., Ch. 208; 55 L. T. 807; 35 W. R. 301—North, J.

Rectification—Nothing left to be performed under Agreement.—After money has been paid under a judgment founded on the construction of an agreement, an action to rectify the agreement on the ground that such construction was contrary to the intention of all parties is barred. *Caird v. Moss*, 33 Ch. D. 22; 55 L. J., Ch. 854; 55 L. T. 453; 35 W. R. 52; 5 Asp. M. C. 565—C. A.

Disentailing Deed.—The court is not prohibited by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 47, from exercising its ordinary jurisdiction to rectify, on the ground of mistake, a deed of re-settlement which has been enrolled as a disentailing assurance under the act. *Hall-Dare v. Hall-Dare*, 31 Ch. D. 251; 55 L. J., Ch. 154; 54 L. T. 120; 34 W. R. 82—C. A.

Mistake as to Parcels.—Where there has been a mistake in the parcels contained in an executed lease, although it may be a mistake by the plaintiff only, the court will order the annulment, or, at the option of the defendant, the rectification of the lease. *Paget v. Marshall*, 28 Ch. D. 255; 54 L. J., Ch. 575; 51 L. T. 351; 33 W. R. 608; 49 J. P. 85—V.-C. B.

Onus of Proof—Marriage Settlement.—The onus lies on those who seek to alter an instrument to show why it should be altered, not on those who support it, to show why it should not be altered. A settlement on marriage will not be rectified or altered, unless it is shown that at the time when the deed was executed there was some definite arrangement in accordance with which it ought to have been prepared as it is desired to rectify or alter it. As to persons not within the consideration, such a settlement cannot be regarded as on the same footing as a voluntary settlement. *Tucker v. Bennett*, 38 Ch. D. 1; 57 L. J., Ch. 507; 53 L. T. 650—C. A.

Want of Independent Advice—Father Agent for Wife.—On the marriage of a daughter, who is living on affectionate terms with her father, he is the proper person to recommend and advise her, and her natural guardian in matters relating to the preparation of her marriage settlement, and there is no occasion for any independent legal adviser beyond the family solicitor. *Smith v. Diffe* (20 L. R., Eq. 666) dissented from. *Id.*

General Knowledge.—Where in an action to obtain the cancellation or modification of a voluntary deed on the ground of undue influence and want of independent advice, the plaintiff admits that he had an accurate general knowledge of what he was doing, and only refused to receive a detailed explanation of the deed because he trusted his solicitor to look

into those details on his behalf, he was as much bound as if he were himself a lawyer, and had drawn the deed with his own hand. *Lovell v. Wallis*, 50 L. T. 681—Kay, J.

Setting aside Release—Mistake—Lapse of Time.]—A release to a trustee was set aside after the lapse of more than twenty years, and after the death of the trustee, on evidence of the plaintiff (corroborated by the terms of the deed) that it was executed in error. In such a case it is not necessary to prove fraud. *Garnett, In re, Gandy v. Macaulay*, 31 Ch. D. 1—C. A.

A testator bequeathed one-half of his residuary personal estate to his sister, and one-quarter thereof to each of his two nieces; he appointed his sister trustee and executrix of his will, and died in the year 1855. The residuary personal estate consisted principally of railway shares and stocks, and at the time of passing the residuary account it was valued at 42,000*l*. The nieces lived with their aunt, who had brought them up from childhood. In 1859, the nieces executed a release of all suits and causes of action in favour of their aunt in consideration of the payment of 10,500*l*. to each. At the time of the execution of the release, the railway shares and stocks had increased in value, and the share of each of the nieces was worth much more than 10,500*l*. The release was drawn up by the aunt's solicitor, and the nieces had no independent advice and executed it in error, but no fraud was imputed. In 1879, the aunt died. In 1883, an action was commenced by one of the nieces to set aside the release:—Held, that the release was invalid and must be set aside. *Id.*

Power of Disposition on failure of issue omitted.]—By a voluntary settlement property was assigned to trustees in trust for the settlor for life, remainder for any wife he might marry for life, with remainders to his issue, and in default or failure of issue in trust for his paternal next-of-kin:—Held, that though a settlement was proper to be made, and though the settlor understood the terms of this settlement, yet as his attention was not drawn to the fact that he might have had a power of disposition over the property in default or failure of issue, such a power ought to be given, and the settlement must be rectified accordingly. *James v. Couchman*, 29 Ch. D. 212; 54 L. J., Ch. 838; 52 L. T. 344; 33 W. R. 452—North, J.

Absence of Power of Revocation—Solicitor taking indirect Benefit under Deed.]—A man of full mental capacity, seised of property which, according to the opinion of one counsel, was limited to the use of himself for life, with remainder to his first and other sons in tail male, with remainder to himself in fee; and according to another opinion, was limited to the use of himself in tail male; instructed a solicitor who had acted generally for him, to prepare a voluntary deed for the benefit of his three nephews—young men in the prime of life, brothers of the half-blood of the solicitor, their father being then alive. The solicitor sent instructions to counsel to prepare a deed barring the entail, and settling the lands in equal shares among the nephews. The deed was drafted by counsel, limiting the lands to the settlor for life; remainder to his wife for life;

remainder to the three nephews as tenants in common in fee, with onerous covenants on the part of the settlor, and without any power of revocation. It was duly executed in 1852, but was not registered. The last survivor of the three nephews died in 1864, leaving the solicitor his heir at law. The settlor in 1868, after being further advised by counsel as to the effect of the deed of 1852, and his position with respect to it, executed another voluntary deed, duly registered, to the trustees of the deeds of 1852, limiting the property in favour of the plaintiff, his adopted child, but took no proceedings to set aside the deed of 1852, and died in 1874. In an action brought by the plaintiff in 1882, to have the solicitor declared a trustee for the plaintiff, and others entitled under the deed of 1868, there being no evidence of fraud or undue influence in the preparation and execution of the deed of 1852:—Held, that although there was no evidence of fraud or undue influence, it was the duty of the solicitor under the circumstances to have distinctly called the attention of the settlor to the advisableness of inserting a clause of revocation in the deed of 1852, and to have pointed out the results that might ensue from its omission; and that therefore the solicitor could not hold a title depending on the absence of a clause of revocation in the deed. *Horan v. McMahon*, 17 L. R., Ir. 641—C. A.

Cancellation—Inchoate Marriage Settlement.]—In contemplation of marriage, an intended wife and her father executed the engrossment of a settlement of, inter alia, funds to be provided by the father, and the present and after-acquired property of the intended wife. The engrossment was given into the custody of the solicitors of the intended husband: it was not executed by him or the trustees. The engagement was broken off by agreement. After the lapse of three and a half years the court declared the engrossment void as a settlement, and directed it to be given up. *Bond v. Walford*, 32 Ch. D. 238; 55 L. J., Ch. 667; 54 L. T. 672—Pearson, J.

By a settlement executed in 1877, in consideration of a then intended marriage, it was declared that a sum of stock, the property of the intended wife, which had been transferred by her to two trustees, should be held by them on trust for the benefit of the intended wife, the intended husband, and the issue of the intended marriage. The marriage was not solemnized, but the parties cohabited without marriage, and three children were born. In 1883 an action was brought by the father and mother against the trustees of the settlement, to obtain a transfer of the fund to the mother:—Held, that the contract to marry had been absolutely put an end to, and that the court could order the stock to be transferred to the lady. *Essery v. Coulard*, 26 Ch. D. 191; 53 L. J., Ch. 661; 51 L. T. 60; 32 W. R. 518—Pearson, J.

Action to set aside Marriage Settlement—Fraud.]—In an action to set aside a marriage settlement, the plaintiff alleged as the grounds of his action, that, previous to the execution of the settlement made upon the marriage between himself and J. S., the latter stated to him that her first husband had been divorced from her, at her suit, by reason of his cruelty and adultery; that such statements were made to induce him

to execute the settlement and contract the marriage; that, in reliance on the representations, he executed the settlement and married J. S.; that he subsequently discovered that the representations were false to the knowledge of J. S., and that she had been divorced from her husband at his suit and by reason of her adultery:—Held, on motion by the defendant, that the plaintiff's statement of claim must be struck out under Ord. XXV. r. 4, as disclosing no reasonable ground of action. *Johnston v. Johnston*, 52 L. T. 76; 33 W. R. 239—C. A. Affirming 53 L. J., Ch. 1014—Pearson, J.

Variation of Settlements on Divorce.]—See HUSBAND AND WIFE (DIVORCE).

II. REGISTRATION OF DEEDS.

Middlesex—Fees for registering Memorial.]—For registering a memorial of a deed of 199 words in the Middlesex Registry under 7 Anne, c. 20, the fees claimed and received were,—1s. for "entry" of the memorial (under s. 11); 1s. 6d. for "administering the oath" of the signing and delivery of the memorial (under s. 5); 1s. for "indorsing a certificate of the said oath upon the memorial, and signing the same" (under s. 5); 1s. for the "certificate indorsed upon the deed to the effect that it had been registered, with the day and hour on which the memorial was entered or registered" (under s. 6):—Held, that these fees were warranted by the act. *Manton v. Truro (Lord)*, 17 Q. B. D. 783; 55 L. J., Q. B. 563; 55 L. T. 293; 35 W. R. 138—D.

— Copyhold Estate — Enfranchisement Deed.]—As, on the execution of a deed enfranchising copyhold land in the county of Middlesex, such land ceases to be copyhold and becomes freehold, in such a case the exception in s. 17 of 7 Anne, c. 20, does not apply, and therefore a memorial of such a deed must be registered under s. 1 of the act. *Reg. v. Truro (Lord)*, 21 Q. B. D. 555; 57 L. J., Q. B. 577; 59 L. T. 242; 36 W. R. 775—C. A.

— Attesting Witness—Execution—Memorial—Commissioners to administer Oaths.]—A memorial of a deed required to be registered in Middlesex, need not, under 7 Anne, c. 20, s. 5, be attested by a witness to the execution of such deed by the grantor; but if the witness be a witness to the execution of the deed by the grantee, it is a sufficient compliance with the statute. A London commissioner to administer oaths in Chancery is now qualified, under 16 & 17 Vict. c. 78, s. 2, to administer oaths to witnesses under the provisions of 7 Anne, c. 20, s. 5. *Ib.*

— Registration of Final Order of Foreclosure.]—An order for foreclosure absolute in respect of lands in Middlesex is not a judgment within the meaning of 7 Anne, c. 20, s. 18, and 1 & 2 Vict. c. 110, so as to require a memorial to be entered at the Middlesex Registry Office; and a direction to the Registrar of Deeds to that effect was refused. *Burrows v. Holley*, 35 Ch. D. 123; 56 L. J., Ch. 605; 56 L. T. 506; 35 W. R. 592—Chitty, J.

— Unregistered Will—Notice—Principal and Agent.]—A testatrix, who died in 1871, by her will devised real estate in Middlesex to trustees upon trust for sale. The will was not registered in Middlesex. The heir-at-law of the testatrix having learned that the will had not been registered, mortgaged the property to different mortgagees, and registered the mortgages. The mortgage deeds were prepared and registered by the heir-at-law himself. The surviving trustee received the rents of the property down to 1878, when he died, and in 1879 a receiver was appointed in an action to administer the estate of the testatrix. The property was sold in 1882 under an order of the court, and notice of the mortgages was then given by the mortgagees to the purchasers, and the purchase moneys were paid into court subject to the claims of the mortgagees. The heir-at-law died in 1885. An application was made to transfer the purchase moneys to the account of the devisees under the will. The mortgagees resisted the application on the ground that the act of 7 Anne, c. 20, gave them a title, because the will had not been registered. Neither of the securities was for moneys advanced, but both for old debts, and the heir-at-law acted in the mortgage transactions as agent of both the mortgagees:—Held, that, if persons claiming under the act had notice of the will, they could not set up the title of the heir-at-law; that in the present case the mortgagees were affected by the notice which their agent the heir-at-law possessed; and that consequently their claims failed. *Weir, In re, Hollingworth v. Willing*, 58 L. T. 792—Chitty, J.

— Mortgages — Priority of.]—Mortgagees of a share of the proceeds of sale of real estate in Middlesex devised upon trust for sale do not acquire priority by registration, but by notice given to the trustees of the will. *Arden v. Arden*, 29 Ch. D. 702; 54 L. J., Ch. 655; 52 L. T. 610; 33 W. R. 593—Kay, J.

Advances by First Mortgagee after Registration of Second Mortgage and Lis pendens.]—A. being in possession of certain lands, executed a mortgage, which was duly registered, to the N. bank, to secure past and future advances. Subsequently A. executed an agreement to mortgage the same lands to B., and in pursuance of such agreement, a mortgage was executed to B., who registered both instruments, but gave no notice to the bank. B. filed a petition for sale of the lands, and registered the matter as a lis pendens. The first actual notice given to the bank was the service on it of the conditional order for sale:—Held, that advances made by the bank after the registration of the subsequent agreement, mortgage, and lis pendens, were not "dispositions" within the meaning of the 4th section of the Irish Registry Act (6 Anne, c. 2), and that all advances made by the bank prior to the service upon it of the conditional order for sale were entitled to priority over the second mortgage. *O'Byrne's Estate, In re*, 15 L. R., Ir. 373—C. A.

Vendors allowing Vendees to Register—Lien — Unpaid Purchase-money.]—Trustees of a charity conveyed land in Yorkshire to R. and W., part of the purchase-money remaining unpaid, and allowed R. and W. to register the conveyance, knowing that they wanted to do so in order to re-sell the land in lots:—Held, that the

trustees had, by their conduct, precluded themselves from asserting their lien for unpaid purchase-money against bona fide sub-purchasers from R. and W. without actual notice, though the sub-purchasers had not examined, as it was their duty to have done, the conveyance to R. and W., a memorial of which was registered, and though the estate of one of the sub-purchasers was equitable only. *Ketticwell v. Watson*, 26 Ch. D. 501; 53 L. J., Ch. 717; 51 L. T. 135; 32 W. R. 865—C. A.

A vendor's lien for unpaid purchase-money need not be registered under 2 & 3 Anne, c. 4. *Id.*

III. ACTIONS ON DEEDS.

Person relying on opposite Constructions in different Actions.—Where a litigant has obtained a construction by the court of certain covenants in a deed in his favour, he cannot in a second suit set up a contrary construction to that adopted by the court in the first suit. *Gandy v. Gandy*, 30 Ch. D. 57; 54 L. J., Ch. 1154; 53 L. T. 306; 33 W. R. 803—C. A.

Who may sue on—Cestui que trust.—To entitle a third person not named as a party to a contract deed, to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of cestui que trust under the deed. *Id.*

IV. PARTICULAR DEEDS.

1. TITLE-DEEDS.

Custody of—Trustee in Bankruptcy—Life Estate of Bankrupt's Wife.—The trustee in bankruptcy of a husband, whose wife is legal tenant for life of land (not to her separate use) has no absolute right to the custody of the title-deeds of the land during the coverture, but the court has a discretion as to the custody. In a case in which there was evidence that a bankrupt's wife was about to apply to the Divorce Court for the dissolution of the marriage:—Held, that the title-deeds of land, of which she was legal tenant for life, ought not to be delivered to the trustee in the bankruptcy, but ought to be retained in court, where the county court judge had, upon the trustee's application for delivery to him, ordered them to be deposited. *Rogers, Ex parte, Pyatt, In re*, 26 Ch. D. 31; 53 L. J., Ch. 936; 51 L. T. 177; 32 W. R. 737—C. A.

Per Cotton, L. J.:—Whether under ordinary circumstances, an assignee from a husband of his right to receive during the coverture the rents of land of which his wife is legal tenant for life, is entitled as a matter of course to the custody of the title-deeds, *quære. Id.*

—**Deeds relating to two Estates—Custody of Solicitors of previous Owner of both Estates.**—The owner in fee of an estate gave her title-deeds into the possession of her solicitors. She afterwards settled the estate, and under the limitations of the settlement part of the estate became vested, after her death, in the plaintiffs, and the remainder in the heir-at-law of the settlor. The heir-at-law could not be found. The solicitors refused to deliver up the deeds to

the plaintiffs:—Held, that the plaintiffs could not recover possession of the deeds from the solicitors without the concurrence of the heir; but that the deeds must be deposited in court, the plaintiffs having liberty to inspect and make copies of them. *Wright v. Robotham*, 33 Ch. D. 106; 55 L. J., Ch. 791; 55 L. T. 241; 34 W. R. 668—C. A.

Production of, to Cestui que trust.—Prima facie, and in the absence of any special circumstances, a cestui que trust, even though he be only interested in the proceeds of the sale of land, is entitled to the production and inspection of all title-deeds and other documents relating to the trust estate which are in the possession of the trustees. One cestui que trust can enforce this right against the trustees, without bringing before the court the other persons beneficially interested in the property when they have no higher right than himself. *Cowin, In re, Cowin v. Gravett*, 33 Ch. D. 179; 56 L. J., Ch. 78; 34 W. R. 735—North, J.

V. PROCEEDINGS ON BONDS.

Order XIV—Penalty.—The indorsement on a writ claimed 500*l.*, as the principal sum due on a bond conditioned for the payment by the obligor to the plaintiff of an annuity of 26*l.* during the life of a child, and until she should attain the age of sixteen years, by specified quarterly payments, and alleged that two of such payments were due and unpaid:—Held, that the plaintiff was not entitled to proceed under Ord. XIV. r. 1, to obtain final judgment, but was limited to the procedure specified in 8 & 9 Will. 3. c. 11, s. 8, and Ord. XIII. r. 14. *Tutcher v. Caralampi*, 21 Q. B. D. 414; 59 L. T. 141; 37 W. R. 94; 52 J. P. 616—D.

Obligation to pay Interest regularly—Default—Forfeiture.—On a bond with a penalty conditioned for the payment of money at a given day, and interest at stated intervals in the meantime, the whole sum becomes demandable on default in the regular payment of interest. It is no defence to plead that the obligors credited the obligee with interest in their books upon which the obligee could draw. *Good v. Empire Printing Company*, 52 J. P. 438—Stephen, J.

Lien on Real Estate.—See LIEN.

Condition in Restraint of Trade—Enforcing by Injunction.—See *London and Yorkshire Bank v. Pritt*, ante, col. 487.

Who may Sue on—Assignee.—See *Palmer v. Mallet*, ante, col. 487.

Foreign Bond—Negotiability.—See NEGOTIABLE INSTRUMENTS.

DEFAMATION.

I. IN ORDINARY CASES.

1. *What is Actionable*, 631.
2. *Privilege*.
 - a. Absolute, 633.
 - b. Qualified, 633.
3. *Evidence*, 635.
4. *Practice and Pleading*, 636.

II. CRIMINAL PROCEEDINGS, 639.

III. SLANDER OF TITLE.—See TRADE.

I. IN ORDINARY CASES.

1. WHAT IS ACTIONABLE.

Slander—Special Damage.—The wrongful refusal of a third party to fulfil a contract may give a right to special damage for a slander if such refusal be the probable consequence of the utterance of the slander. *Société Française des Asphaltes v. Farrell*, 1 C. E. 563—Huddleston, B.

The plaintiff, a married woman living apart from her husband, brought an action of slander against the defendant. The alleged slander was in respect of words not actionable per se, and the consequences were stated to be that the plaintiff had suffered annoyance, loss of friends, credit, and reputation, and that through the defendant having caused an irreparable breach between the plaintiff and her husband, her husband had deprived her of her own house and of an income:—Held, that the damage alleged as the consequence of the slander was not special damage so as to give a cause of action. *Weldon v. De Bathe*, 54 L. J., Q. B. 113; 33 W. R. 328—C. A.

— **No Special Damage—Novice in Religious Community.**—In an action of slander for words imputing unchastity to the plaintiff (alleging, in substance, that she had left her home, not to go into a convent, but because she was pregnant), the plaintiff alleged that the words were spoken of her as a novice in a religious community, and that, by reason of the slander (1), she was disqualified from continuing as a novice; (2), disqualified from re-entering the community, as she bonâ fide intended, after leave of absence for the purpose of attending a sick relative; (3), she was shunned and avoided by her neighbours and friends. The plaintiff had admittedly entered the community as a postulant, and commenced her novitiate, but left within seven months of her admission, and was continuously absent for three years before the date of the slander. No evidence was given that the slander reached the community. By the rules of the community six months should be spent therein as a postulant, and two years as a novice, before profession as a nun, until which the postulant or novice acquired no status in the community. The sisters of the community were precluded from holding any worldly goods, and on profession, took vows of poverty, the income of their property (if any) being held for the benefit of the institution; and the Rev. Mother was directed, according to

the rules of the Council of Trent, to provide for the wants of those who were subject to her in food, clothing, &c.:—Held, that assuming the words to have been spoken of the plaintiff as a novice, they were not actionable per se, or without evidence of special damage; and that there was no evidence of special damage within the rules of law applicable to cases of oral slander sufficient to sustain the action. *Dwyer v. Meehan*, 18 L. R., Ir. 138—C. P. D.

Indictable Offence—Larceny by Husband of Wife's Property.—It is no offence for a husband to take his wife's money while they are living together; sed aliter while they are living apart. Therefore, words spoken amounting in substance to an allegation that a husband has robbed his wife, and nothing more, will not support an action for slander by the husband against the speaker, since they do not in themselves impute an indictable offence. *Lemon v. Simmons*, 57 L. J., Q. B. 260; 36 W. R. 351—D.

Section 12 of the Married Women's Property Act, 1882, which alone creates any such offence on the part of the husband, contains a proviso that "no criminal proceeding shall be taken by any wife against her husband while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife." Accordingly, unless the words complained of allege that, besides robbing his wife, the husband was living apart from, or deserting, or about to desert her, they contain no imputation of an indictable offence, and consequently impute no actionable slander. *Id.*

In respect of Trade—Publication in Trade Newspaper of Extract from Register of Judgments.—The plaintiff was a hatter against whom a judgment had been obtained in the county court. The judgment remained unsatisfied pending an appeal, which appeal the plaintiff subsequently abandoned, and thereupon he satisfied the judgment, but omitted to get the fact of satisfaction entered on the register. The defendants published a trade newspaper, and in a column headed "The Gazette" appeared a list of judgments entered on the county court register, in which the name of the plaintiff with the judgment against him was inserted. The plaintiff brought an action for libel, alleging by innuendo that the insertion of his name in that column implied that the judgment remained unsatisfied, and that he was unworthy of credit. The defendants denied the innuendo. The judge held that the publication was capable of being defamatory, and a jury found a verdict for the plaintiff:—Held, that the meaning of the allegation was properly left for the jury; and that, the jury having found such to be its meaning, together with the fact that the statement was not true, the statement as published was a libel. *Williams v. Smith*, 22 Q. B. D. 134; 58 L. J., Q. B. 21; 59 L. T. 757; 37 W. R. 93; 52 J. P. 823—D.

Libel injurious to Trade.—See TRADE.

2. PRIVILEGE.

a. Absolute.

Member of Parliament—Words spoken in Debate.—Words spoken by a member of parliament in parliament are absolutely privileged: the court has no jurisdiction to entertain an action in respect of them, and will upon motion set aside the writ of summons and statement of claim in such action. *Dillon v. Balfour*, 20 L. R., Ir. 600—Ex. D.

Advocate in Judicial Proceedings.—No action will lie against an advocate for defamatory words spoken with reference to and in the course of an inquiry before a judicial tribunal, although they are uttered by an advocate maliciously, and not with the object of supporting the case of his client, and are uttered without any justification or even excuse, and from personal ill-will, or anger towards the person defamed arising out of a previously-existing cause, and are irrelevant to every issue of fact which is contested before the tribunal. *Munster v. Lamb*, 11 Q. B. D. 588; 52 L. J., Q. B. 726; 49 L. T. 252; 32 W. R. 248; 47 J. P. 805—C. A.

H. was charged before a court of petty sessions with administering drugs to the inmates of M.'s house in order to facilitate the commission of a burglary at it. M. was the prosecutor, and L., who was a solicitor, appeared for the defence of H. There was some evidence, although of a very slight character, that a narcotic drug had been administered to the inmates of M.'s house upon the evening before the burglary, and H. had been at M.'s house on that evening. During the proceedings before the court of petty sessions, L., acting as advocate for H., suggested that M. might be keeping drugs at his house for immoral or criminal purposes. There was no evidence that M. kept any drugs for those purposes:—Held, that no action by M. for defamation would lie against L. *Kendillon v. Maltby* (C. & M. 402; 2 M. & R. 438), dissented from. *Id.*

b. Qualified.

Publication of Privileged Communication by Mistake—Negligence.—The defendant wrote defamatory statements of the plaintiff in a letter to W. under circumstances which made the publication of the letter to W. privileged, but by mistake the defendant placed it in an envelope directed to another person who received and read the letter. In an action for libel:—Held, that the letter having been written to W. under circumstances which caused the legal implication of malice to be rebutted, the publication to the other person, though made through the negligence of the defendant, was privileged in the absence of malice in fact on his part. *Tompson v. Dashwood*, 11 Q. B. D. 43; 52 L. J., Q. B. 425; 48 L. T. 943; 48 J. P. 55—D.

Reports in Newspapers.—In an action to recover damages for libel it appeared that the appellants had in their newspaper falsely charged the respondent, a public officer, with specific acts of misconduct in the execution of the duties of his office, had vouched for the truth of those charges, and on the assumption of their truth, commented on his proceedings in highly offensive and injurious language:—Held, that they were

liable. The privilege which covers fair and accurate reports of proceedings in parliament and in courts of justice does not extend to fair and accurate reports of statements made to the editors of newspapers. *Davis v. Shephstone*, 11 App. Cas. 187; 55 L. J., P. C. 51; 55 L. T. 1; 34 W. R. 722; 50 J. P. 709—P. C.

Newspaper Criticism of Stage Play—"Fair Criticism."—Where an action of libel is brought in respect of a comment on a matter of public interest the case is not one of privilege, properly so called, and it is not necessary in order to give a cause of action that actual malice on the part of the defendant should be proved. The question whether the comment is or is not actionable depends upon whether in the opinion of the jury it goes beyond the limits of fair criticism. *Campbell v. Spottiswoode* (3 B. & S. 769) approved and followed. *Henwood v. Harrison* (7 L. R., C. P. 606) dissented from. *Merivale v. Carson*, 20 Q. B. D. 275; 58 L. T. 331; 36 W. R. 231; 52 J. P. 261—C. A.

Report of Proceedings in Court of Justice—Publication of Judgment alone.—A fair and accurate report of the judgment in an action, published bonâ fide, and without malice, is privileged, although not accompanied by any report of the evidence given at the trial. Defendants published in the form of a pamphlet a report of the judgment delivered in a former action which plaintiff had brought against them. The pamphlet contained no separate report of the evidence given at the trial and there were passages in the judgment reflecting on plaintiff's character. In an action for libel in respect of such publication the jury found that the pamphlet was a fair, accurate, and honest report of the judgment, and was published bonâ fide and without malice:—Held, that it was not necessary to ask the jury whether the pamphlet was a fair report of the trial, that the right questions had been left to the jury, and that the defendants were entitled to judgment on the findings. *Macdougall v. Knight*, 17 Q. B. D. 636; 55 L. J., Q. B. 464; 55 L. T. 274; 34 W. R. 727; 51 J. P. 38—C. A. Affirmed on other grounds, 14 App. Cas. 194; 60 L. T. 762—H. L. (E.).

Letter to Lords of Privy Council.—An action of libel may be maintained for statements in a letter addressed to the Privy Council injurious to the character of the plaintiff, a public officer removable by the Privy Council, upon proof of express malice in the defendant. *Proctor v. Webster*, 16 Q. B. D. 112; 55 L. J., Q. B. 150; 53 L. T. 765—D.

Other Parties present at time of Publication.—The defendant wrote down at the instance of W. T. a statement to the effect that he, W. T., had robbed W., whose manager the defendant was, with the connivance of the plaintiff, and that he, W. T., thereby promised to repay the moneys so stolen by weekly instalments. W., the defendant's wife, and D., who was also in the employ of W., were present at the time. Afterwards the defendant obtained the signature of D. as witness to the statement he had written down:—Held, that the communication, being made and written down in the interests of the employer, was protected, and that that protection was not taken away by reason of the presence of those other parties at the time of the publi-

cation. *Jones v. Thomas*, 53 L. T. 678; 34 W. R. 104; 50 J. P. 149—D.

Injury to Trade — Erroneous Statement of Judgment in former Action — Injunction — Damages.—The plaintiff, who traded as R. H. & Co., and the defendants, who traded as R. H. & Sons, were rival manufacturers of sail-cloth. The plaintiff had formerly been a partner in the defendants' firm. In 1885 the defendants brought an action against the plaintiff, claiming (inter alia) an injunction to restrain him from representing his firm to be the original firm of R. H. & Sons. At the trial the action was dismissed without costs as to that issue, and with costs as to the other issues: the judge being satisfied by the evidence that the then defendant had never made any such representation, but that on two or three occasions one of his agents without his knowledge or concurrence had represented that the then defendants' firm was the original firm. The then defendant repudiated this as soon as he knew it, and at the trial he offered by his counsel to give an undertaking that he would never make such a representation: this undertaking was inserted in the judgment with the defendant's assent. In 1886 the present defendants distributed a printed circular, which stated that they were the original firm, and after giving the title of the former action, headed by the word "Caution," proceeded: "By the judgment the defendant was ordered to undertake not to represent that his firm is, or that the plaintiff's firm is not the original firm of R. H. & Sons. Messrs. R. H. & Sons, finding that serious misrepresentations were in circulation to their prejudice, felt themselves compelled to bring the above action":—Held, that the circular contained an untrue statement of the effect of the judgment in the former action; that it was a libel injurious to the plaintiffs' trade; that it was not privileged; that the defendants had published it maliciously; and that the plaintiff was entitled to an injunction, with the costs of the action. But there being no evidence of damage to the plaintiff, except his own affidavit that the publication of the circular was calculated to injure him, and had injured him, in his business, which he said had greatly fallen off since the issue of it; and the plaintiff not having brought the action till three months after he knew of the publication of the circular, only 5*l.* damages were awarded to him. *Hayward & Co. v. Hayward & Sons*, 34 Ch. D. 198; 56 L. J., Ch. 287; 55 L. T. 729; 35 W. R. 392—North, J.

Plaintiff courting Slander.—Where a person courts the alleged slander by a question, the occasion is privileged. *Palmer v. Hummerston*, 1 C. & E. 36—Day, J.

Express Malice—Proof.—Where evidence has been given showing an utterly untrue statement to have been made, that is of itself sufficient *prima facie* evidence of express malice. *Id.*

3. EVIDENCE.

Of Express Malice.—*See* preceding case.

Other parts of Newspaper to show in what Sense Words used.—The defendant published in a newspaper, of which he was the editor and

publisher, several libels of the plaintiff, who brought an action thereon. At the trial other passages in the same newspaper, besides those containing the libels complained of, were shown to the witnesses. The defendant having obtained a conditional order for a new trial:—Held, by May, C.J., that other passages of the same newspaper might be adduced in evidence to illustrate the meaning of the passages charged to be libellous:—Held, by O'Brien, J., that other publications by the defendant, whether contemporaneous, or precedent, or subsequent, were not admissible in evidence on the question of the sense of the libel unless directly referred to and in that way virtually made part of the libel complained of; and that they were only admissible to prove malice or deliberation, or upon the question of damages. *Bolton v. O'Brien*, 16 L. R., Ir. 97—Q. B. D.

Publication — Newspaper — Liability of Vendor.—The vendor of a newspaper in the ordinary course of his business, though he is *prima facie* liable for a libel contained in it, is not liable, if he can prove that he did not know that it contained a libel; that his ignorance was not due to any negligence on his own part; and that he did not know, and had no ground for supposing, that the newspaper was likely to contain libellous matter. If he can prove those facts he is not a publisher of the libel. But whether such a person can escape liability for the libel if he knows, or ought to know, that the newspaper is likely to contain libellous matter, *Quære*. *Emmens v. Pottle*, 16 Q. B. D. 354; 55 L. J., Q. B. 51; 53 L. T. 808; 34 W. R. 116; 50 J. P. 228—C. A.

— Publication—Husband to Wife.—In an action for libel the fact that the defendant has disclosed the libel to his wife is not evidence of publication. *Wennhak v. Morgan*, 20 Q. B. D. 635; 57 L. J., Q. B. 241; 59 L. T. 28; 36 W. R. 697; 52 J. P. 470—D.

4. PRACTICE AND PLEADING.

Particulars — Names of Persons to whom Slander uttered.—The plaintiff in an action of slander may be ordered, before defence has been delivered, to give particulars of the names of the persons to whom the alleged slander was uttered. *Roselle v. Buchanan*, 16 Q. B. D. 656; 55 L. J., Q. B. 376; 34 W. R. 488—D.

In an action for slander, where the statement of claim alleged that one T. at the request and by the direction of the defendant uttered the slander complained of, the plaintiff was ordered to give particulars of the names of the persons to whom, and of the place at which, such slander was uttered. *Bradbury v. Cooper*, 12 Q. B. D. 94; 53 L. J., Q. B. 558; 32 W. R. 32; 48 J. P. 198—D.

— Publications of Libel.—In an action for libel brought by a director of a company against a committee of shareholders in the company for statements contained in a report drawn up and alleged to be maliciously published by them, the defendants had obtained, after the close of the pleadings, an order for particulars of the occasion of any publication by them to persons other than shareholders:—Held,

that the defendants were not entitled to such particulars, since the publication complained of clearly included publication to others than shareholders, though not expressly so stated, and sufficiently complied with the requirements of Ord. XIX. r. 4 as to pleadings. *Roselle v. Buchanan* (16 Q. B. D. 656) distinguished, as applicable only to actions of slander. *Gouraud v. Fitzgerald*, 37 W. R. 55—D. Affirmed 37 W. R. 265—C. A.

— **Defence that Libels true in Substance and in Fact.**—The defendant published articles alleging that the plaintiff, who was Governor of Mauritius, had been charged by members of the council with sending to the Colonial Office garbled reports of their speeches. The articles were also alleged by the plaintiff to impute that he had in fact transmitted such garbled accounts. An action for libel having been brought, the defendant pleaded that the alleged libels were true in substance and in fact:—Held, that plaintiff was entitled to further and better particulars, it not being clear whether the defence meant that what was charged against the plaintiff had been truly reported, or that what was reported to have been charged was in fact true. *Hennessy v. Wright*, 57 L. J., Q. B. 594; 59 L. T. 795; 36 W. R. 878—C. A.

— **Interrogatories—Newspaper—Name of Correspondent—Manuscript.**—In an action against the publisher of a newspaper for a libel contained in a letter from a correspondent and in a leading article thereon, the defence was that the alleged libel consisted of an accurate report of certain public proceedings and fair comment thereon:—Held, that the plaintiff was not entitled to interrogate the defendant as to the names of the persons on whose information the reports were based, or the name of the correspondent who wrote the letter, or as to the original manuscript of the letter. *Hennessy v. Wright*, 36 W. R. 879—C. A.

— **As to Publication.**—In an action for libel in which the defendant traversed the publication; denied that the words were published of the plaintiff, or in the defamatory sense alleged, and pleaded fair comment; the plaintiff exhibited interrogatories, asking whether the defendant published the libel in two Irish papers specified in the interrogatories, and whether the words were not published of the plaintiff. The defendant was also interrogated (No. 4) as to whether he did not publish the words complained of "in the London *Times* newspaper, or some other and what newspaper?" "When did such publication take place?" The defendant answered all the interrogatories in the one answer as follows:—"That in bona fide comment on the conduct and language of the plaintiff, and in reference to matters of public interest, I caused to be printed and published of and concerning the plaintiff and others in the several newspapers in the said interrogatories mentioned the words in such interrogatories referred to, honestly believing the same to be true and without malice":—Held, that except as to the fourth interrogatory, the answer was sufficient and was not objectionable, on the ground of its qualified form, but that a further answer should be given to No. 4, giving the date

of the alleged publication. *Malone v. Fitzgerald*, 18 L. R., Ir. 187—Ex. D.

— **Material Facts—Names of Persons, though probably Witnesses.**—In an action for libel the defendant pleaded that the libel was true. The substance of the libel was that the plaintiff had fabricated a story to the effect that a certain circular letter purporting to be signed by the defendant had been sent round to the defendant's competitors in business. The plaintiff had in speeches and letters stated that he had seen a copy of the alleged letter, that two of such letters were in existence in the possession respectively of a firm of bankers and a firm of manufacturers at Birmingham, and that his informant in the matter was a solicitor of high standing at Birmingham. In interrogatories administered by the defendant the plaintiff was asked to state the name and address of his informant, in whose hands he had seen the copy of the letter, and the names and addresses of the persons to whom the letter had been sent, and in whose possession the two letters existed; but he refused to do so on the ground that he intended to call those persons as his witnesses at the trial:—Held, that the defendant was entitled to discovery of the names and addresses of such persons as being a substantial part of facts material to the case upon the issue on the plea of justification. *Marriott v. Chamberlain*, 17 Q. B. D. 154; 55 L. J., Q. B. 448; 54 L. T. 714; 34 W. R. 783—C. A.

— **Pleading—Defence—General Reputation of Plaintiff.**—The plaintiff, a professional jockey, sought to recover damages for a libel which stated that he was in the habit of pulling horses belonging to a certain stable. The defendant pleaded a justification, but sought leave to amend his defence by stating that the plaintiff was commonly reputed to have been in the habit of so unfairly and dishonestly riding horses (generally and not of a particular stable) as to prevent their winning races:—Held, that the amendment could not be allowed, since it was a plea to damages only. Rules 4 and 15 of Ord. XIX. apply to such facts as are material to the cause of action or defence, and not to damages. *Wood v. Durham (Earl)*, 21 Q. B. D. 501; 57 L. J., Q. B. 547; 59 L. T. 142; 37 W. R. 222—D.

— **Injunction to restrain Libel—In what Cases granted.**—Since the passing of the Judicature Acts the court has jurisdiction to restrain by interlocutory injunction the publication of a trade libel, but as, if it grants such an injunction, it must pronounce the publication to be libellous before it has been found so by a jury, the jurisdiction is to be exercised only in the clearest cases, where any jury would say that the matter complained of was libellous, and where if they found otherwise their verdict would be set aside as unreasonable. *Liverpool Household Stores Association v. Smith*, 37 Ch. D. 170; 57 L. J., Ch. 85; 57 L. T. 770; 58 L. T. 204; 36 W. R. 485—C. A.

The question as to granting injunctions to restrain publication in a newspaper of reports and correspondence containing unfavourable statements as to the position and solvency of a joint stock company, considered. Injunction to

restrain the publication of future articles reflecting unfavourably on a company, refused on the ground of the difficulty of granting an injunction which would not include matters that might turn out not to be libellous; and because if the injunction was granted in terms to restrain what was libellous, the question of libel or no libel would have to be tried in a very unsatisfactory way on motion to commit. *Ib.*

The court has jurisdiction under the Judicature Act to grant an interlocutory injunction restraining the publication of libels alleged to be injurious to the plaintiff's trade before delivery of the statement of claim in an action to recover damages for such libels. *Punch v. Boyd*, 16 L. R., Ir. 476—Q. B. D.

— **Oral Slander.**] — B. was employed to manage one of L.'s branch offices for the sale of machines, and resided on the premises. He was dismissed by L., and on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at L.'s branch office. He admitted that among the letters so forwarded to him were two which related to L.'s business, and that he did not hand them to L., but returned them to the senders. After his dismissal he went about among the customers, making oral statements reflecting on the solvency of L., and advised some of them not to pay L. for machines which had been supplied through himself. L. brought an action to restrain B. from making statements to the customers or any other person or persons that L. was about to stop payment, or was in difficulties or insolvent, and from in any manner slandering L. or injuring his reputation or business, and from giving notice to the post-office to forward to B.'s residence letters addressed to him at L.'s office, and also asking that he might be ordered to withdraw the notice already given to the post-office:—Held, that the court has jurisdiction to restrain a person from making slanderous statements calculated to injure the business of another person, and that this jurisdiction extends to oral as well as written statements, though it requires to be exercised with great caution as regards oral statements; and that in the present case an injunction ought to be granted. *Hermann Logv v. Beun*, 26 Ch. D. 306; 53 L. J., Ch. 1128; 51 L. T. 442; 32 W. R. 994; 48 J. P. 708—C. A.

II. CRIMINAL PROCEEDINGS.

Newspaper—Information filed without Fiat.]

—The 3rd section of the Newspaper Libel and Registration Act, 1881, which enacts that no criminal prosecution shall be commenced against any proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England, or her Majesty's Attorney-General in Ireland, being first had and obtained, does not apply to a criminal information for libel filed by order of the court. *Yates v. Reg.*, 14 Q. B. D. 648; 54 L. J., Q. B. 258; 52 L. T. 305; 33 W. R. 482; 49 J. P. 436—C. A.

— **Fiat of Director of Public Prosecutions —“Editor.”**] —The fiat of the Director of Public Prosecutions had been granted, under s. 3 of the Newspaper Libel Act, 1881, against the “editor”

of the newspaper in question without naming him:—Held, by the majority of the court, that such fiat was bad, and that the conviction should be quashed. *Reg. v. Judd*, 37 W. R. 143—C. C. R.

— **Directors and Signatories to Articles, Liability of.**] —A limited company having printed a newspaper containing a libel for another limited company, who published the same:—Held, that in the absence of evidence of knowledge of the contents of the newspaper the directors of the former company and the signatories to the articles of association of the latter company were wrongly convicted. *Ib.*

Criminal Information—When granted.]—A criminal information does not lie against a party who has accused by letter a post-mistress of opening letters and tampering with them; there must be some special circumstances to entitle the applicant to that extraordinary remedy. The proper remedy is by indictment. *Littleton (Post-mistress)*, *Ex parte*, 52 J. P. 264—D.

— **Libel upon Deceased Foreigners—Applicant Resident Abroad.]**—Upon application for leave to file a criminal information in respect of a libel upon a deceased foreign nobleman made by his representative who was not resident in this country:—Held, that the court, in the exercise of its discretion, must reject the application, for the rule to be collected from the modern decisions is that a criminal information for libel can only be granted at the suit of persons who are in some public office or position, and not at the suit of private persons. *Reg. v. Labouchere*, 12 Q. R. D. 320; 53 L. J., Q. B. 362; 50 L. T. 177; 32 W. R. 861; 48 J. P. 165; 15 Cox, C. C. 415—D.

Held, also, that the fact that the applicant does not reside in this country is a strong reason for rejecting such an application. Semble, that an application for a criminal information for a libel upon a deceased person, made by his representative, will not be granted. *Ib.*

Evidence of Publication—Editor or Publisher.]

—On the trial of two persons on an indictment for publishing blasphemous libels in a certain print or paper, on which their names were given, one as printer the other as publisher—proof of their identity with the persons whose names were so given, or any evidence merely connecting them with the paper, held not sufficient to fix them with liability. The 7th section of the Libel Act (6 & 7 Vict. c. 76), being held to apply, and to require evidence that they published the libels, and not merely the papers in which they were contained. Evidence that one of them published the paper held sufficient *prima facie* case as against him, without any express evidence that he knew of the libels. But express evidence as to the other, that he was editor, held not sufficient, without evidence that he directed the insertion of the libel. *Reg. v. Ramsay*, 15 Cox, C. C. 231; 1 C. & E. 126—Coleridge, C. J.

What amounts to a Blasphemous Libel.]—The mere denial of the truth of the Christian religion, or of the scriptures, is not enough, per se, to constitute a writing a blasphemous libel, so as to render the writer or publisher indictable. But indecent and offensive attacks on Christianity

or the scriptures, or sacred persons or objects, calculated to outrage the feelings of the general body of the community, do constitute the offence of blasphemy, and render writers or publishers liable at common law to criminal prosecution. *Reg. v. Ramsay*, 48 L. T. 733; 15 Cox, C. C. 231; 1 C. & E. 126—Coleridge, C. J.

Indictment—"Knowing the same to be false"—**Conviction for Publication only.**—On an indictment for publishing a defamatory libel "knowing the same to be false," the defendant may be convicted of merely publishing a defamatory libel. *Boaler v. Reg.*, 21 Q. B. D. 284; 57 L. J., M. C. 85; 59 L. T. 554; 37 W. R. 29; 52 J. P. 791; 16 Cox, C. C. 488—D.

—**Motion to Quash.**—An indictment for libel was framed under ss. 4 and 5 of 6 & 7 Vict. c. 96, whereas the defendant was only committed under s. 5 of that act. The judge refused to quash the indictment, but quashed so much of it as purported to charge the defendant under s. 4. *Reg. v. Felbermann*, 51 J. P. 168—Hawkins, J.

Wife against Husband.—A wife could not before and cannot since the Married Woman's Property Act take criminal proceedings against her husband for defamatory libel. *Reg. v. London (Mayor)*, 16 Q. B. D. 772; 55 L. J., M. C. 118; 54 L. T. 761; 34 W. R. 544; 50 J. P. 614; 16 Cox, C. C. 81—D.

DEMURRAGE.

See SHIPPING.

DEMURRER.

See PRACTICE.

DENTIST.

See MEDICINE.

DESCENT.

See ESTATE.

DESIGNS.

See TRADE.

DETINUE.

Detention of Stock—Injunction to Restrain Dealing with—Depreciation—Damages.—The plaintiffs having instructed their brokers to sell stock, the latter fraudulently deposited the certificate with the C. Bank. The plaintiffs commenced an action for an injunction to restrain the transfer of the stock, and for damages for the unlawful detention. On a motion for an interlocutory injunction, an order by consent was taken by which the bank undertook not to sell or deal with the stock until the trial or further order, and, the plaintiffs undertaking in the usual form to abide by any order as to damages in case the bank had sustained any by entering into their undertaking, the company in which the stock was were restrained from permitting a transfer without the consent of the plaintiffs. The order was made without prejudice to any question. The action went on for some months, after which the bank gave up their claim to the stock, but declined to pay more than nominal damages. The plaintiffs accordingly brought the action on for trial on the question of damages:—Held, that the plaintiffs were entitled to substantial damages on account of the fall in the stock, the order having been obtained to prevent a wrongful sale by the bank. *Williams v. Peel River Land Company*, 55 L. T. 689—C. A.

Power of County Court to order Return of Chattel.—In an action of detinue brought in the county court, the county court judge has jurisdiction to make an order for the delivery by the defendant of the specific chattel wrongfully detained, without giving him the option of paying its assessed value as an alternative. *Winfield v. Boothroyd*, 54 L. T. 574; 34 W. R. 501—D.

DEVASTAVIT.

See EXECUTOR AND ADMINISTRATOR.

DEVISE.

See WILL.

DILAPIDATIONS.

Ecclesiastical.—See ECCLESIASTICAL LAW.

Tenants.—See LANDLORD AND TENANT.

DIRECTOR.

See COMPANY.

DISCLAIMER.

In Bankruptcy.]—See BANKRUPTCY.

In Patents.]—See PATENT.

DISCONTINUANCE.

See PRACTICE.

DISCOVERY.**I. DOCUMENTS.**

1. *Who compelled to make*, 643.
2. *In what Matters*, 645.
3. *Application for Order—Time*, 645.
4. *Privileged Documents*, 646.
5. *Documents held in Right of Another*, 651.
6. *Sealing up Documents*, 651.
7. *The Affidavit*, 652.
8. *The Deposit*, 654.
9. *Costs of Inspection*, 654.
10. *Interrogatories as to*.—See post, col. 662.

II. INTERROGATORIES.

1. *To and by what Persons*, 655.
2. *In what Matters*, 656.
3. *Application for Order—Time*, 657.
4. *What admissible*, 658.
5. *Privilege*, 663.
6. *The Answer*, 663.

III. INSPECTION OF BOOKS OF COMPANY ON WINDING-UP.—See COMPANY, XI, 12.**IV. INSPECTION OF REGISTER OF SHARES.**—See COMPANY, I, 3, c.**V. INSPECTION OF BANKERS' BOOKS.**—See EVIDENCE.**VI. DISCOVERY IN AID OF EXECUTION.**—See EXECUTION.**I. DOCUMENTS.****1. WHO COMPELLED TO MAKE.**

Infant—Next Friend.]—The court refused either to order the next friend of an infant plaintiff to make an affidavit as to documents, or stay the action till he made such affidavit. *Higginson v. Hall* (10 Ch. D. 235), dissented

from. *Dyke v. Stephens*, 30 Ch. D. 189; 55 L. J., Ch. 41; 53 L. T. 561; 33 W. R. 932—Pearson, J.

"Opposite Parties"—Defendant from co-Defendant.]—The plaintiff made in the same action claims against two defendants, the claim against one defendant being in respect of the alleged breach of a certain stipulation of a contract, and the claim against the other defendant being an alternative claim for negligence by him as agent in effecting a contract without such stipulation contrary to instructions :—Held, that one of such defendants could not obtain discovery of documents in the action from the other, Ord. XXXI. r. 12, only providing for discovery between opposite parties. *Brown v. Watkins*, 16 Q. B. D. 125; 55 L. J., Q. B. 126; 53 L. T. 726; 34 W. R. 293—D.

— **Plaintiff from co-Plaintiff—Defendant from co-Defendant.**]—Discovery by way of production of documents may be allowed to a plaintiff from a co-plaintiff, or to a defendant from a co-defendant, in cases in which there may be rights to be adjusted between them respectively. *Shaw v. Smith*, 18 Q. B. D. 193; 56 L. J., Q. B. 174; 56 L. T. 40; 35 W. R. 188—C. A.

Discovery cannot be allowed to a defendant from a co-defendant with a view to show that the co-defendant and not the defendant is liable to the plaintiff, as where a defendant, sued for subsidence under the plaintiff's land, proposes to inspect the mines of a co-defendant in adjoining land. *Brown v. Watkins* (16 Q. B. D. 125) explained. *Id.*

By Person not a Party to the Action.]—By Ord. XXXVII. r. 7, of the Rules of Court, 1883, the court or a judge may in any cause or matter at any stage of the proceedings order the attendance of any person, for the purpose of producing such writings or other documents as he could be compelled to produce at the hearing or trial. *Central News Company v. Eastern News Telegraph Company*, 53 L. J., Q. B. 236; 50 L. T. 235; 32 W. R. 493—D.

In an action brought by the plaintiffs against the defendants for an improper use and publication of certain telegrams transmitted by them to the plaintiffs, the defendants applied, under Ord. XXXVII. r. 7, for the production of certain documents belonging to and in the possession of the Electric News Telegraph Company, who were not parties to the action, with a view of showing that the news contained in the telegrams had been communicated by the plaintiffs to such company, and by them made public prior to the time at which such news was published by the defendants. The defendants contended that the production of the documents in question would simplify the proceedings at the trial and save expense :—Held, that the power conferred on the court was one which, if it existed, should be exercised with extreme caution, and that no sufficient ground had been shown for the production of the documents asked for. *Id.*

Joinder of Parties for Discovery.]—The court will not allow the joinder of solicitors or others as defendants against whom no further relief is sought beyond discovery or payment of costs. *Burstall v. Beyfus*, 26 Ch. D. 35; 53 L. J., Ch. 566; 50 L. T. 542; 32 W. R. 418—C. A.

2. IN WHAT MATTERS.

Action for Penalties, by Common Informer.]—In an action for penalties by a common informer, leave will not be granted to a plaintiff to call upon the defendant for discovery of documents. *Whiteley v. Barley*, 56 L. J., Q. B. 312—D. See also post, col. 656.

3. APPLICATION FOR ORDER—TIME.

Grounds for Ordering—What may be considered.]—Ord. XXXI. rule 12, was not intended entirely to alter the principles as to production of documents, but to give the court a discretion to refuse the discovery of them when there was no reasonable prospect of its being of any use. On an application for an affidavit of documents, evidence ought not to be entered into; the court will form its conclusion from the pleadings, but any other proceedings in the action as, e.g., evidence used on a former occasion, may be looked at. *Downing v. Falmouth United Sewerage Board*, 37 Ch. D. 234; 57 L. J., Ch. 234; 58 L. T. 296; 36 W. R. 437—C. A.

In an action to restrain a nuisance from sewerage works, the plaintiffs, after notice of trial, applied for an affidavit as to documents in the possession of the defendants relating to the matters in question in the action. The application was refused on the ground that it was not to be presumed that the defendants had documents in their possession which would be material on the question whether there was a nuisance or not. The plaintiffs appealed, and gave notice to read the affidavits filed on an application for an interim injunction, which were about thirty in number. From three of these affidavits it appeared that there had been resolutions passed by the defendants bearing on the question of nuisance, and a correspondence between them and the Local Government Board on their proposing an alteration in their system of sewerage:—Held, that the court was right in refusing the general order asked for, but that these affidavits could be looked at on the question whether there was sufficient reason to suppose that there were no documents the production of which would be of any use, and an order was made for an affidavit limited to resolutions of the defendants, and correspondence between them and the Local Government Board; that the plaintiffs ought not to have given notice to read all the affidavits, but ought to have pointed out the parts on which they meant to rely, and they were, therefore, ordered to pay the costs occasioned by the notice. *Ib.*

Before Defence delivered.]—The court has a discretion in ordering discovery, and there is no absolute rule that a defendant should not be ordered to make an affidavit of documents before the delivery of a defence. *Edelston v. Russell*, 57 L. T. 927—Kekewich, J.

The court will as a rule refuse discovery of documents before the defence is delivered, notwithstanding the wide expressions contained in Ord. XXXI. r. 14. *British and Foreign Contract Company v. Wright*, 32 W. R. 413—D.

Particulars of Fraud not given by Plaintiff.]—The plaintiffs employed the defendants to purchase goods, as their agents, at the lowest

possible prices. The plaintiffs sued for an account, and in their statement of claim alleged that the defendants had purchased goods at prices higher than the current prices, and had secretly received from the vendors allowances or commissions. The charges against the defendants were stated in general terms, no particulars being mentioned. The defendants denied the charges, and pleaded a settled account. The plaintiffs applied for production of documents:—Held, by Cotton, L.J. (diss., Fry, L.J.), that the plaintiffs were not bound to give particulars of fraud under Ord. XIX. r. 6, before obtaining discovery of documents. *Whyte v. Ahrens*, 26 Ch. D. 717; 54 L. J., Ch. 145; 50 L. T. 344; 32 W. R. 649—C. A.

Held, by Fry, L. J., that the allegations of fraud in the pleadings not being sufficient to enable the plaintiffs to open a settled account, discovery ought to be refused until the allegations had been made sufficient. *Ib.*

Before Questions of Fact determined.]—In an action to restrain the sale of goods under an alleged infringement of plaintiff's trade-mark and claiming damages for false representations by defendant that his goods were goods of the plaintiff's manufacture, or in the alternative an account of profits, it was ordered that the questions of fact arising in the action should be tried by a special jury before a judge:—Held, that the plaintiff, who had not made his election between damages and profits, was not entitled, before he had succeeded in establishing his title to relief by the verdict of the jury upon the questions of fact in the action, to discovery as to the sales effected by the defendant and production of his books for that purpose. *Fennessy v. Clark*, 37 Ch. D. 184; 57 L. J., Ch. 398; 58 L. T. 289—C. A.

After Judgment—Discretion.]—In an action for breach of promise judgment for the plaintiff had gone by default, and the question of damages had been referred to the master. The plaintiff claimed the right to inspect and take copies of her letters to the defendant as being material to the question of damages:—Held, that the matter was one for the discretionary jurisdiction of the court or judge, and not of right. *Ladds v. Walthew*, 32 W. R. 1000—D.

4. PRIVILEGED DOCUMENTS.

Action for Recovery of Land—Title Deeds—Purchaser for Value without Notice.]—An action having been brought in the Chancery Division to recover possession of land and claiming production and delivery of documents alleged to be material to the plaintiff's title, the defendants pleaded that they were purchasers for valuable consideration without notice, and on this ground objected to the discovery and production of certain documents of title:—Held, that the objection was invalid for the following reason:—Before the Judicature Act, 1873, a plea of purchase for valuable consideration without notice was not available against either discovery or relief claimed in those cases in which the Court of Chancery had concurrent jurisdiction with the Common Law Courts upon legal titles; section 24, sub-s. 2, of that act therefore, gives no protection to the defendants, the court having now complete jurisdiction over

the whole action. *Ind v. Emmerson*, 12 App. Cas. 300; 56 L. J., Ch. 989; 56 L. T. 778; 36 W. R. 243—H. L. (E.).

Public Interest — Communications between Secretary of State and Party.]—In an action for libel the plaintiff, in his affidavit of documents, stated that he had in his custody, in his capacity of governor of a colony, copies of communications which had passed either between the Secretary of State for the Colonies and himself as such governor, or between the Royal Commissioner appointed to enquire into the affairs of the colony and himself as such governor, or between the Commissioner and the Secretary of State; and that the attention of the Secretary of State had been directed to the nature and dates of the documents, and that he had directed the plaintiff not to produce them, and to object to their production, on the ground of the interest of the State and of the public service, and that the plaintiff, therefore, objected to produce them on those grounds:—Held, on motion for liberty to inspect the documents, that the motion must be refused. *Hennessy v. Wright*, 21 Q. B. D. 509; 57 L. J., Ch. B. 530; 59 L. T. 323; 53 J. P. 52—D.

Shorthand Notes in former Proceedings.]—Transcript of shorthand notes of proceedings in open court are not privileged. *Nordon v. Defries* (8 Q. B. D. 508) observed upon. *Worswick, In re, Robson v. Worswick*, 38 Ch. D. 370; 58 L. J., Ch. 31; 59 L. T. 399; 36 W. R. 625—North, J.

The corporation of P. took compulsorily some of R.'s land, and at an arbitration to ascertain the sum to be paid, R. claimed a right of way over other land to a river, and such alleged right had to be considered in regard to the sum to be assessed. R. employed a shorthand writer to take notes of the evidence and arguments, and afterwards had them transcribed for his own purposes. Subsequently he brought an action for a mandatory injunction to compel the corporation to remove materials which they had put on the land over which he claimed the right of way. The relevancy of the notes was admitted. On motion by the corporation for the production of the transcript, R. objected on the ground that it was privileged, as the notes were taken at his expense; and in anticipation of other proceedings against the corporation:—Held, that the transcript of the notes was not privileged, and that it must be produced. *Rawstone v. Preston Corporation*, 30 Ch. D. 116; 54 L. J., Ch. 1102; 52 L. T. 922; 33 W. R. 795—Kay, J.

Copies obtained by Solicitor—Deposition before Receiver of Wrecks.]—In a collision action, the plaintiffs' solicitors, for the purpose of the action, obtained from the Board of Trade copies of depositions made before the receiver of wrecks by the master and crew of the plaintiffs' ship as to the circumstances of the collision:—Held, that the copies, having been obtained by the solicitors for the purposes of the action, were privileged, and that the court would not inquire for what purpose the original depositions were made. *The Palermo*, 9 P. D. 6; 53 L. J., P. 6; 49 L. T. 551; 32 W. R. 403; 5 Asp. M. C. 165—C. A.

Public Records.]—Although *prima facie* privilege cannot be claimed for copies of or

extracts from public records or documents which are *publici juris*, a collection of such copies or extracts will be privileged when it has been made or obtained by the professional advisers of a party for his defence to the action, and is the result of the professional knowledge, research and skill of those advisers. *Lyell v. Kennedy*, 27 Ch. D. 1; 51 L. J., Ch. 937; 50 L. T. 730—C. A.

K.'s solicitor had, for the purpose of K.'s defence in the action, procured copies of and extracts from certain entries in public registers, and also photographs of certain tombstones and houses to be taken, for which K. in his affidavit of documents claimed protection:—Held, that although mere copies of unprivileged documents were themselves unprivileged, the whole collection, being the result of the professional knowledge, skill, and research of his solicitors, must be privileged—any disclosure of the copies and photographs might afford a clue to the view entertained by the solicitors of their client's case. *Ib.*

Copies of Letters.]—A correspondence had taken place between the defendant in an action and persons other than the plaintiff which was material to the questions at issue in the action. The defendant had not preserved the letters received by him or copies of the letters written by him in the course of such correspondence, but after action brought his solicitor, for the purposes of the defence to the action, procured through such third persons copies of the letters so written and received:—Held, that such copies were not privileged against inspection by the plaintiff. *Chadwick v. Bowman*, 16 Q. B. D. 561; 54 L. T. 16—D.

Professional Privilege — Previous Action against Third Party.]—An order having been made for discovery of documents by the plaintiff in an action, the plaintiff stated on affidavit that, among other documents relating to the matters in question in the action, he had in his possession certain documents partially prepared by his solicitors in an action previously brought by him against one D. (a person other than the defendant) for future use in carrying on the said action, but which were, in fact, never completed or used owing to such action not proceeding in consequence of D.'s death, and that the whole of the said documents were of a private and confidential nature between counsel, solicitor, and client:—Held, that the documents were privileged from discovery in the action. *Bullock v. Corry* (3 Q. B. D. 356) followed. *Pearce v. Foster*, 15 Q. B. D. 114; 54 L. J., Q. B. 432; 52 L. T. 886; 33 W. R. 919; 50 J. P. 4—C. A.

Solicitor and Patent Agent — Irrelevancy.]—An action was brought by the registered owner of two letters patent for similar inventions, dated in 1883 and 1884, for infringement of both patents. The plaintiff discontinued the action so far as related to the patent of 1884. The defendants then delivered interrogatories as to documents in his possession relating to the preparation of the specifications filed under both patents. The plaintiff declined to answer on the ground that they were confidential communications between himself and his solicitor and counsel, and that such documents were privi-

leged; and that as regarded any documents relating to the patent of 1884, the interrogatories were irrelevant to the issue. The plaintiff's solicitor had also acted as his patent agent:—Held, that the plaintiff's answer as to documents was insufficient, as it did not distinguish between the communications between him and his solicitor as such, and communications between him and his solicitor in his character of patent agent; the former class only being privileged: and held that the defendants had a right to inspect communications between the plaintiff and his patent agent which related to the preparation of the specification of the patent of 1884, both the inventions patented being so closely connected that evidence material to the issue might be disclosed by such inspection. *Moseley v. Victoria Rubber Company*, 55 L. T. 482—Chitty, J.

— **Anonymous Letters to Solicitor, Counsel and Party to Action.**—The plaintiff sued to recall probate on the ground that the testator was not of sound mind, and that the will was obtained by the undue influence of the defendants. After the commencement of the action four anonymous letters relating to the matters in dispute were received—two by the plaintiff, one by her solicitor, and another by her counsel in the action:—Held, that the letters to the plaintiff must be produced, but that the letters to the solicitor and counsel were privileged, for they must be taken to have been sent to them for the purposes of the action and by reason of their being the plaintiff's legal advisers in the action, and the privilege was not lost because they were not sent in consequence of any request by the solicitor and counsel, nor obtained by their exertions. *Holloway, In re, Young v. Holloway*, 12 P. D. 167; 56 L. J., P. 81; 57 L. T. 515; 35 W. R. 751—C. A.

— **Solicitor and Client—Fraud—Trustee.**—An action was brought for an account of profits in respect of a purchase of trust property, on allegations that the sale was secretly made for the benefit of R., one of the trustees, with the connivance of T., another trustee, who was a solicitor. The representatives of R. claimed privilege from production for letters from T. to R. and for T.'s bill of costs, on the ground that the communications were made by T. acting as solicitor to R. in his private capacity. Production was ordered because the communications passed between two trustees, and because the solicitor and his client were charged with fraud. *Postlethwaite, In re, Postlethwaite v. Richman*, 35 Ch. D. 722; 56 L. J., Ch. 1077; 56 L. T. 733; 36 W. R. 563—North, J.

— **Opinions of Counsel—Reports of Sub-Committees.**—Upon a summons by the defendant that the plaintiffs—a corporation—might be ordered to produce the documents comprised in their affidavit of documents:—Held, that the opinions of counsel with reference to these proceedings, whether taken before or after the commencement of the action, were privileged; and the fact that the defendant was a ratepayer, and the opinions might have been paid for out of the parish rates, gave the defendant no special claim to inspection; and also that minutes of the corporation and sub-committees appointed by them to report concerning matters connected

with the litigation were also privileged. *Bristol (Mayor) v. Cox*, 26 Ch. D. 678; 53 L. J., Ch. 1144; 50 L. T. 719; 33 W. R. 255—Pearson, J.

— **Shareholder's Action against Company.**—A plaintiff in a shareholder's action against a company is entitled to discovery of professional communications between the company and its legal advisers relating to the subject matter of the action, when such communications are paid for out of the funds of the company. *Gouraud v. Edison Gower Bell Telephone Company*, 57 L. J., Ch. 498; 59 L. T. 813—Chitty, J.

— **Reports of Servants and Agents—Minutes of Proceedings.**—In an action against a railway company for work done and materials supplied at their request, the defendant company objected to produce for the plaintiff's inspection (a) their engineer's report to the board of directors with reference to the subject of claim; (b) correspondence between the defendant's servants and agents with reference to the defence of the action; (c) extracts of minutes of private proceedings of the board at meetings with reference to the litigation, then contemplated though not actually commenced—claiming that all these documents were privileged. It was not alleged in the affidavit of discovery that the engineer's report related solely to the defendant's case, or that it was prepared for the purpose of being laid before their legal advisers:—Held, that the defendants were bound to produce the report and the correspondence, save correspondence between them and their solicitors, but were entitled to be excused from producing the minutes. *Worthington v. Dublin, Wicklow and Wexford Railway*, 22 L. R., Ir. 310—Ex. D.

— **Not destroyed by Inaccurate Affidavit.**—Plaintiff made an affidavit of documents claiming privilege as to all documents in the schedule thereto, on the ground that they supported the plaintiff's title, and did not support the title of the defendant. Defendant took out a summons for production, notwithstanding the privilege claimed when the judge in chambers ordered production of one of the documents, and adjourned the hearing of the rest of the summons into court. On hearing the adjourned summons:—Held, that the inaccuracy of the affidavit as to 'one document did not of itself destroy the plaintiff's privilege as to the rest of the scheduled documents. *Leslie v. Cave*, 56 L. T. 332; 35 W. R. 515—Kekewich, J.

— **Effect of Waiver.**—A waiver of privilege in respect of some out of a larger number of documents for all of which privilege was originally claimed does not preclude the party from still asserting his claim of privilege for the rest. *Lyall v. Kennedy*, 27 Ch. D. 1; 51 L. J., Ch. 397; 50 L. T. 730—C. A.

— **Loss of—Reference in Pleadings.**—The privilege claimed for documents is not lost merely by their being referred to in the pleadings. The penalty for non-production is that they cannot afterwards be used in evidence. *Roberts v. Oppenheim*, 26 Ch. D. 724; 53 L. J., Ch. 1148; 50 L. T. 729; 32 W. R. 654—C. A.

5. DOCUMENTS HELD IN RIGHT OF ANOTHER.

Liquidator — Books of Company.—In an action on a promissory note, made by the defendant as to security for the repayment of moneys due to the plaintiffs from a limited company, the defendant objected to produce documents relating to the matters in question in the action, being the banker's pass book and directors' minute book of the company, on the ground that they were in his custody only as liquidator in the voluntary winding up of the company. The company had been dissolved before the application for the discovery of documents was made, but no resolution had been passed under the Companies Act, 1862, s. 155, for the disposal of the documents belonging to it:—Held, that the plaintiffs were entitled to the inspection of the documents, inasmuch as the defendant had them in his absolute control. *London and Yorkshire Bank v. Cooper*, 15 Q. B. D. 473—C. A. Affirming 54 L. J., Q. B. 495; 33 W. R. 750—D.

6. SEALING UP DOCUMENTS.

Partnership Books—Surviving Partner.—The defendant and W. P. were partners. W. P. died and appointed the defendant his executor. In an action by a person interested under W. P.'s will against the defendant a decree was made for administration of W. P.'s estate, and for taking accounts of the partnership as between the defendant as surviving partner and W. P.'s estate. An order having been made for the production of the partnership books by the defendant, he claimed to seal up such entries as related to his own private affairs:—Held, that inasmuch as the plaintiff and defendant were both interested in the partnership property, the defendant was not entitled to the ordinary power to seal up such entries as he might swear to be irrelevant to the matters at issue in the action, but only to seal up entries which related to certain specified private matters mentioned in the order. *Pickering, In re, Pickering v. Pickering*, 25 Ch. D. 247; 53 L. J., Ch. 550; 50 L. T. 131; 32 W. R. 511—C. A.

Form of Affidavit.—In an affidavit of sealing up irrelevant matter, it is not necessary for the deponent to state positively that no sealed-up portion relates to the matters in question. Per Fry, L.J.: The affidavit ought to state what has been done, and upon whose investigation the deponent is relying, and, if he has not conducted the investigation himself, he ought to pledge his oath to the belief that nothing sealed up is relevant to the matter. *Jones v. Andrews*, 58 L. T. 601—C. A.

Conclusiveness of Affidavit.—The mere fact that the sealing up, or affidavit of sealing up, has not been done without carelessness is not a sufficient ground for ordering a general unsealing. In such cases, as in ordinary cases of discovery of documents, the person seeking discovery is bound by the oath of the party making discovery, unless the court is satisfied, not on a conflict of evidence, but from (1) the documents produced, (2) something in the affidavit of documents or sealing, (3) admission

of the party making discovery, or (4) necessarily from the circumstances of the case, that the affidavit as to documents or sealing does not truly state what it ought to state. *Ib.*

Application for General Unsealing.—In an action by a principal against his agents the plaintiff claimed an account of all sums received and paid by the defendants as his agents. The plaintiff subsequently obtained an order for an affidavit of documents. The defendants then obtained liberty to seal up such portions of the documents as were irrelevant, and they sealed up more than 10,000 passages contained in nearly 5,000 books and documents. The plaintiff then applied for an order on the defendants to unseal all books and documents, and all portions thereof, which had been sealed up under the order, or such portions thereof as the court should direct. The court held that the application that everything sealed up should be unsealed could not be acceded to, and that it was necessary for the plaintiff to establish by particular instances his right to compel the defendants to unseal. A list of particular documents was then prepared and brought before the judge, who directed certain scheduled items to be unsealed, but refused the rest of the application:—Held, on appeal, that the plaintiff was not entitled to a general unsealing of the documents. *Ib.*

7. THE AFFIDAVIT.

Conclusiveness of—Grounds on which Inspection ordered.—Where a party claims privilege against the production of documents, on the ground that they support his own title and do not relate to that of his opponent, his affidavit must be taken as conclusive, unless the court can see from the nature of the case or of the documents that the party has misunderstood the effect of the documents. *Attorney-General v. Emerson* (10 Q. B. D. 191), distinguished. *Roberts v. Oppenheim*, ante, col. 650.

The defendants in an affidavit of documents, made pursuant to Ord. XXXI. r. 12, disclosed a copy of an extract from a letter written by a person not a party to the action to one of the directors of the defendant company. The defendants refused to produce the same, on the ground that it was a confidential letter from a person not a party to the action, and on a summons to inspect being taken out, filed an affidavit to the effect that the document related only to their case and did not tend in any way to support the plaintiffs', or impeach their own case:—Held, that as there was nothing in the document itself to disclose the matter of its contents, the affidavit of the defendants was conclusive, and inspection must be refused. *Attorney-General v. Emerson* (10 Q. B. D. 191), distinguished. *Bulman v. Young*, 49 L. T. 736; 31 W. R. 766—D. See also *Jones v. Andrews*, supra.

Joint or Separate Custody—Husband and Wife.—A husband and wife sued as co-plaintiffs in respect of an alleged breach of trust by the trustees of their marriage settlement. The wife had a life estate for her separate use, and sued without a next friend. An order was made that the plaintiffs should file an affidavit stating "whether they or either of them" had in the possession or power "of them or either of them,"

any documents relating to the matters in question. They filed an affidavit admitting the possession of various documents, which they scheduled, and going on to say, "We have not now, and never had in our possession, custody, or power, or in the possession, custody, or power of any other person or persons on our behalf, any deed, &c., other than and except the documents set forth in the said schedule":—Held, that the plaintiffs must be ordered to file a further and better affidavit, for that an affidavit relating only to documents in the joint custody of the husband and wife did not comply with the order, and that the order was right in requiring them to answer as to documents in the possession of either of them. *Fendall v. O'Connell*, 29 Ch. D. 899; 54 L. J., Ch. 756; 52 L. T. 553; 33 W. R. 619—C. A.

Striking out for Prolivity.—Although there is no rule of court specially giving power to the court to take pleadings or affidavits off the file for prolixity, yet the court has an inherent power to do so in order to prevent its records from being made the instruments of oppression. Where, however, an affidavit of documents was of oppressive length, but it appeared to the court that delay and expense would be caused by filing a fresh one, the court permitted it to remain on the file, but ordered the party filing it to pay the costs of it. *Hill v. Hart-Davis*, 26 Ch. D. 470; 53 L. J., Ch. 1012; 51 L. T. 279—C. A.

Document found after Affidavit filed.—It is the duty of a party in an action who, after filing an affidavit of documents, discovers a document of which his opponent has a right to have inspection, but which is not disclosed in the schedule, to inform his opponent of the discovery, either by supplementary affidavit or by notice. *Mitchell v. Darley Main Colliery Company*, 1 C. & E. 215—Hawkins, J.

Non-compliance with Order—Incapacity arising after Writ—Leave to add next Friend.—Where, after writ issued, the plaintiff became incapable of transacting business, and his brother, on his behalf, made an affidavit of documents, and answered interrogatories, the defendant took out a summons to dismiss the action for non-compliance with orders to make an affidavit of documents, and to answer interrogatories; the plaintiff then took out a summons for leave to amend by adding a next friend:—Held, that the defendant was not entitled, under rule 21 of Ord. XXXI. of the Rules of Court, 1883, to have the action dismissed. The action still subsisted, and the plaintiff must have leave to amend by adding a next friend; the plaintiff to pay the costs of both summonses. *Cardwell (Lord) v. Tomlinson*, 54 L. J., Ch. 957; 32 L. T. 746; 33 W. R. 814—V.-C. B.

Compliance with Order after issue of Writ of Attachment, but before Enforcement.—A writ of attachment was issued against the defendant in an action for his contempt in not complying with an order of the court to make and file an affidavit of documents relating to the matters in question in the action. After the issue of the writ of attachment, but before it was enforced, the order was duly complied with by the defendant, and immediate notice of

such compliance was given to the plaintiffs' solicitors. The defendant was nevertheless arrested and imprisoned:—Held, that the arrest was altogether irregular; and that it was the duty of the plaintiffs' solicitors to have stayed the enforcement of the writ of attachment. *Guy v. Hancock*, 56 L. T. 726—Kay, J.

— **Proceedings on Attachment.**—See ATTACHMENT (PERSONS).

8. THE DEPOSIT.

Dispensing with—Discretion of Judge.—A judge has no discretion to dispense with the deposit required by Ord. XXXI. r. 26, before application for discovery or delivery of interrogatories. *Boarder v. Lindsay*, 34 W. R. 473—D.

A party to a cause is not entitled to obtain as a matter of right an order to administer interrogatories without making a deposit under Rules of the Supreme Court, Order XXXI. rr. 25, 26, merely because the other party consents to it. The judge at chambers has upon an application of that kind a discretion, and in the exercise of that discretion may order the deposit to be made, notwithstanding that the party to be interrogated is ready to dispense with a deposit. *Aste v. Stumore*, 13 Q. B. D. 326; 53 L. J., Q. B. 82; 49 L. T. 742; 32 W. R. 219; 5 Asp. M. C. 175—C. A.

In an action where the defendants were charged with fraud, which the court considered to require strict investigation, and where the security for costs under Order XXXI. r. 26, on delivering interrogatories, would have amounted to between 45% and 60%; the court, on proof of the plaintiff's want of means, dispensed with the security. *Smith, In re, Smith v. Went*, 50 L. T. 382; 32 W. R. 512—Kay, J.

— **Documents in which Parties have a Common Interest.**—Order made that the plaintiff in an action of contract should have inspection of the written contract which was in the defendant's possession without giving the security for costs required by Ord. XXXI. rr. 25, 26. The provisions of Ord. XXXI. rr. 25, 26, with regard to security for the costs of discovery do not apply to an application for production of a document in which both parties to the action have a common interest. *Brown v. Liell*, 16 Q. B. D. 229; 55 L. J., Q. B. 73—D.

— **Several Defendants.**—Where in a co-ownership action, brought by a managing owner against his co-owners for an account to recover a balance, the plaintiff sought to interrogate the defendants who were numerous, and to be dispensed from making the usual deposit, the defendants contending that a deposit ought to be made in respect of each defendant interrogated, the court ordered a deposit of 5%, and 10s. for each additional folio over five and no more. *The Whichham*, 53 L. T. 236; 5 Asp. M. C. 479—Butt, J.

9. COSTS OF INSPECTION.

Not between Party and Party.—As between party and party, no costs can be allowed in respect of notices to inspect documents, or of

attendance for the purpose of inspecting documents, at the office of the solicitor to whose client the documents belong. The discretion given to the taxing-master by Ord. LXV. r. 27 (17)—repeated from Rules of Supreme Court, 1875 (Costs), schedule, r. 15—only applies to taxation of costs as between solicitor and client. *Wicksteed v. Biggs*, 54 L. J., Ch. 967; 52 L. T. 428—Pearson, J.

II. INTERROGATORIES.

1. TO AND BY WHAT PERSONS.

"Opposite Parties"—Third Party to Plaintiff.—Persons who are served by a defendant with a third party notice are not thereby made defendants within the definition of the word in the Judicature Act, 1873, s. 100, nor do they become defendants by putting in a defence. But where persons had been served with a third party notice by the defendant for the purpose of claiming an indemnity, and had obtained an order (1) that the question of indemnity should be tried after the trial of the action; and (2) that they should be at liberty to appear at the trial of the action and oppose the plaintiff's claim so far as they were affected thereby, and for that purpose to put in evidence and cross-examine witnesses:—Held, that the third parties had been placed by the order in the position of defendants, and had a right to examine the plaintiff by interrogatories under Order XXXI. r. 1. *Eden v. Weardale Iron and Coal Company*, 35 Ch. D. 287; 56 L. J., Ch. 400; 56 L. T. 464; 35 W. R. 507—C. A.

—By Plaintiff to Third Party.—Persons who had been served by a defendant with a third party notice for the purpose of claiming indemnity, obtained an order (1) that the question of indemnity should be tried after the trial of the action; and (2), that they should be at liberty to appear at the trial of the action, and oppose the plaintiff's claim so far as they were affected thereby, and for that purpose to put in evidence and cross-examine witnesses:—Held, that the third parties had put themselves in the position of "opposite parties" to the plaintiff; and the plaintiff had a right to examine them by interrogatories. *MacAlister v. Bishop of Rochester* (5 C. P. D. 194) followed. *Eden v. Weardale Iron and Coal Company*, 34 Ch. D. 223; 56 L. J., Ch. 178; 55 L. T. 860; 35 W. R. 235—C. A.

—Between Plaintiffs and co-Plaintiffs and Defendants and co-Defendants.—Discovery by way of interrogatories may be allowed to a plaintiff from a co-plaintiff, or to a defendant from a co-defendant, in cases in which there may be rights to be adjusted between them respectively. *Shaw v. Smith*, 18 Q. B. D. 193; 56 L. J., Q. B. 174; 56 L. T. 40; 35 W. R. 188—C. A.

Discovery cannot be allowed to a defendant from a co-defendant with a view to show that the co-defendant and not the defendant is liable to the plaintiff, as where a defendant, sued for subsidence under the plaintiff's land, proposes to inspect the mines of a co-defendant in adjoining land. *Brown v. Watkins* (16 Q. B. D. 125) explained. *Ib.*

2. IN WHAT MATTERS.

Suit for Nullity of Marriage.—In a suit for nullity of marriage, the court has power to give leave to administer interrogatories between the parties to the suit; for suits of that kind were formerly within the jurisdiction of the Ecclesiastical Courts, which had power to allow interrogatories to be administered between the parties, and now all the jurisdiction of the Ecclesiastical Courts as to suits for nullity of marriage (including matters of practice and procedure) is vested in the Probate, Divorce, and Admiralty Division. And, further, even if the power to allow interrogatories to be administered between the parties did not otherwise exist, it would be conferred upon the Probate, Divorce, and Admiralty Division by the Supreme Court of Judicature Act, 1873; for at the time of passing that statute the Superior Courts of Common Law and the Court of Chancery had power to allow interrogatories to be administered between the parties to a suit; and by s. 16, all the jurisdiction of those courts, including the ministerial powers and authorities incident thereto, was transferred to and vested in the High Court of Justice, and by s. 23 the jurisdiction transferred to the High Court may (so far as regards procedure and practice) be exercised in the same manner as it might have been exercised by any of the courts whose jurisdiction has been transferred. *Harvey v. Lovekin*, 10 P. D. 122; 54 L. J., P. 1; 33 W. R. 188—C. A.

In a suit for nullity of marriage the court has power to order interrogatories. *Euston v. Smith*, 9 P. D. 57; 32 W. R. 596—Hannen, P.

Petition for Revocation of Patent.—A petition was presented under s. 26 of the Patents, Designs, and Trade Marks Act, 1883, to procure the revocation of a patent, on certain grounds, which were stated in the particulars of objections. A summons was subsequently taken out, in pursuance of leave specially reserved, for directions as to the further conduct of the petition, asking that the petitioners might be at liberty to deliver to the respondent interrogatories, or, in the alternative, that the respondent might be ordered to furnish particulars of his answer to the petition. The question was whether the practice as to delivering interrogatories applied to a petition of this kind:—Held, that interrogatories might be delivered upon the usual terms of making a deposit. *Haddan's Patent, In re*, 54 L. J., Ch. 126; 51 L. T. 190; 33 W. R. 96—Kay, J.

Action for Penalties—Common Informer.—The general rule is that in an action for penalties by a common informer, leave will not be given to the plaintiff to administer interrogatories. *Martin v. Treacher*, 16 Q. B. D. 507; 55 L. J., Q. B. 209; 54 L. T. 7; 34 W. R. 315; 50 J. P. 356—C. A. See also ante, col. 645.

—What is—Breach of Copyright.—By 3 & 4 Wm. 4, c. 15, s. 2, if any person shall, during the continuance of the sole liberty of representing a dramatic piece, represent such piece without the consent of the author, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40s.:—Held, that this section did not impose a

penalty upon the offender so as to preclude the plaintiff, in an action to recover the specified amount, from administering interrogatories to him. *Adams v. Batley*, 18 Q. B. D. 625; 56 L. J., Q. B. 393; 56 L. T. 770; 35 W. R. 437—C. A.

As to Documents.—See *Hall v. Truman* and *Nicholl v. Wheeler*, post, col. 662.

3. APPLICATION FOR ORDER—TIME.

Summons—Striking out for Irrelevancy—Grounds for Application.—On the hearing of a summons before the chief clerk for leave to deliver interrogatories under Rules of the Supreme Court, 1883, Order XXXI., r. 1, he may consider the general relevancy or irrelevancy of the proposed interrogatories, and may, if a copy of the interrogatories is produced to him on the summons, strike out such as are irrelevant; but he is not at liberty to settle or amend, in the way of condensation, the form of any particular interrogatory that is in itself relevant. *Swabey v. Dovey*, 32 Ch. D. 352; 55 L. J., Ch. 631; 54 L. T. 368; 34 W. R. 510—V.-C. B.

Upon an application for leave to exhibit interrogatories under Rules of Supreme Court 1883, Ord. XXXI., r. 1, it is not necessary for the applicant, nor can he be required, to produce a copy of the proposed interrogatories; and if produced to the chief clerk on the hearing of the summons he has no right to settle them, or to decide upon the relevancy or irrelevancy of specific interrogatories and allow or disallow them accordingly. All that is necessary to support the summons is a statement by the applicant—not necessarily in writing—as to the general nature and scope of the proposed interrogatories, so as to enable the Court to decide whether he is entitled to the whole or any part of what he asks. *Martin v. Spicer*, 32 Ch. D. 592; 54 L. T. 598; 34 W. R. 589—V.-C. B.

Leave given though Tendency to Criminate.—Leave to administer interrogatories ought not to be refused on the ground that it is plain from the nature of the case that they must necessarily criminate the party interrogated, who cannot answer them without admitting that he has been guilty of felony. *Harvey v. Lovekin*, supra.

By Defendant before Delivery of Particulars by Plaintiff.—In an action by the executors of a married woman against her husband to recover furniture said to be part of her separate estate, delivery by the plaintiffs of particulars of and relating to the exact chattels claimed, was postponed until the defendant had stated on oath which of the articles had belonged to his late wife, on the ground that the defendant must know what furniture his wife had, whereas the plaintiffs, as mere executors, had not the means of knowing. *Miller v. Harper*, 38 Ch. D. 110; 57 L. J., Ch. 1091; 58 L. T. 698; 36 W. R. 454—C. A.

General Allegation of Fraud—Principal and Agent—No particulars.—The plaintiff alleged that he had employed the defendant as a stockbroker, but that the defendant had in many of the transactions dealt with himself as principal, and had also charged the plaintiff with moneys

not paid. The plaintiff delivered interrogatories asking for the particulars of the dealings on behalf of the plaintiff and the names of the persons with whom the defendant had dealt and the amounts paid. The defendant refused to answer on the ground that the plaintiff was not entitled to this information until after decree:—Held (dubitante Fry, L.J.), that though there were no particulars of the frauds alleged, the plaintiff was entitled to discovery in order to enable him to give details of the frauds alleged. *Whyte v. Ahrens* (26 Ch. D. 717) discussed. Per Bowen L.J., Ord. XIX., r. 6, is a rule of pleading only. *Leitch v. Abbott*, 31 Ch. D. 374; 55 L. J., Ch. 460; 54 L. T. 258; 34 W. R. 506; 50 J. P. 441—C. A.

4. WHAT ADMISSIBLE.

“Matter in question in the Cause”—Order XXXI., r. 1.—The plaintiff, as executrix of A. M., sued the executor of H. M., alleging that H. M. had received 6,000*l.* in trust for A. M., had invested it in securities producing at least five per cent. per annum, and applied the interest to his own purposes. The plaintiff claimed payment of the 6,000*l.* with interest at five per cent. The defendant professed ignorance as to the matters alleged, and set up several alternative defences: that H. M. had not received the 6,000*l.*; that if he had, he paid it to A. M.; that if he received it A. M. agreed that he should retain it for his own use as a gift from her; that if he received it, it was agreed between him and A. M. that he should retain it in satisfaction of a claim which he had against her; that A. M. was at her death indebted to H. M. in an amount exceeding the 6,000*l.* The plaintiff delivered interrogatories for the examination of the defendant. By interrogatory 18 he asked particulars as to the way in which the 6,000*l.* had been invested by H. M., and what was the rate of interest on the investments, and how the income had been disposed of? By interrogatory 23 he asked whether the defendant was not the brother of H. M., and whether during the period of the transactions referred to in the statement of claim the defendant had not been the solicitor and agent of H. M., and lived with him, and acted as his confidential agent with respect to his property, and become acquainted with all his affairs? The defendant, in answer to interrogatory 18, stated that H. M. had invested the 6,000*l.*, and applied the income to his own purposes, and declined to answer further, and he declined to answer interrogatory 23 at all:—Held, that as the plaintiff was not seeking to follow the investments of the 6,000*l.*, the defendant was not bound to give the particulars of such investments; but that as the defendant did not admit the receipt of five per cent. interest, he was bound to answer as to the amount of interest that had been received, as it would enable the court at the hearing to make an immediate decree for payment of principal and interest if the plaintiff established the trust. *Parker v. Wells* (18 Ch. D. 477) distinguished. Held, further (dissentiente Cotton, L.J.), that the defendant was not bound to answer interrogatory 23, for that an interrogatory asking in substance whether the defendant had not been in such a position that he must know whether the allegations in the statement of claim were

true or false, did not relate to any matter in question in the cause within the meaning of Ord. XXXI., r. 1. *Morgan, In re, Owen v. Morgan*, 39 Ch. D. 316; 60 L. T. 71; 37 W. R. 243—C. A.

As to Damages.—Interrogatories as to the amount of the damages claimed are only admissible, as a rule, where the defendant does not directly traverse the plaintiff's claim, but has either paid money into court or can show that such claims are *prima facie* extortionate. *Clarke v. Bennett*, 32 W. R. 550—D.

Action to recall Probate — Undue Influence.—The plaintiff sued to recall probate on the ground that the testator was not of sound mind, and that the will was obtained by the undue influence of the defendants, two of whom were the executors, and the third universal legatee. The plaintiff delivered interrogatories for the examination of the defendants, asking what sums they had received from the testator by way of payment for services, loan or gift, and whether the universal legatee had since the death of testator made over any and what part of the property to the other defendants. The defendants declined to answer these interrogatories as irrelevant:—Held, that the interrogatories must be answered, the period in the first interrogatory being limited to three years. *Holloway, In re, Young v. Holloway*, 12 P. D. 167; 56 L. J., P. 81; 57 L. T. 515—C. A.

Defence of plene administravit.—In an action against a surviving trustee and the executors of a deceased trustee for alleged breaches of trust, the executors pleaded plene administravit, and the plaintiffs having thereupon administered interrogatories, seeking for particulars of their testator's real and personal estate, and their administration of it, the executors' answer was merely a repetition of their defence:—Held, insufficient, and that the plaintiffs were entitled to a further and more specific answer. *St. George v. St. George*, 19 L. R., Ir. 225—M. R.

Questions as to Defendant's Title.—The plaintiffs brought an action for an account of coal worked by the defendants under certain closes of land, and an injunction to restrain any further working, and by their statement of claim alleged that they were entitled to the minerals under the said closes of land. The defendants denied the title of the plaintiffs, but did not set up any title in themselves. The plaintiffs administered interrogatories to one of the defendant firm, one of which required him to set forth "under or by what, if any, conveyance, assignment, lease, licence, or authority, the defendant firm claim to be entitled to the coals and minerals underlying the closes in question, giving the dates and names or parties to any such conveyance, assignment, or lease, and the names of the person or respective persons from whom they allege that they obtained any such licence or authority, and giving the date of any such licence or authority, and stating whether the same be in writing or not." The defendant objected to answer such interrogatory, whereupon the plaintiffs applied for and obtained an order for a further answer, but the order did not direct to what extent the

answer should go:—Held, on motion to discharge the order, that the order was right. *Cayley v. Sandycroft Brick, Tile, and Colliery Company*, 33 W. R. 577—Pearson, J.

Commonable Rights—Discovery of Plaintiffs Evidence.—B. and N., two landowners in the parish of M., brought an action for a declaration that a piece of land formed part of M. Common, and to establish commonable rights thereover. N. sued as owner in fee of a beerhouse and three cottages, and the plaintiffs pleaded the exercise of the rights claimed from time immemorial. The defendant was the lord of an adjacent manor, and his defence was that the piece of land never formed part of M. Common, but was common land forming part of his own manor; that if the plaintiffs ever had any rights of common thereon such right had been extinguished; that some of the rights could only be used in respect of ancient tenements, and that the beerhouse and three cottages in respect of which N. sued had no land held therewith. After the defence had been delivered, the defendant administered interrogatories to the plaintiffs, asking in effect—(1.) How long the plaintiffs had been owners or proprietors of their properties, and for what estates, what was the tenure thereof, and whether those lands were within the limits of any and what actual or reputed manors, and whether any such premises were ancient messuages, and whether the beerhouse and three cottages had any and what lands appurtenant thereto or held therewith. (2.) Whether the plaintiffs or their predecessors in title, as proprietors or occupiers of any lands in M., or under any other alleged title, had exercised the rights claimed upon any and what part of M. Common, or upon any and what part of the piece of land in question. (3.) The plaintiffs were asked to set forth particulars of their exercise of such rights, and whether they did so by any licence or in consideration of any and what payment. The plaintiffs objected to answer these interrogatories on the ground that they related exclusively to their own title and to the evidence they should adduce at the hearing. Upon a summons that the plaintiffs might be ordered to make a sufficient answer:—Held, that the plaintiff N. must answer so much of the first interrogatory as asked, whether the beerhouse and cottages had any lands appurtenant thereto or held therewith, because he had not pleaded that they had, and the defendant had pleaded that they had not; but that the rest of the interrogatories need not be answered, because they were in effect directed to the discovery of the evidence by which the plaintiffs intended to prove their case at the hearing. *Eade v. Jacobs* (3 Ex. D. 334) and *Hoffmann v. Postill* (4 L. R., Ch. 673) explained. *Lowndes v. Davies* (6 Sim. 468) dissented from. *Bidder v. Bridges*, 51 L. T. 818; 33 W. R. 272—Kay, J.

On appeal by the defendant the question was left to the judges of the Court of Appeal as arbitrators to settle what part of the interrogatories should be answered, and the plaintiffs were directed to answer further parts of them. S. C., 29 Ch. D. 29; 54 L. J., Ch. 798; 52 L. T. 455; 33 W. R. 792—C. A.

Libel—Comparison of Hand-writing.—In order to prove that the defendant was the

writer of a libellous letter, he may be interrogated as to whether or not he was the writer of another letter addressed to a third person,—as leading up to a matter in issue in the cause, and therefore relevant. *Jones v. Richards*, 15 Q. B. D. 439—D.

— **Newspaper—Name of Correspondent—Manuscript.**—In an action against the publisher of a newspaper for a libel contained in a letter from a correspondent and in a leading article thereon, the defence was that the alleged libel consisted of an accurate report of certain public proceedings and fair comment thereon:—Held, that the plaintiff was not entitled to interrogate the defendant as to the names of the persons on whose information the reports were based, or the name of the correspondent who wrote the letter, or as to the original manuscript of the letter. *Hennessy v. Wright*, 36 W. R. 879—C. A.

— **As to Publication in Newspaper.**—In an action for libel in which the defendant traversed the publication; denied that the words were published of the plaintiff, or in the defamatory sense alleged; and pleaded fair comment, the plaintiff exhibited interrogatories, asking whether the defendant published the libel in two Irish papers specified in the interrogatories, and whether the words were not published of the plaintiff. The defendant was also interrogated (No. 4) as to whether he did not publish the words complained of “in the London *Times* newspaper, or some other and what newspaper?” “When did such publication take place?” The defendant answered all the interrogatories in the one answer as follows: “That in bonâ fide comment on the conduct and language of the plaintiff, and in reference to matters of public interest, I caused to be printed and published of and concerning the plaintiff and others in the several newspapers in the said interrogatories mentioned the words in such interrogatories referred to, honestly believing the same to be true and without malice”:—Held, that except as to the fourth interrogatory, the answer was sufficient and was not objectionable, on the ground of its qualified form, but that a further answer should be given to No. 4, giving the date of the alleged publication. *Malone v. Fitzgerald*, 18 L. R., Ir. 187—Ex. D.

— **Names of Persons, though probably Witnesses.**—In an action for libel the defendant pleaded that the libel was true. The substance of the libel was that the plaintiff had fabricated a story to the effect that a certain circular letter purporting to be signed by the defendant had been sent round to the defendant's competitors in business. The plaintiff had in speeches and letters stated that he had seen a copy of the alleged letter, that two of such letters were in existence in the possession respectively of a firm of bankers and a firm of manufacturers at Birmingham, and that his informant in the matter was a solicitor of high standing at Birmingham. In interrogatories administered by the defendant the plaintiff was asked to state the name and address of his informant, in whose hands he had seen the copy of the letter, and the names and addresses of the persons to whom the letter had been sent, and in whose possession the two letters existed; but he refused to do so on the

ground that he intended to call those persons as his witnesses at the trial:—Held, that the defendant was entitled to discovery of the names and addresses of such persons as being a substantial part of facts material to the case upon the issue on the plea of justification. *Marriott v. Chamberlain*, 17 Q. B. D. 154; 55 L. J., Q. B. 448; 54 L. T. 714; 34 W. R. 783—C. A.

— **As to Documents — Sufficient Affidavit.**—After a defendant has made a sufficient affidavit of documents, the plaintiff will not be allowed to administer to him a general roving interrogatory as to documents in his possession, the effect of which would be to compel the defendant to make a further affidavit as to documents. There may possibly be cases in which, after a sufficient affidavit as to documents has been made, the court will allow the plaintiff to deliver an interrogatory as to some specific document or documents, but whether this shall be allowed is a matter within the discretion of the judge in each particular case, and, though his decision can be appealed from, the Court of Appeal will not readily reverse it. *Jones v. Monte Video Gas Company* (5 Q. B. D. 556) explained. *Hall v. Truman*, 29 Ch. D. 307; 54 L. J., Ch. 717; 51 L. T. 586—C. A.

In an action for the recovery of land the defendant claimed that certain documents mentioned in his affidavit of documents were privileged from production, on the ground that they supported his title and did not contain anything impeaching his defence or supporting the plaintiff's case. The defendant's affidavit was sufficient on the face of it. The plaintiffs proposed to administer interrogatories to the defendant for the purpose of showing that the documents in question supported the plaintiff's title, and therefore that they were not privileged from production:—Held, that the interrogatories were inadmissible. *Jones v. Monte Video Gas Company* (5 Q. B. D. 556) and *Hall v. Truman* (29 Ch. D. 307) followed. *Nicholl v. Wheeler*, 17 Q. B. D. 101; 55 L. J., Q. B. 231; 34 W. R. 425—C. A.

— **Particulars of Infringement of Patent.**—An action was brought by the registered owner of two letters patent for similar inventions, dated in 1883 and 1884, for infringement of both patents. The plaintiff discontinued the action so far as related to the patent of 1884. The defendants then delivered interrogatories as to what constituted infringements of both patents, and they asked him as to documents in his possession relating to the preparation of the specifications filed under both patents. The plaintiff declined to answer on the ground that the particulars of infringement had been sufficiently stated by him, and as to the documents, that they were confidential communications between himself and his solicitor and counsel, and that such documents were privileged; and that as regarded any documents relating to the patent of 1884, the interrogatories were irrelevant to the issue. The plaintiff's solicitor had also acted as his patent agent:—Held, that the plaintiff was not obliged to give any further answer as to the particulars of breaches; that the plaintiff's answer as to documents was insufficient, as it did not distinguish between the communications between him and his solicitor as such, and communications between him and his

solicitor in his character of patent agent; the former class only being privileged. *Moseley v. Victoria Rubber Company*, 55 L. T. 482—Chitty, J.

5. PRIVILEGE.

Solicitor and Client—Solicitor Defendant in Action.—In an action for libel contained in a circular, the defendants justified, giving full particulars of the justification. The plaintiff administered interrogatories as to certain communications referred to by the defendants, which they objected to answer upon the ground that by so doing they would disclose facts and information obtained by them in confidence and acting in their capacity as solicitors for a client:—Held, that the defendants were not bound to further answer the interrogatories, the privilege claimed not being their privilege, but that of their clients. *Proctor v. Smiles*, 55 L. J., Q. B. 327—C. A. Affirming 55 L. J., Q. B. 467—D.

—Professional Confidence.—The privilege from discovery resulting from professional confidence does not extend to facts communicated by the solicitor to the client which cannot be the subject of a confidential communication between them, even though such facts have a relation to the case of the client in the action. A plaintiff interrogated a defendant as to whether interviews and correspondence had not, between certain dates, taken place between their respective solicitors, and also between the defendant's solicitor and a third person, in reference to an agreement the specific performance of which it was the object of the action to enforce. The defendant declined to answer the interrogatory, so far as it related to communications between his solicitor and other persons, on the ground that he had no personal knowledge, and the only information he had was derived from confidential communications between him and his solicitor in reference to his defence in the action:—Held, that he must make a further answer. *Foakes v. Webb*, 28 Ch. D. 287; 54 L. J., Ch. 262; 51 L. T. 624; 33 W. R. 249—Kay, J.

See also Cases, ante, I. 4.

Tendency to Criminate.—Leave to administer interrogatories ought not to be refused on the ground that it is plain from the nature of the case that they must necessarily criminate the party interrogated, who cannot answer them without admitting that he has been guilty of felony; he may, however, decline to answer them. *Harvey v. Lovekin*, 10 P. D. 122; 54 L. J., P. 1; 33 W. R. 188—C. A.

6. THE ANSWER.

Sufficiency of.—The duty of the court with reference to answers to interrogatories is now regulated by Ord. XXXI. rr. 10, 11, and limited to considering the sufficiency or insufficiency of the answer, i.e., whether the party interrogated has answered that which he has no excuse for not answering—and only in the case of insufficiency can it require a further answer. *Lyell v. Kennedy*, 27 Ch. D. 1; 53 L. J., Ch. 937; 50 L. T. 730—C. A.

Semble (per Bowen, L.J.), that an embarrassing answer to interrogatories may be dealt with as insufficient. *Id.*

A party interrogated may, on a question of sufficiency, refer to his whole affidavit in answer to interrogatories, and is not restricted to the passages dealing with any particular interrogatory, and all embarrassment to the interrogating party is now obviated by the provisions of Ord. XXXI. r. 24; but he must not endeavour to import into an admission matter which has no connexion with the matter admitted. *Id.*

—Belief founded on Privileged Communications.—A party to an action cannot be compelled to answer interrogatories asking as to his knowledge, information, or belief with regard to matters of fact, if he swears that he has no knowledge or information with regard to those matters except such as he has derived from privileged communications made to him by his solicitors or their agents; for since under those circumstances his knowledge and information are protected, so also is his belief when derived solely from such communications. *Lyell v. Kennedy*, 9 App. Cas. 81; 53 L. J., Ch. 449; 50 L. T. 277; 32 W. R. 497—H. L. (E.).

The plaintiff having been interrogated as to his knowledge, information, and belief upon matters relevant to the defendant's case, answered that he had no personal knowledge of any of the matters inquired into; that such information as he had received in respect of those matters had been derived from information procured by his solicitors or their agents in and for the purpose of his own case:—Held, that the answer was sufficient. *Id.*

—No Information except from Privileged Source.—In an action for damage caused by the negligence of the defendants or their servants in the use of an engine, whereby sparks and red-hot cinders escaped from the engine and set fire to the plaintiff's buildings, the plaintiffs administered the following interrogatory: "Have the defendants or any of their servants or agents any knowledge, information, or belief as to the cause of the fire in respect to the happening whereof this action is brought? If yea, set out the same fully, with dates and all particulars. If any of the said servants or agents have communicated to the defendants such knowledge, information, or belief, let the defendants set out the substance of such communications, with dates and particulars." To this the defendants answered: "We have no information at all on the subject, save such as appears in the reports set out in the schedule to our affidavits, filed in this cause on the 28th May, 1884, and which by the judgment of the Divisional Court of the 7th July last were held to be privileged from production, which we decline to produce:—Held, that the answer was sufficient, as a further or better answer could not be given without disclosing the contents of privileged reports made to the defendants by their servants, which reports the defendants were not bound to disclose. *London, Tilbury, and Southend Railway v. Kirk*, 51 L. T. 599—D.

Knowledge of Servant or Agent.—In an action by owners of water mills to restrain a canal company, who had statutory power to take water from the river on which the plaintiffs' mills were situate, from wrongfully diminishing the quantity of water in the river, to the injury

of the plaintiffs, the defendants interrogated the plaintiffs, and asked them to give a list of the days between specified dates on which they alleged that the working of their mills was interfered with by the negligence of the defendants. The plaintiffs answered that they were unable to specify the particular days:—Held, that this answer was sufficient, and that the plaintiffs were not bound to state whether they had made inquiries of their agents, servants, and workmen. *Bolckow v. Fisher* (10 Q. R. D. 161) distinguished. *Rasbotham v. Shropshire Union Railways and Canal Company*, 24 Ch. D. 110; 53 L. J., Ch. 327; 48 L. T. 902; 32 W. R. 117—North, J.

Power to go behind Affidavit.—Where in an answer to interrogatories the party interrogated declines to give certain information on the ground of professional privilege, and the privilege is properly claimed in law, the court will not require a further answer to be put in, unless it is clearly satisfied, either from the nature of the subject-matter for which privilege is claimed, or from statements in the answer itself, or in documents so referred to as to become part of the answer, that the claim for privilege cannot possibly be substantiated. *Lyell v. Kennedy*, 27 Ch. D. 1; 53 L. J., Ch. 937; 50 L. T. 730—C. A.

The mere existence of a reasonable suspicion which is sufficient to justify the court in requiring a further affidavit of documents is not enough when a claim for privilege in an answer to interrogatories is sought to be falsified. *Id.*

The defendant K. in his answer to interrogatories objected to disclose certain information asked for by the plaintiff L. on the ground of professional privilege, which the court held properly claimed in law. L. sought by reference to certain admissions in the answer itself, and from documents referred to in the interrogatories and answer, as well as from documents scheduled to K.'s affidavit of documents, to show that the information sought was obtained under circumstances which negated the claim of privilege, and sought a further answer:—Held, that no further answer should be required, as the admissions in the answer and in the documents referred to therein only raised a case of suspicion at the most, which might be capable of explanation if K. were at liberty to make an affidavit. *Id.*

The court declined to decide how far, under the present practice, reference could be made, as against the interrogated party, to any document in his possession not referred to in his answer, but only scheduled to his affidavit of documents. *Id.*

Irrelevant and Embarrassing.—Where an interrogatory setting out a certain letter and asking whether the defendant had written such a letter or one to the same purport and effect at any time to any person, was answered by ninety folios of matter giving the whole circumstances of the case:—Held, that such an answer was irrelevant and embarrassing, although a reasonable and legitimate explanation of an answer to an interrogatory is relevant. *Lyell v. Kennedy*, 33 W. R. 44—D.

Striking out—Prolixity.—Where interrogatories are unreasonably prolix, it is the duty of

the court to strike them out under Order XXXI. r. 7. *Grumbrecht v. Parry*, 32 W. R. 558—C. A. Affirming, 49 L. T. 570; 5 Asp. M. C. 176—D.

Order for further Answer vivâ voce.—When a person interrogated has answered insufficiently and has been ordered to further answer by vivâ voce examination, he can only be required to give vivâ voce such an answer to the particular interrogatories mentioned in the order as would have been sufficient if it had been given by his affidavit in answer to interrogatories. The costs of any examination exceeding these limits must be paid by the party examining. *Litchfield v. Jones*, 54 L. J., Ch. 207; 51 L. T. 572; 33 W. R. 251—Pearson, J.

DISORDERLY HOUSE.

Licence for Dancing.—Where dancing is not the principal part of a public entertainment, even though it is the principal part of a particular performance in the entertainment, if that particular performance be not a principal part of the entertainment, a dancing licence is not required under 25 Geo. 2, c. 36, s. 2. *Tay v. Bignell*, 1 C. & E. 112—Cave, J.

Brothel—Prosecution—Alternative Procedure.—In a prosecution of a brothel-keeper under s. 13 of the Criminal Law Amendment Act, 1885, it is competent to the prosecutor either to proceed summarily under that act independently of the earlier acts, or he may, at his option, comply with the preliminary steps specified in s. 5 of 25 Geo. 2, c. 36, as amended by s. 7 of 58 Geo. 3, c. 70, and then become entitled to a reward. *Kirwin v. Hines*, 54 L. T. 610; 50 J. P. 230—D.

Having or keeping House for Performance of Stage Plays.—The appellant was the owner and occupier of a building which he gratuitously allowed to be used on a few occasions for the performance of stage plays, to which the public were admitted on payment, for the benefit of a charity. The appellant had no licence for the performance of stage plays in such building:—Held, that he was rightly convicted of having or keeping a house for the public performance of stage plays without a licence, under 6 & 7 Vict. c. 61, s. 2. *Shelley v. Bethell*, 12 Q. B. D. 11; 53 L. J., M. C. 16; 49 L. T. 779; 32 W. R. 276; 48 J. P. 244—D.

DISTRESS.

When Protected in Bankruptcy.—See BANKRUPTCY, XI. 2.

In Winding-up of Companies.—See COMPANY, XI. 6.

In other Cases.—See LANDLORD AND TENANT.

DISTRICT REGISTRY.

Petition to Wind-up—Removal of Cause to London.—Ord. XXXV. r. 16, provides that, "In any case not provided for by rules 13 and 14, any party to a cause or matter proceeding in a district registry may apply to the court or a judge, or to the district registrar, for an order to remove the cause or matter from the district registry to London, and the court, judge, or registrar may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall be just." Circumstances under which an order for transfer to the High Court will not be made. *Neath and Bristol Steamship Company, In re*, 58 L. T. 180—Kekewich, J.

Administration Action—Taxing Officer.—The court can, in its discretion, order the taxation of costs in an administration action, commenced and prosecuted in a district registry, to be made by the district registrar. The term "taxing officer" in rr. 3, 11, and 12 of Supreme Court Funds Rules, 1884, these rules being read in conjunction with Ord. LXV. r. 27, sub-s. 43, of Rules of Supreme Court, 1883, includes "district registrar," where the court has directed taxation to be made by that officer, and the paymaster is bound to act on the certificate of taxation of a district registrar, when the court, in the exercise of its discretion, has directed taxation in the district registry. The court, however, following *Day v. Whittaker* (6 Ch. D. 784), will not, except under very special circumstances, direct the costs of an action commenced in a district registry to be taxed otherwise than by a taxing-master of the Chancery Division. *Wilson, In re, Wilson v. Altree*, 27 Ch. D. 242; 53 L. J., Ch. 989; 32 W. R. 897—Chitty, J.

DIVIDEND.

See COMPANY.

DIVORCE.

See HUSBAND AND WIFE.

DOCK COMPANY.

See SHIPPING.

DOCTOR.

See MEDICINE.

DOCUMENTS.

Obtaining Discovery and Inspection of.—See DISCOVERY.

Action for Defacing Document as to Character.—See MASTER AND SERVANT.

Order to Deliver up.—See SOLICITOR, V. 1. e.

Other Points.—See DEED.

DOG.

Carriage of Dogs.—See CARRIERS.

License for.—See REVENUE (EXCISE).

Injuries caused by.—See ANIMALS.

DONATIO MORTIS CAUSA.

See WILL.

DOMICIL.

See INTERNATIONAL LAW.

DOWER.

See HUSBAND AND WIFE.

DRAINAGE.

Mortgage of Glebe by Vicar—Foreclosure Action—Parties.—A vicar is a person having a limited interest within the meaning of s. 3 of the Landowners West of England and South Wales Land Drainage and Inclosure Companies Act, and may charge his glebe land thereunder. To a foreclosure action under such a mortgage the patron of the living is not a necessary party. *Goodden v. Coles*, 69 L. T. 309; 36 W. R. 828—Kekewich, J.

Certificate of Inclosure Commissioners—Validity of Charge—Borrowing Powers.—The River Dee Company was by act of parliament empowered to borrow upon mortgage of the lands of the company any sums not exceeding 25,000*l.* The company, however, borrowed more. After this the Lands Improvement Company,

having by its acts power to advance to land-owners money for the improvement of land, advanced to the River Dee Company 6,405*l.*, and by an order the Inclosure Commissioners purported to charge the lands of the River Dee Company with the repayment of that sum and interest by annual instalments:—Held, that the powers given by the Lands Improvement Company's Acts did not override the restriction on the borrowing powers of the River Dee Company, and that the charge on the lands of the River Dee Company was consequently invalid; and that a clause in one of the Lands Improvement Company's Acts making the certificate of the Inclosure Commissioners conclusive evidence of the validity of a charge under the act did not render the charge valid in such a case. *Wenlock (Baroness) v. River Dee Company*, 38 Ch. D. 534; 57 L. J., Ch. 946; 59 L. T. 485—C. A.

— **Land Drainage Charge—Priority.**—The General Land Drainage and Improvement Company's Act, 1849, and the Lands Improvement Company's Act, 1853, each contained a section which provided that, upon the final order or certificate of the Inclosure Commissioners and the execution of the improvements, the company should have a first charge upon the inheritance of the improved lands in priority over every other then existing or future charge. The company of 1853 having executed improvements on land already subject to a charge in favour of the company of 1849, contended that the latter charge was displaced by theirs:—Held, that the two sections were not irreconcilable, and that the charge which was first in order of time was entitled to priority. *Pollock v. Lands Improvement Company*, 37 Ch. D. 661; 57 L. J., Ch. 853; 58 L. T. 374; 36 W. R. 617—Chitty, J.

Order to Repair Sea Wall—Validity—Interest.—The presentment of a jury at a court of sewers in 1861 found that the then owner of A.'s land was bound by reason of his tenure to repair a portion of the sea-wall fronting the land so as to prevent the influx of the waters. In 1881–2 the commissioners of sewers made orders upon A. as the owner of the land to repair this portion of the wall, it having been destroyed by an extraordinary storm and high tide. These orders were made "upon reading the presentment" of 1861. One of the commissioners who made the orders was personally interested as an owner of lands within the level;—Held, that if the commissioners had made the orders under the powers of s. 33 of the Land Drainage Act, 1861 (24 & 25 Vict. c. 133) they must themselves have found as a fact A.'s liability; that if they had exercised such a jurisdiction they would have been acting judicially, and that in that case the orders would have been invalidated by the fact that one of the commissioners was disqualified by reason of interest. *Fobbing Commissioners v. Reg.*, 11 App. Cas. 449; 55 L. T. 493; 34 W. R. 721—H. L. (E.). Affirming 54 L. J., M. C. 89; 49 J. P. 404—C. A.

In Metropolitan District.—See METROPOLIS.

In other Places.—See HEALTH.

DWELLINGS.

Artizans' Dwellings.—See ARTIZANS.

DYING DECLARATION.

See CRIMINAL LAW (PRACTICE).

EASEMENTS AND PRESCRIPTION.

I. RIGHTS OF WAY, 670.

II. LIGHT AND AIR, 675.

III. WATERCOURSES, 681.

IV. RIGHT OF SUPPORT, 684.

V. IN OTHER CASES, 686.

I. RIGHTS OF WAY.

Way of Necessity—Land taken Compulsorily—Public Undertaking.—A. and B. had respectively acquired interests under building agreements in two adjoining plots of land. A local board under their compulsory powers took half an acre, part of A.'s holding, and five acres, part of B.'s holding, for the purpose of sewage works, the necessary proceedings having been taken as against A. and B. in respect of their several interest, and against the reversioner C., in respect of the whole five and a half acres. The only way to the land taken, was a warple way over another part of A.'s building plot, which, for thirty years before the building agreements, had been used by the occupiers of both A.'s and B.'s land for purposes of cultivation, and since the building agreements had been used by A. for his own building purposes:—Held, that the local board had a right of way over the warple way for all necessary purposes in connexion with the sewage works. *Serff v. Acton Local Board*, 31 Ch. D. 679; 55 L. J., Ch. 569; 54 L. T. 379; 34 W. R. 563—Pearson, J.

Implied Grant—Way formed during Unity of Possession.—Where, during unity of possession, a particular and defined way is formed and used over property which is afterwards severed and granted by the owner to different persons, the right of using the way as it is then used may pass by implication, although it be not a way of necessity, and although the general words of the conveyance are not sufficient to pass such a right. *Brown v. Alabaster*, 37 Ch. D. 490; 57 L. J., Ch. 255; 58 L. T. 265; 36 W. R. 155—Kay, J.

Grant by General Words—Implication—Streets not yet Formed.]—By a deed of conveyance land was conveyed to the respondents' predecessor in title, "the situation, dimensions, and boundaries whereof are particularly described in the map or plan drawn on these presents . . . together with all streets, ways, rights, easements, and advantages." The plan showed a piece of land at the intersection of "G. street" and "M. street," which were delineated communicating on a level. The land was in fact, at the date of the conveyance, waste building land on the outskirts of a town, and neither of the streets had been made or dedicated to the public. The soil of the intended streets was the property of the vendor. Houses were built on the land fronting M. street, and both streets were made, and used as streets; but the appellant company afterwards made a branch line passing under G. street, near the property in question, and thereby altered the level of that street, and cut off the access for horses and vehicles from M. street into G. street; a means of access for foot-passengers remained:—Held, that the conveyance granted to the purchaser a right of way from M. street into G. street, and that the alteration of levels had "injuriously affected" the land so as to entitle the respondents to compensation. *Furness Railway v. Cumberland Co-operative Building Society*, 52 L. T. 144; 49 J. P. 292—H. L. (E.).

— "**Appurtenances.**"]—The plaintiff and defendant were tenants under the same landlord of adjoining farms near the sea-coast, to which a highway ran through the defendant's farm; the plaintiff's farm communicated with the highway by a private road, which joined the highway at A. From a point on the plaintiff's farm and on the private road, an ancient lane ran to a spot on the highway nearer than A. to the sea-coast; this lane was not only the nearest way from the plaintiff's farm to the sea-coast, but was also level, whereas the private road was steep and hilly. The lane, which was a formed roadway bounded on either side by turf banks and hedges, ran wholly through the defendant's land, except for a few yards where it started from the private road on the plaintiff's farm, but it had no communication on either side with the defendant's land, and was only open to the defendant's access at the point where it joined the highway; it had been used for many years by the plaintiff, and had been from time to time repaired by him. Prior to 1873 the plaintiff and defendant were tenants from year to year of their respective farms; in that year the landlord granted to the defendant a lease of his farm, which contained no reference to the lane, or to its user by the plaintiff; but the soil of the lane was admittedly included in the admeasurements of the defendant's farm. In 1878 the landlord granted to the plaintiff a lease of his farm "and all houses, buildings, and appurtenances thereto belonging," in which no specific mention was made of the lane or of any right of way over it. The defendant having interfered with the plaintiff's user of the lane:—Held, that the lease to the defendant did not amount to a demise of the soil of the lane free from the plaintiff's right of way, inasmuch as the lessor, not being in possession at the date of the lease, could not make such a demise without derogating from the grant to the plaintiff under which his then existing

tenancy was constituted; that there was an implied reservation of the right of way out of the defendant's lease; and that the right of way over the lane passed to the plaintiff by the lease of 1878 under the word "appurtenances." *Thomas v. Owen*, 20 Q. B. D. 225; 57 L. J., Q. B. 198; 58 L. T. 162; 36 W. R. 440; 52 J. P. 516—C. A.

— "**Right occupied or enjoyed as Parcel or Member**" of Tenement granted.]—A railway company purchased, under the powers of their act, a piece of land on which was a stable. By the conveyance to the company the premises were granted together with all "rights, members, or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel or member thereof." The vendor had many years previously made a private road from the highway to the stable over his own land for his own convenience, and had used it ever since; the soil of this road was not conveyed to the company and no express mention of it was made in the conveyance. The plaintiff refused to allow the company to use the road:—Held, that notwithstanding the unity of possession of the stables and the private road at the date of the conveyance to the company, a right of way passed to the company under the general words in the conveyance. *Kay v. Oxley* (10 L. R., Q. B. 360), and *Watts v. Kelson* (6 L. R., Ch. 166), followed. *Bayley v. Great Western Railway*, 26 Ch. D. 434; 51 L. T. 337—C. A.

User of Right of Way—Change.]—The fact of the stable having been purchased by a railway company for the purposes of their undertaking did not preclude them from claiming the right of way so long as they used the premises as a stable; which they might lawfully do till such time as they were required for the special purposes of the railway, or were sold as superfluous land. Whether the railway company would be entitled to claim the right of way after they had ceased to use the premises as a stable, and had converted them to some purpose connected with the railway, *quære*. *Id*.

Prescription Act—"Person entitled to any Reversion"—Remainderman.]—Where a right of way is claimed by virtue of forty years' enjoyment under the Prescription Act, 2 & 3 Will. 4, c. 71, the period during which the servient tenement has been vested in a tenant for life, with remainder in fee, cannot be deducted from the period of forty years' enjoyment, for the remainderman is "not a person entitled to the reversion expectant on a term" within s. 8. *Symons v. Leaker*, 15 Q. B. D. 629; 54 L. J., Q. B. 480; 53 L. T. 227; 33 W. R. 875; 49 J. P. 775—D.

— **User of Way at Long Intervals.]**—In an action where a right of way was claimed under the Prescription Act (2 & 3 Will. 4, c. 71), s. 2, in respect of twenty years' user as of right, it appeared that the way had only been used by the party claiming it, the defendant, for the removal of wood cut upon an adjoining close. The wood was cut upon this close at intervals of several years; the last cutting having been in the year in which the action was commenced, the one next previous fifteen years before, and the next at another interval of fifteen years.

Between these intervals the road was occasionally stopped up, but the defendant used it as often as he wished while the wood was being cut :—Held, that there had not been an uninterrupted enjoyment of the way for twenty years within the meaning of s. 2 of the Prescription Act which did not apply to so discontinuous an easement as that claimed. *Hollins v. Verney*, 13 Q. B. D. 304; 53 L. J., Q. B. 430; 51 L. T. 753; 33 W. R. 5; 48 J. P. 580—C. A.

Thinly-populated District—Evidence of User.—In an action claiming a public right of way over a track or natural mountain pass about fourteen miles long, running through a thinly-populated district of the Highlands of Scotland and connecting by the shortest route Braemar and Clova, it appeared from the evidence of user that the track in question had been used by the public on foot; by drovers twice a year driving sheep from a market held at Braemar to one held near Clova; that public subscriptions had been collected for a bridge in the line of the track; that some distance up the disputed track there was an old mile-stone, and, that a proprietor in planting trees had specially left a space for the track :—Held, that the amount of user, having regard to the character of the district, was such as might have been expected if the track had been admittedly a public way and not the subject of mere tolerance, and that the evidence was sufficient to establish the right of way. *Macpherson v. Scottish Rights of Way and Recreation Society*, 13 App. Cas. 744—H. L. (Sc.)

Non-user for long Period.—According to the law of Scotland, the constitution of a public right of way does not depend upon any legal fiction, but upon the fact of user by the public as matter of right, continuously and without interruption for forty years. And the amount of user must be such as might have been reasonably expected if the road in dispute had been an undoubted public highway. Also, the user must be a user of the whole road as a means of passage from one terminus to the other, and must not be such a user as can be reasonably ascribed either to private servitude rights or to the licence of the proprietor. The continued exclusion of the public from the use of an alleged public road for thirty-seven years will not, per se, destroy a pre-existent right of public way unless it is maintained for the prescriptive period of forty years, but it is strong evidence that no such public right ever existed. *Mann v. Brodie*, 10 App. Cas. 378—H. L. (Sc.).

Obstruction—Extent of Right.—The defendant, the owner of a building estate, conveyed to the predecessor in title of the plaintiff one of the plots of ground on the estate, and in the conveyance granted to him the right for himself, his heirs, and assigns, and his and their families, tenants, servants and workpeople, with or without horses, cattle, carts and carriages, to pass over the several roads made or to be made through the estate; in the same manner and as fully as if the same roads were public roads. Two of the roads on the estate were forty feet wide, twenty feet in the middle being gravelled for cart and carriage traffic, and there being a strip of grass ten feet wide on either side. The plaintiff, in common with other residents on the estate, was accustomed to walk along these grass strips to

and from his house, which was built on the plot of ground so conveyed as above stated. The defendant caused six ditches or trenches, each about fifteen inches wide and ten inches deep, to be cut completely across the strips of grassland at the sides of the road near the plaintiff's house, the earth taken out of the ditches being banked up at the edges of the ditches, and the plaintiff's passage along the strips was thereby rendered difficult and dangerous. The plaintiff claimed an injunction against the defendant to restrain the continuance of the impediments to his right of way. The defendant contended that the plaintiff's right of way was the same as that of the public along a highway, and that the public ways had similar ditches and trenches cut through the grass at their sides for drainage and similar purposes, and it was proved that in many rural roads in the district such ditches or "grips" were made :—Held, that the right of the public to use a highway extends to the whole road, and not merely to the part used as via trita; that these ditches, if cut on a public highway, would have amounted to a nuisance and obstruction; and that, therefore, as the plaintiff had the same rights over the road as the public would have over a public highway, he was entitled to the injunction. *Nicol v. Beaumont*, 53 L. J., Ch. 853; 50 L. T. 112—Kay, J.

Lease—"Heirs or Assigns"—Regrant of Easement by Lessee—Merger in Reversion.—D. and C., co-owners of an estate, by deed demised for a term of 1000 years a strip of land intersecting the estate for the purpose of making a canal, with the proviso that nothing should prevent D. and C., "their heirs or assigns," from using any of the land demised or any stream of water flowing over the same, or from granting any wayleaves across the same for the carriage of goods, &c., or for any other purpose in like manner as they could have used the same in case the lease had not been granted, but so as not to injure the canal. The canal was made, and the estate was afterwards partitioned by deed between D. and C., the reversion in a portion of the canal being conveyed to C., and the adjoining lands on each side of that portion being conveyed to D. C. afterwards conveyed the reversion in that portion of the canal to the lessees. D. as owner of the lands intersected by that portion of the canal having claimed to grant wayleaves, &c., and build a bridge across it for the purpose of making an access from one side to the other :—Held, that upon the true construction of the lease the proviso operated as a covenant with D. and C. as owners of the reversion and not as owners of the adjoining lands; that this covenant ran with the reversion; and that when the reversion in that portion of the canal became vested in the lessees there was a merger, and the rights under the proviso were extinguished as to that portion of the canal. *Dynevor (Lord) v. Tennant*, 13 App. Cas. 279; 57 L. J., Ch. 1078; 59 L. T. 5; 37 W. R. 193—H. L. (E.)

Action for Interference—Statement of Claim.—In an action for interfering with the plaintiffs' right of way to a certain quarry, the plaintiffs alleged, in the first paragraph of their statement of claim, that they were entitled to a right of way from the public highway through a certain gateway along a certain passage to the said quarry, and back again from the said quarry

to the public highway, for themselves, their agents, servants and licensees, on foot and with horses, carts and carriages, at all times of the year; and in the second paragraph they alleged that they were entitled to a right of way from the public highway through a certain gateway along a certain passage to the said quarry, and back again from the said quarry to the public highway, for themselves, their agents, servants and licensees, on foot and with horses and carts, at all times convenient and necessary for the working of the said quarry, and for removing stones, gravel and other material therefrom. On motion to set aside the first and second paragraphs of the statement of claim:—Held, that the statement of claim was sufficient. *Kenmare (Lord) v. Casey*, 12 L. R., Ir. 374—Q. B. D.

II. LIGHT AND AIR.

Implied Reservation — Notice — Building Scheme—Merger of Lease—Surrender.]—By seven simultaneous leases seven plots of lands marked respectively A, B, C, D, E, F, and G, and forming together one square block, were demised by the owner to J. with a ground plan on each lease, and with covenants for the erection and maintenance of buildings upon each plot according to certain plans. The leases were granted with the view to the erection upon the whole block of one large edifice, of which the several parts and the internal arrangements were to be connected together for a common use and occupation; so, however, as to be separable (if desired) into seven separate buildings. J. being in the occupation of the whole, while the buildings were being erected, mortgaged C, F, and G, by a sub-lease which recited the building scheme and the original leases of C, F, and G, and contained stipulations for the completion of the buildings on C, F, and G. After the buildings had been substantially completed, J. mortgaged E by a deed which recited the lease of E and assigned the buildings thereon, subject to the covenants in the lease, to one who had notice of the general plan of the buildings. J. then mortgaged B. On J.'s bankruptcy the several mortgagees obtained foreclosure decrees in respect of B, C, and E respectively:—Held (Lord Blackburn dissenting), that though there was no express reservation of the right to light, yet, looking at the plans, the covenants in the original leases, and the mortgage deeds, the mortgagees of C and E respectively were by reasonable implication precluded from interfering with the light to the windows in B which looked out upon C and E respectively, and might be restrained accordingly in an action by the mortgagee of B:—Held also, that the mortgagee of B could maintain such an action, although he had surrendered the lease of B and taken a fresh lease from the original lessor; for, without deciding what effect the merger of the original lease might have, whenever the lease of B came to an end either by surrender, forfeiture, or otherwise, the original lessor would have the same rights to light as the mortgagee would have had if the original lease had subsisted. *Russell v. Watts*, 10 App. Cas. 590; 55 L. J., Ch. 158; 53 L. T. 876; 34 W. R. 277; 50 J. P. 68—H. L. (E.).

— **Sale of Plots of Land.]**—Semble, by the Earl of Selborne, that if on a sale and convey-

ance of land adjoining a house to be built by the vendor, it is mutually agreed that one of the outer walls of that house may stand wholly or partly within the verge of the land sold, and shall have in it particular windows opening upon and overlooking the land sold, and if the house is erected accordingly, the purchaser cannot afterwards build upon the land sold, so as to prevent or obstruct the access of light to those windows. *Id.*

Part Performance—Parol Agreement.]—The plaintiff and defendant, the owners of adjoining houses, being about to rebuild, entered into a verbal agreement that the plaintiff should pull down a party-wall and rebuild it lower and thinner, and that each party should be at liberty to make a lean-to skylight with the lower end resting on the party-wall. The plaintiff rebuilt the party-wall and erected a lean-to skylight on his side of it as agreed; the defendant also erected a skylight on his side, but instead of a lean-to, so shaped it as to obstruct the access of light to the plaintiff's premises more than the agreed lean-to skylight would have done:—Held, that the effect of the agreement was to give to each party an easement of light over the other's land; and that the plaintiff, having performed the agreement on his part, was entitled to have it enforced on the part of the defendant. *McManus v. Cooke*, 35 Ch. D. 681; 56 L. J., Ch. 662; 56 L. T. 900; 35 W. R. 754; 51 J. P. 708—Kay, J.

Implied Grant—Vendor—Equitable Owner.]—The owner (subject to a mortgage in fee) of a house and a plot of land adjoining, first leased the house, then contracted to sell the land to the defendant, and afterwards contracted to sell the house subject to the lease to a person under whom the plaintiff claimed. The next step was a conveyance of the house by the owner and his mortgagee to the plaintiff subject to the lease, which was followed by a conveyance (also by the owner and his mortgagee) of the land to the defendant. The plaintiff subsequently recovered possession of the house from the lessee for breach of condition:—Held, that no grant of light to the house could be implied over land which the owner had contracted to sell before the sale or conveyance of the house, and that s. 6, sub-s. 2, of the Conveyancing Act, 1881, did not apply. *Beddington v. Atlee*, 35 Ch. D. 317; 56 L. J., Ch. 655; 56 L. T. 514; 35 W. R. 799; 51 J. P. 484—Chitty, J.

— **Derogation from Grant — Building Scheme—Intention to be Implied.]**—The maxim that a grantor shall not derogate does not entitle a grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee. *Birmingham Banking Company v. Ross*, 38 Ch. D. 295; 57 L. J., Ch. 601; 59 L. T. 609; 36 R. 914—C. A. Affirming 52 J. P. 421—Kekewich, J.

The corporation of a town granted a lease to the plaintiffs of a piece of land and a newly erected building "with the rights, members, and appurtenants to the said premises belonging." The building abutted on a passage twenty feet wide, which the corporation agreed to keep open, and on the other side of the passage were old

buildings about twenty-five feet high. The corporation demised the land on the other side of the passage to the defendant, who erected on the site of the old buildings a house eighty feet high, which materially interfered with the plaintiffs' light. The land on both sides of the passage was part of a larger piece of land laid out by the corporation under a building scheme for the improvement of the town:—Held, that there was no grant, express or implied, in the lease to the plaintiffs of a right to uninterrupted light to the new building; that the obligation on the corporation not to obstruct the plaintiffs' light which was to be implied from the relation in which they had placed themselves to the plaintiffs by granting them the lease, must be measured by the circumstances existing at the date of the lease and known to both parties; that having regard to the fact that the plaintiffs knew that the land was being laid out for building, and that they had stipulated that there should be a passage twenty feet wide adjoining the new building, they had no right to complain of the obstruction caused by the defendant's house, and an injunction was refused. *Ib.*

The rule, that a man who grants a house with lights cannot erect new buildings so as to obstruct those lights, applies to the case where the grantor purposely leaves a strip of land intervening between the house and the lands retained. *Ib.*

Prescription Act—Reservation of Right to Obstruct—“Agreement or Consent.”—A landowner granted a lease to the plaintiff of a house and land with their appurtenances, except rights, if any, restricting the free use of any adjoining land, or the appropriation at any time thereafter of any such land for building or other purposes, obstructive or otherwise. More than twenty years after this lease the subsequent lessee of an adjoining piece of land under the same landowner commenced to build on it in such a way as to obstruct the plaintiff's light. The plaintiff having brought an action and moved for an injunction:—Held, that the exception of any right restricting the free use of the adjoining land did not operate as an agreement or consent on the part of the lessee that the owners of the adjoining land might always have a right to obstruct the access of light to the plaintiff's house within the exception in the 3rd section of the Prescription Act, and, therefore, that the plaintiff had acquired an absolute prescriptive right to the light and was entitled to an injunction. *Mitchell v. Cantrill*, 37 Ch. D. 56; 57 L. J., Ch. 72; 58 L. T. 29; 36 W. R. 229—C. A.

User—Windows with Shutters occasionally opened—“Actually enjoyed.”—The right to access of light is acquired under s. 3 of the Prescription Act for an opening used in such a manner as suits the owner's convenience for the passage of light. Therefore, in the case of windows with movable shutters, which are opened only occasionally at the owner's pleasure, the right is being “actually enjoyed” under s. 3, and there is no such interruption of access as will under s. 4 prevent the right being acquired at the end of the statutory period. *Cooper v. Straker*, 40 Ch. D. 21; 58 L. J., Ch. 26; 59 L. T. 849; 37 W. R. 137—Kay, J.

—“Other Building”—Dwelling-house or Workshop.—The words “other building” used in the Prescription Act (2 & 3 Will. 4, c. 71), s. 3, in connexion with any “dwelling-house, workshop,” mean some building of a like character with a dwelling-house or workshop, and will not necessarily include every structure which may be a building for the purposes of the Metropolitan Building Acts. Accordingly, a permanent structure used for storing and seasoning timber and showing it to customers, which consisted of upright baulks of timber or standards fixed in stone bases built on brick piers, with cross-beams and diagonal iron braces, divided into floors or stagings with open unglazed ends or apertures between the uprights, and which served for drying the timber and also for admitting light, is not a “building” within s. 3, so as by twenty years' uninterrupted enjoyment of the access and use of light to and for the apertures, to have acquired an absolute and indefeasible right thereto. *Harris v. De Pinna*, 33 Ch. D. 238; 54 L. T. 38; 50 J. P. 308—Chitty, J.

—Uninterrupted Access—Definite Channel.—In order to acquire an absolute and indefeasible right to light under s. 3, it must be shown not only that there has been an uninterrupted access of light to the building in respect of which the easement is claimed, but also that the light has reached the building by one and the same channel for the statutory period. Without therefore deciding whether the particular structure was a “building” within the Prescription Act, s. 3:—Held, that as from the nature of the structure and the mode of carrying on business, timber would be so piled as from time to time to block up one or other of the apertures so that the plaintiffs could not prove that there had been an uninterrupted access of light by any one aperture for the statutory period, their claim to an easement failed. *Harris v. De Pinna*, 33 Ch. D. 238; 56 L. J., Ch. 344; 54 L. T. 770; 50 J. P. 486—C. A.

—Access of Air—Acquirement—Unity of Possession.—A right by way of easement to the uninterrupted access of air not coming by any definite channel but over the general unlimited surface of the alleged servient tenement cannot be acquired under the Prescription Act, s. 2, by mere enjoyment for the statutory period; and the fact that the alleged dominant and servient tenements were both held under a common lessor, either of itself, or at any rate when coupled with the fact that the lease of the servient tenement was the earlier, negatives any claim to the easement as arising out of implied covenant. *Ib.*

—Cone of Light.—The right acquired under the Prescription Act, s. 3, is a right to the access and use of the whole or a substantial part of the particular cone of light which has passed for the statutory period over the servient to the dominant tenement. *Scott v. Pape*, 31 Ch. D. 554; 55 L. J., Ch. 426; 54 L. T. 399; 34 W. R. 465; 50 J. P. 645—C. A.

—“Access”—“The Right thereto.”—The word “access” in section 3 of the Prescription Act refers not to the access through the aperture of the dominant tenement but

to the freedom of passage over the servient tenement, although the aperture which admits the light into the dominant tenement defines the area which is to be kept free over the servient tenement. "The right thereto" means the right to the same access and use of light to and for any building. *Ib.*—Per Fry, L. J.

— **Alteration in Dominant Tenement—Plane of Windows—Proof of Identity.**]—The Prescription Act does not require any identity, structural or otherwise, in the building, which after the twenty years is to enjoy the right, with the building which has acquired the right; but the right, although not in gross, but one which must be claimed in respect of a building, may be claimed in respect of any building which is enjoying the whole or a substantial part of the light which passed into the dominant tenement through the old aperture. Consequently, no alteration in the plane of the windows of the dominant tenement, either by advancing or setting back the building, will destroy the right so long as the owner of the dominant tenement can show that he is using through the new apertures in the wall of the new building the same, or a substantial part of the same, light which passed through the old apertures into the old building. But the right to relief may be lost even where there is no substantial alteration if the owner of the dominant tenement has by his alteration so confused the evidence that he cannot prove the identity of the light. *Ib.*

S., in 1872, pulled down a building in the east wall of which were ancient lights, and erected on the site a new building with larger and more numerous windows. No record was preserved of the positions or dimensions of the ancient lights, but it was found as a fact that substantial portions of six of the new windows corresponded with three of the ancient lights. The east wall had been advanced by distances varying from 2 ft. 3 in. to 13 in., the effect of which was slightly to alter the plane of the new windows:—Held, that the alteration made by S. did not amount to an abandonment of his right, and that the plaintiff was entitled to an injunction to restrain any obstruction of so much of the six new windows as corresponded with the three ancient lights. *Ib.*

The mere alteration of a building containing ancient lights without evidence of intention to abandon does not imply an abandonment of the statutory right, under the Prescription Act, 2 & 3 Will. 4, c. 71, to the access and use of light to and for any building which may be substituted for the original building; the intention to abandon the right must be clearly established by evidence. The nature of the statutory right to the access of light discussed. *Scott v. Pape* (31 Ch. D. 554), considered. *Greenwood v. Hornsey*, 33 Ch. D. 471; 55 L. J., Ch. 917; 55 L. T. 135; 35 W. R. 163—V.-C. B.

In rebuilding a house, which had an ancient light in its ground floor front-room, the front wall, which originally stood out beyond the general building line 4 feet at one end and 7 feet at the other, was set back into the general building line; and in the new front wall was placed a window the position of which corresponded to a great extent with the position of the ancient light in the old front wall. The new room was about the same frontage breadth as the

old, but included little more than half the site of it, viz., a depth of 9 feet at one end, and less than 4 feet at the other:—Held, that the right to the ancient light had not been lost. *Bullers v. Dickinson*, 29 Ch. D. 155; 54 L. J., Ch. 776; 52 L. T. 400; 33 W. R. 540—Kay, J.

Interim Injunction—Balance of Convenience.]—The plaintiffs being the owners of an ancient building which had numerous windows, pulled it down and rebuilt it. A few of the windows in the new house included the space occupied by ancient windows, but were of larger dimensions; several others included some portion of the space occupied by ancient windows; and in some cases the spaces occupied by ancient windows were entirely built up in the new house. The defendants commenced to build a house on the opposite side of the street, which if completed according to the plans, would materially interfere with the light coming to the plaintiffs' windows. On a motion for an interim injunction the court, holding that the plaintiffs had shown an intention to preserve, and not to abandon, their ancient lights, and that there was a fair question of right to be tried at the hearing, and considering that the balance of convenience was in favour of granting an injunction rather than of allowing the defendants to complete their building with an undertaking to pull it down if required to do so, granted an injunction till the hearing. *Newson v. Pender*, 27 Ch. D. 43; 52 L. T. 9; 33 W. R. 243—C. A.

Injunction or Damages—Discretion of Court—Lord Cairns' Act.]—In exercising the discretion given by s. 2 of Lord Cairns' Act, to award damages in substitution for an injunction, in the case of a substantial interference with a plaintiff's ancient lights, the court will not, when the result of the defendant's buildings would be, if they were allowed to continue, to render the plaintiff's property absolutely useless to him, compel the plaintiff to sell his property out and out to the defendant. But, if the injury to the plaintiff will be less serious, and his property will remain substantially useful to him, if the defendant's buildings are permitted to continue, the court may exercise its discretion by awarding the plaintiff damages in lieu of an injunction, and for the purpose of exercising that discretion the court will take into consideration the nature and situation of the property, e.g., the circumstance that it is situate in the centre of a large city, such as London. *Aynsley v. Glover* (18 L. R., Eq. 544), *Krehl v. Burrell* (7 Ch. D. 551), and *Smith v. Smith* (20 L. R., Eq. 500), considered. *Holland v. Worley*, 26 Ch. D. 578; 54 L. J., Ch. 268; 50 L. T. 526; 32 W. R. 749; 49 J. P. 7—Pearson, J.

The discretion given to the court by s. 2 of Lord Cairns' Act (21 & 22 Vict. c. 27), to award damages in substitution for an injunction in the case of a substantial interference with a plaintiff's ancient lights, is a discretion to be exercised according to the facts of each particular case. Where the plaintiff has, at the trial, established his statutory right as against a defendant who has erected a building causing a substantial interference with that right, the court will not compel him to accept damages or compensation instead of an injunction, especially where the defendant has, during the progress of the action,

given an undertaking to pull down, if so ordered at the trial. *Holland v. Worley* (26 Ch. D. 578) not followed. *Greenwood v. Hornsey*, *supra*.

III. WATERCOURSES.

Abstraction of Water by Non-riparian Owner

—Absence of Damage—Right of Action.—The owner of land not abutting on a river, with the licence of a riparian owner, took water from the river, and after using it for cooling certain apparatus returned it to the river unpolluted and undiminished:—Held, that a lower riparian owner could not obtain an injunction against the landowner so taking the water, or against the riparian owner through whose land it was taken. *Kensit v. Great Eastern Railway*, 27 Ch. D. 122; 54 L. J., Ch. 19; 51 L. T. 862; 32 W. R. 885—C. A.

Artificial Stream—Rights of Riparian Owner.]

—Observations on the rights which can be acquired by a riparian owner in an artificial stream. *Id.*

—Reservation of, in Lease—Non-interference by Lessor—Unity of Possession—Severance

—Implied Grant.]—Lands, on which were certain dams and artificial watercourses leading therefrom, and which were held under leases containing reservations of all mills, mill-seats, dams, dam-seats, water, and watercourses, and all convenient ways to and from the same, were ordered to be sold in an administration suit. They were accordingly put up for sale by auction in four lots, the particulars and conditions of sale, which set out the reservations in detail, stating that each lot would be sold subject to all rights and easements legally existing. The sale by auction proved abortive. The plaintiff subsequently tendered for lot 4. His offer was accepted, and this lot was conveyed to him, “excepting and reserving all such matters and things as are excepted and reserved in and by the said recited indenture of lease,” and also subject to all such rights and easements as then existed or affected the premises. After the acceptance of the plaintiff’s offer, and before the conveyance to him, H. made a tender for lot 3, which was accepted; and this lot was by deed, subsequent to the plaintiff’s conveyance, assigned to him, with similar exceptions, reservations, &c. H. assigned his interests to the defendants. Prior to, and at the time of, the plaintiff’s proposal and conveyance, some of the artificial watercourses flowed from lot 3 to lot 4, and the water thereof was utilised for certain purposes on this lot. The lessor had never interfered or expressed any intention of interfering with the plaintiff’s user or enjoyment of these watercourses. The defendants obstructed the water flowing therein:—Held, that the plaintiff was entitled to a declaration, as between him and the defendants, of a right to the usual and accustomed flow of water, and to an injunction to restrain the defendants from obstructing the same. Mere possession of rights, corporeal or incorporeal, is sufficient to maintain an action for disturbance of them against a wrongdoer. *Pullan v. Roughfort Bleaching Company*, 21 L. R., Ir. 73—V. C.

—Prescription—Landlord and Tenant—

Enjoyment as of Right.]—The defendants in 1834 demised to the plaintiffs the coal under the C. estate for fifty years, with powers to sink pits, make soughs, &c., erect engines, and make drains, &c., for supplying such engines with water, and also to do certain other acts on the surface for the better draining and working the demised mines and any other mines of which the plaintiffs might become lessees under the lands of any other persons. In 1836 the plaintiffs took a lease for thirty-five years of the O. Colliery from a neighbouring landowner. In 1846 the plaintiffs made a drain about a mile long, chiefly on the C. estate, by which they diverted a small natural stream on the C. estate, and brought it down to the O. colliery, where they made reservoirs for the water at considerable expense. They did not ask leave to make the drain, but the defendants’ agent saw the work going on and encouraged it. In 1872 the plaintiffs became owners in fee of the O. colliery. In 1884, when the lease from the defendants expired, the defendants stopped the drain and diverted the water. The plaintiffs, claiming a right by prescription to the water, commenced this action to restrain them from doing so. The Vice-Chancellor of the County Palatine held that the watercourse was made under the powers of the lease, and that the right to the water expired at the end of the lease, and he dismissed the action:—Held, on appeal, that this dismissal was right, for that if the making this drain was not authorised by the lease (as to which the court gave no opinion) it was made and enjoyed, either under the belief of both parties that it was authorized by the lease, or under a comity between landlord and tenant, and that there was no enjoyment as of right so as to give the tenant a right to the water after the lease had expired. *Chamber Colliery Company v. Hopwood*, 32 Ch. D. 549; 55 L. J., Ch. 859; 55 L. T. 449; 51 J. P. 164—C. A.

Subterranean Water—Riparian Rights—“Defined” and “known” Channel.]

—Subterranean waters can only be the subject of riparian rights when flowing in defined and known channels. “Defined” means a contracted and bounded channel, although the course of the stream may be undefined by human knowledge. “Known” means the knowledge, by reasonable inference, from existing and observed facts in the natural or pre-existing condition of the surface of the ground. “Known” in this rule of law, is not synonymous with “visible,” nor is it restricted to knowledge derived from exposure of the channel by excavation. *Black v. Ballymena Commissioners*, 17 L. R., Ir. 459—V. C.

Prescription—User not precarious.]—In the year 1820 the Court of Landdrost granted leave to the ancestor in title of the respondent to divert the course of certain springs rising in Crown lands from their natural course into one constructed to carry the water to the respondent’s land, and such water was so carried and used up to the year 1855, when the respondent applied to the Government to renew such leave. In the year 1881 the Government granted the sole user of these springs to the appellants:—Held, that as the user was not in its inception precarious, the respondent had acquired a prescriptive title to the use of the water by such user for the third of a century, and that such

title was not affected by the application in 1855 to renew the leave to use the water. *Trench Hock Commissioners v. Hugo*, 10 App. Cas. 336; 54 L. J., P. C. 17; 54 L. T. 92; 34 W. R. 18—P. C.

— **Enjoyment as of Right.**—*See Chamber Colliery Co. v. Hopwood*, supra.

Right to Pollute—Prescription—Variation of User.—From 1832 to 1877 the refuse of a fellmongery, and the washings of dyes used in a coloured rug manufactory, had been discharged into a watercourse, which was an arterial drainage work within the jurisdiction of drainage commissioners. In 1878 the fellmongery was abandoned, and the manufacture of leather boards substituted at the same factory. The pollution caused by the discharge of the refuse of the leather board manufactory was less in degree than that caused by the fellmongery. The drainage commissioners convicted the owners of the leather board factory under a section of a local act of polluting the stream, and this conviction was affirmed on appeal to the Quarter Sessions:—Held, that the conviction must be confirmed, for even if the factory-owners had a prescriptive right to foul the stream, it was as fellmongers, and not as leather board manufacturers; and that there was no authority for holding that the variation of the user, although it cast no increased, but even a less burden on the servient tenement, enabled the factory-owners to substitute a business of a totally different kind to that originally carried on by them, and at the same time claim to maintain their original prescriptive right to pollute the watercourse, even if such right did exist. *Clarke v. Somersetshire Drainage Commissioners*, 57 L. J., M. C. 96; 59 L. T. 670; 36 W. R. 890—D.

Aggravation of Servitude—Accumulation of Water.—By s. 501 of the Civil Code of Quebec the proprietor of the higher land can do nothing to aggravate the servitude of the lower land. Where the plaintiffs, being entitled to a flow of water from their land, executed certain works which had the effect of accumulating the volume of water, and probably of increasing the depth of its channel:—Held, that to the extent of such accumulation and consequent increase of flow, they had aggravated the servitude of the lower land, and to that extent had no right to demand a free course for the water sent down by them. Having insisted on their right to the existing flow, and refused to allege and prove a case for relief pro tanto, their suit was dismissed with costs. *Frechette v. La Compagnie Manufacturière de St. Hyacinthe*, 9 App. Cas. 170; 53 L. J., P. C. 20; 50 L. T. 62—P. C.

Pipes—Repair—Interference with, by Servient Owner.—The owners of a house had had for many years a supply of water by pipes passing through the adjoining land under circumstances which in the view of the court created an easement. The owner of part of the adjoining land proceeded to build a house over part of the line of pipes:—Held, that the owners of the house had a right to go on the adjoining land and repair the pipes when necessary, and that by building the house their means of access to the pipes would be materially interfered with and rendered more expensive; and an injunc-

tion was granted to restrain the building of the house. *Goodhart v. Hyett*, 25 Ch. D. 182; 53 L. J., Ch. 219; 50 L. T. 95; 32 W. R. 165; 48 J. P. 293—North, J.

An agreement had been entered into by D. and the plaintiffs not to erect buildings so as to prevent reasonable access to a sewer under the management of the latter. The defendant holding under D. built a stable on his land so as to delay the plaintiffs' access to the sewer for an hour or so longer than theretofore:—Held, not to be a sufficient ground for a mandatory injunction to pull down the stable. *Sandgate Local Board v. Leney*, 25 Ch. D. 183, n.—Denman, J.

IV. RIGHT OF SUPPORT.

Lateral support of House by Soil and Building not Contiguous.—A., B., and C were the owners of three consecutively adjoining houses in a street; B.'s house intervened between those of A. and C. A.'s premises were destroyed by fire and rebuilt. After rebuilding, B.'s side wall separated from C.'s premises, the adjacent wall in which became cracked. In an action by C. against A. for damages, evidence of architects was given to show that the crack was caused by the settling down of A.'s new building on soft clay, and drawing over with it B.'s premises; and on the other hand architects were produced on behalf of A., who proved that the rebuilding was properly executed, and attributed the separation to an old settlement increasing gradually. The jury, upon the question being submitted to them, found that A. was guilty of negligence; but the learned judge at the trial directed a verdict for A., being of opinion that there was no evidence of negligence:—Held, that as the evidence showed that the injury was caused by the rebuilding of A.'s premises, C. was entitled to maintain the action, even assuming the rebuilding to have been performed with due skill. The principle of *Dalton v. Angus* (6 App. Cas. 740) applied; *Solomon v. Vintners' Company* (4 H. & N. 585) distinguished. *Latimer v. Official Co-operative Society*, 16 L. R., Ir. 305—C. P. D.

Adjoining Owners deriving under Common Grantor—Implied Covenant—Injury following from Acts of Third Party.—The plaintiffs and the defendants were adjoining owners of land. The plaintiffs derived under a grant, made for building purposes, more than twenty years, prior to the injuries complained of. The grantors were the predecessors in title of the defendants. Subsequently to the date of the grant, and after the building of a house by the plaintiffs on their land, a railway cutting was made near the locality; but it did not appear that any injury was thereby caused to the plaintiffs' house. The defendants having, however, piled large quantities of stones on their lands, immediately adjoining the plaintiffs' house, cracks appeared in the walls of the latter, and the plaintiffs brought an action to recover damages caused by the deprivation of the right of support. The judge at the trial left to the jury only the questions:—Whether the plaintiffs' house had been supported by the defendants' land for more than twenty years? and, Whether the injuries complained of had resulted from the deprivation of such support? and his lordship

declined to submit to the jury other questions which the defendants' counsel required to be left to them, viz. :—(1) Were the plaintiffs' houses and their foundations constructed with reasonable skill and care, having regard to the nature of the soil, and other surrounding circumstances? (2) Were due and reasonable precautions taken by the plaintiffs and their predecessors in title to protect and maintain the houses, having regard to the construction and existence of the railway? (3) Were the injuries complained of, or any of them, attributable to the want of such due and reasonable precautions? (4) Was the piling of the stones on the defendants' land a reasonable use thereof, under all the surrounding circumstances? (5) Were the injuries complained of caused wholly by the placing of the stones on the defendants' land? The jury having found for the plaintiffs, and assessed damages:—Held, that the plaintiffs were entitled to retain the verdict, and that their right to support, whether acquired by grant or prescription, was not in any way affected by the alteration of circumstances caused by the making of the railway cutting. *Green v. Belfast Tramways Company*, 20 L. R., Ir. 35—Q. B. D. Affirmed in C. A.

Working Mines—Inclosure Act.]—See Bell v. Love, post, MINES AND MINERALS.

Prescription — Enjoyment precario — Deed inconsistent with Enjoyment as of Right.]—On the 1st of January, 1855, T., a builder, agreed to purchase from S. a plot of land, part of an estate then being laid out for building, bounded, according to the construction put on the agreement by the court, by a plot of land intended to be made into a back street, which T. agreed to pave. About the same time S. employed T. to build a wall upon the other side of the intended street, standing, as the court held, on the property of S. Between 1854 and 1855, while the building scheme was still intended to be carried out, T. built a range of workshops upon the site of the intended street, having a gable resting upon the wall. In 1861 S. conveyed a property on the other side of the wall from the intended street to the defendant's predecessors in title. In 1864 S. executed to T. a conveyance of his piece of land according to the agreement, whereby T. covenanted to pave the intended street. In 1877 S. agreed to convey to T. the site of the intended street. This agreement contained recitals of the intention to make the street and of the conveyance of 1864, and was made subject to any rights of way existing therein. In 1881 the defendant, who had purchased the land on the other side of the wall, pulled down part of the wall, thus destroying the plaintiff's shed. The shed had stood upon the site of the intended street ever since its first erection. The plaintiff brought this action for damages on the ground that he had acquired an easement to rest his shed on the wall:—Held, that the covenant in the deed of 1864, and the recitals in that of 1877, amounted to an acknowledgment by the defendant that up to 1877 he might at any time have been compelled to pull down his shed, and was inconsistent with an enjoyment as of right of an easement of support for it from the wall. *Tone v. Preston*, 24 Ch. D. 739; 53 L. J., Ch. 50; 39 L. T. 99; 32 W. R. 166—Denman, J.

V. IN OTHER CASES.

Breaking up Highways — Presumption of Grant — Prescription.]—The corporation of P., who had no parliamentary powers for the purpose, supplied water to the adjoining urban district of F., and claimed the right to enter upon and break up the streets of F. whenever occasion should require for the purpose of repairing their water-pipes, relying, as regarded some of the streets, on alleged irrevocable licences granted by the predecessors of the local board of F. (i.e., the surveyors of highways), and as regarded other streets on prescription:—Held, (1) that the claim of the corporation was to commit a nuisance; (2) that it was not in the power of the surveyors of highways to grant the alleged licences; (3) that, therefore, as a grant could not be presumed, the corporation could not obtain the right claimed by prescription. *Preston (Mayor) v. Fulwood Local Board*, 53 L. T. 718; 34 W. R. 196; 50 J. P. 228—North, J.

Right of Fishing.]—See FISH.

ECCLESIASTICAL LAW.

- I. CONVOCATION, 686.
- II. BISHOPS AND CLERGY, 687.
- III. PRESENTATION TO AND RESIGNATION OF BENEFICES, 688.
- IV. ADVOWSON, 692.
- V. GLEBE, 692.
- VI. CHURCH, 693.
- VII. DILAPIDATIONS, 693.
- VIII. SEQUESTRATION OF LIVINGS, 693.
- IX. CHURCHWARDENS, 693.
- X. VESTRY, 694.
- XI. CHURCH AND RECTOR'S RATES, 695.
- XII. CHAPELS, 696.
- XIII. BURIAL AND BURIAL BOARDS, 697.
- XIV. TITHES AND THEIR COMMUTATION, 700.

I. CONVOCATION.

Archbishop as President—Election of Proctor.]—The Archbishop of York as president of the convocation of his province having decided that a candidate who had been elected to represent an archdeaconry in the Lower House was disqualified:—Held, that the court had no jurisdiction to grant a mandamus commanding the archbishop to admit the candidate to convocation.

Reg. v. York (Archbishop), 20 Q. B. D. 740; 57 L. J., Q. B. 396; 59 L. T. 443; 36 W. R. 718; 52 J. P. 709—D.

II. BISHOPS AND CLERGY.

Jurisdiction of Archbishop to cite Bishop—Appeal.—The Archbishop has jurisdiction to cite a Bishop in respect of ecclesiastical offences, and an appeal lies to Her Majesty in Council from his refusal to exercise such jurisdiction. *Read, Ex parte*, 13 P. D. 221; 58 L. J., P. C. 32; 59 L. T. 909—P. C.

Disobedience of Order of Suspension—Period of Suspension, Issue of Writ de Contumace Capiendo after—Satisfaction.—The power to issue a writ de contumace capiendo under 53 Geo. 3, c. 127, for disobedience of an order of the Ecclesiastical Court, is not confined to cases where obedience to the order remains possible. A clerk in orders having disobeyed a monition issued in a suit instituted against him in the Ecclesiastical Court under the Church Discipline Act, 1840, a suspension was published and served upon him whereby he was suspended from his clerical office for a period of six months. During such period he officiated in his church, notwithstanding the suspension, and a significavit in respect of such disobedience issued against him. After the expiration of the six months, a writ de contumace capiendo was issued against him under 53 Geo. 3, c. 127, s. 1, upon which he was arrested:—Held, that the writ was lawfully issued. *Cox, Ex parte*, 20 Q. B. D. 1; 57 L. J., Q. B. 98; 58 L. T. 323; 36 W. R. 209; 52 J. P. 484—C. A.

Writ de Contumace Capiendo—Form.—The writ de contumace capiendo was improperly indorsed "The Public Worship Regulation Act, 1874":—Held, that this irregularity did not render the imprisonment illegal. *Dean v. Green* (8 P. D. 79) followed. *Cox, Ex parte*, 19 Q. B. D. 307; 56 L. J., Q. B. 532—D.

Church Discipline Act—Rules of Court—Place of Hearing.—The judge of the Chancery Court of York has power under the Church Discipline Act to make a rule that the hearing of cases in that court shall take place without the local limits of the court. The Chancery Court of York has jurisdiction to hear a suit against a clergyman beneficed in the province of York, in respect of offences alleged to have been committed by him without the limits of the province. *Noble v. Ahier*, 11 P. D. 158—Chancery Court of York.

Letters of Request—Criminal Offence.—Letters of request were presented to the official principal of the Chancery Court of York, requesting that a clerk might be cited before him to answer a charge that he had been guilty of a criminal offence, viz., of sodomy:—Held, that the letters ought not to be accepted, for a charge of so grave a character ought not to be investigated by an ecclesiastical court, until the person charged had been tried and convicted by a criminal court of competent jurisdiction. *A. B., In re*, 11 P. D. 56—Chancery Court of York.

Criminal Suit—Particulars.—In a criminal

suit containing charges of misconduct against a clerk in holy orders, an order was made after the close of the pleadings that the promoter should give particulars of the charges. Such particulars should as a rule be applied for on the admission of articles. *Salisbury (Bishop) v. Ottley*, 10 P. D. 20—Archdeacon.

Curate—Stipend—Differences as to—Application to Stay Action.—The 83rd section of 1 & 2 Vict. c. 106, provides that differences between the incumbent of a benefice and his curate touching the curate's stipend shall be decided summarily by the bishop of the diocese on complaint to him made. The defendant agreed to employ the plaintiff as his curate at an annual stipend of 110*l.*, besides board and lodging in the vicarage house. These terms were set out in the nomination of the curate to the bishop. Differences having arisen relative to the board and lodging, the plaintiff brought an action in the High Court against the defendant to recover damages in lieu of board and lodging:—Held, upon the defendant's motion to stay, that the action would lie, and that the High Court had jurisdiction to try it, since it was neither within the language nor spirit of the above enactment that the bishop should be constituted a judge without a jury to assess damages, or that the plaintiff should be deprived of the ordinary means of recovering them. *Fraser v. Denison*, 57 L. J., Q. B. 550; 52 J. P. 678—D.

—Notice to quit Cure.—A notice by an incumbent to a curate to quit his curacy, given under 1 & 2 Vict. c. 106, s. 95, is not a notice within or subject to the regulations prescribed by s. 112 of the same statute. *Tanner v. Serivener*, 13 P. D. 128—Consistory Court of London.

III. PRESENTATION TO AND RESIGNATION OF BENEFICES.

Mortgage of Advowson—Who entitled to Nominate.—The vicarage of P. formerly consisted of two mediets, known respectively as the upper vicarage and the lower vicarage, the profits and spiritual charge being divided between two incumbents. There was only one parish church, and the right of patronage and nomination to the upper vicarage was vested in the Lord Chancellor, and that of the lower in the Rev. H. F. Welch. In 1873, Welch presented himself to the lower vicarage. In 1875, he mortgaged the advowson thereof (with a power of sale) to Howes for 800*l.*, and in 1877 made a further charge upon it in favour of Howes for 250*l.* In 1878, the Lord Chancellor, under 26 & 27 Vict. c. 120, conveyed to Welch the advowson of the upper vicarage, subject to the then existing incumbency. There was a proviso in the act restricting the purchaser from selling the advowson or next presentation until after the expiration of five years from the date of the purchase. In May, 1879, the incumbency of the lower vicarage having become vacant, the two vicarages were under 3 & 4 Vict. c. 113 and an order in council consolidated, and the two mediets became in respect both of the profits and the spiritual charge one undivided benefice, of which Welch without any form of institution became the incumbent, in whom was vested the

advowson or right of patronage and nomination of the whole undivided benefice. On the 1st of August, 1879, Welch mortgaged the advowson of the consolidated benefice to Howes to secure the previous and further advances, with the usual power of sale. In March, 1882, Howes died, leaving a widow, and having by his will devised and bequeathed his residuary real and personal estate to trustees, in trust for his wife for life, &c. In March, 1883, the executors of Howes contracted to sell the advowson of the undivided benefice to his widow, and she, in April, 1883, contracted to sell the same to one Ellison. In June, 1883, Welch died insolvent (the debt to Howes still remaining unpaid), having by his will devised and bequeathed all his real and personal estate to trustees in trust for his widow (the now plaintiff), for life, &c. The plaintiff and the executors of Howes each claimed the right to present to the undivided vicarage:—Held, upon the authority of *Hawkins v. Chappel* (1 Atk. 621) and *Briggs v. Sharp* (20 L. R., Eq. 317), that the right to nominate was in the plaintiff, she being under her husband's will beneficial owner for life of his estate real and personal, and there being no indication of an intention that during her life the right to nominate should be exercised by any other person. *Welch v. Peterborough (Bishop)*, 15 Q. B. D. 432; 1 C. & E. 534—Mathew, J.

Refusal of Bishop to Institute—Grounds of Refusal.—A bishop refused to institute a clerk in holy orders to a benefice on the grounds that he had, whilst acting as curate to a former holder of the benefice, habitually committed offences against ecclesiastical law and failed to observe the book of common prayer, by wearing unlawful vestments and doing unlawful acts in respect of matters of ritual when officiating in the communion service; and that he declined to undertake not to repeat the offences in the future. In an action against the bishop in which the patron claimed a declaration that he was entitled to have the clerk instituted:—Held, that the defendant had acted within his discretion in refusing to institute the clerk upon the grounds stated, and was therefore entitled to judgment. *Heywood v. Manchester (Bishop)*, 12 Q. B. D. 404; 53 L. J., Q. B. 196; 50 L. T. 236; 32 W. R. 567—Pollock, B.

By 1 & 2 Vict. c. 106, s. 104, within certain dioceses "it shall and may be lawful for the bishop, if he shall think fit, to refuse institution or licence to any spiritual person who, after due examination and inquiry, shall be found unable to preach, administer the sacraments, perform other pastoral duties, and converse in the Welsh language."—The patron of a benefice in one of such dioceses presented a clergyman who could not speak Welsh. The bishop thereupon commissioned certain persons to hold an inquiry as to whether the parish required a pastor who should know Welsh. The persons so commissioned held the inquiry and reported to the bishop, but refused to permit the patron or the clergyman to be present or to be represented or produce evidence at the inquiry. The bishop, on receiving the report, refused to admit or institute the clergyman. In an action by the patron against the bishop in respect of such refusal:—Held, that "due examination and inquiry" meant examination and inquiry as

to the clergyman's knowledge of the Welsh language, not as to the requirements of the parish, that the statute gave an absolute discretion to the bishop as to the mode of ascertaining the requirements of the parish, that he was not bound to hold a formal inquiry of a judicial character for that purpose, and therefore the refusal to hear the patron or the clergyman did not invalidate the inquiry which was held, and the bishop was justified in refusing to admit or institute the clergyman. *Abergavenny (Marquis) v. Llandaff (Bishop)*, 20 Q. B. D. 460; 57 L. J., Q. B. 233; 58 L. T. 812; 36 W. R. 859—Huddleston, B.

Resignation—Validity.—It is not essential to the validity of a deed of resignation of an ecclesiastical benefice that it should be made by the clerk before a notary public; the bishop can dispense with that formality and accept a resignation made by a deed duly executed, and sent to him by the clerk. The resignation of a benefice is not void because it is made at the request of the bishop in order to avoid scandal and legal proceedings. *Reichel v. Oxford (Bishop)*, 35 Ch. D. 48; 56 L. J., Ch. 1023; 56 L. T. 539; 36 W. R. 307—C. A. Affirmed 14 App. Cas. 259—H. L. (E.)

Acceptance of Resignation—Condition—Pecuniary Consideration.—It is not necessary that the bishop's acceptance of a resignation should be in writing, and no particular form is necessary; and if the resignation is sent in at the bishop's request no further acceptance is required. Though the resignation of a benefice must (except in the case of an exchange) be absolute, not conditional, it is perfectly legal for the bishop to fix a future time at which the resignation, when accepted by him, shall come into actual operation by his declaring the benefice vacant. If the bishop, in accepting the resignation of a benefice, agrees to postpone the declaration of the vacancy in order to enable the clerk to receive the next accruing payment of tithe rent-charge, this does not render the resignation invalid as having been made for a pecuniary consideration. *Id.*

Revocation of Resignation before Acceptance.—A clerk who has tendered his resignation to the bishop cannot withdraw it, even before acceptance, if, in consequence of the tender, the position of any party has been altered: e.g., if the bishop has been thereby induced to abstain from commencing proceedings in the Ecclesiastical Court for the deprivation of the clerk. *Id.*—Per North, J.

Compensation to retiring Incumbent—Union of Benefices—Charge whether Alienable.—In pursuance of an order in council under the Union of Benefices Act, 1860, uniting two city benefices, certain annuities were granted to the retiring incumbent and his assigns, out of the annual income of the united benefice, and made a first charge thereon during the joint lives of himself and the incumbent of the united benefice, so long as he should perform in person, or by substitute to be approved of by the bishop, the duties of curate of the united benefice under the style of vicar in charge, with a provision for the retiring incumbent after the death of the incumbent of the united benefice:—Held, that

such annuities were not a benefice with cure within 13 Eliz. c. 20, and accordingly could be validly mortgaged by the retiring incumbent. *McBean v. Deane*, 30 Ch. D. 520; 55 L. J., Ch. 19; 53 L. T. 701; 33 W. R. 924—Chitty, J.

Pension to Retiring Incumbent—"Net Annual Value" of Benefice.—By s. 8 of the Incumbents' Resignation Act, 1871 (34 & 35 Vict. c. 44), it is provided that the pension which may be allowed to a retiring incumbent shall in no case exceed one-third part of "the annual value of the benefice resigned"; and by s. 11 the annual value for the purposes of the Act is defined to be the net "annual value" after making certain deductions therein specified:—Held, that the amount of the retiring pension is to be fixed with reference to the net annual value of the benefice at the date of the incumbent's resignation; and that, having been once fixed, it is not liable to subsequent alteration in consequence of a diminution in the net annual value of the benefice through agricultural depression or through the formation of a part of the parish into a district chapelry. *Robinson v. Dand*, 17 Q. B. D. 341; 55 L. J., Q. B. 585; 54 L. T. 871; 34 W. R. 639—D.

Privity between Incumbent and Patron—Estoppel.—An incumbent who comes into a benefice is a privy in law to the patron who appointed him, so as to be entitled to the benefit, and subject to the burden, of the same estoppel as the patron. R., the incumbent of a living, sent in his resignation of the benefice to the bishop, on the understanding that the resignation was not to be formally accepted, nor the benefice declared vacant, until a date agreed upon between himself and the bishop. Before that date arrived R. withdrew his resignation, but the bishop refused to accept the withdrawal, and at the time agreed upon declared the benefice vacant, after which the patrons appointed another incumbent, who was duly instituted and inducted into the benefice. R. brought an action against the bishop to have his resignation declared null and void. To this action the patrons of the living were parties, and the sole question was whether the resignation was effectual, and it was decided against R. that the resignation was effectual and complete. R. refused to give up the parsonage-house and glebe lands, and in an action brought against him by the new incumbent, for an injunction to restrain him from continuing in wrongful possession of the premises and for trespass, R. set up substantially the same defence as in the former action, namely, that his resignation was not effectual:—Held, that, as the question of the effectuality of the resignation was raised and disposed of in the former action, to which the patrons were parties, and as R. would have been estopped from raising that question again in any proceedings between himself and the patrons, he was also estopped from raising the same question as a defence against the incumbent, who, as being a privy in law to the patrons, was entitled to take advantage of the same estoppel, and that such defence should be struck out as frivolous and vexatious. *Magrath v. Reichel*, 57 L. T. 850—D.

IV. ADVOWSON.

Passing by Deed—Construction.—An advowson, although it is an hereditament, and as being the right of presentation to a church at a particular place, "does concern land at a certain place," is but a right collateral to land, and is not aptly described as "being situate at" a particular place. Such a description, however, may pass an advowson under certain circumstances, e.g., when upon an examination of the whole instrument a clear intention is shown that it shall pass, or upon evidence that there is no other property in that particular place capable of being disposed of by the instrument. *Anon.* (3 Dyer, 323, b) and *Kensley v. Langham* (Cas. t. Tal. 143) discussed and reconciled. *Crompton v. Jarrett*, 30 Ch. D. 298; 54 L. J., Ch. 1109; 53 L. T. 603; 33 W. R. 913—C. A.

G. J., tenant in tail in possession of manors, lands, and hereditaments, devised by the will of J. J., and also of the advowson of Christ Church, Doncaster, appointed to somewhat similar uses by a separate devise in the same will, by a deed which recited only the devise of the manors, &c., disentailed and limited to the use of himself in fee, "all and singular the manors, lands, hereditaments, and premises devised by the said will, and also all other the lands, hereditaments, and premises whatsoever, of which he was seised as tenant in tail in possession in anywise howsoever." By a deed of resettlement executed the next day, after reciting that he was seised of "the several manors and hereditaments comprised in the schedule subject to certain charges," and desired to settle "the same hereditaments," he assured to trustees in strict settlement, "all and singular the manors, messuages, farms, lands, and hereditaments comprised and described in the schedule," "and all other the freehold hereditaments of him the said G. J. situate in the parish of Doncaster." The schedule contained a detailed description of the parcels, but neither in it nor the deed itself was there any reference to or any provision applicable to the advowson. G. J. had property other than the advowson in the parish of D., and the advowson was not subject to any charges. It was admitted that some portions of the disentailed property had been intentionally omitted from the resettlement:—Held, that having regard to the recitals, the omission of parts of the property, and looking to the whole scope of the deed, the advowson was not by force of the general words "all other hereditaments situate in the parish of D.," included in the deed of resettlement. *Ib.*

When "Charity Property."—See CHARITY, III.

Mortgage of—Right of Presentation.—See *Welch v. Peterborough (Bishop)*, ante, col. 689.

V. GLEBE.

Mortgage by Vicar—Foreclosure—Parties.—A vicar is a person having a limited interest within the meaning of s. 3 of the Landowners' West of England and South Wales Land Drainage and Inclosure Companies Act, and may charge his glebe land thereunder. To a foreclosure action under such a mortgage the

patron of the living is not a necessary party. *Goodden v. Coles*, 59 L. T. 309; 36 W. R. 828—Kekewich, J.

VI. CHURCH.

Chancel Gates.—A faculty for chancel gates was granted, it being shown that the chancel, from its richness, required protection. *St. Agnes, In re*, 11 P. D. 1—Consistory Court, Liverpool.

Communion Table in Side Chapel.—The court, on the ground of convenience and saving of expense, decreed a faculty for the erection of a communion table in a side chapel of a church in which there was already a communion table. *Holy Trinity Church, Stroud Green, In re*, 12 P. D. 199; 36 W. R. 288—Consistory Court of London.

Requests for Erection of, &c.—See CHARITY, I. 2.

VII. DILAPIDATIONS.

Claim by succeeding, against Estate of deceased, Incumbent—Payment pari passu.—Where the bishop has, under s. 34 of the Ecclesiastical Dilapidations Act, 1871, made an order stating the cost of the repairs for which the executors of a late incumbent are liable, the sum so stated is under s. 36 a debt payable to the new incumbent out of the assets of the late incumbent *pari passu* with the debts of his other creditors. *Monk, In re, Wayman v. Monk*, 35 Ch. D. 583; 56 L. J., Ch. 809; 56 L. T. 856; 35 W. R. 691; 52 J. P. 198—Stirling, J.

Repairs done by Sequestrator—Disallowance.—See next case.

VIII. SEQUESTRATION OF LIVINGS.

Dilapidations—Repairs done by Sequestrator—Accounts, Objection to.—A benefice having been sequestered under a writ of sequestration in an action, an inspection of the glebe buildings by the diocesan surveyor was directed by the bishop, and a report made by such surveyor under the Ecclesiastical Dilapidations Act, 1871. The report estimated the cost of the necessary repairs to the buildings at 140%, and no objections were taken to such report under s. 16 of the act. The sequestrator, being subsequently of opinion that the repairs provided for by the surveyor's report were inadequate, expended on the repairs of the buildings a much larger sum than 140%. No inspection or report, except as before mentioned, was ordered by the bishop or made by the surveyor:—Held, that the sequestrator had no authority to expend on repairs out of the proceeds of the benefice a larger sum than that estimated as necessary by the surveyor's report under the Ecclesiastical Dilapidations Act, 1871, and that such expenditure must be disallowed. *Kimber v. Paravicini*, 15 Q. B. D. 222; 54 L. J., Q. B. 471; 53 L. T. 299; 33 W. R. 907—D.

IX. CHURCHWARDENS.

Election—Refusal to put Amendment.—At a meeting of the vestry to elect churchwardens,

D. was proposed to be re-elected, when parishioners moved an amendment that before electing a churchwarden a certain correspondence between the Charity Commissioners and the churchwardens as to some parish charity fund should be produced. The vicar refused to put the amendment, and declared D. duly elected:—Held, on a rule for a mandamus, that the vicar was wrong in refusing to put the amendment, and that he was wrong in not putting to the meeting whether D. should be elected. *Reg. v. Hagbourne (Vicar)*, 51 J. P. 276—D.

Authority of—Free Seats—Distribution of.—Churchwardens of a church with free seats have authority to direct, for the maintenance of order and decorum, in which of those seats certain classes of the congregation may and others may not sit. A person may be convicted by justices, under 23 & 24 Vict. c. 32, s. 2, of violent behaviour in a church, although such behaviour was in assertion of a bona fide claim of right. *Asher v. Calcraft*, 18 Q. B. D. 607; 56 L. J., M. C. 57; 56 L. T. 490; 35 W. R. 651; 51 J. P. 598—D.

—To prevent Inhabitant from attending Service.—There is no right on the part of a churchwarden forcibly to prevent an inhabitant of a parish or district from entering the church for the purpose of attending service, even though the churchwarden may be of opinion that he cannot be conveniently accommodated. The statute of 5 & 6 Edw. 6, c. 1, s. 2, having imposed a general duty to go to church, which still is binding upon members of the church of England, has conferred a correlative general right to go to church on those who are so obliged to go. The temporal courts have jurisdiction over an action against a churchwarden for forcibly preventing an inhabitant from entering the church for the purpose of attending divine service. *Taylor v. Timson*, 20 Q. B. D. 671; 57 L. J., Q. B. 216; 52 J. P. 135—D.

X. VESTRY.

Member—Qualification—Assessment to Poor Rate—Penalty.—By 18 & 19 Vict. c. 120 (Metropolis Local Management Act, 1855), s. 6, "the vestry elected under this act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than 40% per annum; and no person shall be capable of acting or being elected as one of such vestry for any parish, unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish":—Held, that to be qualified as a vestryman under the act, a person must be the occupier of real property in the parish, and be himself rated or assessed in respect of such occupation to the required amount. *Mogg v. Clark*, 16 Q. B. D. 79; 55 L. J., Q. B. 69; 53 L. T. 890; 34 W. R. 66; 50 J. P. 342—C. A.

Meeting to Elect Churchwardens.—See *Reg. v. Hagbourne (Vicar)*, supra.

Superannuation Allowance to Officer—Discretion as to Amount.—A metropolitan vestry

has a discretion under 29 Vict. c. 31, s. 1, to grant or to refuse a superannuation allowance to a retiring officer; but, if an allowance be granted, the vestry has no discretion as to the amount, which must be in accordance with the scale prescribed in s. 4. *Reg. v. St. George's Vestry*, 19 Q. B. D. 533; 56 L. J., Q. B. 652; 35 W. R. 841; 52 J. P. 6—D.

XI. CHURCH AND RECTOR'S RATES.

Church Rate—Application of—In consideration of Extinguished Tithes.—The hamlet of Bethnal Green was made a separate parish by 16 Geo. 2, c. 28. By s. 35 of that act all garden pennies and small tithes arising within the hamlet were made payable to the churchwardens of the new parish to be applied for the maintenance and support of the rector "and such other uses as were thereby directed." In no part of the act was there any direction as to the purposes for which so much of the garden pennies and small tithes as were not paid to the rector were to be applied, but by s. 25 the rector, churchwardens, and overseers, &c., were to be vestrymen, and were to meet from time to time, and appoint a lecturer, churchwardens, sidesmen, parish clerk, and other officers for the new parish. There never was any surplus of the garden pennies and small tithes after paying the stipend of the rector. By a subsequent local act the garden pennies, &c., were extinguished, and the churchwardens were required to make a composition rate on property within the parish to pay the rector's stipend, and any deficiency in the rates and duties applicable towards maintaining divine service in the parish church, and repairing the church:—Held, that the effect of 16 Geo. 2, c. 28, was to direct and authorise the balance of the garden pennies and small tithes, &c. (after payment of the rector's stipend), to be employed in payment of the parish officers elected pursuant to s. 25; that such balance, although, in fact, it had never been so applied, was appropriated by law (within the meaning of s. 5 of the Compulsory Church Rate Abolition Act, s. 68) to the payment of ecclesiastical purposes; that the whole of the garden pennies, &c. (not only the part applicable to the rector's stipend), being extinguished, the composition rate was levied in consideration of such extinguishment; and that, therefore, not only such part of the composition rate as was required to pay the rector's stipend, but also the part applicable to ecclesiastical purposes, could legally be raised. *St. Matthew's, Bethnal Green v. Perkins*, 53 L. T., 634—H. L. (E.). Affirming *S. C.*, sub nom. *Reg. v. St. Matthew's, Bethnal Green*, 50 L. T. 65; 48 J. P. 340—C. A.

Rector's Rate—Liability to Poor Rate—Payment in lieu of Tithes.—By a local act the parish of F. was constituted a separate parish, and it was provided that the parson should receive the tithes within the limit of the parish. It was further provided that the corporation of the town of F., which was in the parish, should levy a rate, called "the rector's rate," on all houses, shops, warehouses, cellars, and outhouses, with the appurtenances, then being, or which should at any time thereafter be built, in the town, after the rate of sixteen pence in the pound, and pay the same to the parson of the

parish. When houses, shops, warehouses, cellars, and outhouses had been built on land liable to tithe, tithe had not been collected in respect thereof. The defendant, the parson of the parish, was rated to the relief of the poor in respect of the rector's rate:—Held, that though under 43 Eliz. c. 2, a parish is rateable as an inhabitant in respect of tithes and money payments in lieu of tithes, yet the defendant was not liable in respect of the rector's rate, which was not a payment in lieu of tithes, inasmuch as it was levied on lands which would not, on default of payment of the rector's rate, be liable to tithes. *Reg. v. Christopherson*, 16 Q. B. D. 7; 55 L. J., M. C. 1; 53 L. T. 804; 34 W. R. 86; 50 J. P. 212—C. A.

XII. CHAPELS.

Trust Deed—Alteration of Trust—Dissentient Members.—Under a deed dated in 1766, certain property was directed to be held in trust to be used as a meeting-house for Protestant dissenters of the Presbyterian or Independent denomination, so long as the laws of Great Britain should tolerate Protestant Dissenters. For eighty years previously to February, 1881, the property had been enjoyed as the chapel of a congregation of Independents. On that date a majority of the members passed a resolution to transfer the chapel and congregation to the Presbyterian Church of England:—Held, that the trust was for the benefit of Presbyterians and Independents—both or either, and for neither denomination to the exclusion of the other. Also, that as there was such express direction in the trust deed, Lord Lyndhurst's Act (7 & 8 Vict. c. 45), s. 2, had no application on the question of usage:—Held further, that the proposed transfer to the Presbyterian Church of England was an alteration of the trust, and was a matter which could not be effected except by the unanimous vote of the congregation. *Attorney-General v. Anderson*, 57 L. J., Ch. 543; 58 L. T. 726; 36 W. R. 714—Kekewich, J.

Liability for Paving New Street—"House"—"Land"—"Owner."—By the term "houses," in s. 105 of the Metropolis Local Management Act, 1855, and the term "land," in s. 77 of the Metropolis Local Management Act, 1862, it is intended to include (with certain exceptions) all the frontage of a new street, so as to make all the owners of the frontage liable to contribute to the expense of paving the new street. The word "house" includes every building which is capable of being used as a human habitation. If a building, which is physically capable of being so used, is prevented, either by common law or statute, from being ever put to such a use, it is exempted from the liability to contribute to the expense. A consecrated church of the Established Church of England is exempted, because, by reason of its consecration, it becomes by the common law for ever incapable of being used as a habitation for man. But a leasehold chapel fronting on a new street, the chapel being vested in trustees, on trust to permit it to be used as a place of religious worship by a congregation of Wesleyans, is a house within the meaning of s. 105, for, by the consent of the landlord, the trustees, and the cestuis que trustent, the trusts might at any moment be put an end to:—Held, also, that the trustees

were the "owners" of the chapel, and as such liable to contribute to the expense of paving the new street. *Wright v. Ingle*, 16 Q. B. D. 379; 55 L. J., M. C. 17; 54 L. T. 511; 34 W. R. 220; 50 J. P. 436—C. A.

XIII. BURIAL AND BURIAL BOARDS.

Burial within 100 yards of Dwelling-house.]

—By 18 & 19 Vict. c. 128, s. 9, no ground not already used as or appropriated for a cemetery shall be used for burials "within the distance of one hundred yards from any dwelling-house" without the consent of the owner, lessee, or occupier of such dwelling-house:—Held, that the word "dwelling-house" did not, for the purposes of the act, include the curtilage, and, therefore, that the specified distance must be measured from the walls of the dwelling-house. *Wright v. Wallasey Local Board*, 18 Q. B. D. 783; 56 L. J., Q. B. 259; 52 J. P. 4—A. L. Smith, J.

Burial Board—Appointment of.]—The existence of a legally constituted burial board for the whole of a parish, does not prevent the vestry of an ecclesiastical district formed out of such parish under 1 & 2 Will. 4, c. 38, and which does not separately maintain its own poor, from legally appointing a burial board for such district under 18 & 19 Vict. c. 128, s. 12. *Reg. v. Tonbridge (Overseers)*, 13 Q. B. D. 339; 53 L. J., Q. B. 488; 51 L. T. 179; 33 W. R. 24; 48 J. P. 740—C. A.

— **Right of Burial—Erections on Grave—General Control.]**—The defendants, a burial board, had provided a burial-ground under 15 & 16 Vict. c. 85. By s. 33 of that act the burial board are empowered to sell the exclusive right of burial in any part of their burial-ground, the right of constructing any vault or place of burial, and also the right of erecting any monument, gravestone, tablet, or monumental inscription in such burial-ground. By s. 38 the general management, regulation, and control of the burial-ground are vested in the burial board.—For the purpose of burying a deceased daughter, the plaintiff purchased from the defendants, and they conveyed to him, "the exclusive right of burial" in a grave space in their burial-ground in perpetuity; and they also granted him the right to erect a gravestone on the grave. He afterwards placed upon the grave a wreath and, to protect it, a glass shade covered with a wire frame. It was the general rule of the defendants never to allow the placing of such glass shades on the graves in their burial-ground, and accordingly the defendants removed the glass shade and wire frame without the consent of the plaintiff:—Held, that the plaintiff had only acquired such rights as, under s. 33, the defendants were empowered to sell; that such rights did not include a right to place the glass shade and wire covering on the grave; and that, in the exercise of the control vested in them by s. 38, the defendants were entitled to remove the same. *McGough v. Lancaster Burial Board*, 21 Q. B. D. 323; 57 L. J., Q. B. 568; 36 W. R. 822; 52 J. P. 740—C. A.

— **Liability to Income Tax—Surplus Income in aid of Poor-rate—"Profit."]**—A burial board

was constituted under 15 & 16 Vict. c. 85, and in pursuance of the act a burial-ground was provided with money charged upon the poor-rate of the parish, and the surplus over expenditure of the income derived from the fees charged by the board was regularly applied in aid of the poor-rate:—Held, that the board were liable to be assessed to the income tax in respect of such surplus, inasmuch as the provision requiring it to be applied in aid of the poor-rate did not prevent it from being a "profit" within 5 & 6 Vict. c. 35, s. 60. *Paddington Burial Board v. Inland Revenue Commissioners*, 13 Q. B. D. 9; 53 L. J., Q. B. 224; 50 L. T. 211; 32 W. R. 551; 48 J. P. 311—D.

Burning Dead Body.]—*See Reg. v. Price*, and *Reg. v. Stephenson*, ante, col. 578.

Cemeteries Clauses Act—Bye-Laws—Exclusion.]

—A bye-law of a cemetery prohibited a discharged servant from being admitted to the cemetery, except by special leave of the directors, and it authorized his removal. D., the owner of a grave, employed W., a discharged servant, to do some work:—Held, that there was nothing unreasonable in the bye-law, and that W. was rightly excluded by force from the cemetery. *Martin v. Wyatt*, 48 J. P. 215—D.

Burial Fees—Separation of Parishes—Performing Ceremony.]—Where a cemetery is formed by a burial board under the Burials Acts, 1852 and 1853, for a parish which never had any burial-ground, the incumbent of the parish is bound to perform the services in the consecrated part of the cemetery over bodies of parishioners and inhabitants of his parish, and is entitled to take any ecclesiastical fees which the board may collect in respect of such services. *Hornby v. Twentieth Park Burial Board* (31 Beav. 52), discussed. *Stewart v. West Derby Burial Board*, 34 Ch. D. 314; 56 L. J., Ch. 425; 56 L. T. 380; 35 W. R. 268—Kay, J.

The parish of Walton, which included the township of West Derby, had an ancient churchyard, fees being, by custom, payable to the vicar (as distinguished from the rector) for burials therein. By the Walton Rectory Act, 1843, the township of West Derby was made a separate parish. It comprised three chapels of ease with consecrated cemeteries attached, which, prior to the separation, had been provided for the parish of Walton, and the sentences of consecration of which reserved double fees for burials to the vicar of Walton and the curates of the chapels. No districts were attached to any of these chapels. The parish of West Derby never had any separate burial-ground of its own, but in 1884, a burial-ground was provided in that parish by a burial board under the Burials Act, 1852 (15 & 16 Vict. c. 85), extended by 16 & 17 Vict. c. 134, a portion of it being duly consecrated. An action having been brought by the rector of West Derby against the board, claiming the right to bury and receive fees for burials in such burial-ground, the court being of opinion that it had jurisdiction to entertain the action, as the question involved one of property, namely, the right to fees:—Held, reading ss. 32 and 52 of the Burials Act, 1852, together, that in the consecrated portion of such burial-ground, the plaintiff, as rector of West Derby, was under an absolute obligation, by himself or by

his curate, or such duly qualified person as he might authorize, to perform the same duties in respect of burial in such burial-ground of parishioners or inhabitants of West Derby as he would have been obliged to perform if it had been the burial-ground of his parish, and was entitled to the rights and authorities incident to such duties; and was also entitled to receive all such fees as the burial board might collect or receive in respect of such duties. *Id.*

— **Sexton's Fees—Formation of Districts—Burial Board—Cemetery.**—The precinct or chapelry of N. became long before 1859, by augmentation of Queen Anne's Bounty, a perpetual curacy, and was treated as a separate and distinct parish for all civil purposes—baptisms, marriages, and burials being performed in the chapel and the burial-ground thereto belonging. In 1850, a portion of the precinct of N. was assigned to St. John's Church, Southall, which district became under 6 & 7 Vict. c. 37 and other acts a new parish for all ecclesiastical purposes. By Order in Council of May, 1859, the chapelry of N., except the part so assigned to St. John's, was constituted a separate parish for ecclesiastical purposes; and the chapel became the parish church of N. In 1860, a piece of land adjoining St. John's Church, which had been conveyed to the ecclesiastical commissioners for the purpose of a burial-ground for that district (there having been previously no burial-ground within the district, and the parishioners thereof having been buried in the churchyard of N.) was consecrated as such burial-ground, and used as the burial-ground both of the parish of St. John and the perpetual curacy of N. The sexton of St. John's performed the duties and received the fees for interments in the churchyard of St. John's. By an Order in Council of September, 1880, a portion of the parish or perpetual curacy of N. was assigned to St. John's, and became under the provisions of 32 & 33 Vict. c. 94, s. 1, a part of that parish. In 1881, a burial board was formed for the whole poor-law parish of N. (including St. John's and the perpetual curacy of N.), and they provided a cemetery for the whole district—the churchyard of N. being closed for burials. The statute under which the Orders in Council were made (6 & 7 Vict. c. 37) makes provision for all other persons affected by the change, but is silent as to the position of the sexton and his fees:—Held, that the plaintiff (who had been appointed sexton of N. in 1865) was not entitled to fees in respect of burials in the cemetery from that portion of the parish of N. which had been annexed to the parish of St. John; but that the burial-board had a right to apportion the burial fees in accordance with the limits of the two parishes. *White v. Norwood Burial Board*, 16 Q. B. D. 58; 55 L. J., Q. B. 63; 54 L. T. 81; 34 W. R. 123; 50 J. P. 100—D.

Sale of disused Burial-Ground—Buildings on, prohibited by subsequent Statute.—By the St. Saviour's, Southwark (Church Rate Abolition) Act, 1883, after reciting that certain land was then vested in trustees upon trust to apply the income for the purposes therein mentioned, the land was (sects. 6 and 7) vested in the trustees appointed by the act upon trust to apply the income for purposes corresponding to those of the original trust; and by s. 9 the trustees were

empowered to sell the land or let it on building or other leases. The land had formerly been used as a burial-ground, but in 1853 it was closed as such by an Order in Council, and thus became a "disused burial-ground." By s. 3 of the Disused Burial-Grounds Act, 1884, building on any disused burial-ground is prohibited, but s. 5 enacts that nothing in the act contained "shall apply to any burial-ground which has been sold or disposed of under the authority of any Act of Parliament." In 1885 the trustees under the Act of 1883 put the land up for sale by auction, describing it in the particulars as "building land," and stating in the conditions that although it was a disused burial-ground, they believed that it came within s. 5 of the act of 1884, and that they had therefore power under the act of 1883 to sell it as building ground. The property was knocked down to Messrs. O., who signed the contract and paid the deposit. The purchasers, who bought for building purposes, having refused to complete on the ground that building on the land was expressly prohibited by the act of 1884:—Held, on a summons by the trustees under the Vendor and Purchaser Act, 1874, that the act of 1883 did not constitute a sale or disposition "under the authority of any Act of Parliament," and that having regard to the act of 1884, the contract could not be enforced against the purchasers. *St. Saviour's Rectory (Trustees) and Oyley, In re*, 31 Ch. D. 412; 55 L. J., Ch. 269; 54 L. T. 9; 34 W. R. 224; 50 J. P. 325—V.-C. B.

XIV. TITHES AND THEIR COMMUTATION.

Whether Rateable to Poor Rate—Personal Payment—Payment in Lieu of Tithes.—By 37 Hen. 8, c. 12, provision was made for payment to the clergy of the city of London and their successors of a rate made upon the inhabitants and calculated upon the rent of the houses in the city. In this and several subsequent statutes these payments were described as tithes. A special Act passed in 1881 provided that all tithes and sums of money in lieu of tithes arising or growing due in a parish in London should cease and be extinguished, and the tithe-owner should receive in lieu and satisfaction thereof a fixed annual sum, to be levied and collected in the same manner as the poor rates. Neither the above-mentioned tithes nor the fixed annual sum in lieu thereof, had ever been assessed for the relief of the poor:—Held, that the owner was not rateable to the poor-rate in respect of this fixed annual sum, as such sum was a personal payment, and was not a payment in lieu of tithes rateable under 43 Eliz. c. 2. *Esdaile v. City of London Union*, 19 Q. B. D. 431; 56 L. J., M. C. 149; 57 L. T. 749; 35 W. R. 722; 51 J. P. 564—C. A.

Poor Rate—How Recoverable.—Where the owner of a tithe rent-charge does not pay the rates to which he is assessed in respect thereof, the amount is recovered from one or more of the occupiers of the land out of which such rent-charge issues, and not from the owner of such rent-charge. *Lamplugh v. Yalding Overseers*, 52 L. J. 505—Wills, J. Affirmed 22 Q. B. D. 452; 58 L. J., Q. B. 279; 37 W. R. 422; 53 J. P. 389—C. A.

Property Tax—"Annual Value"—**Expenses of Collection.**]—In estimating the "annual value" of tithe commutation rent-charge for the purpose of charging the owner thereof with property tax under 16 & 17 Vict. c. 34, s. 32, the amount necessarily expended by him in collection of the tithe rent-charge must be deducted. *Stevens v. Bishop*, 20 Q. B. D. 442; 57 L. J., Q. B. 283; 58 L. T. 669; 36 W. R. 421; 52 J. P. 548—C. A.

Non-payment of Tithes—"Tithes in kind"—**Periodical Sums charged on Land**—"Statute of Limitations."—The statute and decree of 37 Hen. 8, c. 12, provided that the inhabitants of the city of London for the time being should yearly for ever pay their tithes in respect of their houses after certain rates. A lay impropriator of the tithes in a parish within the city having brought an action to recover from the inhabitants of certain houses within the parish tithes payable under this statute, it appeared that (so far as was known) no tithes or payments in lieu of tithes had ever been paid in respect of those houses:—Held, upon the authority of *Andreus v. Drever* (3 Cl. & F. 314) that (apart from statute) mere non-payment afforded no defence even against a lay impropriator, that the payments imposed by 37 Hen. 8, c. 12, were not a render of tithes in kind within the meaning of the Tithe Prescription Act, 2 & 3 Will. 4, c. 100, s. 1, and that that act afforded no defence, and that the payments imposed by 37 Hen. 8, c. 12, were "annuities or periodical sums of money charged upon land" within the meaning of the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 1, and that the statute (as amended by 37 & 38 Vict. c. 57) afforded a defence to the action. *Payne v. Esdaile*, 13 App. Cas. 613; 58 L. J., Ch. 299; 59 L. T. 568; 37 W. R. 273; 53 J. P. 100—H. L. (E.)

— **"Rent"** — **"Composition"** — **Statute of Limitations.**]—The right to tithe rent-charge in Ireland was vested in a spiritual corporation sole until 1871, when it was transferred by statute to a lay corporation. In 1877 the lay corporation brought an action against the persons liable to pay tithe rent-charge to recover six years' arrears. For more than twenty years next before action there had been no payment and no acknowledgment in writing:—Held, that the tithe rent-charge was "rent" within s. 1 of the Statute of Limitations (3 & 4 Will. 4, c. 27), and not a "composition" within the exception to s. 1, compositions in Ireland having been abolished by 1 & 2 Vict. c. 109; that s. 2 of 3 & 4 Will. 4, c. 27, applied as between the owner and the persons liable to tithe rent-charge; that the lay corporation could not avail themselves of the provisions of s. 29 in favour of spiritual corporations sole; and that the action was barred by the lapse of twenty years. *Irish Land Commission v. Grant*, 10 App. Cas. 14; 52 L. T. 228; 33 W. R. 357—H. L. (Ir.).

Arrears not Recoverable by Sale.]—By the 67th section of the Tithe Commutation Act (6 & 7 Will. 4, c. 71), the sum thenceforth payable in lieu of tithes is declared to be "in the nature of a rent-charge issuing out of the lands charged therewith." Lands in respect of which a tithe rent-charge was payable having become unproductive, and the remedy by distress and entry having become ineffectual:—Held, that the sum

payable in lieu of tithes is not by the statute rendered a charge on the inheritance; and that the owner of the rent-charge was not entitled to claim a sale of the lands in order to recover the arrears of his rent-charge. *Bailey v. Badham*, 30 Ch. D. 84; 54 L. J., Ch. 1067; 53 L. T. 13; 33 W. R. 770; 49 J. P. 660—V.-C. B.

Recovery of Arrears—**Liability of Owner of part of Lands charged**—**Contribution.**]—The defendant was the owner and occupier of certain lands in the parish of P., which by a private act were charged with the payment to the vicar of 270l. in lieu of all tithes. The act provided that if the annual rents were in arrear, the vicar was to have such and the same powers and remedies for recovering the same as by the laws and statutes of the realm are provided for the recovery of rent in arrear; and also that if no sufficient distress was found on the premises, the vicar might enter and take possession of the same until the arrears were satisfied. Four years' arrears of the annual rent accrued in respect of the whole of the lands charged, during the whole of which period the defendant was the owner and occupier of a portion only of such lands:—Held, that the vicar might maintain an action of debt against the defendant for the whole amount in arrear, the remedy by real action, which was a higher remedy than the action by debt, having been abolished by 3 & 4 Will. 4, c. 27, s. 36. And held, further, that the defendant had his remedy in an action against the co-owners for contribution. *Christie v. Barker*, 53 L. J., Q. B. 537—C. A.

EDUCATION.

See SCHOOLS.

EJECTMENT.

See LANDLORD AND TENANT.

Pleadings in Action for.]—See PRACTICE (PLEADING).

Writ of Possession when Plaintiff's Title Expired.]—Where a landlord has recovered judgment in an action against his tenant for the possession of premises which had been held over after the expiration of the tenancy, he will be allowed to issue the writ of possession notwithstanding that his estate in the premises terminated after the commencement of the action and before the trial, unless it be unjust and futile to issue such writ, and it is for the defendant to show affirmatively that this will be the result of issuing such writ. *Knight v. Clarke*, 15 Q. B. D. 294; 54 L. J., Q. B. 509; 50 J. P. 84—C. A.

ELECTION.

Doctrine of—Restraint on Anticipation.]—

The doctrine of election depends on intention, and a settlement which settles property on the wife without power of anticipation contains a declaration of a particular intention inconsistent with and excluding the doctrine of election; so that the married woman who by the settlement has (being an infant) covenanted to settle future property is not bound, on taking a bequest for her separate use, to make compensation to her husband and children out of the income of the fund settled to her separate use without power of anticipation. *Willoughby v. Middleton* (2 J. & H. 344), dissented from; *Smith v. Lucas* (18 Ch. D. 531), and *Wheatley, In re* (54 L. J., Ch. 201), approved. *Vardon's Trusts, In re*, 31 Ch. D. 275; 55 L. J., Ch. 259; 53 L. T. 895; 34 W. R. 185—C. A.

In the case of a married woman to whom an interest with a restraint on anticipation attached thereto is given by the same instrument as that which gives rise to a question of election, the doctrine of election does not apply, as the value of her interest in the property to be relinquished by way of compensation has, by the terms of the instrument, been made inalienable. *Wheatley, In re, Smith v. Spence*, 27 Ch. D. 606; 54 L. J., Ch. 201; 51 L. T. 681; 33 W. R. 275—Chitty, J.

By a post-nuptial settlement made in 1847, it was agreed and declared by and between the husband, wife, and trustees, and the husband covenanted that all property which the wife, or her husband in her right, was then or should during the coverture become possessed of or entitled to, should be assured upon trust for the wife for life to her separate use, without power of anticipation, and after her death upon trusts in favour of the husband and issue of the marriage. During the coverture property of the wife was reduced into possession by the husband, and settled upon the trusts of the settlement. In 1883 the wife became entitled, as one of the next of kin of a deceased testator, to a share of undisposed of personalty:—Held, that the wife could be put to her election, notwithstanding that the compensating fund was subject to restraint on anticipation. *Willoughby v. Middleton* (2 J. & H. 344) questioned but followed. *Queade's Trusts, In re*, 54 L. J., Ch. 786; 53 L. T. 74; 33 W. R. 816—Chitty, J. See preceding cases.

Under Wills.]—See WILL.

Not to Avoid Contract on Ground of Fraud.]—See FRAUD.

ELECTION LAW.

I. PARLIAMENTARY.

1. Registration of Voters.

- a. Personal Disqualifications, 704.
- b. City and Borough Voters, 704.
- c. County Voters, 711.
- d. Notice of Objections, 712.
- e. Revising Barrister, 714.

2. Election of Members.

- a. The Poll, 718.
- b. Returning Officer, 718.
- c. Election Expenses, 719.
- d. Election Petition, 720.
- e. Corrupt Practices, 721.
- f. Criminal Law relating to, 722.

II. MUNICIPAL.—See CORPORATION.

III. SCHOOL BOARD.—See SCHOOLS.

IV. LOCAL BOARD.—See HEALTH.

I. PARLIAMENTARY.

1. REGISTRATION OF VOTERS.

a. Personal Disqualifications.

Aliens—Persons Born in Hanover.]—Persons born in Hanover before 1837, resident in this country and not naturalised; persons born in Hanover since 1837, resident in this country and not naturalised; and persons born in Prussia of Hanoverian parents born before 1837, and now resident in this country and not naturalised, are all aliens and not entitled to the franchise. *Isaacson v. Durant*, 17 Q. B. D. 54; 55 L. J., Q. B. 331; 54 L. T. 684; 34 W. R. 547—D.

Constable of Metropolitan Police.]—By 10 Geo. 4, c. 44, s. 18, a constable of the Metropolitan police force is disqualified from voting at the election of a member of parliament for certain counties or for any city or borough within the Metropolitan police district:—Held, that such a constable is a person "incapacitated by law or statute from voting," within 41 & 42 Vict. c. 26, s. 28, sub-s. 7, and consequently is not entitled to be retained on the list of voters under the Registration of the People Act, 1867 (30 & 31 Vict. c. 102). *Doulton v. Halse*, 18 Q. B. D. 421; 56 L. J., Q. B. 41; 56 L. T. 340; 35 W. R. 502; 51 J. P. 183; 1 Fox, 1—D. See 50 Vict. s. 2, c. 9.

b. City and Borough Voters.

Joint Tenancy in Law—Separate Occupation in fact.]—A claim to be placed on the register of parliamentary voters may be sustained by each of two persons who are joint tenants of an entire holding consisting of separately rated dwelling-houses and land, pay a single rent, and accept receipts in their joint names, but live each in one of the dwelling-houses separately, and work portions of the land severally, and the remainder jointly. *Torish v. Clark*, 18 L. R., Ir. 289—C. A.

Lodger—Old Lodgers' List—Claim to be Registered.]—The claim to be registered is an essential part of the qualification for the lodger franchise. The voter was on the old lodgers' list of voters for a borough for 1885. He made no claim to be registered for 1886; but the overseers, instead of causing the old lodgers' list for that year to be printed de novo from the claims served upon them, caused it to be printed from a copy of the old lodgers' list in the current register, from which they intended to erase the

names in respect of which no claims had been received. They had, however, omitted to erase the name of the voter, and failed to discover the mistake before the list had been signed and published:—Held, that the voter was not entitled to have his name retained in the list for 1886. *Hersant v. Halse*, 18 Q. B. D. 412; 56 L. J., Q. B. 44; 56 L. T. 337; 35 W. R. 503; 51 J. P. 135; 1 Fox, 12—D.

Inhabitant Householders—Lodgers.]—The fact that the landlord of a house let out in separate tenements lives in the house is a vital element to be considered in determining whether or not the occupiers of such tenements are lodgers, or qualified as inhabitant householders under the Representation of the People Act, 1884, and, as an all but universal rule, will prevent their successfully claiming the franchise in respect of such occupation otherwise than as lodger. The decision of such cases depends upon the effect of evidence given to establish a matter of fact; but it is a question of law whether any given matter of fact is conclusive upon the law, or whether there is any evidence to sustain any given findings of fact. In order to constitute lodgings which will qualify for the franchise, the part of the house occupied by the claimant must be part of one "dwelling-house"; and in the case of an inhabitant occupier of part of a house, claiming as such, it must be shown that the part which he occupies is in itself one separate "dwelling-house," and not merely part of one. *Hogan v. Sterrett*, 20 L. R., Ir. 344—C. A.

—House let in Flats—Landlord living on Premises.]—Where the claimant, his landlord, and a third person were each occupiers of a separate flat of the house rented by the landlord, and all three used the stairs, land-door, and yard in common, the revising barrister having decided that the claimant was not an inhabitant occupier, but a lodger:—Held, that on the facts, the onus lay on the claimant of showing that he was an inhabitant occupier and not a lodger, and that he had failed to do so. Held also, that the manner in which other houses in the street were occupied was not material to the question, as each claimant's case must be decided upon its own facts. *Campbell v. Chambers*, 20 L. R., Ir. 355—C. A.

—Occupation as Owner or Tenant—Permissive user of Room.]—During the qualifying year, and for some time previously, a separate room in the dwelling-house of claimant's father was allotted by him to the claimant, who slept in and occupied the room, separately and exclusively for his own purposes, as his own. The claimant's father was sole tenant of the premises, and had control of the door and of the rest of the house:—Held, that the claimant was not entitled to the franchise. *Clarke v. Buchanan*, 20 L. R., Ir. 201—C. A.

Constructive Residence—Freeholder.]—The appellant, who claimed to be registered as a voter for the city of Exeter, had a bedroom kept for his exclusive use in his father's house in Exeter. During the qualifying period he went to London in quest of employment, and having obtained a temporary situation in London he remained there for two months and then re-

turned to his father's house in Exeter. He remained in Exeter three weeks and then went back to London, and obtaining employment there did not return to Exeter during the rest of the qualifying period:—Held, that the facts did not show a constructive residence in Exeter during the qualifying period within the meaning of the Reform Act, 1832 (2 & 3 Will. 4, c. 45), s. 31. *Beal v. Exeter (Town Clerk)*, 20 Q. B. D. 300; 57 L. J., Q. B. 128; 58 L. T. 407; 36 W. R. 507; 52 J. P. 501; 1 Fox, 31—D.

Service Franchise—Municipal Vote.]—Occupation of a dwelling-house by virtue of an office, service, or employment within the meaning of the Representation of the People Act, 1884 (48 Vict. c. 3), s. 3, is no qualification for the municipal franchise. *McClean v. Prichard*, 20 Q. B. D. 285; 58 L. T. 337; 36 W. R. 508; 52 J. P. 519; 1 Fox, 94—D.

—Religious Community—Bedroom constituting "Dwelling-house."]—Each teacher in a college conducted by a religious community had, as such, during the qualifying period, the exclusive use of a separate bedroom in the college by virtue of his office or employment as a teacher in the college, which was managed by a resident principal, under the supreme control of the superior-general of the community, who himself lived in Paris. The revising barrister having found that each bedroom so occupied constituted a "dwelling-house" for the purpose of the franchise, and was not inhabited by the person by whom the teachers were employed, or under whom they served:—Held, that the teachers were entitled to the franchise. *Stribling v. Halse* (16 Q. B. D. 246) followed. *Alexander v. Burke*, 22 L. R., Ir. 443—C. A.

—Gardener occupying Bedroom over Coach-house.]—Where W.'s gardener, during the qualifying period, exclusively occupied a bedroom over W.'s coach-house, in which bedroom he took his meals, which were prepared by W.'s cook, and sent to him from W.'s house, the coach-house containing W.'s carriages, and being situate in a detached walled yard, separated from his house by an avenue, but included in the grounds surrounding it:—Held, that the gardener was entitled to the franchise. *Holly v. Burke*, 22 L. R., Ir. 463—C. A.

—Separate Bedroom—Shop Assistants.]—The claimant, a shop assistant, had, during the qualifying period, by virtue of his employment, the sole use of a bedroom in a dwelling-house belonging to his employers, in which were a number of other bedrooms occupied by other persons in the same employment. The claimant and all the other persons residing in the house had their meals in a common room, of which they each had the joint use, in addition to the separate use of their respective bedrooms. The employers exercised a general control over the house, and enforced such control by means of a resident caretaker, but not otherwise:—Held, that each assistant who had the sole use of a bedroom under the above circumstances had obtained the service franchise by virtue of s. 3 of the Representation of the People Act, 1885. *Stribling v. Halse*, 16 Q. B. D. 246; 55 L. J., Q. B. 15; 54 L. T. 268; 49 J. P. 727; 1 Colt. 409—D.

— **Occupation of Rooms in Workhouse.**—The industrial trainer of a workhouse occupied two rooms in the workhouse building. The master of the workhouse resided in other rooms, and another room was set apart for the use of the guardians who transacted business therein. It was part of the master's duty to lock the workhouse gates at a certain hour, and to report to the guardians if the industrial trainer was out after that time:—Held, that the master of the workhouse was not a person under whom the trainer served, within the meaning of 48 Vict. c. 3, s. 3; that the guardians could not be said to reside in the workhouse; and that the trainer was entitled to the franchise. *Adams v. Ford or Fox*, 16 Q. B. D. 239; 55 L. J., Q. B. 13; 53 L. T. 666; 34 W. R. 64; 49 J. P. 711; 1 Colt. 403—D.

— **Separate Bedroom—Joint use of Sitting room.**—H., a servant, occupied exclusively, by virtue of his service, a furnished bedroom in a dwelling-house belonging to his master, and had in common with another young man the use of a sitting-room in the same house. All the furniture belonged to the master, who did not reside in the house, but had free access at all times to every portion of it except H.'s bedroom, and had access to it whenever he asked for the key, which he had a right to demand whenever he chose; the bedrooms were made up by a charwoman who was paid by the master and did not reside on the premises:—Held, that H. was entitled to the franchise. *Hasson v. Chambers*, 18 L. R., Ir. 68—C. A.

R. was foreman of a shop and place of business in which a number of young men were employed. By virtue of that employment he and they lived in a separate house in which he had a bedroom that he occupied exclusively. He and the other employes took their meals in a common sitting-room, and the only resident in the house was a servant paid by the employer to attend to the occupants; R. had a latchkey for the hall door and had also charge of the other keys, and it was his duty to see that the doors were locked and the occupants within doors every night:—Held, that R. was entitled to the franchise. *Id.*

— **Coachman living over Stable.**—C. as his employer's coachman occupied a room over the stable and was treated as a domestic servant. The stable was in the employer's yard and was a part of the curtilage of the dwelling-house—the house and yard being all included under the separate number in the poor-rate book; there was a separate gateway and gate from the yard into a back lane, and also a wicket leading from the yard into the lane. The gate and wicket formed the only access to the yard except by going through the employer's house, and were under her control. Another of the servants cleared out C.'s rooms:—Held, that C. was not entitled to the franchise. *Id.*

— **Soldier occupying Quarters.**—A non-commissioned officer in the service of the Crown claimed the parliamentary franchise as the inhabitant occupier of a dwelling-house in respect of rooms occupied by him as his quarters in barracks. He had inhabited the rooms, which consisted of a bedroom and sitting-room, during the qualifying period, subject, however, to cer-

tain regulations and powers of superior officers incident to military service, such, for instance, as the power of entry by the commanding officer at any time, and by other superior officers for the purpose of preserving order, and by certain officers at stated times for the purpose of inspection of the rooms, the power of the commanding officer to forbid any person to enter or leave the barracks at any time, and the obligation to be in his quarters at a stated hour every evening. The Crown supplied certain necessary articles of furniture for the rooms, the rest of the furniture being the claimant's own. The rooms formed part of one of the blocks of buildings situate within the barrack inclosure, the remaining rooms in the block being occupied by other non-commissioned officers, some of whom were superior in rank to the claimant, and the senior of whom was bound to preserve order in the block, and would be entitled to enter the claimant's rooms for that purpose. The colonel commanding lived in a house situate within the walls of the barracks:—Held, that the claimant was entitled to the franchise under the 3rd section of the Representation of the People Act, 1884, on the ground that he had inhabited a dwelling-house within the meaning of that section, and that no person under whom he served had inhabited such dwelling-house. *Atkinson v. Collard*, 16 Q. B. D. 254; 55 L. J., Q. B. 18; 53 L. T. 670; 34 W. R. 75; 50 J. P. 23; 1 Colt. 375—D.

Compulsory Absence on Duty—Militiaman.]

—A non-commissioned officer on the staff of a militia regiment resided with his family in a house within a borough. During the annual training of the regiment he was absent from the borough twenty-six days of the qualifying year, but while so absent his house continued to be occupied by his wife, family, and furniture. With the leave of his superior officer he returned at intervals during the annual training to his house in the borough, and could have returned there every night had the distance been less, as his duties did not require his attendance:—Held, following *Ford v. Barnes* (16 Q. B. D. 254) and *Spittall v. Brook* (18 Q. B. D. 426), that occupation, under the circumstances, was broken. *Donoghue v. Brook*, 57 L. J., Q. B. 122; 58 L. T. 411; 1 Fox, 100—D.

A private in a militia regiment was compulsorily absent from his residence for training during part of the qualifying year. While at training he could not leave the regiment without breach of military discipline:—Held, that he was not entitled to the parliamentary franchise as an inhabitant occupier. *Martin v. Hanrahan*, 22 L. R., Ir. 452—C. A.

— **Non-commissioned Officers.]**—Where votes were claimed by persons in military service, the claimants, non-commissioned officers, had been absent for twenty-one days during the qualifying period from their quarters on duty elsewhere, and could not return without leave, but during such absence, in one case the claimant's wife and family, and in the other his furniture, remained in the quarters which were retained for him:—Held, that it not sufficiently appearing in those cases that there had been any constructive inhabitation of the rooms by the claimants during the twenty-one days when they were in fact absent, they were not qualified under

section 3 of 48 Vict. c. 3. *Ford v. Barnes*, 16 Q. B. D. 254; 55 L. J., Q. B. 24; 53 L. T. 675; 34 W. R. 78; 50 J. P. 37; 1 Colt. 396—D.

The appellant, a non-commissioned officer, resided with his family in barracks, situate within a borough, in separate rooms allotted to him by the quartermaster-general. During twenty-seven days of the qualifying year he was compulsorily absent from the borough, but while so absent his name was retained on the strength of the regimental dépôt in the monthly returns to the War Office, and the rooms continued to be occupied by his furniture and his family; but he himself could not (unless by leave, which he had obtained for one or two days) return to the borough without being guilty of a breach of duty.—Held, following *Ford v. Barnes* (16 Q. B. D. 254), that the appellant had not occupied the rooms in the barracks during the qualifying period, and that he was not entitled to be registered as a voter for the borough. *Spittall v. Brook*, 18 Q. B. D. 426; 56 L. J., Q. B. 48; 56 L. T. 364; 35 W. R. 520; 1 Fox, 22—D.

Compulsory Absence—Servant at Hotel.—The claimant was tenant of a house in which his family resided, but by the terms of his employment, as a servant of an hotel, the claimant was obliged to remain in the hotel for six days and six nights in each week, the remaining day and night in each week being spent by him in his own house.—Held, that the claimant was entitled to the franchise in respect of the house. *McKendrick v. Buchanan*, 20 L. R., Ir. 206—C. A.

Absence of Undergraduates from Universities.—The undergraduates of Oxford and Cambridge are not permitted to reside in their rooms during the vacations, which comprise nearly six months of the year, without special leave from the college authorities, who are accustomed to let and otherwise make use of their rooms during their absence.—Held, that such compulsory absence amounted to a break of residence disqualifying them for the exercise of the franchise. *Tanner v. Carter; Banks v. Mansell*, 16 Q. B. D. 231; 55 L. J., Q. B. 27; 53 L. T. 663; 34 W. R. 41; 1 Colt. 435—D.

Successive Occupation.—A claim to the parliamentary franchise may be sustained by combining a series of occupation of dwelling-houses during the qualifying period—(a) partly by virtue of service, and partly under ordinary tenancies or (b) wholly by virtue of service. *Torish v. Clarke*, 18 L. R., Ir. 285—C. A.

Area divided into two Constituencies.—G. claimed a vote for the borough of Lewisham in respect of the occupation of two houses in immediate succession, the first house being situated at Beckenham, and the second at Lower Sydenham. Before the passing of the Redistribution of Seats Act, 1885, both Beckenham and Lower Sydenham were included in the west division of the county of Kent; but by that act Beckenham became included in the Sevenoaks division of the county, and Lower Sydenham became included within the area of the Parliamentary borough of Lewisham, which borough was then first created.—Held, that G. was entitled to be registered as a voter for the borough of Lewisham by virtue

of s. 17 of the Redistribution of Seats Act, 1885. *Dixon v. Steele*, 55 L. J., Q. B. 36; 1 Colt. 458—D.

Rates unpaid—Owner liable—No notice to Occupier.—A claimant is not entitled to the franchise as a rated occupier where the rates, payable in respect of the qualifying premises have not been paid, though the owner, and not the occupier, is the person liable to pay the rates, and though no notice of the rate being in arrear was given to the occupier, as required by the 30 & 31 Vict. c. 102, s. 28. *Clarke v. Buchanan*, 20 L. R., Ir. 244—C. A.

Arrears accrued previously to Qualifying Year.—A person claiming the county franchise as a rated occupier is not entitled to be registered unless he has paid on or before the next previous 1st July, all poor-rates due by him in respect of the qualifying premises and not merely the rates assessed during the preceding calendar year. *Clarke v. Torish*, 18 L. R., Ir. 60—C. A.

Medical Relief—Uncertificated Midwife.—The wife of the appellant, being near her confinement, applied to the relieving officer of the union for an order for the attendance of a medical man. The guardians authorized the relieving officer to give her an order for such attendance, but she was in fact attended during her confinement by an uncertificated midwife, who was sent to her and paid by the relieving officer.—Held, that the relief afforded to the wife was "medical assistance" within 48 & 49 Vict. c. 46, s. 2, and that the appellant was not disqualified from being registered as a parliamentary voter. *Honeybone v. Hambridge*, 18 Q. B. D. 418; 56 L. J., Q. B. 46; 56 L. T. 365; 35 W. R. 520; 51 J. P. 103; 1 Fox, 26—D.

Parochial Relief—Employment by Guardians during prevalence of Distress.—The appellant and others had, during a portion of the qualifying period, and at a time when great distress prevailed, been employed by the board of guardians of the union in which they resided to break stones, and had received payment for their work. The payments received had not been in any way commensurate with the amount of work done, but with the wants of each person employed; and had varied according to the number of children belonging to such person.—Held, that the payments so made constituted relief given to the persons employed; and that they were therefore disqualified from being registered by reason of their having been in receipt of parochial relief within s. 36 of the Representation of the People Act, 1832. *Magarrill v. Whitehaven Overseers*, 16 Q. B. D. 242; 55 L. J., Q. B. 38; 53 L. T. 667; 34 W. R. 275; 49 J. P. 743; 1 Colt. 448—D.

Payment for Funeral.—Application for a receipt of provision, under 29 & 30 Vict. c. 38, for the interment of a deceased member of his family during the qualifying year is sufficient to disqualify the recipient, though otherwise entitled to the franchise, from being registered as a parliamentary voter. *Kerr v. Chambers*, 20 L. R., Ir. 207—C. A.

Receipt of Alms.—By the provisions of a charity, regulated by a scheme of the Charity Commissioners, a certain number of the poor

inhabitants of a borough, who had not been for two years in receipt of parish relief, were received into an almshouse, where certain weekly payments and other benefits were bestowed upon them. They were liable to be removed for misconduct and other causes:—Held, that they had received alms within s. 36 of 2 & 3 Will. 4, c. 45, and were therefore disqualified from voting. *Baker v. Monmouth Town Council*, 53 L. T. 688; 34 W. R. 64; 49 J. P. 776—D.

The claimants during the qualifying period occupied almshouses in a borough and received out of a charitable fund for the sustenance of the inmates allowances of 6s. a week. The charity was regulated by an Act of Parliament, which provided that the inmates of the almshouses were to be persons "who from age, ill-health, accident, or infirmity should be unable to maintain themselves":—Held, that the facts showed a receipt of "alms which by the law of Parliament disqualify from voting" under the Reform Act, 1832 (2 & 3 Will. 4, c. 45), s. 36, and that the claimants were not entitled to be registered as voters. *Edwards v. Lloyd*, 20 Q. B. D. 302; 57 L. J., Q. B. 121; 58 L. T. 409; 52 J. P. 519; 1 Fox, 54—D.

The Licensed Victuallers' Asylum is an institution incorporated under royal charter. The design of the institution is to receive and maintain decayed aged licensed victuallers and their wives and widows. Only those who have contributed to the funds of the institution as subscribers or donors are eligible to be elected as inmates of the asylum. The funds of the institution are largely augmented by private benevolence. The inmates are subject to various rules of discipline, which may be altered from time to time by the board of management. No person having an income exceeding a certain amount is qualified to be elected or to remain an inmate of the asylum. The funds of the institution are applied, amongst other things, in augmentation of the incomes of the inmates up to a limit fixed from time to time by the board:—Held, that the rules of the institution do not necessarily show that the inmates are in receipt of alms such as to disqualify them from the franchise under the provisions of 2 & 3 Will. 4, c. 45, s. 36. *Daniels v. Allard*, 1 Fox, 70—D.

c. County Voters.

Equitable Freehold—Lands vested in Trustees — Voluntary Association.—Where an association of persons has purchased land for the purposes of an undertaking, and vested it by deed in trustees and managers upon such terms and conditions that, while the trusts of such deed subsist, the individual members of the association are respectively entitled only to a share in the net profits of the undertaking carried on upon the land, such members have not an equitable freehold in the land so as to acquire the county franchise, although the association is not incorporated or registered as a joint stock company, but is a mere voluntary association without statutory powers or restrictions. *Baater v. Brown* (7 M. & G. 198) discussed and distinguished. *Watson v. Black*, 16 Q. B. D. 270; 55 L. J., Q. B. 31; 54 L. T. 17; 34 W. R. 274; 1 Colt. 418—D.

Rentcharge below Value of £5—Occupation.—By s. 18 of the Reform Act, 1832, no person

shall be entitled to a county vote in respect of any freehold lands or tenements of which he may be seised for a life or lives, except he shall be "in the actual and bona fide occupation of such lands or tenements," or except the same shall be of the clear yearly value of not less than 10*l.* (reduced to 5*l.* by a subsequent act):—Held, that a rentcharge for life below the yearly value of 5*l.* being incapable of occupation, was not within the exception in s. 18, and therefore did not confer a county vote. *Druitt v. Christchurch Overseers*, 12 Q. B. D. 365; 53 L. J., Q. B. 177; 32 W. R. 371; 1 Colt. 328—D.

Rentcharge — Actual Possession.—A. being possessed of a rentcharge issuing out of freehold lands, granted it unto B., C. and D., and their heirs, to hold the same unto B., C. and D., and their heirs, to the use of A., B., C. and D., their heirs and assigns for ever, in equal one-fourth shares as tenants in common:—Held, that all the grantees took under the Statute of Uses, and that by force of the statute, and on the authority of *Heelis v. Blain* (18 C. B., N. S. 90), they were from the date of the deed in actual possession of their shares of the rentcharge within s. 26 of 2 & 3 Will. 4, c. 45. *Lowcock v. Broughton Overseers*, 12 Q. B. D. 369; 53 L. J., Q. B. 144; 51 L. T. 399; 32 W. R. 247; 1 Colt. 335—D.

d. Notice of Objections.

Service through Post—No Postal Delivery.—Notice of objection to the retention of his name on the supplemental list of inhabitant occupiers in their polling district, was addressed to each of a number of persons to the townland in which he resided, and was posted on the 19th August, at D., from which town the notice would in ordinary course have reached the local post office (situate within a short distance of the townland in each case) at mid-day on the 20th, and would have remained there till called for. There was no postal delivery at any of the townlands, and the notice could not have reached the person objected to unless he went or sent to his local post office, or unless by some accidental delivery or conveyance. At the revision a stamped duplicate copy of the notice in each case was produced to prove service, but no other evidence of service was given or tendered, or any proof that any person objected to was aware of the posting of the notice, or had sent to his post office on the 19th or 20th, or received the notice on or before the 20th:—Held, that the notices had been duly served. *Adams v. Buchanan*, 18 L. R., Ir. 292—C. A.

— "**Ordinary course of Post.**"—Notices of objection to borough voters under 6 Vict. c. 18, s. 17, were addressed to barracks in which the voters resided, and were posted in time to have been delivered on August 20 by postmen in the ordinary course of post at places within the borough elsewhere than at the barracks. Letters addressed to the barracks were never delivered at the barracks by postmen, but were taken from the post-office by orderlies. On the evening of August 20 the letters addressed to the barracks were taken from the post-office by orderlies. Some of such letters were distributed at the barracks on August 20, others on August 21, while with respect to others there was no evidence as to the time of distribution:—Held,

that the facts did not show that there was any "ordinary course of post" to the barracks within the meaning of s. 100, and that therefore there was no evidence that the notices had been served on August 20. *Childs v. Cox*, 20 Q. B. D. 290; 58 L. T. 338; 36 W. R. 505; 1 Fox, 84—D.

Form of — Residence of Freeman — Power of Amendment.]—By the Reform Act, 1832 (2 & 3 Will. 4, c. 45), s. 32, no freeman of a city or borough is entitled to be registered as a parliamentary voter in any year unless "he shall have resided for six calendar months next previous to the last day of July (now by the Parliamentary and Municipal Registration Act (41 & 42 Vict. c. 26), s. 7, 15th of July), in such year within such city or borough or within seven statute miles from the place where the poll for such city or borough shall heretofore have been taken." A notice of objection was served on a freeman of Norwich dated August 12, and containing as the ground of objection the statement "That you do not reside at 12, Clifton Street, Norwich." The revising barrister held that the notice was sufficient, but amended it by substituting in it the words "That you have not resided at 12, Clifton Street, Norwich, for six calendar months next preceding the 15th day of July last, and that you have not throughout that period resided within the city of Norwich or seven miles thereof":—Held, that the notice was bad, that the defect in it was not a "mistake" within the meaning of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28, sub-s. 2, and that the revising barrister had no power to amend. *Bridges v. Miller*, 20 Q. B. D. 287; 57 L. J., Q. B. 125; 58 L. T. 405; 36 W. R. 509; 52 J. P. 518; 1 Fox, 47—D.

Description of Objector.]—A notice of objection was signed: "R. B. on the list of parliamentary voters for the parliamentary borough of Battersea and Clapham." The borough of Battersea and Clapham consists of two divisions, those of Battersea and Clapham, and contains two parishes, those of St. Mary, Battersea, and Clapham. The Battersea division is wholly in the parish of St. Mary, Battersea, the Clapham division is partly in that parish and partly in that of Clapham. The name of the objector was in the list of occupiers for the parish of Clapham in the Clapham division:—Held, that the notice was insufficient, as it did not state the parish on the list of voters for which the objector's name was to be found. *Wood v. Chandler*, 20 Q. B. D. 297; 57 L. J., Q. B. 126; 36 W. R. 522; 52 J. P. 520; 1 Fox, 61—D.

A notice of objection to a county vote was signed: "G. C., of Churchyard, on the list of parliamentary voters for the parish of Petersfield":—Held, that the place of abode of the objector was insufficiently described under the Registration Act, 1885 (48 Vict. c. 15), s. 18, Sched. 2, Form I., No. 2. *Humphrey v. Earle*, 20 Q. B. D. 294; 57 L. J., Q. B. 124; 58 L. T. 403; 36 W. R. 510; 52 J. P. 518; 1 Fox, 39—D.

Where the witness to a claim for the lodger franchise described himself therein as "agent," he being, in fact, a registration agent, and the revising barrister amended accordingly, although holding the original description sufficient:—Held, that the description of "agent" was suffi-

cient. *Campbell v. Chambers*, 22 L. R., Ir. 460—C. A.

Omission of Date.]—Where a notice of objection to a person on the list of voters for any county is delivered to overseers and is defective under the Parliamentary Registration Act, 1843, s. 7, the defect is not cured by the publication by the overseers, under s. 18, of the name of the person objected to. The omission of a part of the date from such a notice is a defect which invalidates it, and cannot be amended. *Freeman v. Newman*, 12 Q. B. D. 373; 53 L. J., Q. B. 108; 51 L. T. 396; 32 W. R. 246; 1 Colt. 342—D.

Specifying List.]—A notice of objection given to overseers was to the names "in the Blockhouse List," "Division 1." There are three lists of Parliamentary voters for the Blockhouse:—firstly, householders and occupiers; secondly, freemen; and, thirdly, lodgers; but the only one of these which is divided is the first:—Held, that the notice did, at all events, sufficiently specify the list, to which the objection referred, to authorize an amendment by the revising barrister under s. 28, sub-s. 2 of 41 & 42 Vict. c. 26. *Bollen v. Southall*, 15 Q. B. D. 461; 54 L. J., Q. B. 589; 34 W. R. 45; 49 J. P. 119; 1 Colt. 368—D.

e. Revising Barrister.

Late Publication of Claims by Overseer.]—An overseer received claims in due times from occupiers and from lodgers not already on the register, but published a list of them some days after the time specified in the second Schedule, part 2 of the Registration Act, 1885:—Held, that this did not invalidate the lists, and that the revising barrister was right in accepting and revising them. *Wells v. Stanforth*, 16 Q. B. D. 244; 55 L. J., Q. B. 12; 54 L. T. 183; 50 J. P. 631; 1 Colt. 451—D.

Declaration as to Misdescription—Reception of, as Evidence.]—A declaration by a person entered on a list of voters as to a misdescription in such list cannot be received as evidence by a revising barrister, unless it has been sent within the statutory times to the town clerk or clerk of the peace. *Daking v. Fraser*, 16 Q. B. D. 252; 55 L. J., Q. B. 11; 34 W. R. 366; 1 Colt. 455—D.

Powers of Amendment—Altering Nature of Qualification.]—In a list of voters, the nature of the appellant's qualification was described in the third column as "dwelling-house," and in the fourth column the name and situation of the qualifying property were described as "5, Victoria Cottages." The respondent objected to the appellant's name being retained on the list, whereupon the appellant asked the revising barrister to amend the third column of the list by altering "dwelling-house" to "dwelling-houses in succession," and the fourth column by altering "5, Victoria Cottages" to "High Street, Wapping, and 5, Victoria Cottages." The appellant had not sent in a declaration under s. 24 of the Parliamentary and Municipal Registration Act, 1878. The barrister refused to amend:—Held, that the barrister

was right, as the amendment would alter the nature of the qualification; and the effect of s. 28, sub-s. 13 of the act of 1878, on sub-s. 1 of that section, is to limit the power of making such an amendment to cases in which a declaration has been duly sent in under s. 24 of that act. *Porrett v. Lord* (5 C. P. D. 65) disapproved. *Foskett v. Kaufman*, 16 Q. B. D. 279; 55 L. J., Q. B. 1; 54 L. T. 64; 34 W. R. 90; 50 J. P. 484; 1 Colt. 466—C. A.

—**Tenement and Garden.**—In the overseers' list of occupiers entitled to vote for a division of a county, the "nature of the qualification" of a voter was described as "tenement and garden," and the "description of the qualifying property" was stated to be "part bailiff's tenement." An objection was taken that the nature of the qualification was wrongly described. It was proved before the revising barrister that the voter was an inhabitant occupier of a part of a dwelling-house, and the barrister amended the list by striking out the word "dwelling-house" before "tenement":—Held, that, looking at the whole entry, the words "tenement and garden" might fairly be read as intended to be used in the vulgar but inaccurate sense of a small house, and to describe the qualification arising from the occupation of a dwelling-house, and consequently that the barrister had power to amend the entry as he had done for the purpose of more accurately defining the qualification:—But held, that the proper alteration would have been to strike out the words "tenement and garden," and substitute the word "dwelling-house." *Dashwood v. Ayles*, 16 Q. B. D. 295; 55 L. J., Q. B. 8; 53 L. T. 58; 34 W. R. 53; 50 J. P. 132; 49 J. P. 776; 1 Colt. 486—C. A.

In the overseers' list of occupiers entitled to vote for a division of a county, the "nature of the qualification" of a voter was described as "tenement and garden" and the "description of the qualifying property" was stated to be "School Yard." The "nature of the qualification" of thirty-three other voters was described in the same way. As to two of the thirty-three the "description of the qualifying property" was stated to be "School Yard," as to five "Cat Lane," as to three "High Street," as to five "Bridge." In each case the voter occupied a dwelling-house and garden of a less annual value than 10*l.*:—Held, that, looking at all the cases together, the revising barrister might fairly consider that the words "tenement and garden" were intended to describe a dwelling-house, and that he had power to amend the description by striking out the words "and garden," and inserting the word "dwelling-house" before "tenement," though it would have been better to strike out "tenement" also. *Minifie v. Banger*, 16 Q. B. D. 302; 55 L. J., Q. B. 10; 53 L. T. 590; 50 J. P. 131; 1 Colt. 493—C. A.

—**Notice of Objection.**—See *Bridges v. Miller*, ante, col. 713, and *Freeman v. Newman* and *Bollen v. Southall*, col. 714.

—**Houses in Succession—Omission of One.**—The nature of the qualification of a voter was described on the parliamentary list as "dwelling-houses in succession," and the name and situation of the qualifying property were described in the fourth column of the list "as 44, Oxford Street and 34, Prospect Place, Cowick Street."

He had, in fact, occupied three houses in succession during the qualifying period, but the overseer by mistake omitted to specify the third house, viz. 31, Prospect Place, and the occupation of the two only as they appeared on the list was insufficient to give the vote. These facts were proved before the revising barrister, and he was asked to amend the fourth column, and did so by striking out the figures "44" and "34":—Held by Stephen and Cave, JJ. (Lord Coleridge, C.J., dissenting), that under 41 & 42 Vict. c. 26, s. 28, the revising barrister had refused to correct the mistake, although it should not have been corrected by striking out the numbers, and that the list should be amended by inserting "and 31" after the words "Oxford Street" in the fourth column of the list. *Ford v. Hoar*, 14 Q. B. D. 507; 54 L. J., Q. B. 286; 53 L. T. 44; 33 W. R. 566; 49 J. P. 103; 1 Colt. 351—D.

Where a person's right to be admitted to the Parliamentary franchise depends upon his occupation of different premises in immediate succession, his claim must set forth and describe the several qualifying premises, and if it omit to do so, the revising barrister has power, under s. 4 of the Parliamentary Registration (Ireland) Act, 1885 (48 Vict. c. 17), to amend or correct it. *Dempsey v. Keegan*, 18 L. R., Ir. 280—C. A.

The statements of facts on a claim to be admitted to the Parliamentary franchise must be sufficient to constitute a legal franchise of some defined character, and then, if the proved facts turn out to be insufficient to establish a legal franchise of that character, but one sufficient to establish a legal franchise of another character, the claimant may be registered. If the legal nature of the qualification derived from premises mentioned in the claim is not sufficiently stated, the claim can be amended; but no qualifying property which is not mentioned can be added. *Melaugh v. Chambers*, 20 L. R., Ir. 286—C. A.

M. claimed to be registered as an inhabitant "occupier" in respect of the premises, 1, Cottage-row, in the borough of Londonderry. The claim described the qualifying premises as "dwelling-house, 1, Cottage-row, in immediate succession from dwelling-house, Corbett-street, Londonderry." It was proved that M. had gone to reside at No. 1 in September, 1885, from No. 8, Cottage-row, which latter premises he had occupied for about three weeks immediately after the house in Corbett-street, where he had resided since before the previous 20th July, and that the premises so immediately occupied had been omitted from the claim, owing to the claimant's considering it unnecessary to mention them:—Held, that the claim was defective in not setting out all the qualifying premises, and that the revising barrister had no power to amend it in this respect. *Id.*

—**"Successive Occupation" inserted by Mistake.**—The qualification of a voter was stated in the third column of the list to be "offices, successive occupation," and in the fourth column "High Street and Charles Street," whereas it was proved that during the whole of the qualifying period he had occupied one office only, namely, in High Street, and would have had by reason of such occupation a good and sufficient qualification. The misdescription was an error of the overseers:—Held, that the revising

barrister had power under 41 & 42 Vict. c. 26, s. 28, to correct the mistake, and should have amended the list by striking out the words "successive occupation" and "Charles Street." *Lynch or Blossie v. Wheatley*, 14 Q. B. D. 504; 54 L. J., Q. B. 289; 53 L. T. 49; 1 Colt. 364—D.

—**Lodger Claim—Amount of Rent.**—It is essential that every lodger claimant should state whether he pays rent for his lodgings or not, what is the specific amount of any rent he pays, and to whom he pays it; and in the event of his occupying lodgings without paying rent, he must specifically show that he is exonerated by agreement from doing so without their losing the essential character of lodgings. A claim by a lodger under 31 & 32 Vict. c. 49, s. 4 (as extended by 48 Vict. c. 3, s. 7, sub-s. 3), in the form No. 31 in schedule 1 to the Parliamentary Registration (Ireland) Act, 1885 (48 Vict. c. 17), stated the "amount of rent paid" at "10*l.* and upwards, including the salary," and another like claim by another lodger stated such rent as "10*l.* and upwards" only. The revising barrister was called upon by the claimants to amend the claims (as having been so filled in by "mistake") by inserting specific amounts for the rents payable, but he was of opinion that he had no power to do so, and rejected the claim:—Held, that the revising barrister had power, if necessary, to amend the claims by inserting a specific sum for the rent payable, if he had sufficient materials before him for the purpose. *Clarke v. Torish* 18 L. R. 207—C. A.

Power to Transfer from one List to another.—**Sec. 15 of the Parliamentary and Municipal Registration Act, 1878**, enacts that where the whole or part of the area of a municipal borough is co-extensive with or included in the area of a parliamentary borough, the lists of parliamentary voters shall, so far as practicable, be made out and revised together; and specifies the mode in which overseers of parishes shall make out the lists. By sub-s. 2, where the parish is situate wholly or partly both in the parliamentary borough and the municipal borough, the lists shall be made out in three divisions: Division 1 shall comprise the names of the persons entitled both to be registered as parliamentary voters and to be enrolled as burgesses; division 2 shall comprise the names of the persons entitled to be registered as parliamentary voters, but not to be enrolled as burgesses; division 3 shall comprise the names of the persons entitled to be enrolled as burgesses, but not to be registered as parliamentary voters. By s. 28, sub-s. 15, where a list is made out in divisions the revising barrister shall place the name of any person in the division in which it should appear according to the result of the revision, regard being had to the title of the person to be on the list both as a parliamentary voter and a burgess, or only in one of those capacities, and shall expunge the name from the other division (if any), in which it appears. An objection in respect only of a voter's qualification for the parliamentary franchise having been taken to the retention of his name in division 1, the revising barrister struck the name off division 1; and was thereupon asked to place it in division 3, but refused so to do unless proof was given of a qualification entitling the voter to be on the burgess roll:—Held, that the decision of the revising barrister

was right, and that he was not bound, under s. 28, sub-s. 15, to place the name in division 3. *Greenway v. Bachelor*, 12 Q. B. D. 376; 53 L. J., Q. B., 179; 50 L. T. 270; 32 W. R. 320; 1 Colt. 322—D.

Appearance before, by Agent.—At the hearing of an objection to a voter's name being retained on a list of parliamentary voters, B. stated that he appeared on behalf of the voter and refused to answer a question put to him by the objector, whether or not he had been requested by the voter to appear on his behalf; and the revising barrister declined to order him to answer the question, and allowed him to give evidence in support of the voter's qualification:—Held, that sub-s. 11 of 41 & 42 Vict. c. 26, s. 28, does not require that a person appearing on behalf of a person, against whom objection is made, should have been personally authorised to do so. *Quære*, whether under the sub-section any authority is necessary. *Ford v. Smerdon*, 49 J. P. 760—D.

2. ELECTION OF MEMBERS.

a. The Poll.

Ballot Paper—Absence of Official Mark.—A ballot paper which conforms in other respects to the requirements of the Ballot Act, 1872 (35 & 36 Vict. c. 33), is not void because it has not on the face of it the official mark directed by s. 2 of that act to be marked on both sides of the ballot paper. *Pickering v. James* (8 L. R., C. P. 489) considered. *Ackers v. Howard*, 16 Q. B. D. 739; 55 L. J., Q. B. 273; 54 L. T. 651; 34 W. R. 609; 50 J. P. 519—D.

Voting Twice—Effect of.—It was proved that a vote had been given by some unknown person in the name of a voter, W., for the respondent. W. afterwards voted for the petitioner:—Held, that a vote must be added to the petitioner's number and a vote deducted from the respondent. *St. Andrews Election*, 4 O'M. & H. 32.

A voter, whose name appeared twice in the register, voted twice for the petitioner under a mistaken notion that he was entitled to do so:—Held, that the first vote was good and the second bad. *Id.*

S. B. having voted in the Stepney Division and then in Whitechapel:—Held, that the first vote was good, and that the second did not, unless given with a corrupt intention, involve the offence of personation. Where a voter's name is wrongly placed upon the register for two divisions of the same borough he is entitled to elect in which he will vote. *Isaacson v. Durant*, 54 L. T. 684; 4 O'M. & H. 34—Denman and Field, JJ.

Reasonable time to Vote.—See *Aylesbury Division of Bucks Election*, 4 O'M. & H. 59.

b. Returning Officer.

Taxation of Charges.—At a parliamentary election the high sheriff was the returning officer, the duties being performed on his behalf by a firm of solicitors, one of whom was under-sheriff. The returning officer's charges included a charge

for professional assistance rendered to him by the under-sheriff's firm, which was disallowed on taxation, on the ground that no detailed account was sent in to the returning officer within fourteen days of the return, as required by s. 5 of the Returning Officers Act, 1875:—Held, that the charge was wrongly disallowed on the above ground, the section not being applicable as between the returning officer and the candidates to charges made for work done for the returning officer by his own agents. *Essex Election (South-Eastern Division), In re*, 19 Q. B. D. 252; 56 L. J., Q. B. 356; 57 L. T. 104; 36 W. R. 44—D.

The right of a returning officer under s. 2 of the same Act to be paid his reasonable charges and expenses is not limited to such charges only as have been vouched under ss. 4 and 5 of the act, nor is a charge made by him to be disallowed merely because in the account sent in by him to the candidates it appears under a wrong heading. A returning officer is not limited to charging for such services and expenses as come verbatim et literatim within the description in the schedule to the act, if they are services and expenses of one of the kinds mentioned in the schedule. *Ib.*

A charge for storing ballot-boxes from one election to another in order to avoid the expense of procuring fresh ones was therefore allowed, although no such charge is expressly provided for in the schedule to the act. *Ib.*

A returning officer at a parliamentary election is not entitled to remuneration for personal services rendered by him in the conduct of the election, under the heading of professional or other assistance, which he has not as a matter of fact employed. *Shoreditch (Horton Division) Election, In re, Walker, Ex parte*, 56 L. T. 529—D.

— **Time for Application.**—“Apply to the Court.”—By s. 4 of 38 & 39 Vict. c. 84, it is enacted that an application to tax the returning officer's charges at a parliamentary election may be made, within fourteen days from the delivery of the account, to the county court having jurisdiction at the place of nomination for the election:—Held, that an application made within the time specified to the registrar of the county court when the judge was not sitting was properly made. *Reg. v. Bloomsbury County Court Judge*, 56 L. T. 321; 51 J. P. 212—C. A. Affirming 17 Q. B. D. 778; 55 L. J., Q. B. 443—D.

— **Power to Review.**—Where the accounts of a returning officer have been taxed by the registrar of a county court under the Parliamentary Elections (Returning Officers) Act, 1875 (38 & 39 Vict. c. 84), s. 4, the county court judge has no jurisdiction to review the registrar's taxation. *Reg. v. Lambeth County Court Judge*, 17 Q. B. D. 96—D. See 49 & 50 Vict. c. 57.

c. Election Expenses.

What are.]—A trivial expense, not authorised by the schedule to the Corrupt and Illegal Practices Prevention Act, 1883, and returned amongst “election expenses” is not necessarily illegal. *Isaacson v. Durant*, 54 L. T. 684; 4 O'M. & H. 34—Denman and Field, JJ.

Meeting to induce Person to be Candidate.]—

Where a meeting is held or other expenses are incurred with the object of inducing a person to become a candidate at an election, the question whether the costs of the meeting and other expenses are “election expenses” is one which must be answered in relation to the particular circumstances of the case. *Birkbeck v. Bullard*, 54 L. T. 625; 4 O'M. & H. 84.

Persons Paid to Keep Order.]—Money paid by an agent of a candidate for the employment of persons to keep order at meetings connected with the election is an expense connected with the management and conduct of an election, within the meaning of s. 28 of the Corrupt and Illegal Practices Prevention Act, 1883. *Packard v. Collings*, 54 L. T. 619; 4 O'M. & H. 70.

Registration Expenses.—Starting a Newspaper.]—Expenses incurred by a candidate as a subscription to registration expenses need not be returned as election expenses. A candidate at the general election of 1885 established a newspaper in Aug., 1885, which ceased to appear in Jan., 1886:—Held, that losses incurred in connexion therewith need not be returned as election expenses. *Crossman v. Gent-Davis*, 54 L. T. 628; 4 O'M. & H. 93.

Disputed Claims, Payment of.—Notice of Application for Leave.]—An application on behalf of a candidate at a parliamentary election for an order of the High Court for leave to pay a disputed claim within s. 29, sub-s. 7, of the Corrupt and Illegal Practices Prevention Act, 1883, will not be granted without due notice to the candidate on the other side, the returning officer, and the constituency at large, by public advertisement or otherwise. *South Shropshire Election, In re*, 54 L. T. 129; 34 W. R. 352—D.

d. Election Petition.

Trial.—Change of Venue.—“Special Circumstances.”]—Where the allegations of fact in a parliamentary election petition are not in dispute but are specifically admitted by the respondent so as to render it unnecessary at the trial to call witnesses from the district in which the election took place, the court may order the petition to be tried in London on the ground that “special circumstances” exist within the meaning of s. 11, sub-s. 11, of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), which render it desirable that the petition should be tried elsewhere than in the county or division where the election took place. *Arch v. Bentinck*, 18 Q. B. D. 548; 56 L. J., Q. B. 458; 56 L. T. 360; 35 W. R. 476—D.

Examination of Voting Paper.]—It is competent for the judges at the hearing of an election petition to examine a voting paper before the vote given thereupon is proved to have been bad. The provisions of the Ballot Act against inspecting voting papers do not apply to the court. *Isaacson v. Durant*, 54 L. T. 684; 4 O'M. & H. 34—Denman and Field, JJ.

Evidence of Voting.]—The statement on oath of a voter that he had voted in two divisions of the same borough is evidence of the vote given

in the latter division, without the further production of the voting paper. *Ib.*

Calling Witnesses—Conduct of Case.—To call the respondent and his agents as the sole witnesses in support of a petition, and to treat them as hostile witnesses, is not the proper way to conduct a petition. *Crossman v. Gent-Davis*, supra.

Agency.—Where the petitioner makes out a *prima facie* case of agency, it must be accepted unless rebutted by the respondent. *Birkbeck v. Bullard*, supra. See also *Aylesbury Division of Bucks*, 4 O'M. & H. 59.

Bribery.—In a case where bribery is proved the court has no power to report, under s. 22 of the Corrupt and Illegal Practices Prevention Act, 1883, that the offence is of a trivial nature, and ought not to void the election. *Birkbeck v. Bullard*, supra.

Reserving Points of Law.—See *Ackers v. Howard*, 4 O'M. & H. 65.

Public Prosecutor—Cross-examination on behalf of.—The public prosecutor is not entitled to administer a general cross-examination, without definite object, to every witness called in the course of the hearing of a petition. Cross-examination with the view of showing that a mistake has been made in giving to one voter the paper intended for another is not admissible. *Isaacson v. Durant*, supra.

Costs.—Where a petition is utterly unfounded the costs of the public prosecutor will be ordered to be paid by the petitioner. *Crossman v. Gent-Davis*, supra.

An overloaded petition will be visited with costs, even if it is successful. *Birkbeck v. Bullard*, supra. See also *Ackers v. Howard*, 4 O'M. & H. 65.

—Withdrawal of Petition—Higher Scale.—The 43rd section of the Corrupt and Illegal Practices Prevention Act, 1883, applies only to the costs of the director of public prosecutions at the trial of the petition, and when the petition is withdrawn the court has no power, under the 41st section of the Parliamentary Elections Act, 1861, to order the preliminary costs of the director of public prosecutions, and the costs of the inquiries made by him to be paid by the parties. Under the 44th section of the Corrupt and Illegal Practices Prevention Act, 1883, the costs of an election petition will usually be allowed on the higher scale, in accordance with the old practice under the 41st section of the Parliamentary Elections Act, 1868. *Pascoe v. Puleston*, 54 L. T. 733; 50 J. P. 134.

e. Corrupt Practices.

Bribery.—A single case of bribery by an agent renders an election void. A circular letter addressed by a candidate to his constituents must not be interpreted with the same strictness as a commercial document. *Birkbeck v. Bullard*, supra. See also *Aylesbury Division of Bucks*, 4 O'M. & H. 59.

To offer a voter his travelling expenses with the intention of inducing him to come and vote

for a given candidate is bribery, and the Corrupt and Illegal Practices Prevention Act, 1883, has not altered the law in this particular. *Packard v. Collings*, supra.

Illegal Employment—What is.—D. and his agents gave gratuitous refreshments to certain persons styled "workers" at a parliamentary election at which D. was a candidate:—Held, that this was an illegal employment within s. 17 of the Corrupt and Illegal Practices Prevention Act, 1883, and rendered the election of D. void. *Schneider v. Duncan*, 54 L. T. 618; 4 O'M. & H. 76.

The employment of persons to keep order at meetings connected with an election is an illegal employment within the meaning of s. 17 of the Corrupt and Illegal Practices Prevention Act, 1883. *Packard v. Collings*, supra.

Intimidation by Rioting.—See *Ackers v. Howard*, 4 O'M. & H. 65.

Treating—What is.—Treating is not the entertainment of equals by equals, but of an inferior by a superior with the object of securing the goodwill of the inferior (per Cave, J.). *Birkbeck v. Bullard*, 54 L. T. 625; 4 O'M. & H. 84.

—Effect of.—General bribery and treating will void an election if proved to have existed upon the side of a successful candidate. Semble, that if general bribery and treating are proved, it is the duty of the judges to report the prevalence of extensive corruption. *Packard v. Collings*, 54 L. T. 619; 4 O'M. & H. 70, and see *Aylesbury Division of Bucks*, 4 O'M. & H. 59.

f. Criminal Law relating to.

Indictment for "Corrupt Practices"—Description of Offence.—In an indictment for a "corrupt practice" within the meaning of s. 3 of the Corrupt and Illegal Practices Prevention Act, 1883, it is necessary to specify the particular offence with which the prisoner is charged. *Reg. v. Stroulger*, 17 Q. B. D. 327; 55 L. J., M. C. 137; 55 L. T. 122; 34 W. R. 719; 51 J. P. 278; 16 Cox, C. C. 85—C. C. R.

An indictment charged that at a parliamentary election the prisoner was "guilty of corrupt practices against the form of the statutes in that case made and provided." The jury found the prisoner guilty of corrupt practices by offering money for votes. After verdict it was objected that the indictment was bad, because it did not sufficiently describe the nature of the offence with which the prisoner was charged:—Held, per Lord Coleridge, C.J., and Mathew, J., that the indictment was bad for insufficient description of the offence charged, but that the defect was cured by verdict; per Field, J., that the indictment was good, but that, if not, the defect was cured by verdict; per Denman, J., and Day, J., that the indictment was bad, and that the defect was not cured by verdict. *Ib.*

An indictment under the Corrupt and Illegal Practices Prevention Act, 1883, which merely charges the defendant with being guilty of a corrupt practice at an election, but does not specifically allege against him what that corrupt practice was, is bad for generality. *Reg. v. Norton*, 16 Cox, C. C. 59—Pollock, B.

Personation—Application for Ballot Paper in assumed Name.]—If at a parliamentary election a man applies to the presiding officer for a ballot paper in a name other than his name of origin, or in the name by which he is generally known, but in a name which appears on the register of voters, and which was inserted therein by the overseers in the belief that it was the name of the applicant, and for the purpose of putting him on the register, he is entitled to vote, and is not a person who “applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person,” so as to be guilty of the offence of personation within the meaning of s. 24 of the Parliamentary and Municipal Elections Act, 1872, or the Corrupt and Illegal Practices Prevention Act, 1883. *Reg. v. Fox*, 16 Cox, C. C. 166—Hawkins, J. See also *Isaacson v. Durrant*, ante, col. 718.

— Appointment of Presiding Officer.]—In order to sustain a conviction for personation it is not necessary to state in the indictment, or to prove at the trial, that the presiding officer at the booth where the offence was committed was duly appointed. Semble, the appointment of a presiding officer need not be in writing. *Reg. v. Garvey*, 16 Cox, C. C. 252—Ir. C. C. R.

EQUITY TO A SETTLEMENT.

See HUSBAND AND WIFE.

ENTRY.

See EVIDENCE.

ESTATE.

Descent ex parte Maternâ or ex parte Paternâ.]—S. 4 of the Inheritance Act (3 & 4 Will. 4, c. 106), is not merely declaratory of the old law; it introduces a new rule as to the tracing of the descent in the case of a limitation to the heirs general of a deceased person. By a marriage settlement executed in 1810, real estate of the wife was limited to the use of the husband for life, remainder to the use of the wife for life, and, after limitations in favour of the issue of the marriage, the ultimate limitation was “to the use of the right heirs of J. W., deceased (the mother of the wife), for ever.” At the date of the settlement the wife was seised of part of the real estate as the heiress-at-law of her deceased mother, and of the other part as one of the co-heiresses of her deceased maternal great uncle. The wife died in 1846; the husband died in 1871. The limitations in favour of the issue all failed

on the death in 1880 of the surviving son of the marriage:—Held, that, if under the ultimate limitation the wife took the estate as a purchaser, *Mandeville's case* (Co. Litt. 26 b.) did not apply, and that the descent from her would be traced in the ordinary way, and not ex parte maternâ. But held, that, under the ultimate limitation, the wife took the estate as part of the old estate which she had before the marriage, and that the descent was not broken by the settlement. *Moore v. Simkin*, 31 Ch. D. 95; 55 L. J., Ch. 305; 53 L. T. 815; 34 W. R. 254—Pearson, J.

A testator who died in 1853, devised as his own an estate which had devolved on his late wife in fee as heiress-at-law of her mother. The devise was to trustees in fee, on trust to pay the rents to the testator's only son and to his two daughters in equal shares, and to the survivors or survivor of them, with remainder on trust for the children of the son and the daughters respectively in fee, with an ultimate remainder unto and to the use of the testator's own right heirs. The son and both the daughters survived the testator, but they all died without issue. The son survived the daughters, and died intestate. He was the heir-at-law of his father, and also of his mother. The testator had also devised real estate of his own to the son, who elected to confirm the will:—Held, that the equitable estate, which the son took under the will, and by virtue of his election, merged in the legal estate which descended to him from his mother, and that the descent was regulated by the legal estate, and that, consequently, on his death intestate and without issue, the property descended to the heir of his maternal grandmother, who was the last purchaser of the legal estate, and not to his own heir. *Douglas, In re, Wood v. Douglas*, 28 Ch. D. 327; 54 L. J., Ch. 421; 52 L. T. 131; 33 W. R. 390—Pearson, J.

Descent of—Construction of Settlement.]—See SETTLEMENT.

Tenants for Life — Remainderman.]—See TENANT.

Joint Tenancy—Severance of.]—See TENANT.

ESTOPPEL.

I. BY RECORD.

1. *General Principles*, 724.
2. *Against what Parties*, 727.
3. *In what Cases*, 728.

II. BY DEED, 732.

III. BY MATTER IN PAIS, 735.

I. BY RECORD.

1. *General Principles*.

Meaning of Doctrine as to Res Judicata.]—The doctrine of res judicata does not apply only where there is a record. It is one of the most

fundamental doctrines of all courts that there must be an end to litigation, and that the parties have no right of their own accord after having tried a question between them and obtained a decision of the court, to start that litigation over again on precisely the same questions. *May, In re, House, Ex parte*, 28 Ch. D. 518; 54 L. J., Ch. 338; 52 L. T. 79; 33 W. R. 917.—Per Lord Esher, M.R.

Same Litigant setting up Opposite Constructions of Deed.]—Where a litigant has obtained the decision of the court on the construction of a deed in his favour, he cannot ask the court in a subsequent action to put an opposite construction on the same deed. *Gandy v. Gandy*, 30 Ch. D. 57; 54 L. J., Ch. 1154; 53 L. T. 306; 33 W. R. 803—C. A. See also *Roe v. Mutual Loan Fund Association*, 19 Q. B. D. 347; 56 L. J., Q. B. 541; 35 W. R. 723—C. A.

Same matter in Issue—Forgery of Will—Revocation of Probate.]—In an action in the Probate Division, T. and G. propounded an earlier, and P. a later will. The action was compromised, and by consent verdict and judgment were taken for establishing the earlier will. Subsequently P. discovered that the earlier will was a forgery, and in an action in the Chancery Division, to which T. and G. were parties, obtained a verdict of a jury to that effect, and judgment that the compromise should be set aside. In another action in the Probate Division for revocation of the probate of the earlier will:—Held, that T. and G. were estopped from denying the forgery. *Priestman v. Thomas*, 9 P. D. 210; 53 L. J., P. 109; 51 L. T. 843; 32 W. R. 842—C. A.

Decision not necessary.]—A native of Chili made his will in London and died. A caveat having been entered on behalf of his daughter, the executors propounded the will in solemn form, alleging that the testator was domiciled in England. The daughter pleaded that the deceased was at the date of the will and until his death domiciled in Chili, and that the will was not duly executed according to the law of Chili. Upon this plea (*inter alia*) the executors took issue. The judge of the Probate Court made a decree by which he pronounced for the validity of the will, found that the deceased was at the date of the will and at his death a domiciled Englishman, and decreed probate to the executors. The daughter afterwards filed a bill against the executors, alleging that the testator was a domiciled Chilean, that his will being executed in England according to English law was good by the law of Chili, but so far only as the testator could by the law of Chili dispose by will of one-fourth of his personal estate, and that the other three-fourths belonged to the daughter. The executors by answer set up the decree of the Probate Court as a bar. An order having been made for inquiry as to the testator's domicile, in an administration suit under circumstances (which it was contended) made it equivalent to an order in the suit by the daughter against the executors, the question whether the order was right was litigated between the daughter and the residuary legatee:—Held, that the decree of the Probate Court was not conclusive in rem as to the domicile, because the finding as to the domicile was not necessary to the decree:—Held, also,

that for the same reason the decree of the Probate Court was not conclusive *inter partes* as to the domicile, as between the daughter and the residuary legatee, for the executors could not, by litigating in the probate suit a question of domicile which it was not necessary to decide for the purposes of that suit, conclude the residuary legatee as to the testator's power of disposing of his property, and that as the residuary legatee was not bound, the daughter could not be bound, since estoppel must be mutual. *Concha v. Concha*, 11 App. Cas. 541; 56 L. J., Ch. 257; 55 L. T. 522; 35 W. R. 477—H. L. (E.)

Action for Rectification of Agreement already construed by Court.]—C. built a ship for B., and a considerable sum remained due to them, for which they had a lien on the ship. M. had made advances to B. An agreement was made between the three parties for sale of the ship by C., and for the distribution of the proceeds. The agreement was very obscure, and left it doubtful in what order the claims of C. and of M. were to be paid. After the sale M. sued C. for an account of the proceeds, and judgment was given in the court of the County Palatine for carrying into execution the trusts of the agreement, and for the requisite account. On taking the account before the Registrar, C. claimed to be allowed his debt, but the registrar held that M. had priority. The proceeds were amply sufficient to pay M.'s claim, but not C.'s also. The Vice-Chancellor affirmed the view of the registrar, and made an order for C. to pay M.'s claim. C. appealed, but the appeal was dismissed, and the money was paid to M. After this C. brought an action to rectify the agreement by making it provide that C.'s claim should have priority over that of M. M. pleaded that the agreement having been executed, and the money paid under the order of the Palatine Court, C. was not entitled to any relief:—Held, on appeal, that the action must be dismissed, for that although the question of rectification not having been before the Palatine Court, there was no *res judicata*, C. could not come to have the agreement rectified after it had been worked out, and the fund distributed, under the order of the court in the Palatine action. *Caird v. Moss*, 33 Ch. D. 22; 55 L. J., Ch. 854; 55 L. T. 453; 35 W. R. 52; 5 Asp. M. C. 565—C. A.

Proof that Actions are the same—Pleadings.]—In order to raise the defence of *res judicata* it is not necessary to set forth in detail in the defence the pleadings in the other action the judgment in which is said to operate as *res judicata*, but, in order to judge whether the same questions were at issue in the first action as in the second, the court will look at the pleadings in the first action, though they were not set forth in the defence in the second action. *Houstoun v. Sligo (Marquis)*, 29 Ch. D. 448; 52 L. T. 96—Pearson, J.

Judgment in first Action when Obtained.]—Whether a judgment obtained in one action before the trial of another can operate by way of estoppel as *res judicata*, unless the judgment was obtained before the issue of the writ in the second action, *quære*. *Id.*

Judgment against Agent set aside—Action

against Principal.]—The plaintiff had supplied goods on K.'s order, to a theatre, and had obtained judgment against K. for the price. Whilst the judgment was still standing the plaintiff commenced an action against the lessee of the theatre for the price of the same goods. The lessee objected that the matter was res judicata. The judgment against K. was set aside before the hearing of an appeal to the Divisional Court:—Held, that as the judgment had been set aside, the action was rightly brought against the lessee. *Partington v. Hawthorne*, 52 J. P. 807—D.

2. AGAINST WHAT PARTIES.

Privity between Incumbent of Benefice and Patron.]—An incumbent who comes into a benefice is a privity in law to the patron who appointed him, so as to be entitled to the benefit, and subject to the burden, of the same estopped as the patron. R., the incumbent of a living, sent in his resignation of the benefice to the bishop, on the understanding that the resignation was not to be formally accepted, nor the benefice declared vacant, until a date agreed upon between himself and the bishop. Before that date arrived R. withdrew his resignation, but the bishop refused to accept the withdrawal, and at the time agreed upon declared the benefice vacant, after which the patrons appointed another incumbent, who was duly instituted and inducted into the benefice. R. brought an action against the bishop to have his resignation declared null and void. To this action the patrons of the living were parties, and the sole question was whether the resignation was effectual, and it was decided against R. that the resignation was effectual and complete. R. refused to give up the parsonage-house and glebe lands, and in an action brought against him by the new incumbent, for an injunction to restrain him from continuing in wrongful possession of the premises and for trespass, R. set up, substantially, the same defence as in the former action, namely, that his resignation was not effectual:—Held, that, as the question of the effectuality of the resignation was raised and disposed of in the former action to which the patrons were parties, and as R. would have been estopped from raising that question again in any proceedings between himself and the patrons, he was also estopped from raising the same question as a defence against the incumbent, who, as being a privity in law to the patrons, was entitled to take advantage of the same estoppel. *Magrath v. Reichel*, 57 L. T. 850—D.

Partners — Judgment against One — Action against other Partners barred.]—An unsatisfied judgment against one joint contractor on a bill of exchange, given by him alone for the joint debt, is a bar to an action against the other joint contractor on the original contract. The plaintiffs sold goods to a partnership consisting of the defendant and W. After the sale the partnership was dissolved. The plaintiffs, who were not aware of the dissolution, drew bills for the price of the goods, which were accepted by W. in the partnership name. The plaintiffs sued W. in the partnership name on the bills, and recovered judgment, which was not satisfied. The plaintiffs afterwards sued the defendant for the price

of the goods:—Held, that the case was within the principle of *Kendall v. Hamilton* (4 App. Cas. 504), and the judgment against W. on the bills was an answer to the action. *Drahe v. Mitchell* (3 East, 251), distinguished. *Cambefort v. Chapman*, 19 Q. B. D. 229; 56 L. J., Q. B. 639; 57 L. T. 625; 35 W. R. 838; 51 J. P. 455—D.

— Proof against Estate of One—Action against other Partner.]—Although by the law as settled by *King v. Hoare* (13 Mee. & W. 494) and affirmed by *Kendall v. Harrison* (4 App. Cas. 504), a judgment obtained against one or more of the members of a firm or co-contractors precludes recourse to any other person not joined in the action, an exception to that rule has been long established in courts of equity—namely, that a surviving partner, or the estate of a deceased partner, is still liable to creditors of the partnership. *Hodgson, In re, Beckett v. Ramsdale*, 31 Ch. D. 177; 55 L. J., Ch. 241; 54 L. T. 222; 34 W. R. 127—C. A.

Executors of Executrix de son tort.]—J. being indebted to the plaintiff in the sum of 360*l.*, died on November 2, 1882, intestate. His widow, A., without obtaining letters of administration inter-meddled with his assets, and the plaintiff having sued her as executrix of her husband for the sum of 360*l.*, she consented to judgment, and the plaintiff thereupon signed judgment against her as executrix for his debt and costs. After her death he brought an action against her executors to recover 372*l.* 5*s.*, suggesting a devastavit by A. of her husband's assets:—Held, that the judgment against A. was conclusive as against her to show that she then had assets of J. to satisfy the amount of the debt, viz. 372*l.* 5*s.*, and that to the extent of the difference between that amount and the sum of 154*l.*, found by the jury to be remaining at her death, a devastavit must be presumed to have been committed by her, for which her assets in the hands of the defendants were liable. *Ennis v. Rockford*, 14 L. R., Ir. 285—Q. B. D.

3. IN WHAT CASES.

Distinct Causes of Action—Same wrongful Act.]—Damage to goods, and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and therefore the recovery in an action for compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person. The plaintiff brought an action in a county court for damage to his cab occasioned by the negligence of the defendant's servant, and, having recovered the amount claimed, afterwards brought an action in the High Court of Justice against the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence:—Held, by Brett, M.R., and Bowen, L.J. (Lord Coleridge, C.J., dissenting), that the action in the High Court was maintainable, and was not barred by the previous proceedings in the county court. *Brunsdon v. Humphrey*, 14 Q. B. D. 141; 53 L. J., Q. B. 476; 51 L. T. 529; 32 W. R. 944; 49 J. P. 4—C. A.

A ship, A., and her cargo, belonged to the same owners, and the plaintiffs advanced 1000*l.* as a

loan to such owners, and received as security, in conformity with the agreement made between them and the borrowers, the bill of lading, on which the master indorsed a receipt for 1000*l.* as advanced freight, and also a policy of insurance on advanced freight. Ship A. was lost through a collision with the defendant's vessel, whose negligence was admitted. It was proved that the difference between the value of the cargo at the port of destination and at the port of loading would have considerably exceeded 1,000*l.* In an action by the holders of a bill of lading for 1,000*l.* against the defendant's ship:—Held, that the plaintiffs were entitled to recover the sum, and that the fact that a sum in respect of disbursements for ship A. on her voyage, and wages paid in advance had been awarded to the owners of the A. by the registrar and merchants was no bar to the plaintiff's right to recover in this action. *The Thyatira*, 8 P. D. 155; 52 L. J., P. 85; 49 L. T. 406; 32 W. R. 276; 5 Asp. M. C. 147—Hannen, P.

Separate Actions for Injuries to part of same Consignment of Goods.]—In September, 1883, the plaintiffs (a firm of millers) delivered to the defendant railway company a quantity of flour to be carried on the railway, nine sacks being consigned to D., and the remainder being consigned to the plaintiffs themselves. Some of the flour, comprising one of the sacks received by the plaintiffs and the greater portion of that delivered to D., was damaged in the carriage. D. used up two and a half sacks of the injured flour, and then he returned five sacks to the plaintiffs and claimed damages for the two and a half sacks which he had used. The plaintiffs notified to the defendants the damage sustained, and proceeded to recover damages for the injury to six sacks of the flour, but did not claim in respect of the two and a half sacks used up by D., and they obtained decree against the defendants on the 31st October, 1883. D., on the 17th December, 1883, issued a civil bill against the plaintiffs for the damage to the two and a half sacks, and obtained a decree against them on the 17th April, 1884, which was affirmed on appeal, and the amount was paid by the plaintiffs to D. The defendant railway company were served by the present plaintiffs with notice of D.'s civil bill and the appeal from the decree, and invited to attend on the hearing. The plaintiffs afterwards sued the defendant railway company by civil bill to recover the amount which they had been obliged to pay to D. for damages and costs under the decree of 19th April, 1884:—Held, that the injury to the two and a half sacks being an integral part of the cause of action arising from the defendant's negligence in the carriage of flour and for which the plaintiffs sued in the first process, the second action was not maintainable. *Russell v. Waterford and Limerick Railway*, 16 L. R., Ir. 314—Ex. D.

Former Cause between same Parties.]—To a petition by a wife against her husband for restitution of conjugal rights, the respondent, by his answer and cross-petition for a divorce, pleaded cruelty on the part of the petitioner.—Reply, that previously to the filing of the present petition the now petitioner filed a petition for a divorce on the ground of cruelty, and the now respondent filed his answer preferring charges of cruelty against the petitioner ex-

tending over the same period mentioned in his present answer, and prayed for a divorce; that the charge of cruelty in his former answer was the same as the charge alleged in the present answer and petition; that the former case was set down to be heard before the judge and a jury, and the issues were, first, whether the respondent was guilty of cruelty; secondly, whether the petitioner was guilty of cruelty; that the said issues were tried, and the respondent gave in evidence the several allegations of cruelty set forth in the present answer and cross-petition; and that thereupon the claim of the now respondent to a divorce *a mensa et thoro* was refused; and further, that after the evidence was so given, the judge asked the respondent's counsel whether they required to have any question left to the jury on the second issue, and the counsel replied that they did not, and abandoned the claim on the former cross-petition, and the jury were thereupon discharged from finding on the second issue; and that the respondent was estopped and concluded by the proceedings had in the former suit, and by the said issue, and by acts and admissions of his counsel at the trial:—Held, on demurrer, that the reply was bad, the facts stated by it not amounting to an estoppel on the respondent. *Carnegie v. Carnegie*, 17 L. R., Ir. 430—Mat. Affirmed in C. A.

Dismissal for want of Prosecution—Consent Order.]—An order by consent, in the absence of an agreement to compromise the cause of action, to dismiss an action for want of prosecution, is no bar to the institution of a fresh action. In this respect the practice of the old court of Chancery remains unchanged. *Magnus v. National Bank of Scotland*, 57 L. J., Ch. 902; 58 L. T. 617; 36 W. R. 602—Kay, J.

The plaintiffs in an action, wherein the same parties were respectively plaintiffs and defendants, and the same relief was sought as in the present action, had paid the defendants' costs and consented to an order, made on summons taken out by the defendants, dismissing the action for want of prosecution. The plaintiffs subsequently brought the present action, whereupon the defendants moved that the question of law might first be tried whether the plaintiffs were not estopped from bringing the present action by reason of the consent order made in the previous action:—Held, that the motion must be dismissed. *Id.*

Prohibition in previous Action.]—The plaintiff's solicitor, who carried on business within the jurisdiction of the Mayor's Court, wrote to the defendant demanding payment of 7*l.* 6*s.* 6*d.* for goods sold and delivered. The defendant wrote to the plaintiff's solicitor (which he received within the jurisdiction) admitting that he owed to the plaintiff 5*l.* 6*s.* 6*d.* The plaintiff brought an action in the Mayor's Court for 7*l.* 6*s.* 6*d.*, and the defendant obtained a writ of prohibition staying proceeding therein, as the contract was entered into and the plaintiff and defendant resided out of the jurisdiction. The plaintiff then commenced a second action to recover 5*l.* 6*s.* 6*d.* on an account stated, and the defendant obtained a second writ of prohibition:—Held, that the prohibition in the first action was not an estoppel against bringing the second action. *Grundy v. Townsend*, 36 W. R. 531—C. A.

Fresh Action on Fresh Evidence.—The next of kin of a testator instituted a suit for administration with a will annexed, bearing date 1868, of which the sole executor and universal legatee was the testator's wife, who predeceased him. The opposition parties claiming to be legatees set up the contents of a later will, alleged to have been executed in 1877 or 1878, but which could not be found. The Court of Appeal, reversing the judgment of the Probate Division, decided that there was not sufficient evidence of the contents of the second will, and their decision was affirmed in the House of Lords. A fresh suit for probate of the second will was then commenced by the executor of the testator and residuary legatee of the will of 1877-78, who had been the confidential solicitor of the deceased, and who had acted as solicitor for the legatees all through the litigation. The suit was founded upon fresh evidence of the contents and execution of the second will:—Held, that although the plaintiff had been privy to the prior action, an application to stay the proceedings generally could not be granted, but that the proceedings ought to be stayed until the costs of the plaintiffs in the prior action had been paid. *Peters v. Tilly*, 11 P. D. 145; 55 L. J., P. 75; 35 W. R. 183—Butt, J.

Where a petition for the re-transfer of stock has been heard on the merits, and is dismissed on the ground that the petitioner has failed to make out his title, he cannot on the subsequent discovery of fresh evidence to support it, present a fresh petition for the same object without the leave of the court previously obtained. *May, In re, House, Ex parte*, 28 Ch. D. 518; 54 L. J., Ch. 338; 52 L. T. 79; 33 W. R. 917—C. A.

Second Action for same Cause—Prayer for "further or other Relief."—In March, 1881, the plaintiff handed to one Bird, a broker, shares in a mining company, with a transfer signed (a blank being left for the name of the transferee), for the purpose of sale. Bird died; and it was then discovered that he had, without the knowledge or authority of the plaintiff, lodged the shares with the defendant's firm as security for an advance. Having received notice from the company that they were about to register the shares in the name of the defendant, the plaintiff commenced an action in the Chancery Division of the High Court to restrain the defendant's firm and the company from parting with the shares, or registering the defendant as transferee—concluding with the usual prayer for "such further or other relief as the nature of the case might require." On the 23rd of February, 1882, the defendants in that action consented to an order for the delivery up of the shares to the plaintiff forthwith. The order directed that, "upon delivery of the deed or form of transfer, and the securities representing the same, and upon payment of costs to the plaintiff and the mining company, all proceedings in the said Chancery action should be stayed." The shares were not delivered up to the plaintiff until the 28th of April, 1882, when they were sold at a considerable loss. In an action against the defendant in the Queen's Bench Division to recover damages for this detention, the jury found that the plaintiff did not authorize Bird to pledge the shares for his own debt, or lend them to him for that purpose:—Held, that the plaintiff was estopped by the consent order made in the Chan-

cery action on the 23rd of February, 1882, from recovering in this action damages for such detention, and that the defendant was not responsible for the detention of the shares by the mining company after the order had been made in the suit in the Chancery Division. *Serrao v. Noel*, 15 Q. B. D. 549—C. A.

Same Facts—Two Offences.—On 5th March B. was charged under 1 & 2 Will. 4, c. 32, s. 30, with trespass in pursuit of game, but acquitted for want of corroboration of a witness. On 14th May, B. was charged under s. 23 with unlawfully using a dog for taking game, he having no licence. The facts were precisely the same, but on the second occasion the witness was corroborated and the justices were satisfied, but B. was discharged on the ground of *res judicata*:—Held, that the justices were wrong, and that there was no *res judicata* as the offences were not inconsistent. *Bollard v. Spring*, 51 J. P. 501—D.

Application technically Different.—Where a divisional court has decided against an applicant on one application, a divisional court consisting of other judges will not overrule or review that decision on a second application by him, which though technically different from the first, raises the identical point again. *Reg. v. Eardley*, 49 J. P. 551—D.

Same Charge.—L. was charged with night-poaching under 9 Geo. 4, c. 69, and, in course of cross-examination of prosecutor's witnesses, the justices considered he had been illegally arrested, and discharged him. L. was again summoned for the same offence, on the same facts, when the justices held that they had no jurisdiction, as the former discharge was *res judicata*:—Held, that the justices were right. *Reg. v. Brackenridge*, 48 J. P. 223—D.

Counterclaim in County Court—Action in High Court.—Where in an action in a county court a defendant has relied upon a cause of action by way of counterclaim, upon which he has obtained a verdict for an amount beyond the jurisdiction of the county court, and judgment has been entered for the defendant, but no relief has been given in respect of the balance in excess of the plaintiff's claim, the defendant is not estopped from afterwards bringing an action in the High Court upon the same cause of action. *Webster v. Armstrong*, 54 L. J., Q. B. 236; 1 C. & E. 471—Mathew, J.

The defendant in the High Court is estopped by the verdict and judgment of the county court from denying the cause of action of the plaintiff in the High Court, and the only question to be decided in the High Court is the amount of damages. *Id.* See 47 & 48 Vict. c. 61, s. 18.

II. BY DEED.

Inconsistent with Document.—No estoppel can be raised on a document inconsistent with the document itself. *Colonial Bank v. Hepworth*, 36 Ch. D. 36; 56 L. J., Ch. 1089; 57 L. T. 148; 36 W. R. 259—Chitty, J.

Forgery—One Joint Holder estopped—Right of other to Sue.—One of two executors, at

various periods, some of which were more than six years before the commencement of the action, forged his co-executor's signature to transfers of stock, which were duly registered. He applied the proceeds of the transfers to his own purposes, but continued to pay the amounts of the dividends to the persons entitled. The other executor, on discovery of the fraud, informed the railway company that the transfers were invalid, and demanded that the stock should be registered in the names of herself and another who had been appointed trustees of the will. The railway company declined to accede to this request, and the present action was brought that the company might be ordered to register the plaintiffs as owners of the stock:—Held, that though the fraudulent executor was estopped by his own action from denying the validity of the transfers, such estoppel did not affect his innocent co-executor; and that the innocent executor had in equity a sufficient interest in the stock to enable her to sue her fraudulent co-executor and the railway company. *Barton v. North Staffordshire Railway*, 38 Ch. D. 458; 57 L. J., Ch. 800; 58 L. T. 549; 36 W. R. 754—Kay, J.

Validity of Issue of Debentures—Right of other Holders.—The secretary of a company, by direction of the directors, caused debentures payable to bearer to be prepared, sealed and stamped. They were then placed in a box that was kept at the company's London office, which was also the office of T., one of the directors. Some of the debentures were delivered to an agent, N., with instructions to issue them to the public. After the commencement of the winding-up of the company, N., who had been unable to issue the debentures, returned them to T., who, previously to the commencement of the winding-up, had made large advances to the company. T. gave some of the debentures to R. and Co., his creditors (in satisfaction of their claims), and they took them, supposing that they had been regularly issued to T.:—Held, that the holders of valid debentures were not estopped from disputing the validity of those held by R. and Co. *Mowatt v. Castle Steel and Iron Works Company*, 34 Ch. D. 58; 55 L. T. 645—C. A.

Patentee disputing Validity of Patent.—H., in 1873, took out a patent for improvements in bobbin-net and twist-lace machines; in his specification he claimed, not only the whole combination, but also three subordinate combinations. In 1877 H. became bankrupt, and his trustee assigned the patent to C. In 1880 H. took out another patent for improvements in bobbin netting and twist lace, and shortly afterwards entered into partnership with S. C. brought an action against H. & S. for infringing his patent. H. & S. delivered a defence containing a denial of the infringement, and of the validity of C.'s patent. C., by his reply, stated that H. & S. were estopped from denying the validity of his patent. H. & S. obtained leave to sever in their defence and to deliver particulars of objections, without prejudice to any question at the trial as to their being estopped from objecting to the validity of C.'s patent. The court having decided that C.'s patent was bad, on the ground that the original patentee had claimed, not only for the whole combination, but also for three subordinate combinations, one of which was not novel, allowed the appeal of

S., who had taken that objection to the patent:—Held, as to H., that he was not estopped from disputing the validity of the patent granted to himself and assigned by his trustee in bankruptcy. *Smith v. Cropper*, 13 App. Cas. 249; 55 L. J., Ch. 12; 53 L. T. 330; 33 W. R. 753—H. L. (E.).

Deposit Note of Society given by Directors.—The directors of an unincorporated building society which had no borrowing powers borrowed money for the benefit of the society and gave to the lender as security the promissory notes of the directors. The society was afterwards incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), and acquired borrowing powers. The appellant, who was the representative of the lender, applied to the society for repayment of the loan, but ultimately agreed to refrain from legal proceedings against the society on the directors giving him a deposit note for the amount due. The directors accordingly gave him a deposit note under the seal of the society, stating that the money was lent by the appellant on the date of the deposit note, and he thereupon gave up to them the promissory notes above mentioned:—Held, that the deposit note was not binding on the society. *Sheffield Building Society, In re, Watson, Ex parte*, 21 Q. B. D. 301; 57 L. J., Q. B. 609; 59 L. T. 401; 36 W. R. 829; 52 J. P. 742—D.

Release of Legacies—Other Property falling in.—A testatrix by her will bequeathed 4,000*l.* upon trust for investment for her niece for life, and in case the niece should die without issue, the testatrix directed that the sum should fall into her residuary estate. She also bequeathed several other pecuniary legacies, and the will contained also a residuary bequest. The estate proved insufficient to pay the pecuniary legacies in full, and the pecuniary legatees (including the niece) executed a deed of release to which the residuary legatees were not parties, by which they acknowledged the receipt of dividends upon the legacies in discharge of the amounts of the several legacies, and released the executors and also the estate of the testatrix from all further claims and demands. The niece afterwards died without issue, and the sum which thus fell into the estate was sufficient to pay the balances on the pecuniary legacies in full. The legacy of 4,000*l.* was fully recited in the deed of release:—Held, that as the release could not have been intended to enure for the benefit of the residuary legatees, the pecuniary legatees were not estopped by the release from claiming to have the balances of their legacies made up out of the fund that had thus fallen in. *Ghost's Trusts, In re*, 49 L. T. 588—Kay, J.

Lease—Rent—Mutuality.—The estoppel which enables a landlord who is mortgagee without the legal estate to sue for rent, is mutual, and renders him liable on the covenants in the lease. *Hartcup v. Bell*, 1 C. & E. 19—Manisty, J.

Recitals in Settlement.—A marriage settlement contained a recital that B. was "seised of or otherwise well entitled to" certain messuages, the whole deed showing the meaning to be that B. was entitled in one shape or other to the fee simple of all the property therein conveyed:—

Held, a sufficient estoppel as to the part of the property in which at the date of the settlement B. had no interest whatever, but as to which her interest accrued subsequently. *Horton, In re, Horton v. Perks*, 51 L. T. 420—Kay, J.

III. BY MATTER IN PAIS.

Action against Owner by Estoppel and Real Owner.]—Goods had been supplied to the M. Mansions upon the order of the housekeeper. The vendor sued the owner and the secretary for payment. The secretary had previously paid for goods supplied by the plaintiffs by cheques, signed "M. Mansions account."—Held, that the doctrine of *Scarf v. Jardine* (7 App. Cas. 345) applied, and that the plaintiff could not sue the secretary, whose liability depended only on estoppel, at the same time as the real owner. *Jones v. Ashwin*, 1 C. & E. 159—Cave, J.

Sale by Apparent Owner—Attempt to oust Purchaser.]—If a person, being sole next of kin, is in possession of a chattel term without letters of administration having been obtained, and there are no debts due by the deceased, or anything to prevent such next of kin from using the term as his own, then he, the beneficial owner, can sell the term; and if the purchaser goes into possession under the contract of sale, the vendor cannot afterwards, either by obtaining a grant of administration, or in any other way, disaffirm his own act, and annul the contract. *Hamill v. Murphy*, 12 L. R., Ir. 400—Ex. D.

Jus tertii—Execution Debtor—Claimant in Interpleader.]—A mere estoppel, which precludes the execution debtor from denying the title of the claimant in an interpleader proceeding, confers no title upon the claimant as against the execution creditor. *Richards v. Johnson* (28 L. J., Ex. 322), followed. *Richards v. Jenkins*, 18 Q. B. D. 451; 56 L. J., Q. B. 293; 56 L. T. 591; 35 W. R. 355—C. A.

Principal and Agent—Set off.]—Whether the doctrine that on a contract with an agent for an undisclosed principal, the buyer can set off against the principal a debt due from the agent, is founded on estoppel, *Quære*. *Cooke v. Eshelby*, 12 App. Cas. 271; 56 L. J., Q. B. 505; 56 L. T. 673; 35 W. R. 629—H. L. (E.)

Agreement by Manager of Company.]—C. proposed to H., the general manager of the M. & O. Bank, that the bank should advance him 8,000*l.*, to enable him to conclude a contract for the purchase of an unpaid vendor's interest in a colliery. H. had authority to make the advance. An agreement between C. and the bank, providing for the loan of the money by the bank, and the mortgage of the interest in the colliery to be purchased to the bank to secure repayment of the loan and charges, was prepared by a solicitor on H.'s instructions and signed by C. H. then declined to make the agreement without consulting the directors, and obtained C.'s signature to a document to the effect that the agreement was subject to the approval of the directors. On the same day, after a meeting of the directors, H. told C. that the directors approved, and that the bank would advance the money. The agreement was never signed by

anybody on the part of the bank. Subsequently H. told C. he ought to be more firmly bound to take the money from the bank, and induced him to sign a document to the effect that, in consideration of the bank's agreeing to carry out the arrangements mentioned in the agreement, he agreed to pay the bank charges named therein, whether the bank carried through the transaction or not. In fact, the directors did not approve of the agreement, and H. acted under an erroneous impression that they did. The bank refused to find the money, and C. was in consequence unable to complete his contract: Held, that the bank was estopped from denying such an agreement. *Manchester and Oldham Bank v. Cook*, 49 L. T. 674—Per A. L. Smith, J.

Postmaster-General—Authority of Clerk—Telegrams.]—Where a certain sum is charged for a telegram and the sender is afterwards called upon to pay an increased sum:—Held, that he is bound to pay the amount so claimed, as the Postmaster-General is in no way estopped from suing, and is not bound by inaccurate representations made by a clerk in his employ. *Postmaster-General v. Green*, 51 J. P. 582—D.

Bill of Sale treated as Valid—Declared to be Invalid.]—Where the grantor of a bill of sale which is afterwards found to be invalid has derived advantage from treating it as valid, he cannot set up its invalidity for the purpose of obtaining a further advantage. *Roe v. Mutual Loan Fund Association*, 19 Q. B. D. 347; 56 L. J., Q. B. 541; 35 W. R. 723—C. A. See also *Gandy v. Gandy*, 30 Ch. D. 57; 54 L. J. Ch. 1154; 53 L. T. 306; 33 W. R. 803—C. A.

Receipt of Money under Deed bars Repudiation of Execution.]—Where a deed of assignment by debtors to a trustee for the benefit of all creditors who should execute the deed was executed by the plaintiffs, who appended a note that they executed only in respect of certain claims scheduled to the deed and amounting to \$73,531, and it appeared that subsequently thereto they received a sum of money from the trustee by virtue of their execution of the deed:—Held, that the plaintiffs were bound, and that, as they had received payment under the deed, they could not be heard to repudiate it, and deny their execution. *Yarmouth Exchange Bank v. Blethen*, 10 App. Cas. 293; 54 L. J., P. C. 27; 53 L. T. 537; 33 W. R. 801—P. C.

Receipt of Dividend on Composition—Action for Balance.]—The plaintiffs, who were creditors of the defendant, a trader in insolvent circumstances, took an active part in procuring the acceptance of a scheme of composition of the defendant's affairs, and obtained proxies from the debtor's other creditors. At a meeting of the creditors the plaintiffs withdrew the proof of their debt against the estate of the defendant on the ground that, owing to a fraudulent statement on his part on an earlier occasion, they had been induced to forbear to press their claim against him. They, however, proposed a resolution that a composition of 1*l.* 3*d.* in the pound should be accepted in satisfaction of the debts due from the debtor, and by using the proxies held by them they carried the resolution. A dividend of 1*l.* 3*d.* in the pound was received by the plaintiffs on their proof. They subsequently brought their

action in the county court for the unpaid balance of their debt, and the county court judge gave a verdict and judgment for the amount claimed. The defendant obtained a rule nisi to set aside the verdict and judgment and for a new trial:—Held, on the argument of the rule, that the plaintiffs, having acted as they had done, had assented to the composition otherwise than by proving their debt and accepting a dividend on it, and that they could not maintain an action for the unpaid balance of their debt, and that judgment should be entered for the defendant. *Thorpe v. Dakin*, 52 L. T. 856—D.

Payment of Rent—Jus tertii.—Where a person claiming to be assignee of the reversion receives rent from the tenant by fraud or misrepresentation, such payment is no evidence of title; but where there is no fraud or misrepresentation, such payment is *prima facie* evidence of title, and the tenant can only defeat that title by showing that he paid the rent in ignorance of the true state of the title, and that some third person is the real assignee of the reversion, and entitled to maintain ejectment. *Carlton v. Bowcock*, 51 L. T. 659—Cave, J.

Certificate of Shares—Mandamus to compel Registration.—A prerogative writ of mandamus will not lie to compel a company to register as a holder of shares therein, a person to whom they have issued certificates in respect of such shares where the company have issued prior certificates in respect of such shares to some one else, without clear proof that the person to whom the last certificates were issued has a better title than the person to whom the earlier ones were issued, even though the person holding the earlier certificates has not been entered in the company's register as the holder of such shares. When such a writ is asked for the company are not estopped from relying on the actual facts of the case. *Reg. v. Charnwood Forest Railway*, 1 C. & E. 419—Denman, J. Affirmed in C. A. See also COMPANY, VI., 9.

Calls—Acting as Member of Company.—Where a member of a mutual insurance company, afterwards converted into a limited company, has vessels on its books as insured, and pays calls and otherwise acts as if he were a member of the company, he is, in any action brought against him by the limited company for calls on losses, estopped from denying his liability, and from setting up either any irregularity in the transfer from the one company to the other, or that the losses were paid without any stamped policies being entered into in contravention of 30 Vict. c. 23, s. 7. *Barrow Mutual Ship Insurance Company v. Ashburner*, 54 L. J., Q. B. 377; 54 L. T. 58; 5 Asp. M. C. 527—C. A.

Invalidly made—Liability of Director.—The articles of association of a company provided that the board of directors should consist of not less than three directors, but when a call was made there were only two directors remaining, one of whom was the defendant, who assisted in passing the resolutions for the call. In an action against the defendant for calls:—Held, that he by his conduct was estopped from disputing the validity of such resolutions, and was liable to pay the amount of the call. *Fuure Electric Accumu-*

lator Company v. Phillipart, 58 L. T. 525—Hawkins, J.

Issue of fully-paid Shares.—When a company issues shares to directors as fully paid-up shares, and afterwards endeavours to recover a call on such shares:—Held, that the company was prevented by estoppel from recovering the amount of such calls. *Christchurch Gas Co. v. Kelly*, 51 J. P. 374—Mathew, J.

Misrepresentation that Change of Company only Change of Name.—T., P., and D., three directors of a company, gave a joint guarantee to bankers to secure the balance which might be due at the closing of their account to the extent of 2,000*l.* In September, 1880, the company went into voluntary liquidation, and immediately re-commenced business under the same directors, but as a new company with the addition of the word "manufacturing" to their former title. The termination of the old company was not disclosed to the bankers, who continued their business with the company without intermission, merely putting the addition to the name on the cheques and in their books. P. died in December, 1880. In November, 1881, the new company was wound up, when it was indebted to the bankers, who commenced an action upon the guarantee for the amount due to them:—Held, that T. and D. by not having given notice to the plaintiffs upon the death of P., that they declined to be answerable for any other amount than that which was due at P.'s death, and by their concealment of the fact that a new company had been formed, and by the tenor of their conduct in carrying on the business as before, were estopped from denying their liability upon the guarantee, and were liable to the full amount thereby secured. *Ashby v. Day*, 54 L. T. 408; 34 W. R. 312—C. A. Affirming 54 L. J., Ch. 935—V. C. B.

Bill of Lading.—A company owned a line of steamers called "The Monarch Line," running between New York and London. A. was in the habit of shipping goods on steamers running on this line. A. shipped goods in a steamer at New York, and received a bill of lading made out in the ordinary form given by the company for goods shipped on their steamers, save that it had the words "extra steamer" added after the words "Monarch Line of Steamships." At London an overside release for the goods was signed and given by the company's agents to A., and the freight received by them from A.:—Held, in an action by A. against the company for non-delivery of the goods, that the company were estopped from saying that the contract of shipment was not made with them. *Herman v. Royal Exchange Shipping Company*, 1 C. & E. 413—Huddleston, B. Affirmed in C. A. See also cases sub tit. SHIPPING (BILL OF LADING).

Conduct of Patentee—Infringement.—In an action by P., a patentee for infringement against persons who had bought machines from B., it was proved that P. had asked the purchasers to try his machine, saying that it was a better machine than B.'s, but gave no intimation that he considered B.'s machine an infringement of his patent, though he admitted that at the time he did consider it to be so:—Held, that as the

purchasers did not depose that when they bought B.'s machines they were ignorant of P.'s patent, nor was there any reason to believe that they were ignorant of it, or that P. supposed them to be so; P. had not on the ground of estoppel, lost his right to sue them for an infringement in using B.'s machines, it not being the duty of a patentee to warn persons that what they are doing is an infringement, and P.'s conduct not amounting to a representation that it was not an infringement. *Proctor v. Bennis*, 36 Ch. D. 740; 57 L. J., Ch. 11; 57 L. T. 662; 36 W. R. 456—C. A.

Advice Notice—Negligence in issuing two Notes.]—The defendants, having received a consignment of wheat, sent to the consignees an advice note, which described the consignment as "sacks wheat, four trucks," and did not contain any details as to weight, rates or charges, but across the printed form was written, "account to follow." The consignees gave B. a delivery order in respect of this wheat, and he obtained an advance from the plaintiffs upon it; the plaintiffs sent this delivery order to the defendants, and they accepted it. On the following day the defendants sent to B. another advice note on a printed form similar to the one already sent, but across the upper part was written the words, "charges only;" the invoice number was different; the consignment was described as 151 sacks of wheat; the weight, the rate, and the amount of charges were filled in. B. filled up the delivery order at the bottom in favour of the plaintiffs, produced it to them, and obtained a second advance from them, as they believed it to relate to a second parcel of wheat. The plaintiffs delivered this order to the defendants, who accepted it, and who allowed the plaintiffs on both occasions to take samples of the wheat. There was, in fact, only one parcel of wheat, and the two advice notes related to the same parcel. B. went into liquidation, and the plaintiffs, having lost the amount of one of the advances so made by them, sued the defendants for the amount:—Held, that the plaintiffs were entitled to recover the amount claimed, for that the defendants had so dealt with the wheat and advice notes as to lead the plaintiffs to believe that there were in fact two consignments of wheat, and that they were in consequence estopped from afterwards alleging that there was in fact but one consignment of wheat. *Coventry v. Great Eastern Railway*, 11 Q. B. D. 776; 52 L. J., Q. B. 694; 49 L. T. 641—C. A.

Negligent Representation of Wharfinger.]—Goods were in 1875 stored by brokers with wharfingers, who issued a warrant for the same. In 1885 the servants of the defendant, who had taken over the wharf and business, delivered the goods by mistake to certain persons instead of goods to which they were entitled, and the defendant was not made aware of the mistake. The warrant had been negotiated, and was in January, 1886, in the possession of B. and E. In that month, no rent having been paid for the goods since 1880, the defendant wrote two letters to the plaintiff, who had previously taken over the business of the brokers and carried it on under their name, informing him, as the supposed holder of the warrant, and as the person presumed interested

in the goods, that the goods were in hand, that rent was due, and that, unless it was paid, the goods would be sold to cover the amount due. The plaintiff made no reply, but afterwards, and in consequence of receiving these letters, he bought the warrant from B. and E. and applied to the defendant for the goods, when the defendant first discovered that they were no longer in his possession. In an action to recover damages for a wrongful conversion of the goods:—Held, that the defendant was liable, being estopped from denying that he had the goods specified in the warrant, because he had by his negligent misrepresentation led the plaintiff to believe that the goods were in his possession, and such misrepresentation was the cause of the plaintiff's loss, the plaintiff having purchased the warrant in consequence of the same. *Seton v. Lafone*, 19 Q. B. D. 68; 56 L. J., Q. B. 415; 57 L. T. 547; 35 W. R. 749—C. A.

Negligence of Mortgagee.]—The plaintiff, mortgagee of a policy of life insurance, handed it to the mortgagor for a particular purpose. On the plaintiff demanding it back from time to time, the mortgagor made excuses for not doing so; and the plaintiff then forgot that it had not been returned. Afterwards the mortgagor deposited the policy with the defendants to secure an advance. The plaintiff gave notice of his interest to the insurance company before the defendants:—Held, that the plaintiff was entitled to the policy as against the defendants, and that the conduct of the plaintiff had not been such as to estop him from asserting his claim against the defendants. *Hall v. West End Advance Company*, 1 C. & E. 161—Williams, J.

Proximate Cause of Loss.]—A company incorporated under a charter granted by Charles II. were possessed of a common seal, and also of a certain amount of stock which stood in their names in the books of the defendants. The seal was entrusted to the custody of their clerk, in whom implicit confidence was placed, and who managed the affairs of the company without being subject to any control or supervision. The clerk affixed the seal of the company in the presence of two witnesses, who were not corporators, to two powers of attorney for the transfer of the stock belonging to the company. These transfers were lodged with the defendants, who in due course paid over to the clerk the proceeds of the sale of the stock. The clerk was subsequently tried and convicted of fraud in affixing the seal to the transfers without the authority of the company, and of appropriating the proceeds of the sale of the stock to his own use. In an action for a declaration that the company were entitled to have the stock stand in their names in the defendants' books, and that they might be ordered to replace the stock in the plaintiffs' names:—Held, upon the authority of *Bank of Ireland v. Trustees of Evans' Charities* (5 H. L. Cas. 389), that even assuming the company were negligent in entrusting the seal to the custody of their clerk, the negligence necessary to entitle the defendants to insist that the transfers were invalid must be negligence in or immediately connected with the transfers themselves, and that, inasmuch as the forgery committed by the clerk, and not the negligence of the company in entrusting him with the seal, was the proximate cause of the

loss, the defendants were liable to replace the stock. *Merchants of the Staple v. Bank of England*, 21 Q. B. D. 160; 57 L. J., Q. B. 418; 36 W. R. 880; 52 J. P. 580—C. A.

Notice to Treat—Validity.]—The Commissioners of Sewers, acting under the powers of 57 Geo. 3, c. 29, gave the plaintiff notice to treat for the purchase of his property for the purpose of widening a street. The whole of the property was not required for that purpose, and it appeared that the improvement contemplated was rather lowering the level of, than widening the street. The plaintiff negotiated with the commissioners during eight months on the basis of the notice, and endeavoured to obtain from them as large a price as he could for the property. On his failing to obtain so large a price as he desired he brought an action for an injunction to restrain the commissioners from proceeding on the notice to treat. On motion for an injunction:—Held, the plaintiff during the negotiations had not such knowledge that the commissioners did not bona fide want his houses for purposes within their compulsory powers as to preclude him now from objecting to their taking the houses. *Lynch v. Commissioners of Sewers*, 32 Ch. D. 72; 55 L. J., Ch. 409; 54 L. T. 699; 50 J. P. 548—C. A. Reversing 34 W. R. 226—Kay, J.

EVIDENCE.

I. JUDICIAL NOTICE, 742.

II. PRESUMPTIONS, 742.

III. ADMISSIONS, 743.

IV. DECLARATIONS AND FAMILY TRADITION, 743.

V. ENTRIES, 745.

VI. DOCUMENTS.

1. *Judicial Proceedings*, 746.
2. *Maps*, 747.
3. *Registers*, 747.
4. *Wills*, 748.
5. *Minute Books*, 748.
6. *Reports—Public Body*, 749.
7. *Bankers' Books*, 749.
8. *Letters*, 750.
9. *Proof—Secondary Evidence*, 750.
10. *Parol Evidence—Admissibility*, 751.

VII. WITNESSES.

1. *Competency*, 754.
2. *Where Corroboration necessary*, 754.
3. *Practice—Privilege*, 754.

VIII. EXAMINATION OF WITNESSES UNDER COMMISSION.

1. *When Witness Abroad*, 757.
2. *When Witness within Jurisdiction*, 758.

IX. EVIDENCE ON AFFIDAVIT.

1. *Practice generally*, 761.
2. *Cross-Examination*, 763.

X. IN PARTICULAR CASES.

1. *In Bastardy Cases—See BASTARDY.*
2. *On Winding up of Companies—See COMPANY, XI., 12.*
3. *In Criminal Cases—See CRIMINAL LAW.*
4. *On Appeal—See APPEAL.*

XI. COSTS OF EVIDENCE—See COSTS.

I. JUDICIAL NOTICE.

Places on Admiralty Chart.]—A court should take judicial notice of the geographical positions of, and general names applied to, a district as shown on the Admiralty chart. *Birrell v. Dryer*, 9 App. Cas. 345; 51 L. T. 130; 5 Asp. M. C. 267—H. L. (Sc.)

II. PRESUMPTIONS.

Death—Person not heard of for Seven Years.]—If a person has not been heard of for seven years, there is a presumption of law that he is dead; but there is no presumption as to when, during the seven years, he died. The person upon whom it rests to prove, either that he was alive or dead at a particular time, must do so by distinct evidence. *Rhodes, In re, Rhodes v. Rhodes*, 36 Ch. D. 586; 56 L. J., Ch. 825; 57 L. T. 652—North, J.

A. R. was last heard of in 1873; but there was no evidence as to when he died. He died entitled to a sum of money, which had recently been paid to his administrator:—Held, that (in the absence of any evidence as to when he died) neither his next-of-kin in 1873, nor his next-of-kin in 1880, were entitled to have the money paid to them. *Id.*

Although there is no legal presumption as to the actual time of death, there is a presumption at law, when a party has been absent and not heard of for seven years, that he is dead. The plaintiffs having insured the life interest of one H. with the defendant insurance company for the better security of certain advances to H., and H. not having been seen or heard of for a period of over seven years:—Held, that H. must be taken to be dead, and that the plaintiffs were entitled to the amount of the life policy and bonuses. *Willyams v. Scottish Widows Fund*, 52 J. P. 471—Stephen, J.

Legitimacy of Children.]—The presumption in favour of the legitimacy of a child born in wedlock is not a presumption juris et de jure, but may be rebutted by evidence, which must be clear and conclusive and not merely resting on a balance of probabilities. *Bosville v. Attorney-General*, 12 P. D. 177; 56 L. J., P. 97; 57 L. T. 88; 36 W. R. 79—D.

Legal Origin for existing state of things.]—In the absence of evidence as to the origin of an existing state of things, an illegal origin is not to be presumed, if it might naturally have had a legal origin. *Croft v. Rickmansworth Highway Board*, 57 L. J., Ch. 589—Kekewich, J.

III. ADMISSIONS.

By Counsel—Proof of Facts dispensed with.]

—At the trial of an action counsel made an admission as to the law of Scotland, but the judge did not consider himself bound by that admission and received evidence upon the point: Held, that as the question of Scotch law was one of fact, proof of which like proof of other facts might be dispensed with by the admission of counsel, the judge was wrong in going into the matter. *Urquhart v. Butterfield*, 37 Ch. D. 357; 57 L. J., Ch. 521; 57 L. T. 780; 36 W. R. 376—C. A.

Between Co-defendants.]—Admissions between co-defendants under Ord. XXXII. r. 2, of the Rules of the Supreme Court, 1883, to which the plaintiff is not a party, cannot be entered as evidence against the plaintiff, and therefore cannot be included in an order for taxation and payment of the general costs of the action. *Dodds v. Tuke*, 25 Ch. D. 617; 53 L. J., Ch. 598; 50 L. T. 320; 32 W. R. 424—V.-C. B.

Of Mother as to Legitimacy of Child.]—When the legitimacy of a child born in wedlock is in question, previous statements of the mother that the child is a bastard are admissible as evidence of her conduct, though she would not be allowed to make such statements in the witness-box. *The Aylesford Peerage*, 11 App. Cas. 1—H. L. (E.).

By Agent—Letter from Captain to Owners.]

A letter from the master of a ship to her owners is admissible as evidence against them in regard to the facts therein stated; but the opinion of the master in such a letter is not evidence. *The Solway*, 10 P. D. 137; 54 L. J., P. 83; 53 L. T. 680; 34 W. R. 232; 5 Asp., M. C. 482—Hannen, P.

—Engineer's Log-book.]—The engineer's log-book kept on board a steamer is admissible as evidence against the shipowner. *The Earl of Dumfries*, 10 P. D. 31; 54 L. J., P. 7; 51 L. T. 906; 33 W. R. 568; 5 Asp., M. C. 342—Butt, J.

Previous Belief—Parliamentary Oaths Acts.]

—Statements and avowals of a defendant as to his belief in a Supreme Being, and as to whether an oath, as an oath, has any binding force upon his conscience, are admissible in the trial at bar of an action for penalties under the Parliamentary Oaths Act, 1866, even though such statements or avowals were made before he was elected a member of the parliament in which he sat and voted. *Attorney-General v. Bradlaugh*, 14 Q. B. D. 667; 54 L. J., Q. B. 205; 52 L. T. 589; 33 W. R. 673; 49 J. P. 500—C. A.

IV. DECLARATIONS AND FAMILY TRADITION.

Of Deceased Person — Legitimacy — Family Tradition.]—P. died intestate, and the Crown claimed his property on the ground that he was illegitimate. The evidence which was relied on to prove illegitimacy was (1) declarations made and letters written by P. whilst alive

asserting his own illegitimacy; (2) absence of proof that the man whom P.'s next-of-kin asserted to be P.'s legitimate father was alive at the date of P.'s conception; (3) family tradition and admissions by the next-of-kin now claiming the property:—Held, (1) that declarations made by a deceased person before his death as to his own illegitimacy were admissible in evidence; (2) that it lay on the claimant to prove that the man asserted by her to be the father of P. was alive at the date of P.'s conception, before it was necessary for the Crown to prove non-access by that man to P.'s mother at that date; and (3) that family tradition was admissible to corroborate P.'s declaration as to his own illegitimacy. *Perton, In re, Pearson v. Attorney-General*, 53 L. T. 707—Chitty, J.

Where the legitimacy of a child born in wedlock is in issue, previous statements by the mother that the child is a bastard are admissible as evidence of her conduct, although she could not be allowed to make such statements in the witness-box. *The Aylesford Peerage*, 11 App. Cas. 1—H. L. (E.).

Declarations by a reputed father contained in business letters written by one of his daughters in his name and under his dictation were admitted as evidence after his death of the date of their birth upon the question of their legitimacy. *Turner, In re, Glenister v. Harding*, 29 Ch. D. 985; 53 L. T. 528—Chitty, J.

— Only received in Questions of Pedigree.]

—The defendant to an action for goods sold, work done, and money paid, set up the defence of infancy. In support of this defence an affidavit made by his father, since deceased, in an administration suit, to which the plaintiff in this action was not a party, containing a statement by the father as to the place and date of the defendant's birth, was tendered and received in evidence:—Held, that such a declaration was only receivable in questions of pedigree, and that no such question was raised in this case, so that the case did not fall within that exception to the general rule as to the inadmissibility of hearsay evidence. *Haines v. Guthrie*, 13 Q. B. D. 818; 53 L. J., Q. B. 521; 51 L. T. 645; 33 W. R. 99; 48 J. P. 756—C. A.

A. and B. were married in 1806, and C., their daughter, was born in 1811. A. and B. were dead, and there was evidence that, after the birth of C., B. had stated that she had had a son, who was older than C., and had died before the birth of the latter. The Christian name of the son could not be ascertained, and there was no other evidence of his birth or death:—Held, that B.'s statements were admissible as a declaration by a deceased person on a question of pedigree, that the death of the son of A. and B., though his Christian name was unknown, might be presumed to have occurred between 1806 and 1811, and that a grant of administration should be made, describing him by his surname with his Christian name in blank. *Thompson, In goods of*, 12 P. D. 100; 56 L. J., P. 46; 57 L. T. 373; 35 W. R. 384—Hannen, P.

Family Reputation and Tradition.]—Where a witness deposed that she had received a letter from her niece A. relating the fact of the death of A.'s father (which was material to the issue in the case), and that the family repute founded on that letter was that A.'s father was dead:—

Held, that as family repute is only admissible in question of pedigree, the evidence should have been rejected. *Palmer v. Palmer*, 18 L. R., Ir. 192—C. A.

Deliberate statements made by deceased members of a family, who, if alive, could have been competent witnesses, are generally admissible, but a statement by one member of a family that B., another member, did a certain act, which act, if done at all, was done before the deceased's birth, and there being nothing to show what were his grounds of knowledge, and the fact not otherwise being proved, is not evidence that the particular act was done by any one; and though the statement cannot be altogether rejected, yet it can only be received as mere family tradition. *Lovat Peerage, The*, 10 App. Cas. 763—H. L. (Sc.).

Statements post litem motam.—When a person leaves his native place and goes to another place to pursue a claim to an estate situated there, and on his return tells certain persons what was said to him by persons connected with the family while so pursuing his inquiries; these statements are not admissible evidence. *Ib.*

Incompleteness of Declaration—Unsigned Documents.—In questions of pedigree, the circumstance that a document containing a relevant declaration by a deceased declarant is not complete for its primary purpose, does not affect the admissibility of the declaration. Thus, where the question was one as to the marriage of A. and B., both deceased, a declaration by A. that B. passed as his wife contained in a draft will in A.'s handwriting was held admissible, although such draft will was never executed by A. *Lambert, In re*, 56 L. J., Ch. 122; 56 L. T. 15—Chitty, J.

V. ENTRIES.

By Deceased Person—Course of Business—Postage.—Neither proof of an entry made by a deceased person in the ordinary course of business in a postage-book of a letter to be posted, nor proof of possession by the deceased person for the purpose of posting, is sufficient evidence of postage. *Rowlands v. De Vecchi*, 1 C. & E. 10—Day, J.

—Against Interest.—In order that an admission made by a dead man may be admissible in evidence on the ground that it was against his interest, it must have been actually against his interest at the time when it was made; it is not sufficient that it might possibly turn out afterwards to have been against his interest. An admission made by a bankrupt in his statement of affairs that a debt is due from him, is not after his death admissible evidence as against his assignee in bankruptcy of the existence of the debt, merely because it might turn out that there was a surplus after paying the creditors. *Edwards, Ex parte, Tollemache, In re*, 14 Q. B. D. 415—C. A.

An admission of a debt, contained in a bankrupt's statement of his affairs made after the commencement of bankruptcy proceedings, is not evidence as against his creditors of the existence of a debt, even though the statement was verified by his oath (without cross-examina-

tion), and he has since died. *Revell, Ex parte, Tollemache, In re*, 13 Q. B. D. 720; 54 L. J., Q. B. 89; 51 L. T. 376; 33 W. R. 288—C. A.

—Payment reviving Statute-barred Debt.—In 1884 a foreclosure action was brought by the representative of a mortgagee against the assignees of the equity of redemption of land mortgaged in 1863, and the equity of redemption in which was assigned to the defendants in July, 1878. The only evidence that interest had been paid since 1876 was an entry in the diary of the deceased mortgagee of 50% paid by the mortgagor for principal and interest. The date of the entry was September, 1878.—Held, by North, J., that as the entry would prove the revival of a debt then statute-barred, it was an entry in the interest of the mortgagee, and could not be received in evidence in favour of his representatives. Held, on appeal, that whether the entry was admissible or not, it was not sufficient to take the case out of the Statute of Limitations, because it was only evidence of a payment made by the mortgagor after he had parted with his equity of redemption. *Newbould v. Smith*, 33 Ch. D. 127; 55 L. J., Ch. 788; 55 L. T. 194; 34 W. R. 690—C. A. Affirmed, 87 L. T., Jour. 255—H. L. (E.).

Entries in Books—Evidence as against Third Parties.—H., who employed Messrs. P. as his solicitors, was in the habit of leaving moneys of his in their hands for investment for his benefit. In 1878 Messrs. P., who had lent money of their own to V. & E., an engineering firm, on a mortgage of certain works, repaid themselves 11,000*l.*, part of the debt, out of the moneys of H. in their hands, and in their books entered the transaction as a "loan" by H. to V. & E. of 11,000*l.* at 5 per cent., the interest being paid to him during his life by Messrs. P. Messrs. P. became bankrupt, and a summons was taken out by H.'s representative, that she became, under declarations of trust by Messrs. P., sub-mortgagee for 11,000*l.* and interest, of the works, or part owner to that extent, and for other relief. As evidence in support of the summons, the claimant relied on the above-mentioned entry in Messrs. P.'s books; on entries in a cash account furnished to her by them of half-yearly payments of interest on the 11,000*l.*; on a tabular statement of mortgages in the residuary account of H.'s estate, prepared by them for the purposes of legacy duty; and on a letter written by Messrs. P. to her containing a similar tabulated statement of mortgages forming part of H.'s estate.—Held, that although the entries she relied on were not evidence as against third parties such as the company, yet as against Messrs. P. they established a declaration of trust of a mortgage for 11,000*l.* and interest extending to all the works of V. & E. at the place mentioned at the date of the letter. *Vernon, Ewens, & Co., In re*, 32 Ch. D. 165; 54 L. T. 365; 34 W. R. 606—V.-C. B.

VI. DOCUMENTS.

1. JUDICIAL PROCEEDINGS.

Judgment, Proof of.—A judgment may be proved by the production of a duly certified copy of an entry in the entry-book of judgments

of the court in which the judgment was recovered. *Anderson, Ex parte, Tollemache, In re*, 14 Q. B. D. 606; 54 L. J., Q. B. 383; 52 L. T. 786—C. A.

Report of Judge—Irish Action.—A report made by an Irish judge to a divisional court in Ireland to be used on an application to set aside a verdict, is evidence in an English action between the same parties of what took place at the trial and what the judge decided. *Houstoun v. Sligo (Marquis)*, 29 Ch. D. 448—C. A.

Judgment — Shorthand Note.—An affidavit verifying the shorthand note of the judgment in the action pleaded as *res judicata* was also admitted. *Id.*

— **Shorthand Writer Dead.**—It was proposed to read a shorthand note of proceedings in a prior probate suit, but the shorthand writer was dead. On an affidavit being produced by a person who had acted as proctor in that suit certifying to the correctness of the note, the court permitted it to be read. *De Mora v. Concha*, 29 Ch. D. 281—C. A.

— **Records Lost.**—The plaintiffs in an action to establish commonable rights over a piece of land in a certain parish, founded their claim upon an action of novel disseisin brought in 23 Hen. 3, the records in which were missing. It was submitted that the proceedings could be proved by (1) a note-book in the British Museum containing a note of the case, which was submitted as being a copy of the record; (2) a document forming part of the Cottonian MSS. in the British Museum, purporting to be a register of a priory interested in the action, containing an account of the action; and (3) a note of the action in an entry in the church-book of a parish, the parson of which was a defendant to the action, made 438 years after the date of the action:—Held, that (1) and (2) were not admissible, but that (3) was receivable in evidence *quantum valeat*, as an entry of an historical fact in which the parish was interested, it being probably taken from the record which might then have been in existence. *Bidder v. Bridges*, 54 L. T., 529; 34 W. R. 514—Kay, J.

2. MAPS.

Ordnance Maps—Maps in British Museum.—In an action to establish commonable rights over a piece of land on behalf of all the proprietors and occupiers of lands or tenements in a certain parish, the question raised by the evidence was: whether the land in question was within the parish. The ordnance map, and several other maps, some of which had been kept in the British Museum, were tendered in evidence for the purpose of showing the position of the boundaries of the parish:—Held, that the maps were not admissible in evidence. *Id.*

3. REGISTERS.

Memorandum in Church Register.—A memorandum in a register of a church by its deceased

rector made 110 years ago, though not a contemporaneous entry made in the regular course of the register, is admissible as evidence, and goes to prove that the rector did the things stated in the memorandum. *Lauderdale Peerage, The*, 10 App. Cas. 692—H. L. (Sc.). See also *Bidder v. Bridges*, *supra*.

Baptismal Register—Entry of Date of Birth.—Although an entry in a baptismal register by the officiating clergyman of the day when the baptised child was born furnishes no proof per se that the child was born on the day stated, the entry will not be rejected altogether as an item of evidence upon an inquiry as to the legitimacy, from its birth before or after the marriage of its reputed parents, of the child in question. *Turner, In re, Glenister v. Harding*, 29 Ch. D. 985; 53 L. T. 528—Chitty, J.

— **Proof of Writing—Duty.**—Entries in registers of births, deaths, and marriages are only admissible in evidence if it is proved either that they are in the handwriting of a deceased person whose duty it was to make the entries, or that a public duty to keep the registers was imposed upon the person making the entries. *Lyell v. Kennedy*, 56 L. T. 647; 35 W. R. 725—C. A.

4. WILLS.

Attesting Witnesses—Proof of Handwriting.—On proof satisfactory to the court of the handwriting of the two attesting witnesses to a will containing a due attestation clause and executed in France by a testatrix domiciled in that country; and upon evidence that diligent search had been made, but without success, for the two attesting witnesses, it was held that sufficient proof had been given that the requisite formalities attending the due execution of the will had been complied with. *Barendale v. De Valmer*, 57 L. T. 556—Chitty, J.

New Zealand Probate—English Probate necessary.—A petitioner asked for payment out of court of money to which he was entitled under an appointment by will:—Held, that probate of the will in the Supreme Court of New Zealand was not sufficient for this court to act upon, but the will must be proved in England. *Limehouse Board of Works, Ex parte, Vallance, In re*, 24 Ch. D. 177; 52 L. J., Ch. 791; 48 L. T. 941; 32 W. R. 387—Pearson, J.

5. MINUTE-BOOKS.

Unsigned — Proper Custody.—A minute, of date 1749, from an original unsigned minute-book, produced from the proper custody and kept in accordance with a charter of a society, is admissible evidence. *Lauderdale Peerage, The*, 10 App. Cas. 692—H. L. (Sc.).

Vestry Minute-Book.—The brother of the defendant entered into a contract with a vestry constituted under the Metropolis Management Act, 1855, and in order to enable him to carry it out, borrowed money from the defendant, who by way of security took an assignment of the

contract. Afterwards the defendant was elected a member of the vestry. An action for penalties having been brought against the defendant for acting as member of the vestry, an attendance-book of the members signed by the defendant, and the minute-book of the vestry containing his name as a member in attendance, were put in as evidence at the trial:—Held, that there was evidence under s. 60 of the above Act that the defendant had acted as member of the vestry. *Hunnings v. Williamson*, 11 Q. B. D. 533; 52 L. J., Q. B. 416; 46 L. T. 361; 32 W. R. 267—C. A.

6. REPORTS—PUBLIC BODY.

Surveyor of Public Body.—A public body, acting under the powers of the Lands Clauses Act, had entered into negotiations with the plaintiff for the purchase of his land. They passed a resolution directing their solicitor to write a letter to the plaintiff, the resolution being based upon the report of their own surveyor. The plaintiff wished to put the report in evidence to shew the grounds for passing the resolution, and to explain the latter:—Held, that the report was not admissible as evidence. *Cooper v. Metropolitan Board of Works*, 25 Ch. D. 472; 50 L. T. 602—C. A.

7. BANKERS' BOOKS.

Inspection—When Ordered.—In an action for goods sold and delivered, to which payment and a counterclaim were pleaded, the plaintiff, after issue joined, applied ex parte to a judge at chambers, and obtained leave, under s. 7 of the Bankers' Books Evidence Act, 1879, to inspect the defendant's banking account. The order was served on the defendant's bankers, and they, on receipt of it, informed the defendant, who thus heard of the order which had been made. The defendant took out a summons before the same judge to set aside the order, and obtained a variation of it by which the inspection was limited to the period within which the goods were alleged to have been sold and delivered:—Held, that, under the circumstances, the plaintiff was not entitled to the order for inspection. *Davies v. White*, 53 L. J., Q. B. 275; 50 L. T. 327; 32 W. R. 520—D.

The plaintiff in an administration action was a residuary legatee of M., a solicitor, the testator in the action, and in the course of the cross-examination on the accounts, before the chief clerk, of the defendant H., who was the testator's son-in-law and executor, and was carrying on business as a solicitor under the firm of "M. & H.," applied to the court under s. 7 of the Bankers' Books Evidence Act, 1879, that she, or her solicitor, who had been appointed receiver in the action, might be at liberty to inspect at the bankers of the testator and the defendant the books of the bank for four years containing the entries of the accounts of the testator and also of M. & H., and to take copies of such entries. The plaintiff's solicitor deposed that the inspection was necessary for the purposes of the action:—Held, that the plaintiff was entitled to the order asked for. *Marshfield, In re, Marshfield v. Hutchings*, 32

Ch. D. 499; 55 L. J., Ch. 522; 54 L. T. 564; 34 W. R. 511—V.-C. B.

—Application Ex parte—Limit of Time.]

—In civil proceedings an order for inspection of the banking account of a party under section 7 of the Bankers' Books Evidence Act, 1879, may properly be made upon an ex parte application, although as a general rule it would be advisable to serve the party before making the order, and the application need not in every case be supported by evidence. The inspection granted ought, however, to be limited to the period covered by the matters in dispute in the proceedings. *Arnott v. Hayes*, 36 Ch. D. 731; 56 L. J., Ch. 844; 57 L. T. 299; 36 W. R. 246—C. A.

In civil proceedings an application for such an order for inspection ought not to be made ex parte; and semble, that the power to grant the order ex parte is limited to criminal proceedings. *Davies v. White*, supra—Per Day, J.

8. LETTERS.

"Without Prejudice."—The effect of letters and interviews "without prejudice" discussed. *Kurtz v. Spence*, 57 L. J., Ch. 238; 58 L. T. 438—Kekewich, J.

Proof of Postage.—See *Rowlands v. De Vecchi*, ante, col. 745.

9. PROOF—SECONDARY EVIDENCE.

Attesting Witness.—An appointment of new trustees, not required to be by deed or to be attested, was made by deed, executed abroad by the donee of the power, who was resident abroad, and his execution of it was attested by a witness, also resident abroad. A vesting order was then applied for, one of the old trustees being of unsound mind, and was supported by proof of the handwriting of the signature of the appointor to the deed:—Held, that the petitioners must prove the handwriting of the attesting witness, or, failing that, must show that they had endeavoured to find a witness in England who could speak to his handwriting, and failed in doing so, in which case the order might be drawn up on proof of the handwriting of the appointor. *Rice, In re*, 32 Ch. D. 35; 55 L. J., Ch. 799; 54 L. T. 589; 34 W. R. 747—C. A. See also *Baxendale v. De Valmer*, ante, col. 748.

Secondary Evidence—Notice to Produce.—Action to restrain an alleged libel, to the effect that the plaintiff was infringing the patent rights of the defendant, a rival tradesman. The defendant, in cross-examination, stated that he had been in the habit of consulting A., an engineer (one of his witnesses), as to his patents, and had received from him a written report. The plaintiff had not required from the defendant an affidavit of documents, and on the twelfth day of the trial notice by leave was given to the defendant to produce the report next day. The report not being produced next day, the plaintiff's counsel, after the evidence for the defendant was closed, asked leave to recall the defendant or A., to be

examined as to the contents of the report, or that A. might produce a copy of it. The court refused to allow parol evidence to be given at that stage of the trial, with respect to a document as to which no proper notice to produce had been given. *Sugg v. Bray*, 54 L. J., Ch. 132; 51 L. T. 194—North, J.

— **Foundation Deed of Charity.**—An extract of the foundation deed of a charity, purporting to be signed by the founder, which had been hung up in the board-room of the charity for many years, and on its cessation was given into the care of one of the governors and secretary of the charity, was admitted as evidence of its trusts. *Hospital for Incurables, In re*, 13 L. R., Ir. 361—M. R.

— **Unstamped—Admissibility.**—An unstamped document embodying an agreement, not falling within the exceptions specified in the Stamp Act (33 & 34 Vict. c. 97), is inadmissible in evidence in civil proceedings for any purpose whatever. *Interleaf Publishing Company v. Phillips*, 1 C. & E. 315—Williams, J.

A charterparty executed entirely abroad, and stamped within two months after it has been received in this country, can be received in evidence, since it falls within the provisions of 33 & 34 Vict. c. 97, s. 15, and not of ss. 67 and 68 of that act. *The Belfort*, 9 P. D. 215; 53 L. J., P. 88; 51 L. T. 271; 33 W. R. 171; 5 Asp. M. C. 291—D.

10. PAROL EVIDENCE—ADMISSIBILITY.

— **Latent Ambiguity—Question for Judge or Jury.**—In an action on a policy of insurance, if the evidence discloses a latent ambiguity in the policy requiring a resort to parol evidence, the question at issue ceases to be one of construction for the court, and becomes one of fact for a jury. *Hordern v. Commercial Union Insurance Co.*, 56 L. J., P. C. 78; 56 L. T. 240—P. C.

— **To explain Acts and Standing Orders.**—Evidence of the usages and practice of the House is admissible to explain the meaning of the Parliamentary Oaths Act, 1866, and the standing orders of the House with regard to making and subscribing the oath. *Attorney-General v. Bradlaugh*, 14 Q. B. D. 667; 54 L. J., Q. B. 205; 52 L. T. 589; 33 W. R. 673; 49 J. P. 500—C. A.

— **To explain Document.**—By the terms of a written agreement J. agreed to lease to W. "a shop and premises which are to be built at a cost not to exceed 400*l.*, at the annual rental of 75*l.*" J. expended 750*l.* in building, and refused to grant W. a lease at a rent of 75*l.* In an action by W. against J. for specific performance, the defendant set up as a defence a contemporaneous parol proviso to the agreement to the effect that if the outlay exceeded 400*l.* the rent was to be raised in proportion.—Held, that such parol proviso did not contradict, but merely explained, the terms of the written contract, and that the evidence was admissible. *Williams v. Jones*, 36 W. R. 573—Kekewich, J.

Parol evidence to explain the circumstances under which a guarantee to a bank for advances was given, is admissible to aid the court in con-

struing the document. *Grahame v. Grahame*, 19 L. R., Ir. 249—V. C.

— **For purpose of Rectification.**—Letters offered in evidence to show that during negotiations for a sale the vendor had declined to enter into a proposed covenant not to solicit the old customers, were admissible, not to construe the agreement, but as showing a collateral verbal agreement which would be a defence to an action for specific performance, the defendant also seeking by counterclaim rectification of the agreement. *Pearson v. Pearson*, 27 Ch. D. 149; 54 L. J., Ch. 37—C. A.

— **Application for Cancellation.**—Where it is sought to cancel a lease, or executed conveyance upon equitable grounds, parol evidence is admissible, even where there has been an antecedent agreement in writing for the lease or conveyance. *Gun v. M'Carthy*, 13 L. R., Ir. 304—Flanagan, J.

— **To add to Consideration.**—By an agreement in writing G. agreed that Y. should receive all the money that was then due, and which should become due, to G. upon the winding-up of a society, Y. paying to G. out of such money the sum of 100*l.* The consideration was stated to be, "In consideration of a sum of money this day paid," &c.:—Held, that evidence was admissible to show that, in addition to the consideration expressed, there was another consideration, namely, that Y. should vote for the winding-up of the society. *Barnstable Second Annuitant Society, In re*, 50 L. T. 424—D.

— **To shew Signature by Agent to be for Principal himself.**—By articles of agreement under seal between J. A. & Co. and Y. & Co., Y. & Co. agreed to do certain work for which J. A. & Co. were to make certain payments, and the agreement contained this clause: "It is further understood between the parties to this contract that J. O. Schuler guarantees payment to Y. & Co. of all moneys due to them under the contract." The attestation clause was "signed and delivered by the said J. A. & Co. in the presence of C. T.," and Schuler, acting under a power of attorney, signed as follows: "P. P. A.—J. A. & Co., J. O. Schuler." Y. & Co. sued Schuler as guarantor, and evidence was given at the trial of statements by Schuler at the time of execution that he intended to sign on his own behalf as well as on that of A. & Co. A verdict was found for the plaintiffs. Schuler moved for a new trial on the ground that he had not signed the guarantee:—Held, that evidence that Schuler intended to sign in his own right as well as on behalf of J. A. & Co. did not contradict the document, and was admissible, and that Schuler must be taken to have signed as a contracting party. *Young v. Schuler*, 11 Q. B. D. 651; 49 L. T. 546—C. A.

— **Custom of Trade—Brokers personally liable.**—A written contract made by brokers on behalf of undisclosed principals for the sale of hides provided that "if any difference or dispute shall arise under this contract, it is hereby mutually agreed between the sellers and buyers that the same shall be settled by the selling brokers, whose decision in writing should be final and binding on both sellers

and buyers.' In an action against the brokers in respect of inferior hides delivered under the contract, the buyers made a claim for the breach against the brokers as principals by custom of the trade :—Held, that evidence of a custom of the trade that a broker who does not disclose his principal is personally responsible for the performance of the contract and liable for the breach was rightly rejected, as such custom was inconsistent with the arbitration clause, which would, if the custom were incorporated, make the brokers judges in their own cause. *Barrow v. Dyster*, 13 Q. B. D. 635; 51 L. T. 573; 33 W. R. 199—D.

The defendants, who were hop-brokers, gave to the plaintiffs the following sold-note : "Sold by Ongley & Thornton (the defendants) to Messrs. Pike, Sons, & Co., for and on account of owner, 100 bales . . . hops . . . (Signed) for Ongley & Thornton, S. T." In an action for non-delivery of hops according to sample, the plaintiffs sought to make the defendants personally liable on the above contract, and tendered evidence to show that by the custom of the hop trade, brokers who do not disclose the names of their principals at the time of making the contract are personally liable upon it as principals, although they contracted as brokers for a principal. No request was made by the plaintiffs to the defendants to name their principal :—Held, that the custom gave a remedy against the brokers as well as against the principals, that it was not in contradiction of the written contract, and that evidence of the custom was properly admitted at the trial. *Hutchinson v. Tatham* (8 L. R., C. P. 482) considered. *Pike v. Ongley*, 18 Q. B. D. 708; 56 L. J., Q. B. 373; 35 W. R. 534—C. A.

— **Not inconsistent with Document.**—Goods were shipped under a bill of lading at Calcutta to be delivered in like good order and condition from the ship's tackles at the port of London. On arrival in the port of London the consignees demanded overside delivery into lighters immediately from the ship's tackles. The shipowner landed them on the dock wharf, and was ready to deliver them thence into the consignee's lighters, but the consignee carted them away, thereby becoming liable to certain dock charges which he paid. In an action by the consignee to recover the amount so paid, the jury found that there was a custom for steamships having a general cargo (the defendants' ship being such) coming into the port of London and using the docks, to discharge the goods on the quay, and thence into lighters :—Held, that the custom found was not inconsistent with the terms of the bill of lading, and that the shipowner was entitled to discharge the goods on to the quay, and was not liable for the charge sought to be recovered. *Marzetti v. Smith*, 49 L. T. 580; 5 Asp. M. C. 166—C. A. Affirming, 1 C. & E. 6—Cave, J.

A bill of lading stipulated (inter alia) that "the merchandise shipped thereunder was to be received on the quay at London, and delivered therefrom by the person appointed by the steamship's agents, &c., the merchandise to be received and delivered according to the customs and usages of the respective ports." A custom was proved with regard to grain cargoes coming to London, that if the merchant does not demand delivery of the grain within twenty-four hours

after the ship's arrival, the ship is entitled to discharge the goods on the quay. The merchant did not demand delivery of the cargo within the twenty-four hours, and it was landed on the quay :—Held, that the custom was not inconsistent with the terms of the bill of lading, and that therefore the merchant was bound to pay the expenses incurred in weighing out the cargo and the quay rates. *Aste v. Stumore*, 1 C. & E. 319—C. A.

VII. WITNESSES.

1. COMPETENCY.

Evidence of Husband—Non-access.—W., by will, bequeathed 1,500*l.* to trustees in trusts for C., the wife of J. for life, and after her death to divide the same equally among the children of the marriage. J. deserted C., who subsequently cohabited with M., and during such cohabitation A. was born. On the death of C., A., an infant by her next friend, applied for maintenance, out of the fund, whereupon J. filed an affidavit denying the legitimacy of A. upon the ground, among others, of non-access to his wife :—Held, that this was not a "proceeding instituted in consequence of adultery" within the meaning of s. 3 of the Evidence Further Amendment Act, 1869, and therefore, the evidence of the husband as to non-access was not admissible. *Nottingham Guardians v. Tomkinson* (4 C. P. D. 343) followed. *Walker, In re, Jackson, In re*, 53 L. T. 660; 34 W. R. 95—Kay, J. See also *The Aylesford Peerage*, ante, col. 744.

2. WHERE CORROBORATION NECESSARY.

Claim against Estate of Deceased Person.—There is no rule of law that the uncorroborated evidence of a claimant against the estate of a dead man will be rejected, but it will be regarded with jealous suspicion. *Garnett, In re, Gandy v. Macaulay*, 31 Ch. D. 1—C. A.

There is no rule of law which precludes a claimant from recovering against the estate of a deceased person on his own testimony without corroboration; although the court will in general require such corroboration. *Hodgson, In re, Beckett v. Ramsdale*, 31 Ch. D. 177; 55 L. J., Ch. 241; 54 L. T. 222; 34 W. R. 127—C. A.

A claim against the assets of a deceased person cannot be allowed upon the uncorroborated evidence of the claimant. This rule is of universal application, and does not depend on the character or position of the claimant. *Harnett, In re, Leahy v. O'Grady*, 17 L. R., Ir. 543—V.-C.

3. PRACTICE—PRIVILEGE.

Examination before Trial of Person not a Party to the Action.—By Ord. XXXVII. r. 7, of the Rules of Court, 1885, the court or a judge may in any cause or matter at any stage of the proceedings order the attendance of any person, for the purpose of producing such writings or other documents as he could be compelled to produce at the hearing or trial. *Central News Company v. Eastern News Telegraph Company*, 53 L. J., Q. B. 236; 50 L. T. 235; 32 W. R. 493—D.

In an action brought by the plaintiffs against the defendants for an improper use and publication of certain telegrams transmitted by them to the plaintiffs, the defendants applied, under Ord. XXXVII. r. 7, for the production of certain documents belonging to and in the possession of the Electric News Telegraph Company, who were not parties to the action, with a view of showing that the news contained in the telegrams had been communicated by the plaintiffs to such company, and by them made public prior to the time at which such news was published by the defendants. The defendants contended that the production of the documents in question would simplify the proceedings at the trial and save expense:—Held, that the power conferred on the court was one which, if it existed, should be exercised with extreme caution, and that no sufficient ground had been shown for the production of the documents asked for. *Id.*

Enforcing Attendance of Witness out of Jurisdiction.—When an action and “all matters in difference” between the parties have been referred by consent to an arbitrator, no writ of subpoena will be granted under 17 & 18 Vict. c. 34, s. 1, in order to compel the attendance at the hearing before the arbitrator of witnesses residing within the United Kingdom but out of the jurisdiction of the Queen’s Bench Division; for the hearing before the arbitrator is not a “trial” within the meaning of that enactment. *Hall v. Brand*, 12 Q. B. D. 39; 53 L. J., Q. B. 19; 49 L. T. 492; 32 W. R. 133—C. A.

Hostile Witness—Discretion of Judge.—At the trial of an action the defendant’s counsel, in order to show that a witness called by him was hostile, and to obtain leave to treat him as such under s. 22 of the Common Law Procedure Act, 1854, asked the judge to look at an affidavit made by the witness in a former action. The judge, being of opinion that there had been nothing in the witness’s demeanour, or in the way he had given his evidence, to show that he was hostile, refused to look at the affidavit:—Held, on motion for a new trial, that the discretion given to the judge under s. 22 of the Common Law Procedure Act, 1854, was absolute, and the court had no jurisdiction to review his decision. *Rice v. Howard*, 16 Q. B. D. 681; 55 L. J., Q. B. 311; 34 W. R. 532—D.

Refusal to Answer—Tendency to Criminate.—Where a question is in form an innocent one, it is not a sufficient ground of refusal for a witness to say that he believes his answer to such a question will or may criminate him; but he must satisfy the court that there is a reasonable probability that it would or might do so. *Gilbert, Ex parte, Genesc, In re*, 3 M. B. R. 223—C. A.

Not allowed—Statement of Claim admitted.—The statement of claim in salvage actions should contain such facts as, if admitted, will constitute the whole of the plaintiff’s case, as the court will decline to admit evidence at the hearing, except on special grounds, where the facts alleged in the statement of claim are admitted. *The Hardwick*, 9 P. D. 32; 53 L. J., P. 23; 50 L. T. 128; 32 W. R. 598; 5 Asp. M. C. 199—Hannen, P.

Privilege—Solicitor and Client.—All communications between a solicitor and his client are not privileged from disclosure, but only those passing between them in professional confidence and in the legitimate course of professional employment of the solicitor. Communications made to a solicitor by his client before the commission of a crime for the purpose of being guided or helped in the commission of it, are not privileged from disclosure. *Reg. v. Cox*, 14 Q. B. D. 153; 54 L. J., M. C. 41; 52 L. T. 25; 33 W. R. 396; 49 J. P. 374; 15 Cox, C. C. 611—C. C. R.

C. and R. were partners under a deed of partnership. M. brought an action against R. & Co., and obtained judgment therein, and issued execution against the goods of R. The goods seized in execution were then claimed by C. as his absolute property under a bill of sale executed in his favour by R. at a date subsequent to the above-mentioned judgment. An interpleader issue was ordered to determine the validity of the bill of sale, and upon the trial of this issue, the partnership deed was produced on C.’s behalf, bearing an indorsement purporting to be a memorandum of dissolution of the said partnership, prior to the commencement of the action by M. Subsequently C. and R. were tried and convicted upon a charge of conspiring to defraud M., and upon that trial the case for the prosecution was, that the bill of sale was fraudulent, that the partnership between R. and C. was in truth subsisting when it was given, and that the memorandum of dissolution indorsed on the deed was put there after M. had obtained judgment, and fraudulently ante-dated, the whole transaction being, it was alleged, a fraud intended to cheat M. of the fruits of his execution. Upon the trial a solicitor was called on behalf of the prosecution to prove that after M. had obtained the judgment C. and R. together consulted him as to how they could defeat M.’s judgment, and as to whether a bill of sale could legally be executed by R. in favour of C. so as to defeat such judgment, and that no suggestion was then made of any dissolution of partnership having taken place. The reception of this evidence being objected to, on the ground that the communication was one between solicitor and client, and privileged: the evidence was received, but the question of whether it was properly received was reserved for this court:—Held, that the evidence was properly received. *Cromack v. Heathcote* (2 B. & B. 4); *Rex v. Smith* (1 Phil. & Arn. on Evidence, 118); and *Doe v. Harris* (5 C. & P. 592), overruled. *Follett v. Jefferyes* (1 Sim., N. S. 1); *Russell v. Jackson* (9 Hare, 387); and *Gartside v. Outram* (26 L. J., Ch. 113), approved. *Id.*

Judgment having been signed against a married woman in an action, an inquiry was directed before a master whether she was possessed of any separate estate. The solicitor to the trustees of her marriage settlement, being subpoenaed by the judgment creditor upon the inquiry as a witness, and to produce documents, stated that the deed of settlement was in his possession as solicitor to the trustees, but refused to state the names of the trustees or produce the deed on the ground of professional privilege:—Held, that he must state the names of the trustees and produce the deed. *Bursill v. Tanner*, 16 Q. B. D. 1; 55 L. J., Q. B. 53; 53 L. T. 445; 34 W. R. 35—C. A.

VIII. EXAMINATION OF WITNESSES UNDER COMMISSION.

1. WHEN WITNESS ABROAD.

When granted.—L. granted to T. an exclusive licence to use in England a certain patented invention for making sugar. This invention was also patented in America, and M., an American sugar manufacturer, had a licence for its use in the United States. L. brought his action against T. to have the licence rectified, alleging that the real agreement between the parties was that the licence was not to interfere with the importation into England of sugar made abroad under the patent. The statement of claim alleged that M. had introduced L. to T., and that the negotiations between L. and T. had proceeded on the understanding that sugar made abroad under the patent might be imported; but there was no allegation, nor did it appear in evidence, that M. had taken part in the negotiations. L. applied to have a commission to examine M. in America:—Held, that if it appeared that the evidence of M. would be material, the commission ought to be granted, there being nothing to shew that M. was keeping out of the way to avoid cross-examination. *Berdan v. Greenwood* (20 Ch. D. 764, n.) distinguished. *Langen v. Tate*, 24 Ch. D. 522; 53 L. J., Ch. 361; 49 L. T. 758; 32 W. R. 189—C. A.

But held, that, on the materials before the court, the commission should be refused, there being nothing to show that M. had taken such part in the negotiations as to make his evidence material. The court, however, as an indulgence, gave the plaintiff an opportunity of adducing evidence to show that M. could give material evidence. *Id.*

Where it is sought to have a material witness examined abroad, and the nature of the case is such that it is important that he should be examined here, the party asking to have him examined abroad must show clearly that he cannot bring him to this country to be examined at the trial. *Lawson v. Vacuum Brake Company*, 27 Ch. D. 137; 54 L. J., Ch. 16; 51 L. T. 275; 33 W. R. 186—C. A.

If it is shown that there are material witnesses resident abroad whom a party wishes to examine, a commission to examine them abroad will be granted if there is any reasonable ground for their not coming here, unless a case is made showing that it is necessary for the purposes of justice that they should be examined in England. *Armour v. Walker*, 25 Ch. D. 673; 53 L. J., Ch. 413; 50 L. T. 292; 32 W. R. 214—C. A.

A party is not entitled to a commission *ex debito justitiæ* upon showing that a material witness is resident out of the jurisdiction. The granting of the commission is a matter of judicial discretion to be exercised according to the particular circumstances of each case. In a case where it was shown that witnesses were out of the jurisdiction and their examination on commission abroad would be much less expensive than bringing them to the trial in England, and there was nothing to show that their presence in court was essential:—Held, that the commission should issue. *Coch v. Allcock*, 21 Q. B. D. 178; 57 L. J., Q. B. 489; 36 W. R. 747—C. A.

power to order a commission to issue for the examination abroad of a party to an action, though the circumstances which will induce the court to make such an order are different from those required to be shown on an application for a commission to examine a mere witness. Where a plaintiff residing abroad claimed as an heir-at-law who had been missing for twenty-four years, Kay, J., ordered a commission to issue to take his evidence abroad, without prejudice to the right of the defendant to cross-examine him at the trial in England in the presence of witnesses who could speak to his identity:—Held, on appeal, that the order must be varied by directing that the depositions of the plaintiff were not to be read at the trial without the consent of the defendant. *Nadin v. Bassett*, 25 Ch. D. 21; 53 L. J., Ch. 253; 49 L. T. 454; 32 W. R. 70—C. A.

Affidavit in Support.—A plaintiff who desires to be examined on commission must make out by affidavit a strong *prima facie* case why he should not attend and be examined at the trial; and the onus is not on the defendant in the first instance to show why he should attend to be examined at the trial. A plaintiff is not entitled to be examined on commission in the absence of any affidavit by himself, showing strong and positive reasons for his not attending to be examined at the trial. *Light v. Anticosti Company*, 58 L. T. 25—D.

Form of Commission—Misdescription of Court—Cross-examination.—In a divorce suit the petitioner obtained a commission to examine witnesses in India, addressed to "The Judges of the Supreme Court at Calcutta." The Supreme Court was abolished by 24 & 25 Vict. c. 104, by which a "High Court of Judicature at Fort William in Bengal," was established, with all the jurisdiction, power and authority of the abolished court. Witnesses were examined under the commission, and cross-examined on behalf of the respondent:—Held, that the evidence must be admitted at the trial, as the commission was in effect addressed to the judges of whatever was the highest court at Calcutta, and the judges of the High Court answered the description, and that the cross-examination of witnesses was no waiver of the right to object to the evidence. *Wilson v. Wilson*, 9 P. D. 8; 49 L. T. 430; 32 W. R. 282—C. A.

Names of Witnesses.—If the names of some of the witnesses to be examined on a commission abroad are specified, the court may grant the commission for the examination of the witnesses named "and others." *Nadin v. Bassett*, *supra*.

Single Commissioner—Administration of Oath.—When a single commissioner is appointed to take evidence abroad, the commission should authorize him to administer the oath to himself. *Wilson v. De Coulon*, 22 Ch. D. 841; 53 L. J., Ch. 248; 48 L. T. 514; 31 W. R. 839—Fry, J.

2. WHEN WITNESS WITHIN JURISDICTION.

Evidence de bene esse—Witness above Seventy Years of Age—Affidavit.—The court

Parties to Action—Plaintiff.—The court has

has jurisdiction on a proper occasion, when it is "necessary for the purposes of justice," to make an order for an examination de bene esse of witnesses upon an ex parte application, the order being taken by the applicant at his peril, and subject to the risk of being discharged on sufficient grounds. An order was made in chambers on an ex parte application by the plaintiffs to examine de bene esse thirty witnesses upon an affidavit of the plaintiffs' solicitor merely stating that he was advised that they were material witnesses—that they were all above seventy years of age, and that he was advised and believed that by reason of their age it was desirable that their examination should be taken without delay. This order was discharged on motion in court, mainly on the ground that the affidavit was insufficient:—Held, that the affidavit did not satisfy the requirements of Ord. XXXVIII. r. 3, but leave was given to put in a further affidavit stating what information had been obtained, and what steps had been taken to obtain such information as to the age of the different witnesses, and also stating generally the facts which the particular witnesses were going to depose to. Although the fact that a witness is seventy years old is generally a good *prima facie* ground for an order for his examination de bene esse, such a practice will not necessarily be applied to an extraordinary case, e.g., where an order has been made to examine thirty witnesses. On a subsequent application made on a further affidavit of the solicitor, in which he divided the witnesses into four classes who were to depose to four different heads of evidence:—The court declined to allow the examination de bene esse of ten of the proposed witnesses who were between seventy and seventy-five years old, without prejudice to a subsequent application for leave to examine them on grounds other than age, but allowed the other twenty witnesses above seventy-five to be examined de bene esse upon the undertaking of the plaintiffs' counsel to produce at the trial, if so requested by the defendant, any of such witnesses who might be then alive. *Bidder v. Bridges*, 26 Ch. D. 1; 50 L. T. 287; 32 W. R. 445—C. A. Affirming 53 L. J., Ch. 479—Kay, J.

— **Evidence rejected at Trial—Appeal.**—Where the evidence of a witness had been rejected at the hearing of an action, and there was an appeal against that decision, the witness being dangerously ill, the Court of Appeal allowed his evidence to be taken de bene esse before a special commissioner pending the appeal; the appellant undertaking to abide by any order which the court might hereafter make as to the costs of the application and the costs of the examination. *Solicitor to the Treasury v. White*, 55 L. J., P. 79—C. A.

Action to perpetuate Testimony—Illegitimacy.—A lunatic, having several children, obtained a divorce from his wife on the ground of her adultery. It was alleged that one of the children born before the divorce was illegitimate, and the committee presented a petition that proceedings might be taken to perpetuate the testimony of the illegitimacy:—Held, that the proper course was for the court to settle some of the lunatic's property on his children, and the legitimate children, having raised the question as to the right of the child, who it was alleged

was illegitimate, to participate, could then bring an action to perpetuate the testimony. *Stoer, In re*, 9 P. D. 120; 51 L. T. 141; 32 W. R. 1005—C. A.

— **Delivery of Defence, Default in.**—In an action to perpetuate testimony, the time for delivery of defence having expired, and the defendant not having applied for an extension of time, the plaintiff obtained, on motion, an order that the action might proceed, notwithstanding the defendant's default, and that he might be at liberty to examine the witnesses (one of whom was of advanced age and in failing health) as if the pleadings were closed. *Bute (Marquess) v. James*, 33 Ch. D. 157; 55 L. J., Ch. 658; 55 L. T. 133; 34 W. R. 754—V.-C. B.

Form of Order.—In an action for replacement of railway stock alleged to have been transferred from the name of the plaintiff by means of a forged transfer, an attesting witness of the execution of the transfer was dangerously ill. On motion ex parte on behalf of the plaintiff for leave to examine the witness de bene esse, and for the appointment of a special examiner:—Held, that it was a proper case to make the order, the judge directing the order to be drawn up in accordance with the form in Seton on Decrees (4th ed.), 1635, omitting the words, "And it is ordered that the plaintiff be at liberty to give such depositions in evidence at the trial of this action":—That, at the trial of the action, before leave to use the evidence was given, it would be necessary to prove that the witness was not capable of being examined. *Barton v. North Staffordshire Railway*, 56 L. T. 601; 35 W. R. 536—Kay, J.

Appointment of Special Examiner.—The court refused to appoint a special examiner, holding that the matter must go to the examiner in rotation. *Id.*

It is not now the practice of the court to appoint a special examiner to take a country examination, even, for instance, in a Welsh case, where it is alleged to be necessary that the examination should be taken by a person conversant with the Welsh language. In such a case the examination will be referred in the usual way to one of the examiners of the court, who is entitled, if necessary, to the assistance of an interpreter. *Bute (Marquess) v. James*, supra.

Examination—Subpena.—A witness required to attend before an examiner under Ord. XXXVII. r. 20, is not bound to attend unless served with a subpoena. *Stuart v. Balkis Company*, 53 L. J., Ch. 790; 50 L. T. 479; 32 W. R. 676—Chitty, J.

— **Priority of Witnesses.**—There is no general rule as to the order of priority in which witnesses are to be examined before an examiner; but the examiner may exercise his discretion as to the most convenient order in which the examination of the witnesses may be taken. *Id.*

— **Adjournment—Power to Recall.**—After a witness has been examined before an examiner of the court and his depositions have been signed, the examiner has power to adjourn the examination, and the witness may be recalled

and is bound to attend upon notice given to him that his attendance is required. *Metropolitan (Brush) Electric Light and Power Company, In re, Offer, Ex parte*, 54 L. J., Ch. 253; 51 L. T. 816—Kay, J.

Certificate not Taken up.—Where an examiner's certificate has not been taken up, its effect will not be allowed to be stated in court. *Stuart v. Balkis Company*, supra.

IX. EVIDENCE ON AFFIDAVIT.

1. PRACTICE GENERALLY.

Consul unable to Administer Oath.—Where, by German law, a British consul is not allowed to administer an oath, the affidavit may be sworn before a German judge. *Faucus, In goods of*, 9 P. D. 241; 54 L. J., P. 47; 33 W. R. 323; 48 J. P. 743—Hannen, P.

Sworn before Notary in Foreign Country.—Before and after the Act 15 & 16 Vict. c. 86, affidavits sworn in foreign parts out of her Majesty's dominions before a notary public might be filed, and that practice continued in force down to the time when the Rules of the Supreme Court, 1883, came into operation.—Held, that this practice is not abrogated by Ord. XXXVIII. r. 6, and Ord. LXXII. r. 2, of the Rules of 1883; and may be followed, at any rate in cases where the practice under the Rules of 1883 would be very inconsistent. *Cooke v. Wilby*, 25 Ch. D. 769; 53 L. J., Ch. 592; 50 L. T. 152; 32 W. R. 379—Chitty, J.

Sworn before Clerk of Foreign Circuit Court.—An affidavit was sworn before the clerk of the circuit court of Monroe county, in the State of Wisconsin, U. S., Chicago, distant about 250 miles from Monroe county, being the nearest place where a British consul or vice-consul was resident. The British vice-consul at Chicago certified that the clerk of the circuit court had authority to administer oaths. The court, on motion ex parte for leave to file the affidavit, made the order. *Brittlebank v. Smith*, 50 L. T. 491—V.-C. B.

Description of Deponent.—In support of a petition for the appointment of a new trustee in the place of a trustee who had become lunatic, two affidavits were filed as to the fitness of the person proposed to be appointed. The deponent of one affidavit was described as a "gentleman," the other deponent being described as an accountant. Each affidavit described the proposed new trustee as a "gentleman," but also stated that he was a person of independent means.—Held, that the description of the deponent as a "gentleman" was insufficient, that the position in life of the deponent ought to be stated so as enable the court to judge whether his evidence was reliable, but that the other affidavit was sufficient. *Horwood, In re*, 55 L. T. 373—C. A.

Deponent's Abode.—By Order XXXVIII. r. 8, every affidavit shall state the description and true place of abode of the deponent; where therefore a deponent gave an illusory address or no address at all, the court would not allow

them to be used. *Hyde v. Hyde*, 59 L. T. 523—Hannen, P.

Omission of Title of Commissioner.—An affidavit was sworn before a commissioner to administer oaths, but in the jurat he merely signed his name, and did not add his title as commissioner.—Held, that notwithstanding this omission, the affidavit was sufficient. *Johnson, Ex parte, Chapman, In re*, 26 Ch. D. 338; 53 L. J., Ch. 763; 32 W. R. 693—C. A.

Striking out for Prolivity.—Although there is no rule of court specially giving power to the court to take affidavits off the file for prolivity, yet the court has an inherent power to do so in order to prevent its records from being made the instruments of oppression. *Hill v. Hart-Davis*, 26 Ch. D. 470; 53 L. J., Ch. 1012; 51 L. T. 279—C. A.

Power of Court to exclude.—The court, if it be of an opinion that such a course is necessary for the purposes of justice, has authority to exclude affidavit evidence altogether, and to direct that the same shall not be used, but that the witnesses shall be examined orally at the trial. *Lovell v. Wallis*, 53 L. J., Ch., 494; 49 L. T. 593—Kay, J.

Irregularity—Illiterate Witness.—Affidavits made by an illiterate person were sworn with the usual form of jurat not containing the certificate required by Ord. XXXVIII. r. 13. The managing clerk of the deponent's solicitor deposed that he had prepared the affidavits from the deponent's personal instructions, that he carefully read them over to him before they were sworn, and that the deponent appeared perfectly to understand them. It was not, however, deposed that the affidavits were read over in the presence of the commissioner.—Held, that there was no sufficient evidence to satisfy the court that the affidavits were read over to and appeared to be perfectly understood by the deponent within the meaning of Ord. XXXVIII. r. 13, and that the affidavits must be taken off the file. *Longstaffe, In re, Blenkarn v. Longstaffe*, 54 L. J., Ch. 516; 52 L. T. 681—Kay, J.

Right to Use—Further Consideration.—Where proceedings in an action had been carried on under an order made in pursuance of Ord. XV., and there had been no trial of the action, the court, on further consideration of the action, allowed an affidavit to be read which had not been before the chief clerk, and therefore was not mentioned in the certificate. *Michael, In re, Dessau v. Lewin*, 52 L. T. 609—Kay, J.

Attesting Witness not to be Found.—In a suit for revocation of probate on the grounds of undue execution, and incapacity, where it appeared that every effort had been made to find one of the attesting witnesses, but without success—the court allowed the affidavit made by him eight years before, at the time of proving the will at the district registry, to be admitted as evidence of execution and capacity. *Gornall v. Mason*, 12 P. D. 142; 56 L. J., P. 86; 57 L. T. 601; 35 W. R. 672; 51 J. P. 663—Butt, J.

Time for Filing.—On the hearing of a summons adjourned from chambers into Court,

affidavits filed after the time fixed by the chief clerk for the filing of evidence cannot be used before the Judge in Court unless special leave to use the new affidavits has been given either by the Judge or the chief clerk. This rule does not apply where no time has been fixed by the chief clerk for the filing of evidence. *Chifferiel, In re, Chifferiel v. Watson*, 58 L. J., Ch. 137; 58 L. T. 877; 36 W. R. 806—North, J.

Used before Cross-examination completed.]—Semble, that the fact that a cross-examination on affidavit is not concluded does not prevent the court from looking at the affidavit. *Lewis v. James*, 54 L. T. 260—C. A.

2. CROSS-EXAMINATION.

Power of Court to use—Cross-examination not completed.]—See preceding case.

In what Cases—Summons for Administration by Infants.]—Infants were entitled under a will to legacies of considerable amount, and they were also entitled in remainder subject to the life interests of four persons to seven-elevenths of the residuary estate. An originating summons was taken out by one of the tenants for life and the infants asking for administration of the testator's estate. Affidavits were filed in support of the summons, and the witnesses were cross-examined at considerable length:—Held, that the cross-examination was most improper, and that it should not be resorted to in such a case, and a direction was given that in future cross-examinations should not be resorted to in such cases without an application to the court. *Wilson, In re, Alexander v. Calder*, 54 L. J., Ch. 487—Pearson, J.

— Form of Notice requiring Production of Deponents.]—On the prosecution of an inquiry added to a decree, one party filed an affidavit by a person resident in South America, and gave notice to read it, whereupon the opposite party gave notice that he required to cross-examine the deponent, not saying when, where, or before whom:—Held, that Ord. XXXVIII. r. 28, excluding an affidavit from being read, except by special leave, unless the deponent is produced for cross-examination—even supposing that Ord. XXXVIII. rr. 21, 22, make that rule applicable to evidence on an inquiry, and supposing that Ord. XXXVIII. r. 28, applies to a witness resident out of the jurisdiction—did not exclude the present affidavit, as the notice for cross-examination did not follow the terms of Ord. XXXVIII. r. 28:—Held, also, that the order of the Court of Appeal admitting the affidavit as evidence, without prejudice to any application by the opposite party, within fourteen days, for the cross-examination of the deponent in any place in South America, before some proper person to be appointed for that purpose, was right under all the circumstances. *Concha v. Concha*, 11 App. Cas. 541; 56 L. J., Ch. 257; 55 L. T. 522; 35 W. R. 477—H. L. (E.)

— Discretion of Court or Judge.]—The court or judge has a discretion in making an order under Order XXXVIII. r. 1, for the attendance for cross-examination of a person

who has made an affidavit, and is not bound to make such an order. *La Trinidad v. Browne*, 36 W. R. 138—North, J.

Expenses of Production of Deponent.]—The provision in Rules of Court, 1875, Ord. XXXVIII. r. 4, that the party producing deponents for cross-examination upon their affidavits shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production, is confined to a cross-examination of the deponents before the court at the trial of the action, and does not apply to a cross-examination on an affidavit filed after decree for the purpose of proceedings in chambers. *Knight, In re, Knight v. Gardner*, 25 Ch. D. 297; 53 L. J., Ch. 183; 49 L. T. 545; 32 W. R. 469—C. A.

The direction in Ord. XXXVIII. r. 23, of Rules of the Supreme Court, 1883, that the party producing a deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production, taken in conjunction with Ord. XXXVII. r. 21, of the same rules, which provides that evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial, is not confined to the cross-examination of the deponent before the court at the trial of the action, but applies also to a cross-examination before the chief clerk in chambers or before an examiner. *Backhouse v. Alcock*, 23 Ch. D. 669; 54 L. J., Ch. 842; 52 L. T. 342; 33 W. R. 407—Chitty, J.

The effect of Ord. XXXVIII. r. 28, of the Rules of the Supreme Court, 1883, which provides that the party producing a deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production, taken in conjunction with Ord. XXXVII. r. 22, which provides that the practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial shall extend and be applicable to evidence taken in any cause or matter at any stage, is that the expenses of production of a witness for cross-examination upon affidavit before a trial must be borne in the first instance by the party producing such witness. *Mansel v. Clanricarde*, 54 L. J., Ch. 982; 53 L. T. 496—Kay, J.

— After Judgment in Administration Action.]

—The plaintiff after judgment in an administration action obtained an order for cross-examination of defendant (the executor) upon his affidavit, in answer to inquiries directed by the judgment, denying possession of any part of the testator's estate. The defendant declined to attend before the examiner until plaintiff had paid his expenses. The plaintiff having subsequently served defendant with a subpoena moved that he be ordered to attend at his own expense:—Held, that it was open to the plaintiff to combine the two methods of procedure and that the defendant was bound to produce himself at his own expense for cross-examination; and further, that regarding the defendant as a deponent whose attendance was required for cross-examination, the penalty imposed by Ord. XXXVIII. r. 28, of having his affidavit rejected, did not relieve

him from the obligation to attend at his own expense. *Baker, In re, Connell v. Baker*, 29 Ch. D. 711; 54 L. J., Ch. 844; 52 L. T. 421—Chitty, J.

EXCISE.

See REVENUE.

EXECUTION.

1. *Form of Writ*, 766.
2. *Fieri Facias*, 766.
3. *Elegit*, 767.
4. *Sequestration*, 767.
5. *Equitable Execution—Receiver*, 769.
6. *Charging Order—Stocks and Shares*, 772.
7. *Discovery in Aid of*, 773.
8. *Rights of Execution Creditor*, 774.
9. *Attachment of Debts—See ATTACHMENT*.
10. *Validity and Effect as against Trustee in Bankruptcy—See BANKRUPTCY*, XI., 1.
11. *Scire facias—See COMPANY*, X.
12. *Sheriff's Duty on—See SHERIFF*.
13. *Costs of Execution*.
 - a. In General—*See SHERIFF*.
 - b. In County Court—*See ante*, col. 546.
14. *Against Rolling Stock of Railway Company—See RAILWAY*.
15. *Staying Execution pending Appeal—See APPEAL*.

1. FORM OF WRIT.

In General.—The true interpretation of the words, Ord. XLII. r. 14, of the Rules of 1883, "The forms used in Appendix H. shall be followed, with such variations as circumstances may require"—is, that the forms in Appendix H. can only be varied for the purpose of making them to be in accordance with the terms of the judgment or order. *Boswell v. Coaks*, 57 L. J., Ch. 101; 57 L. T. 742; 36 W. R. 65—C. A.

2. FIERI FACIAS.

Whether Goods those of Apparent Owner or Intestate—Business carried on.—After the death in May, 1880, of A., a shopkeeper, his daughter B. carried on the business. Judgment was obtained against B. personally, and a fi. fa. was issued thereon and delivered to the sheriff in March, 1881. At this time B. was in possession of shop goods of considerable value, some of which had been the property of A. in his lifetime, and the rest were purchased out of the proceeds of sale of other goods of A. In an action for a false return against the sheriff, who had returned nulla bona, he claimed to have a verdict entered for him on the ground that the goods were not the goods of B. No evidence was given of any testamentary disposition by A. :—Held, that in the absence of any proof that the trading was carried on by B. as personal representative of A.,

the onus of which lay on the sheriff, the goods purchased by her after A.'s death could not be held to be the assets of A. *Kelly v. Browne*, 12 L. R., Ir. 348—Ex. D. Affirmed in C. A.

On Order for Taxation of Bill of Costs.—*See SOLICITOR (BILL OF COSTS)*.

What can be seized—Against Partnership.—A sheriff cannot sell a partner's interest in the goodwill or book debts or anything else which he cannot seize. *Helmore v. Smith*, 35 Ch. D. 436; 56 L. T. 535; 36 W. R. 3—C. A.

Pawnbroker's Business—Unredeemed Pledges—Property in Articles Pawned.—A receiver was appointed in an action in the Queen's Bench Division, to receive the profits and other moneys receivable from a pawnbroker's business carried on by the defendant. Subsequently to the appointment of the receiver, but before he perfected his security, a writ of fi. fa. was issued to the sheriff to recover a sum of money ordered to be paid by the defendant in an action in the Chancery Division, in pursuance whereof the sheriff took possession of certain goods and chattels in the possession of the defendant, including various articles pawned with her and not yet redeemed. The receiver perfected his security, and claimed the redeemable pledges in the defendant's house :—Held, that the defendant, as pawnbroker, had a qualified property in the articles pawned with her and not yet redeemed, which was not intercepted by the appointment of a receiver; and that therefore the sheriff was entitled to hold such articles on behalf of the execution creditor, and to receive money paid to redeem the same. *Rollason, In re, Rollason v. Rollason*, 34 Ch. D. 495; 56 L. J., Ch. 768; 56 L. T. 303; 35 W. R. 607—North, J.

Sale of Interest in Licensed Premises—Assignment of Licence.—Under a writ of fi. fa. against G., certain chattels and his interest in licensed premises were seized, advertised for sale, and sold on the 31st January, 1885, by the sheriff. No reference to the licence was made either in the advertisements, conditions of sale, or deed of assignment, which was dated the 10th February, 1885, except that in the latter the premises were described as "licensed," as occupied by G. as a licensed publican, and the deed did not purport to assign the licence. The sheriff was not possessed of the licence, but it was subsequently indorsed and delivered by G. to the purchaser. On the 4th April, 1885, G. was adjudicated a bankrupt. The purchaser, however, obtained an ad interim transfer of the licence on the 14th April, and an absolute transfer at the October Sessions. In August the hearing of a charge and discharge, raising a question as to the property in the licence, was adjourned by consent to November, on the terms that the position of the parties should be considered at the hearing as if unaltered :—Held, that the licence did not pass under the sheriff's assignment; that the subsequent indorsement, delivery, and transfer of it by G. to the purchaser were void as against the assignees in bankruptcy of G., and that the licence formed part of the estate and effects of G. in the bankruptcy matter; but having regard to the proceedings at the licensing sessions, the court declined, for the time being, to make any

order for the transfer of the licence to the assignee in bankruptcy, or to award damages against the purchaser for withholding the licence. *Gilmer, In re*, 17 L. R., Ir. 1—Bk.

Sale of Goods by Private Contract.—Application Ex parte.—Under s. 145 of the Bankruptcy Act, 1883, the court has a discretion to order goods taken in execution by the sheriff to be sold by private contract instead of by public auction, notwithstanding that the application for leave to sell by private contract is made by the execution creditor ex parte, and in the absence of all the other creditors of the execution debtor. *Hunt v. Fensham*, 12 Q. B. D. 162; 32 W. R. 316—D.

3. ELEGIT.

Seizure but not Delivery of the Goods.—By the Bankruptcy Act, 1883, s. 146, "the sheriff shall not under a writ of elegit deliver the goods of a debtor, nor shall a writ of elegit extend to goods," and by s. 169, which repeals, amongst other enactments, so much of 13 Edw. 1, c. 18, as relates to the chattels of the debtor, save only his oxen and beasts of the plough, it is enacted that "the repeal effected by this act shall not affect anything done before the commencement of this act under any enactment repealed by this act; nor any right or privilege acquired or duty imposed, or liability or disqualification incurred under any enactment so repealed." Some days before the 1st of January, 1884, when the Bankruptcy Act, 1883, came into operation, the sheriff entered into possession and seized goods of the defendant, under a writ of elegit issued under statute 13 Edw. 1, c. 18, at the suit of the plaintiff, a judgment creditor of the defendant, but no delivery of such goods had been made to the plaintiff before the 1st of January, 1884:—Held, that the Bankruptcy Act, 1883, had not deprived the plaintiff of his right to the delivery of such goods. *Hough v. Windus*, 12 Q. B. D. 224; 53 L. J., Q. B. 165; 50 L. T. 312; 32 W. R. 452; 1 M. B. R. 1—C. A. See also ante, col. 154.

Extends to Leaseholds.—Notwithstanding the provisions of s. 146 of the Bankruptcy Act, 1883, a writ of elegit still extends to leaseholds. *Richardson v. Webb*, 1 M. B. R. 40—D.

See also BANKRUPTCY, XI., 1.

4. SEQUESTRATION.

Wilful Disobedience of Corporation to Order—How Made and on what Materials.—The court had granted an injunction restraining the defendants from polluting with sewage a pool belonging to the plaintiff, but suspended the order for three months to allow them to comply with it. They had moved the court for a further extension of time, but had been refused. As they had taken no steps to obey the order, the plaintiff soon after the expiration of the three months served them with notice of motion under Ord. XLII. r. 31, for leave to issue sequestration against the property of the corporation. Before, however, this notice was served they remedied the nuisance, so the motion now came on merely as a question of costs. The defendants submitted the following technical objections

under the Rules of the Supreme Court, 1883: (1) No memorandum had been indorsed upon the copy of the judgment served on them, as required by Ord. XLI. r. 5. (2) No copies of the affidavits intended to be used had been served with the notice of motion, as required by Ord. LII. r. 4. (3) There was no case for sequestration at all, but if there were the plaintiff was entitled to, and ought to have issued his writ under Ord. XLIII. r. 6, without moving for leave. (4) Application for leave, if necessary, ought to have been by summons in chambers, in accordance with *Snow v. Bolton* (17 Ch. D. 434):—Held, that the defendants had been guilty of wilful disobedience to the order of the court; and (1) that Ord. XLI. r. 5, had no application to a prohibitive order like the present one; (2) that copies of affidavits need only be served with the notice of motion in cases where the liberty of the subject was involved, as in attachment; (3) that Ord. XLIII. r. 6, applied to something to be done in a limited time, and not to something which had been ordered (as in the present case) not to be done at all; and (4) that, under the circumstances of the case, the plaintiff was right to move the court in the first instance instead of proceeding by summons in chambers. *Selous v. Croydon Rural Sanitary Authority*, 53 L. T. 209—Chitty, J.

Personal Service of Order.—A husband obtained a decree for restitution of conjugal rights, which was not complied with, and the court afterwards made an order giving the petitioner the custody of the only child of the marriage. A copy of the order for custody was left at the house where the respondent was residing, but the respondent had not given up the child to the petitioner. The court, being satisfied that the order as to the custody of the child had come to the knowledge of the respondent, ordered a writ of sequestration to issue against her for non-compliance with the order, without a previous writ of attachment, and ordered the respondent to pay the costs of the motion. *Allen v. Allen*, 10 P. D. 187; 54 L. J., P. 77; 33 W. R. 826—Hannen, P.

Form of Writ.—On the application of a husband, who had obtained a decree nisi for divorce against his wife, an order was made that the wife should deliver up into the custody of the husband the children of the marriage. The wife knew of the order, but evaded service of it, and disobeyed it. On the application of the husband an order was then made declaring the wife contumacious and in contempt, and directing that a writ of sequestration should issue against the estate and effects of the wife:—Held, first, that as the wife knew of the order for delivery up of the children, and evaded service of it, personal service of the order upon her was not necessary to give the court jurisdiction to issue the writ of sequestration; secondly, that the general form of the writ of sequestration against "the estate and effects" of the wife, without any express limitation therein to separate property of the wife not subject to a restraint on anticipation, was right, but that the writ would only operate on her separate property which was not so subject. *Hyde v. Hyde*, 13 P. D. 166; 57 L. J., P. 89; 59 L. T. 529; 36 W. R. 708—C. A.

Against Benefice of Debtor.]—See ECCLESIASTICAL LAW, VIII.

When Receiver appointed in Lieu of.]—See *Whiteley, In re, infra*.

5. EQUITABLE EXECUTION—RECEIVER.

Service of Summons out of Jurisdiction.]—The plaintiff having obtained judgment against the defendant, a foreigner resident out of the jurisdiction, a summons was issued by leave of a judge at chambers, calling on the defendant to show cause why a receiver should not be appointed. On an application for leave to serve this summons on the defendant out of the jurisdiction :—Held, that there was no jurisdiction to grant such leave. *Weldon v. Gounod*, 15 Q. B. D. 622—D.

Evidence of Property.]—Where a plaintiff obtained judgment and issued execution, and the sheriff returned nulla bona, the court will not appoint a receiver on the ground that since the return, the defendant has been found to be possessed of a patent the value of which did not appear from the evidence before the court. *Smith v. Carter*, 52 J. P. 615—D.

Form of Order—Security.]—Where a judgment creditor, in an action for equitable execution, obtained the appointment of a receiver for the purpose of creating a charge upon the debtor's property, subject to prior incumbrances, but not for the purpose of entering into possession or receiving the rents and profits, the receiver was not required to give security, the plaintiff and the receiver undertaking not to act without the leave of the court. *Hewett v. Murray*, 54 L. J., Ch. 572; 52 L. T. 380—V.-C. B. See also *McGarry v. White, infra*.

When Trustee out of the Jurisdiction.]—An order had been made for the payment of money into court by the defendant in an action for breach of trust. The defendant was out of the jurisdiction of the court at the time, and there was slight prospect of his returning within it. The plaintiff accordingly moved to enforce the order by the appointment of a receiver of the interest payable to the defendant on some shares owned by him in a certain syndicate :—Held, that the court would enforce its order for the payment of money on a defendant out of its jurisdiction by the appointment of a receiver of property belonging to him within its jurisdiction. *Coney, In re, Coney v. Bennett*, 29 Ch. D. 993; 54 L. J., Ch. 1130; 52 L. T. 961; 33 W. R. 701—Chitty, J.

Married Woman—Separate Estate.]—In an action against a married woman alleged to be possessed of separate estate, no defence was delivered, and the master found that she was entitled to separate property vested in trustees and subject to certain charges. The plaintiff was appointed receiver without security of the residue of the income of the separate estate, after payment of the prior charges, the plaintiff undertaking to act without remuneration. *McGarry v. White*, 16 L. R., Ir. 322—Q. B. D.

M., a married woman, by her next friend, applied to tax the bill of costs of her solicitor,

incurred in a suit relating to her separate estate. After the taxing-master's certificate had been filed, an order was made on the application of the solicitor, directing an inquiry of what M.'s separate estate consisted at the date of the filing of the certificate capable of being reached by the judgment and execution of the court, and appointing a person to receive it until the amount found due on taxation was paid :—Held, that this order was proper, and that it was not necessary to take separate proceedings by action to enforce the demand against the separate estate. *Peace and Waller, In re*, 24 Ch. D. 405; 49 L. T. 637; 31 W. R. 899—C. A.

Garnishee Proceedings not Applicable.]—Since the Judicature Acts the court can grant equitable execution by the appointment of a receiver at the instance of a judgment creditor against debts and sums of money payable to the judgment debtor to which garnishee proceedings are not applicable. *Westhead v. Riley*, 25 Ch. D. 413; 53 L. J., Ch. 1153; 49 L. T. 776; 32 W. R. 273—Chitty, J.

Receiver instead of Sequestration.]—An order was made against the defendants in an action, who were defaulting trustees, for the payment of money into court. The defendants having failed to comply with such order, an application was made by the plaintiffs that a writ of attachment might issue against them. At the defendants' instance, however, the court made an order allowing payment by weekly instalments. L., one of the defendants, had made an affidavit on that occasion stating that all the property he possessed was the furniture in his house. It subsequently transpired that L. had executed bills of sale affecting the furniture; but that the plaintiffs, in other proceedings, had successfully disputed the validity of such bills of sale. An application was accordingly made on behalf of the plaintiffs for the appointment of a receiver of the furniture by way of equitable execution. For the defendant L. it was contended that the legal and proper remedy of the plaintiffs was by sequestration, and that the court had no jurisdiction to appoint a receiver :—Held, that, although under r. 4 of Ord. XLII. of the Rules of the Supreme Court, 1883, sequestration was the appropriate remedy, yet under s. 25, sub-s. 8 of the Judicature Act, 1873, the court had jurisdiction to appoint a receiver if it appeared just or convenient so to do; and that, in the present case, it was just and convenient to appoint a receiver, and that an order must be made accordingly. *Whiteley, In re, Whiteley v. Learoyd*, 56 L. T. 846—Kay, J.

Judgment Debtor entitled to Legacy.]—A judgment debt being unsatisfied for want of goods of the defendant, who was entitled, expectant on the death of a tenant for life, to a legacy of much larger amount than the debt :—Held, that a receiver should be appointed by way of equitable execution to receive a sufficient portion of the legacy when it should become receivable. *Macnicoll v. Parnell*, 35 W. R. 773—D.

Effect of—No Elegit or Registration—Subsequent Purchaser.]—A judgment debtor had lands in Surrey subject to an equitable mortgage, and his judgment creditor obtained an order for

a receiver of these lands. This order was not registered. After the appointment of the receiver the debtor sold the lands to a purchaser for value without notice :—Held, first, that under the circumstances of the case, it was just and convenient for the court to appoint a receiver within the Judicature Act, 1873, s. 25, sub-s. 8; secondly, that as the appointment of the receiver was equivalent to actual delivery of the land in execution, registration of the order appointing the receiver was, under 27 & 28 Vict. c. 112, unnecessary, registration under that Act being only necessary when an order for sale is required, and that the purchaser was affected by the order. *Pope, In re*, 17 Q. B. D. 743; 55 L. J., Q. B. 522; 55 L. T. 369; 34 W. R. 693—C. A.

What he can Receive—Fund in Discretion of Trustees.—An order was made, in an action in a county court, appointing a receiver to receive the interest of a sum of money in the hands of trustees, and ordering the trustees to pay a specific amount out of the interest to the receiver half-yearly until the judgment in the action should be satisfied. The trustees were trustees of a will, by which they were directed to set apart and invest the sum in question, and were authorised, at their absolute discretion, from time to time, and at such time or times as they should think proper, to pay or apply the whole or any part of the income to or for the benefit of the judgment debtor in such a manner in all respects as they should think proper. The trustees applied for a prohibition :—Held, that, as it depended on the discretion of the trustees whether anything should be paid to the judgment debtor, the receiver could not be entitled to receive the interest in their hands, and that an order for payment could not be made against the trustees, who were strangers to the action, and therefore the county court judge had exceeded his jurisdiction, and the proper remedy was by prohibition. *Reg. v. Lincolnshire County Court Judge*, 20 Q. B. D. 167; 57 L. J., Q. B. 136; 58 L. T. 54; 36 W. R. 174—D.

Indian Officer's Pension.—The pension of an officer of her Majesty's forces, being by s. 141 of the Army Act, 1881, made inalienable by the voluntary act of the person entitled to it, cannot be taken in execution, even though such pension be given solely in respect of past services, and the officer cannot again be called upon to serve :—Held, that an order appointing a receiver of such pension was bad. *Birch v. Birch* (8 P. D. 163) approved; *Dent v. Dent* (1 L. R., P. 366) distinguished. *Lucas v. Harris*, 18 Q. B. D. 127; 56 L. J., Q. B. 15; 55 L. T. 658; 35 W. R. 112; 51 J. P. 261—C. A.

Improper Conduct of Receiver—Application to what Court.—A receiver was appointed in an action in the Queen's Bench Division under an order directing him to collect the rents of certain specified property (including property in which S. was in possession as mortgagee), such order to be without prejudice to the rights of any incumbrancer who might be in or enter into possession. The receiver gave notice to the tenants of the mortgaged property to pay the rents to him, who informed him that they had already been served with a notice from S. The receiver not withdrawing the notice, S. brought an action in the Chancery Division, asking for an injunction to

restrain the receiver from receiving the rents :—Held, that although the receiver's conduct was improper, and in violation of the rights of S., S. was not justified in instituting a fresh action in the Chancery Division; and that, whatever might have been the course previous to the Judicature Act, such a proceeding since that act was irregular, the proper course being to apply in the action and to the court in and by which the receiver was appointed. *Searle v. Choat*, 25 Ch. D. 723; 53 L. J., Ch. 506; 32 W. R. 397—C. A.

6. CHARGING ORDER—STOCKS AND SHARES.

Jurisdiction—Order charging Cash—Stop Order.—A charging order may be made by a judge of the Queen's Bench Division upon cash standing to the credit of the debtor in the Chancery Division in the name of the Paymaster-General. Such an order may be made *ex parte*, and in order to give effect to it it is not necessary to obtain a stop order or to obtain the appointment of a receiver; but notice given to the Paymaster-General will be sufficient to secure priority. *Brereton v. Edwards*, 21 Q. B. D. 488; 60 L. T. 5; 37 W. R. 47—C. A. Affirming on other grounds 52 J. P. 647—D.

Date from which commencing.—A charging order nisi, when it is afterwards made absolute, takes effect from the date of the order nisi. *Id.*

Writ of Execution not issued.—A charging order cannot be made unless there be an existing writ of execution issued and leviable. When therefore a writ of *fi. fa.* had been issued, the debt partly levied, and the writ returned, the court declined to grant an order, charging the defendant's interest in money, in court, until the plaintiff issued a new writ of *fi. fa.* *Donohoe v. Mullarkey*, 18 L. R., Ir. 425—Ex. D.

Not an Execution against Goods of Debtor.—An order nisi charging shares under 1 & 2 Vict. c. 110, s. 14, is not an execution against the goods of a debtor within s. 45 of 46 & 47 Vict. c. 52 of the Bankruptcy Act, 1883. *Hutchinson, Ex parte*, or *Plowden, Ex parte, Hutchinson, In re*, 16 Q. B. D. 515; 55 L. J., Q. B. 582; 54 L. T. 302; 34 W. R. 475; 3 M. B. R. 19—D.

Service of Notice on Legatee—Effect of.—Service of a notice under Ord. XLVI. r. 4, as to stock or shares comprised in a legacy by the legatee or his solicitor, is not an acceptance of the legacy so as to bring the legatee under the liabilities attaching to the stock or shares, or estop him from subsequently disclaiming the legacy. *Hobbs v. Wayet*, 36 Ch. D. 256; 56 L. J., Ch. 819; 57 L. T. 225; 36 W. R. 73—Kekewich, J.

Order for Sale of Shares.—The plaintiff, having recovered judgment in an action, obtained an order absolute under Ord. XLVI., charging shares of the defendant in a company with the payment of the judgment debt and interest, and then applied to the court for an order for sale of the shares :—Held, that s. 24 of the Judicature Act, 1873, did not give the court jurisdiction to order the sale. *Leggott v. Western*, 12 Q. B. D. 287; 53 L. J., Q. B. 316; 32 W. R. 460—D.

Writ to Enforce—Service out of Jurisdiction.]

—This was a motion for leave to issue for service out of the jurisdiction a writ in an action seeking to enforce a charging order obtained by the plaintiff, a judgment creditor, upon certain shares belonging to the defendant, the judgment debtor. The Judgment Act (1 & 2 Vict. c. 110), s. 14, which by virtue of Ord. XLVI. r. 1, regulates the effect of a charging order, provides that "such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." Ord. XL. r. 1, provides that service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the court or a judge whenever (e) "the action is founded on any breach, or alleged breach, within the jurisdiction, of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction":—Held, that, assuming that the case could be treated as one of contract at all, it would only be a contract that the shares should be charged, and of such a contract there had not been any breach within the jurisdiction. *Moritz v. Stephan*, 58 L. T. 850; 36 W. R. 779—North, J.

Fund in Court—Priority over Mortgage.]—

A judgment creditor cannot, by obtaining a charging order on a fund in court, acquire priority over a previous mortgagee of the fund who has obtained no order. *Bell, In re, Carter v. Stadden*, 54 L. T. 370; 34 W. R. 363—Kay, J.

7. DISCOVERY IN AID OF.**Garnishee Order—Oral Examination of**

Garnishee.]—A garnishee order is an order for the payment of money, and a judgment creditor, being a person entitled to enforce it, may apply to the court for an order for the oral examination of the garnishee under Ord. XLII. r. 32. *Cowan v. Carhill*, 52 L. T. 431; 33 W. R. 583—D.

Examination of Third Parties.]—

There is no power under Ord. XLII. r. 32, when a judgment or order has been obtained for the recovery or payment of money, to make an order for the examination of any person other than the debtor liable under such judgment or order, or in the case of a corporation, other than an officer of the defendant corporation. *Irwell v. Eden*, 18 Q. B. D. 588; 56 L. J., Q. B. 446; 56 L. T. 620; 35 W. R. 511—C. A.

On the application of a husband, who had obtained a decree nisi for divorce against his wife, an order was made that the wife should deliver up into the custody of the husband the children of the marriage. The wife knew of the order, but evaded service of it, and disobeyed it. On the application of the husband an order was then made declaring the wife contumacious and in contempt, and directing that her mother, sister, and brother-in-law should attend the court to be examined as to her whereabouts:—Held, that the court had no jurisdiction to order the attendance of third parties for examination. *Hyde v. Hyde*, 13 P. D. 166; 57 L. J., P. 89; 59 L. T. 529; 36 W. R. 708—C. A.

8. RIGHTS OF EXECUTION CREDITOR.**Debtor's Interest.]—**

A judgment creditor can only by execution take such property of his debtor as the debtor could deal with properly and without violation of the rights of other persons. *Badeley v. Consolidated Bank*, 38 Ch. D. 238; 57 L. J., Ch. 468; 59 L. T. 419; 36 W. R. 745—C. A.

Interpleader—Jus tertii.]—

Upon the trial of an issue under a sheriff's interpleader between a claimant and the execution creditor, in the absence of any evidence of title on the part of the claimant, or if the claimant's interest be shown to have passed to a third person, the execution creditor is entitled to succeed. *Richards v. Jenkins*, 18 Q. B. D. 451; 56 L. J., Q. B. 293; 56 L. T. 591; 35 W. R. 355—C. A.

Possession by Sheriff.]—

The possession of goods by the sheriff under an execution is not the possession of the execution creditor. *Id.*

Receiver appointed in Partnership Action—

Subsequent Judgment against Firm.]—Where a plaintiff had obtained an order for dissolution of partnership and accounts, and a receiver was appointed, a creditor, who had obtained a judgment in the Queen's Bench Division of the High Court of Justice for 48*l.* 13*s.* 8*d.* and 8*l.* costs, took out a summons in chambers for leave to issue execution against the assets of the firm in the hands of the receiver, and this application was refused. On the motion to discharge the order: the Court refused to decide that the applicant would be entitled to any preferential payments in the administration of the partnership assets, but gave him a charge for his judgment debt, with 4 per cent. interest and costs, and costs of the motion, on all the moneys then in the hands of the receiver, or to come into his hands, he undertaking to deal with it according to the order of the court, the court intending to preserve to the applicant such legal rights as he would have had in case the sheriff had seized under an execution and sold on that day. *Kewney v. Attrill*, 34 Ch. D. 345; 56 L. J., Ch. 448; 55 L. T. 805; 33 W. R. 191—Kay, J.

See also cases sub tit., **SHERIFF.**

EXECUTOR AND ADMINISTRATOR.**I. RIGHTS, POWERS, AND DUTIES, 775.**

1. *Dealing with Estate*, 775.
2. *Power to Pledge or Mortgage Estate*, 780.
3. *Allowances and Payments to*, 782.
4. *Right of Retainer*, 783.
5. *Right of Set-off*, 786.

II. LIABILITIES, 786.

1. *In General*, 786.
2. *Devastavit*, 788.

III. ASSETS, 790.

1. *What are*, 790.
2. *Admission of Assets*, 790.
3. *Distribution of Assets*, 791.
 - a. Interest on Legacies, 791.
 - b. In other Cases, 792.

IV. EXECUTOR DE SON TORT, 796.

V. PROCEEDINGS BY AND AGAINST, 796.

VI. ADMINISTRATION ACTIONS, 800.

1. *Order when Made—Jurisdiction*, 800.
2. *Parties*, 803.
3. *Practice*, 804.
4. *Costs*, 808.
 - a. When Estate Insufficient—Priority, 808.
 - b. In other Cases, 811.

I. RIGHTS, POWERS AND DUTIES.

1. DEALING WITH ESTATE.

Duty to Convert — Wilful Default.]—The testator, at his death, had cargoes of cotton which he had purchased on speculation, and his executors, in the exercise of due care and discretion (though at one time they might have sold the whole of the cotton in a fluctuating market, at a small profit) kept it until it fell in price, and loss to the assets was thereby sustained;—Held, that the executors had not been guilty of wilful default. *Blount v. O'Connor*, 17 L. R., Ir. 620—M. R.

The will contained a clause, that the testator's trustees should be at liberty to sell all his ships, houses, and other property, and invest the same as they should think most desirable, but not in British Funds; his trustees to be free from all liability, in investing the money received for the sale of any of his property. The testator had railway and foreign stock, which the trustees did not sell, and which afterwards fell in value, causing a large loss to the assets:—Held, that they were not guilty of wilful default. *Ib.*

— Reasonable Discretion.]—An executor's discretion is not that of an absolute owner: it is limited by the duty of bringing the assets into a proper state of investment within a reasonable time; the onus is upon him to show that he has acted *bonâ fide* and has exercised a reasonable discretion. Where the testator's assets were subject to trusts in favour of unborn persons and consisted in part of shares with unlimited liability, and the executors delayed conversion after the same was demanded by those beneficially interested:—Held, that they were liable for the value of the shares ascertained at a reasonable date from the death of the testator, which in this case was fixed at six months. *Hiddingsh v. De Villiers*, 12 App. Cas. 624; 56 L. J., P. C. 107; 57 L. T. 885—P. C.

It is not the duty of executors to turn the whole estate into money; their duty is to liquidate it, that is reduce it into possession, cleared of debts and outgoing, and so left free for enjoyment by the heirs, and to hold any trust fund separate from their own. *Beningfield v. Baxter* (12 App. Cas. 167) approved. *Ib.*

Powers of Investment.]—The executors in-

vested part of the assets in the purchase of railway stock and of freehold premises in England, and on the security of a mortgage:—Held, not wilful default, but acts which (if not authorized by the will) would render them liable to account for the money so invested, under the ordinary decree to account. *Blount v. O'Connor*, *supra*.

See also TRUST AND TRUSTEE.

Wilful Default—What is.]—Wilful default means improper neglect to receive assets, not the misapplication of assets once received. The latter act is a devastavit, for which executors are chargeable, under the ordinary decree to account. *Ib.*

— Division of Securities.]—After payment of the debts and legacies, &c., the trustees divided the securities representing the residue, into four parts, and allocated a part to each of the four persons entitled to the residue with their assent, and out of the two parts purchased residences for the persons entitled to them, at their request, charging the sums so invested as payments on account of their respective shares:—Held, that the executors were not guilty of wilful default or breach of trust. *Ib.*

Power to postpone Sale of Business—Profits — Tenant for Life or Remainderman.]—A testator devised and bequeathed his real and personal estate upon the usual trusts for sale and conversion, the proceeds to be invested and to be held upon trust for his wife for life, and, after her death, for his children. The will contained the usual power to postpone the sale and conversion of the real and personal estate, and the usual direction that until sale and conversion the rents, profits, and income thereof should be paid to the same persons and applied in the same manner as the income of the trust estate. The will contained no reference whatever to the business of the testator, which comprised the bulk of his estate. The executors carried on the business for nearly two years with a view to its sale as a going concern, and the question arose whether the profits of the business during that period were to be treated as capital or income:—Held, that the executors had power to carry on the business for a reasonable period with a view to its sale as a going concern; and that as the testator had expressly directed that the profits of his personal estate until conversion were to be treated as income, the general rule laid down in *Hove v. Earl of Dartmouth* (7 Ves. 137) did not apply, and therefore the widow was entitled to the profits of the business. *Brown v. Gellatly* (2 L. R., Ch. 751) and *Kirkman v. Booth* (11 Beav. 279) distinguished. *Chancellor, In re, Chancellor v. Brown*, 26 Ch. D. 42; 53 L. J., Ch. 443; 51 L. T. 33; 32 W. R. 465—C. A.

Direction to carry on Testator's Business—Right to Premises and Plant.]—A testator after giving legacies and annuities, proceeded to say: "My executors may realize such part of my estate as they think right and in their judgment to pay the aforementioned legacies." He then directed his business to be carried on till his son attained the age of thirty, but did not dispose of the profits, nor did his will contain any further disposition of his real or personal estate, except

a gift of a particular house. The testator carried on his business in a freehold mill which was his own property:—Held, that so long as the testator's business was continued for the purposes and under the directions of the will, the executors were entitled to the free use and occupation of the business premises, and of the fixed plant and machinery therein, without paying any rent for the same. *Cameron, In re, Nixon v. Cameron*, 26 Ch. D. 19; 53 L. J., Ch. 1139; 50 L. T. 339; 32 W. R. 834—C. A.

But held, that the descended real estate could not be affected by the direction to carry on the testator's business any further or otherwise than such carrying on might be necessary for payment of the legacies and annuities given by the will, and that, so soon as they were provided for, the direction to carry on the business became inoperative, and ceased to be binding either on the heir-at-law or the next of kin, and that any surplus profits which had arisen since the testator's decease after providing for the legacies and annuities, must be apportioned between the heir-at-law and the next of kin according to the values of the real and personal estate employed in the business. *Id.*

Carrying on Trade—Goods bought by Representative—Rights of Vendors.—The administratrix of an intestate, a dealer in builders' materials, carried on the intestate's trade, and bought cement for the purposes of the trade. On the 15th of April, 1886, a receiver and manager was appointed in an administration action by the infant child of the intestate. On the 22nd of April the vendors recovered judgment against the administratrix for the price of the cement, but judgment was not signed till the 18th of May, on which day, the cement remaining in specie was sold along with other effects under an order in the administration action. Execution was never issued by the vendors of the cement, but they applied in the administration action to have the proceeds of its sale applied in payment of their debt. The court refused this relief, but declared them entitled to a lien on the beneficial interest of the administratrix in the intestate's estate. The vendors appealed:—Held, that the cement, as between the vendors and the administratrix, was the property of the administratrix, she being a debtor to them for the price, and that as between the administratrix and the estate the cement belonged to the estate subject to the right of the administratrix to be indemnified for the price if she was not a debtor to the estate—that the vendors could not have any higher claim than hers, and were not entitled to anything more than the order gave them. Whether the order was right in declaring them entitled to a lien, *quære*. *Evans, In re, Evans v. Evans*, 34 Ch. D. 597; 56 L. T. 768; 35 W. R. 586—C. A.

Transfer of Shares—Sale by Representative of Beneficial Owner.—The registered owner of a share in a company died in 1859 intestate, and administration to her estate was granted to A. P., her sole next of kin. A. P. died in November, 1859, intestate, and administration to his estate was granted to his widow, E. P. In February, 1860, E. P. passed the residuary account of the original owner's estate showing no debts. In November, 1860, E. P. described as "administratrix of A. P., administrator of "

the original owner, executed a transfer of the share, which was passed by the company:—Held, that the sale was valid and binding in equity. *Clark v. South Metropolitan Gas Company*, 53 L. T. 646—C. A. Affirming 54 L. J., Ch. 259; 33 W. R. 160—North, J.

Forged Transfer by one Executor.—One of two executors, at various periods, some of which were more than six years before the commencement of the action, forged his co-executor's signature to transfers of stock, which were duly registered. He applied the proceeds of the transfers to his own purposes, but continued to pay the amounts of the dividends to the persons entitled. The other executor, on discovery of the fraud, informed the railway company that the transfers were invalid, and demanded that the stock should be registered in the names of herself and another who had been appointed trustees of the will. The railway company declined to accede to this request, and the present action was brought that the company might be ordered to register the plaintiffs as owners of the stock:—Held, that one of the co-executors could not transfer stock registered in the names of both; that the transfers were not good as to one moiety of the stock, and that the innocent executor had in equity a sufficient interest in the stock to enable her to sue her fraudulent co-executor and the railway company. *Barton v. North Staffordshire Railway*, 38 Ch. D. 458; 57 L. J., Ch. 800; 58 L. T. 549; 36 W. R. 754—Kay, J.

Sale of Real Estate—Renunciation—Powers of Acting Executor.—A testator by his will directed that his debts should be paid, and that his property (which included real estate) should be sold by his executors. One of the executors alone proved the will, the other renounced probate:—Held, that the acting executor could make a good title to real estate, and that he had power to sell and convey it. *Fisher and Haslett, In re*, 13 L. R., Ir. 546—V.-C.

Sale of Leaseholds by Administrator under Grant subsequently Revoked.—A grant of letters of administration obtained by suppressing a will containing no appointment of executors is not void ab initio, and accordingly a sale of leaseholds by an administratrix who had obtained a grant of administration under such circumstances to a purchaser who was ignorant of the suppression of the will, was upheld by the court, although the grant was revoked after the sale. *Bovall v. Bovall*, 27 Ch. D. 220; 53 L. J., Ch. 838; 51 L. T. 771; 32 W. R. 896—Kay, J.

Sale of Leaseholds many Years after Death of Testator.—A testator who died in 1847, possessed of certain leaseholds held for a term of years, by his will directed his debts to be paid; and the residue of his property he bequeathed, after payment of his debts, to his executors in trust for payment of certain annuities. There was no specific bequest of the term of years. The executors after a lapse of thirty-seven years put up the leasehold premises for sale by auction. No necessity for the sale was disclosed on the abstract of title, nor was it alleged that any debts of the testator remained unsatisfied. The purchaser objected that the abstract did not

disclose how the vendors, after such a lapse of time, still retained the power to sell:—Held, that a good title to sell had not been shown by the executors. *Molyneux and White, In re*, 15 L. R., Ir. 383—C. A.

A testator left all his property to W. B. and M. R. upon trust, in the first place, to pay his debts, and subject thereto in trust for his wife and children in equal shares, and appointed his trustees and M. B. executors. The testator died in April, 1868, and in October, 1885, M. R., who had alone proved the will, put up for sale as executrix, a portion of the assets consisting of a house in Dublin, held for a term of years. One of the conditions of sale provided that the purchaser should not require any of the legatees to be parties to the conveyance. C., having purchased the premises, objected to the title, upon the ground that a good title could not be made without the concurrence of the legatees of the leasehold and W. B.:—Held, that the period which had elapsed since the testator's death did not create a presumption of the executrix's assent, and that she had authority to sell. *Ryan and Caranagh, In re*, 17 L. R., Ir. 42—V. C.

The rule intimated in *Tanqueray-Willowme and Landau, In re* (20 Ch. D. 465), that where an executor is selling real estate, after twenty years have elapsed from the testator's decease, a presumption arises that the debts have been paid, and the purchaser is therefore put upon inquiry, does not in general apply to the case of an executor selling leaseholds of his testator. *Whistler and Richardson, In re*, 35 Ch. D. 561; 56 L. J., Ch. 827; 57 L. T. 77; 35 W. R. 662; 51 J. P. 820—Kay, J.

A testator bequeathed leaseholds to his executrix upon trust to pay an annuity, and bequeathed his residuary estate to the executrix. Shortly before twenty years had elapsed from the testator's decease the executrix contracted to sell the leaseholds at a price to be ascertained by a named person. Shortly after the twenty years had elapsed the price was ascertained. It was not shown that there were debts of the testator remaining unsatisfied, nor did it appear that the executrix had been in possession of the leaseholds as legatee:—Held, that the purchaser was not entitled to require the concurrence of the annuitant in the assignment of the leaseholds. *Id.*

Sale by Executor to Himself Voidable.—B. was a member of a firm of three partners, and also the surviving member of another firm of two partners, which was the sole or chief creditor of the first firm. B.'s executor purchased the estate of the first firm for his own benefit, with the result that nothing was left for B.'s widow and universal legatee:—Held, in a suit by the widow against the executor, that such sale was voidable; and that a decree be made for a general administration of B.'s estate, declaring that the sale be set aside with certain special directions. *Travis v. Milne* (9 Hare, 150) approved. *Beninfield v. Baxter*, 12 App. Cas. 167; 56 L. J., P. C. 13; 56 L. T. 127—P. C.

A., B., and C. were executors and B. and C. trustees of a testator who had property in Jamaica. A. proved the will in Jamaica, and B. and C. in England. Before the estate was wound up and accounts settled, A. purchased from B. and C. a business carried on by the

testator in Jamaica:—Held, that the sale to A., being of itself a part of the process of realising the estate, could not be justified as a sale to an executor who had assented to a bequest, and must be set aside at the instance of the beneficiaries. *Harvey, In re, Harvey v. Lambert*, 51 L. T. 449—Kekewich, J.

Purchase of Estate by Executor who has not Proved.—A sale is not to be avoided merely because, when entered upon, the purchaser has the power to become trustee of the property purchased, as for instance by proving the will which relates thereto, though in point of fact he never does become such. Such a purchaser is under no disability, and in order to avoid such sale it must be shown that he in fact used his power in such a way as to render it inequitable that the sale should be upheld. *Clark v. Clark*, 9 App. Cas. 733; 52 L. J., P. C. 99; 51 L. T. 750—P. C.

Power to Compromise.—Sect. 30 of the Trustees and Mortgagees Act, 1860, which empowers executors to compromise claims relating to the estate of their testator is not confined to claims outside his will, but applies to the claim of a legatee. *Warren, In re, Weedon v. Warren*, 53 L. J., Ch. 1016; 51 L. T. 561; 32 W. R. 916—Kay, J.

2. POWER TO PLEDGE OR MORTGAGE ESTATE.

Pledge of Assets to secure Personal Debt—Notice—Transfer of Mortgage.

—C. and his wife were trustees and executors of the will of R., by which the testator devised and bequeathed all his real and personal estate to them in trust for Mrs. C. for life, for her separate use, and, after her decease, for her children. Part of the assets consisted of certain shares in the H. Bank, and shortly after the testator's death, C. and his wife invested other portions of the assets upon two mortgages of fee-simple estate which were made to them jointly; but beyond showing that the money had been advanced on a joint account, did not disclose any trust. C. afterwards opened an account with the M. Bank, and as security for overdrafts, deposited with them the bank shares and the mortgages, these latter being sub-mortgaged to the M. Bank by deed, which was not, however, acknowledged by Mrs. C. as a married woman. To reduce his overdraft, C., at the suggestion of the manager of the M. Bank, authorised the bank to sell the shares, and induced Mrs. C. to join in such sale. They were accordingly sold by the brokers of the bank on account of C. and his wife, "representatives of R.," and in the transfer deeds C. and his wife were described as "executors of R." The M. Bank was also paid the moneys due to them on foot of the mortgages, but not until after receiving express notice of the trusts affecting them. In a suit by C.'s children after his death:—Held (1), that the bank having received the proceeds of sale of the shares, with distinct notice that they constituted part of the testator's assets, even though unaware of the trusts of the will, could not retain the amount in liquidation of C.'s personal indebtedness to themselves, and were accordingly bound to replace the same. (2) That the bank, not having acquired the

legal estate in the mortgaged premises, except for the life of C., in consequence of the want of acknowledgment by Mrs. C., they could only set up an equitable title to the mortgages, which even assuming them to have originally been purchasers for value without notice, could not prevail against the earlier equity in the plaintiffs. *Connolly v. Munster Bank*, 19 L. R., Ir. 119—V. C.

Mortgage of Real Estate for Payment of Debts and Legacies.—Section 18 of Lord St. Leonards' Act does not apply to a case where a testator has devised his real estate, by way of settlement, to a person or persons for life, with remainders over. The meaning of that section is, that where a testator has devised his whole estate and interest directly to A. or to A. and B., or any number of persons as tenants in common, or joint tenants in fee or in tail, so that the devisee or devisees can themselves mortgage the property, then the executors are not to have the power. But where the estate is devised by way of settlement, so that there is no individual or individuals who are able to make a title to a mortgage, then that is a case to which s. 16 (whereby executors are empowered to mortgage a testator's real estate for payment of debts or legacies) was intended to apply. A testator, by his will, appointed certain persons therein named executors and trustees thereof, and, after making certain specific devises and bequests, he devised and bequeathed all the residue of his real and personal estate subject to his debts, funeral and testamentary expenses, and to the legacies thereinbefore bequeathed, unto and equally between his two sons for life, with remainders over. The executors mortgaged a portion of the residuary real estate:—Held, that this was a case in which s. 16 was applicable, and that the mortgage was a perfectly valid one. *Wilson, In re, Pennington v. Payne*, 54 L. T. 600; 34 W. R. 512—Kay, J.

Mortgage of Leasehold to secure Debt due by Executor—Priority of Legatees.—A testator possessed of leaseholds bequeathed, amongst others, pecuniary legacies to each of his two daughters, and appointed his son residuary legatee and executor. The son, on the testator's death, went into possession of all his assets, including the leaseholds, and paid interest to the daughters on their legacies, the principal sums remaining unpaid and due to the legatees. Many years after the testator's death, the testator's son deposited with a bank the leases of the testator's leasehold premises to secure, by way of equitable mortgage, the amount of his (the son's) own overdrawn account, and the evidence showed that the bank dealt with him as absolute owner. On the petition of the bank, the leaseholds were sold, and the daughters claimed to be placed on the schedule as incumbrancers on the leaseholds in respect of their unpaid legacies in priority to the claim of the bank:—Held, that the bank was not entitled in priority to the legatees, but was only entitled to a charge on the executor's beneficial interest in the leaseholds as residuary legatee. *Queale's Estate, In re*, 17 L. R., Ir. 361—C. A.

Implied Power to Mortgage—Executors directed to carry on Trade—Freehold Premises.—A testator by his will directed that his business should be carried on by his executors, there-

inafter named, and appointed as such his wife and S., the latter of whom renounced probate. The testator had carried on his trade in premises of which he was seised for a freehold estate, and these were not devised to the executors. He had deposited the title deeds of these premises with bankers by way of equitable mortgage. His widow, who proved the will, continued carrying on his trade, and after his death she obtained from the bank further advances (some of which were made before probate), for the purpose, as she stated, of carrying on the business, on the security of the deeds, which remained throughout with the bank:—Held (a), that the absence of a devise of the freehold premises to the executors did not prevent their making a valid mortgage thereof; (b) that the fact that some of the advances were made before probate was immaterial; (c) that the direction to carry on the business was given to the executors *virtute officii*, and that all powers incident thereto were capable of being exercised by the acting executrix alone; and (d) that a fresh deposit of the title deeds was unnecessary. *Devitt v. Kearney*, 13 L. R., Ir. 45—C. A.

Held, also, that the freehold premises were assets employed by the testator for the purpose of his business at the time of his death, and that the executrix was impliedly authorised to mortgage them for the purpose of carrying on the business, and therefore the deposit constituted a valid security for all the advances. *Id.*

3. ALLOWANCES AND PAYMENTS TO.

Payment to one of two Executors—Executor also Agent of Debtor.—Payment by a debtor, for the express purpose of discharging his debt to an estate, to his own agent, who happens to be, but not to the debtor's knowledge, one of the executors of the estate, is not sufficient to discharge the debtor. *Miller v. Douglas*, 56 L. J., Ch. 91; 55 L. T. 583; 35 W. R. 122—Stirling, J.

Residuary Account signed by Executor—Evidence of Receipt of Money.—Although a residuary account signed by an executor is *prima facie* evidence of receipt of the moneys credited in the account, it is evidence which is open to explanation, and the acknowledgment is not conclusive against him in favour of a debtor to the estate. *Id.*

Interest on Advances to Estate.—An executrix, who advanced money for the payment of simple contract debts charged on the testator's real estate, allowed interest on such advances. *Biggar v. Eastwood*, 15 L. R., Ir. 219—M. R.

Costs, Charges, and Expenses—Application to Strike Solicitor off Rolls.—A solicitor, acting for the administrator of a deceased intestate, retained in his hands a portion of the estate and failed to account for the same. The administrator applied for and obtained in 1876, in the Queen's Bench Division, a rule that the solicitor should be struck off the rolls, or should answer an affidavit relating to the retention of the sum by him. A writ of attachment was issued against the solicitor, who absconded, and the writ was renewed in each term down to 1887. In that year, upon further consideration of an action to

administer the intestate's estate, the taxing-master was directed to tax the costs, charges, and expenses of the administrator properly incurred. He disallowed all the costs of the proceedings against the solicitor, on the ground that they were not ordinary proceedings, but were in the nature of punishment to the solicitor:—Held, upon a summons to review the taxation, that the real object of the proceedings against the solicitor was to obtain the money due to the estate, and that therefore some of the costs incurred ought to be allowed; but it was referred to the taxing-master to consider how far the costs incurred subsequently to obtaining the rule were for the benefit of the estate and should be allowed. *Davis, In re, Muckalt v. Davis*, 57 L. J., Ch. 3; 57 L. T. 755—North, J.

4. RIGHT OF RETAINER.

Claim within Statute of Frauds.—An executor or administrator would commit a devastavit who paid a debt to a creditor who is prevented from enforcing it by the Statute of Frauds. And for the same reason an executor or administrator cannot retain such debt if due to himself. A father in consideration of the marriage of his daughter made a verbal promise to pay his daughter and her husband 500*l*. He died intestate without performing his promise, and the daughter took out administration to his estate:—Held, that the administratrix could not retain the debt out of the assets. *Rownson, In re, Field v. White*, 29 Ch. D. 358; 54 L. J., Ch. 950; 52 L. T. 825; 33 W. R. 604; 49 J. P. 759—C. A.

Balance Order for Amount of Calls.—A balance order obtained by a liquidator of a company in course of winding up against the executors of a deceased contributory for the payment of the amount of calls due from him, does not operate as a judgment to destroy the executors' right of retainer in respect of a debt due to them from their testator's estate. *Hubback, In re, International Hydropathic Company v. Hawes*, 29 Ch. D. 934; 54 L. J., Ch. 923; 52 L. T. 908; 33 W. R. 666—C. A.

When Executrix a Cestui que Trust—Breach of Trust.—A testator appointed his wife sole executrix of his will. By a settlement executed on the marriage of the testator and his wife certain funds were settled upon trust for the wife for life, with remainder to the children of the marriage. The testator, who acted as solicitor for this trust, appropriated certain of the trust funds. He also appropriated to his own use the residuary estate to which his children were entitled under the will of a testatrix and of which he was one of the trustees. The testator died, and an action was brought by a creditor for the administration of his estate, which was insolvent. The executrix, on behalf of her own life interest, and also on behalf of her children, claimed the right to retain out of the estate of the testator the amounts appropriated by him as above stated:—Held, that the trustees of the settlement and will being the persons to sue for and recover the funds appropriated, and not the executrix, she had no right of retainer. *Dunning, In re, Hatherley v. Dun-*

ning, 54 L. J., Ch. 900; 53 L. T. 413; 33 W. R. 760—C. A.

Debt due to Executor of Trustee—Exercise of, for Benefit of Trust Estate.—B. was the executrix of her late husband, whose estate was insolvent, and who was indebted to the estate of A., of which he was sole trustee, in a considerable sum of money in respect of the proceeds of sale of certain real estate, and therefore the right to receive the money and the obligation to pay were centred in the same person. Under these circumstances B. claimed to be entitled, in priority to all other creditors upon her late husband's estate, to retain out of his personal assets which had come to, or were in her hands, or had been paid into court, a sum in respect of the proceeds of sale of the real estate. The question was, whether an executor or administrator was bound to retain for debts to which he was entitled as trustee when required to do so by his cestui que trust:—Held, on the authority of *Sander v. Heathfield* (19 L. R. Eq. 21), that the right of retainer must be allowed. *Faithfull, In re, Hardwick v. Sutton*, 57 L. T. 14—Chitty, J.

Husband Executor—Charging Separate Estate with Funeral Expenses.—A husband, executor of his wife's will made under a testamentary power of appointment, is entitled to retain out of her estate the expenses of her funeral, though such estate was insufficient for creditors, and her will did not contain any charge of debts and funeral expenses. *McMyn, In re, Lightbown v. McMyn*, 33 Ch. D. 575; 55 L. J., Ch. 845; 55 L. T. 834; 35 W. R. 179—Chitty, J.

Judgment for Administration.—An action was brought by creditors for the administration of the estate of an intestate, a widow, against the administrator, who was her eldest son, and who was acting under letters of administration granted to him previously. The defendant had joined, as surety, with the intestate in giving a security for certain loans which had been procured by her for her own purposes, and he claimed to retain out of the assets of the intestate, in or coming to his hands as administrator, a sum sufficient to repay these loans with interest. He had not, in fact, repaid them, although he was personally liable to do so. The defendant was at one period engaged in farming, and the intestate from time to time made him small advances when he was in want of money to assist him in carrying on his business, or for his maintenance. The intestate never attempted to recover these moneys, and she took no acknowledgment for them. The plaintiffs sought to charge the defendant with the moneys so received by him. By the chief clerk's certificate it was certified, amongst other things, that the defendant had made the claim above mentioned, which the chief clerk had allowed, and that the plaintiffs had brought in the set-off before referred to, but which the chief clerk had disallowed. The plaintiffs took out a summons to vary the chief clerk's certificate:—Held, that the right of the retainer existed notwithstanding the judgment for administration, and notwithstanding that the defendant had not in fact repaid the loans before the judgment; and that, upon his repaying them, he would be permitted

to retain. *Orme, In re, Evans v. Maxwell*, 50 L. T. 51—Kay, J.

Administration Action—Receiver appointed.]

—A creditor who has been appointed executor by his debtor, and who, as executor, has got in assets to the full amount of his debt, is entitled to priority, in respect of his right of retainer, after a creditor's administration action has been commenced, and he has handed over the assets to a receiver appointed in the action, and this notwithstanding that he has proved his debt in the action. *Harrison, In re, Latimer v. Harrison*, 32 Ch. D. 395; 55 L. J., Ch. 687; 55 L. T. 150; 34 W. R. 736—Pearson, J.

In a creditor's administration action brought against an executrix, who was also a creditor of the testator, a receiver was appointed, who obtained possession of certain legal assets as to which the executrix would have had a right of retainer if they had come to her hands:—Held, following with reluctance *Richmond v. White* (12 Ch. D. 361), and *In re Birt* (22 Ch. D. 604), that after the appointment of the receiver the executrix could not claim retainer out of any assets got in by him. *Williams' Estate, In re* (15 L. R., Eq. 270), distinguished. *Jones, In re, Calver v. Lawton*, 31 Ch. D. 440; 55 L. J., Ch. 350; 53 L. T. 855; 34 W. R. 249—Kay, J.

The estate was insolvent, there were both specialty and simple contract creditors, and the executrix, who was a simple contract creditor, had got in certain legal assets before the receiver was appointed:—Held, that she could only exercise her right of retainer as against creditors of equal degree with herself; and accordingly, that the assets being treated as divided rateably among the specialty and simple contract creditors, she could retain her debt against the dividends payable to the simple contract creditors to the extent of the legal assets received by him. *Id.*

Hinde Palmer's Act, 1869, the object of which was only to place specialty and simple contract creditors on an equal footing inter se for the purpose of distribution, ought not to be so construed as to give incidentally to an executor the power to defeat specialty as well as simple contract creditors; although the act, by augmenting the fund for the payment of simple contract debts, has to that extent enlarged the right of retainer. *Id.*

Right of Representatives of deceased Executor

—**Debt under Covenant.**—An executor's right of retainer is limited to so much of the assets of his testator as comes into the possession or under the control of the executor, or is paid into court during his lifetime. If an executor asserts in his lifetime a right of retainer, but dies without having exercised it, his representatives may exercise that right for the benefit of his estate only as to anything which came into the actual possession or under the actual control of their testator, or which was paid into court during his lifetime. Claims by an executor for breach of a covenant to assign a policy, and to replace furniture, if sold, by other furniture of like value, are claims for damages for breach of pecuniary contracts for which there is a certain standard or measure, and may therefore, on the authority of *Loane v. Casey* (2 W. Bl. 965), be retained. *Compton, In re, Norton v. Compton*,

30 Ch. D. 15; 54 L. J., Ch. 904; 53 L. T. 410—C. A.

5. RIGHT OF SET-OFF.

Debt of Husband to Testator—Wife's share in Residue—Deduction of Debt from Wife's share.]

—A testator bequeathed to his married daughter, after the death of his wife, a share of the residue of his real and personal estate. The daughter's husband owed the testator 725*l.*, a sum equal to or in excess of her share of residue. There were six children of the marriage. The daughter had about 70*l.* a year derived from an uncle, for her life, with remainder to her children, and her husband had no private means, and made only some 60*l.* a year by his business. The testator left six children him surviving. He died in 1877:—Held, the case not coming within the Married Women's Property Act, 1882, that although the executors had a right to set off the debt due from the husband against the share given to the wife, yet as the claim of the husband, if there had been no debt, would have been subject to the wife's equity to a settlement, which would therefore have been prior to the husband's claim, the wife's equity was also prior to the executor's right of retainer. *Knight v. Knight* (18 L. R., Eq. 487) distinguished. *Briant, In re, Poulter v. Shackel*, 39 Ch. D. 471; 57 L. J., Ch. 953; 59 L. T. 215; 36 W. R. 825—Kay, J.

Heir at Law—Debtor to Estate—Descended Realty.]

—A testator devised his realty to his executors and trustees, to be converted and divided equally amongst five persons, one of whom died in his lifetime, and a portion of the testator's realty lapsed to his heir at law, who was indebted to the testator. The realty was sold and the proceeds received by the surviving executor and trustee, who claimed to set off the debt against the value of the descended realty:—Held, that the executor could not set off the debt against the lapsed realty which had descended to the debtor as heir at law. *Milnes v. Sherwin*, 53 L. T. 534; 33 W. R. 927—North, J.

II. LIABILITIES.

1. IN GENERAL.

Contracts made whilst no Personal Representative—Ratification—Services for Benefit of Estate.]

—During a period in which there was no personal representative of the estate of a deceased testatrix, the appellant, acting upon the instructions of Easton, a relative of the deceased, did work as a solicitor in respect of the administration and for the benefit of the estate. Subsequently the respondent Phillips obtained letters of administration de bonis non, and refused to pay the appellant's bill of costs:—Held, that the respondent was not bound, as administrator, to pay such costs. *Phillips, Ex parte, Watson, In re*, 19 Q. B. D. 234; 56 L. J., Q. B. 619; 57 L. T. 215; 35 W. R. 709—C. A.

Shares taken by Executors.]

—Executors applied for shares in a company in exchange for shares held by their testator in another company, the business of which had been taken over by the company to which the application was made. An offer of an exchange of shares had

been made to the testator in his lifetime, but he had never replied to it. The executors had originally been entered on the register individually as "executors of W. D., deceased," in respect of the shares; but at their request their names were removed from the register, and their testator's entered in their place as holders of the shares:—Held, that this was a new contract entered into by the executors, upon which the testator's estate was not liable. The testator's name was a mere dummy name, and the executors were personally liable in respect of the shares. *Cheshire Banking Company, In re, Duff's Executors' Case*, 32 Ch. D. 301; 54 L. T. 558—C. A.

Non-repair by Tenant for Life — Claim whether in time.]—Where a testator gives successive interests, and adds to them a direction that the person who takes shall do a particular thing, and the devisee accepts the estate, there is a personal liability, capable of being enforced in equity, to perform the directions imposed by the testator. A testator gave his real estate to trustees upon trust for his widow for life, with remainder over, in events which happened, to A. for life, and, in events which happened, to B. for life, with remainder to his children, if any, in tail, with remainders over. The will contained a direction that each tenant for life or in tail of any of the hereditaments should, during her or his estate, keep the buildings thereon in substantial repair; and if any such person should neglect to effect such repairs within six months after being thereunto requested by the trustees, the trustees should be at liberty to effect such repairs. The widow of the testator was in possession of the hereditaments until her death in June, 1883. Her will was proved in February, 1884. She had omitted to repair the buildings. More than six months after her death, but within six months after probate of her will, a claim was carried in against her estate, in an administration action, in respect of the omission to repair, the claimants being the trustees of the will and the then equitable tenant for life:—Held, that the estate of the deceased tenant for life was liable for such omission to repair. Held, also, that the claim was properly made by the trustees of the will, and that the remedy being in equity, the 3 & 4 Will. 4, c. 42, s. 2 did not apply. *Williames, In re, Andrew v. Williames*, 54 L. T. 105—C. A.

Lease—Measure of Liability.]—An executor who takes possession of a leasehold of his testator is liable personally as assign of the lease for subsequent rent, up to the letting value of the holding. *Bowes, In re, Strathmore (Earl) v. Vane*, 37 Ch. D. 128; 57 L. J., Ch. 455; 58 L. T. 309; 36 W. R. 393—North, J.

When executors received a premium upon the assignment of a lease, and paid the amount into their testator's estate:—Held, that they were not personally liable for rent accrued due after the assignment, in respect of the premium so paid in. *Goodlund v. Ewing*, 1 C. & E. 43—Stephen, J.

— Executor de son tort.]—An executor de son tort in possession of lands, held by the deceased owner for an unexpired term of years, is suable by the landlord for rent. *Fielding v. Crownin*, 16 L. R., Ir. 379—C. A.

Loss by Agent's Insolvency—Onus of Proof.] A common order having been made for the administration of a testator's estate, the district registrar by his certificate found the outstanding personal estate to consist in part of book debts amounting nominally to 291*l.*; as to 113*l.*, part of which he certified that it represented a portion of book debts which the executors had employed H. to collect, and for which H. had not accounted, and had claimed to deduct 55*l.* for remuneration, but that 25*l.* was enough. The certificate went on to say, that H. had gone into liquidation and that no part of the 113*l.* was likely to be recovered. No application was made to vary this certificate. It appeared that H. had collected in all 168*l.*, had paid to the executors in April, May, and June, 1880, sums amounting in all to 55*l.*, and had gone on collecting without making any further payment to the executors till July, 1881, when a receiver was appointed in the action, but it did not appear when he became insolvent, nor at what times the moneys received came to his hands. The action having come on for further consideration:—Held, that where an executor or trustee employs an agent to collect money under circumstances which make such employment proper, and the money collected is lost by the agent's insolvency, the burden of proof is not on the executor to show that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was. *Brier, In re, Brier v. Evison*, 26 Ch. D. 238; 33 W. R. 20—C. A.

2. DEVASTAVIT.

Effect of Laches.]—Mere laches in abstaining from calling upon the executors to realise for the purpose of paying his debt will not deprive a creditor of his right to sue the executors for devastavit, unless there has been such a course of conduct, or express authority on his part, that the executors have been thereby misled into parting with the assets, available to answer his claim. *Birch, In re, Roe v. Birch*, 27 Ch. D. 622; 54 L. J., Ch. 119; 51 L. T. 777; 33 W. R. 72—Chitty, J.

Claim within Statute of Frauds.]—An executor or administrator commits a devastavit by paying a creditor who is prevented from enforcing his claim by the Statute of Frauds. *Rounson, In re, Field v. White*, ante, col. 783.

Mortgage by Testator—Limitations, Statute of Rents and Profits—Assets—Specialty Creditor.]—A testator mortgaged freeholds, and died in May, 1867, having devised all his real and personal estate to A. and B. upon certain trusts, and having appointed them his executors. The executors, without making provision for the mortgage debt, applied the whole of the personal estate in payment to simple contract creditors and beneficiaries. In 1869, A. died, and C. was appointed trustee in his place in 1871. The rents of the real estate were received by A. and B., and by B. and C., and after payment of the interest on the mortgage the balance was applied in accordance with the trusts of the will. The mortgaged property became an insufficient security, and interest having fallen into arrear, the mortgagees in 1886 commenced proceedings against B. and C., under which accounts of the

testator's personal estate received by A. and B. or by B. alone, were directed, and also the usual accounts of the testator's real estate, including an account of rents and profits against B. and C. Accounts were accordingly carried in in which B. and C. claimed credit for all payments and disbursements made to simple contract creditors and beneficiaries, and further that as to such of the payments as were made by A. and B. upwards of six years prior to the action any claim on a devastavit was statute barred, and that as to the rents and profits they were not liable to account for them at all:—Held, following *Marsden, In re* (26 Ch. D. 783) on this point and distinguishing *Gale, In re* (22 Ch. D. 820), that B. could not set up his own and A.'s wrongful payment by way of devastavit as a defence in order to claim the benefit of the Statute of Limitations. *Hyatt, In re, Bowles v. Hyatt*, 38 Ch. D. 609; 57 L. J., Ch. 777; 59 L. T. 227—Chitty, J.

That as to the rents and profits which had been received by B. or B. and C. jointly, that they were under 3 & 4 Will. 4, c. 104, assets by accretion liable under the circumstances for payment of creditors by specialty just as much as the real estate was assets under that statute. *Id.*

The executors of a testator who had mortgaged certain leasehold property belonging to him continued to pay interest on the mortgage debts, but applied the surplus of the testator's estate in payments to beneficiaries under his will, making no provision for meeting the mortgages. The mortgaged property proved insufficient for payment of the mortgages. In an action commenced for administration of the testator's estate, the mortgagees claimed that the executors were liable to them for the payment made to beneficiaries. The executors claimed to be credited with these payments on the ground of acquiescence by the mortgagees, and as to such of them as were made more than six years before the commencement of the action, they claimed the benefit of the Statute of Limitations:—Held, that there had been no acquiescence by the mortgagees, and that the executors, being trustees for the creditors, could not set up the Statute of Limitations as a bar to a claim in respect of a devastavit committed by them. *Marsden, In re, Bowden v. Layland*, 26 Ch. D. 784; 54 L. J., Ch. 640; 51 L. T. 417; 33 W. R. 28—Kay, J.

Liability of Executors of Executor de son tort.—J. being indebted to the plaintiff for 360l. died intestate, and his widow, A., without obtaining letters of administration, intermeddled with his assets, and on the plaintiffs suing her as executrix of her husband for that sum, she allowed judgment to go by consent. A. died shortly after, having appointed the defendants her executors. The plaintiff then brought an action against her executors to recover the 360l., suggesting a devastavit by A.; they pleaded no assets and denied the devastavit; the plaintiff replied, by way of estoppel, the judgment against A. The jury found that at A.'s death there remained assets of J. to the amount of 154l.:—Held, that the judgment against A. was conclusive to show that she had then assets of J. to the amount of 360l., and that therefore a devastavit must be presumed to have been committed by her to the extent of the difference between 360l. and 154l. *Ennis v. Rochford*, 14 L. R., Ir. 285—Q. B. D.

III. ASSETS.

1. WHAT ARE.

By Accretion.—See *Hyatt, In re*, supra.

Windfalls—Real or Personal Estate.—A testator devised estates upon which there were plantations of larch trees. At the time of his death a great number of the larch trees had been more or less blown down by extraordinary gales:—Held, that having regard to the maxim "quicquid plantatur solo, solo cedit," the principle applicable was that if a tree was attached to the soil it was real estate, and if severed, personality; that the life and manner of growth of any particular tree was no test of its attachment to the soil, and that the degree of attachment or severance was a question of fact in the case of each particular tree. If the tree was severed from the soil it belonged to the executors, if otherwise, to the inheritance. *Ainslie, In re, Swinburn v. Ainslie*, 30 Ch. D. 485; 55 L. J., Ch. 615; 53 L. T. 645; 33 W. R. 910; 50 J. P. 180—C. A.

Documents—Administrator de bonis non—Privy of Estate.—Where a solicitor has acted professionally for a testator and for his executor or administrator, and papers belonging to the estate have come into his possession, and, after the death of the executor or administrator, an administrator de bonis non has been appointed, the administrator de bonis non is not entitled to reclaim from the solicitors the papers in his possession without first paying the costs due to him, not only in respect of work done for the testator, but also in respect of work done for the executor or administrator. *Watson, In re*, 53 L. J., Ch. 305; 50 L. T. 205; 32 W. R. 477—Pearson, J.

There is a privy of estate between an executor or administrator and a subsequent administrator de bonis non, and the liabilities of the estate pass, with the benefits of it, to the administrator de bonis non. *Id.*

2. ADMISSION OF ASSETS.

Legacy—Payment of Interest to Tenant for Life.—In January, 1863, P., the executor, wrote to the tenant for life under a will as follows: "In answer to your letter in reference to the trust moneys in which you have a life interest and the family of the late Mr. Payne the ultimate benefit, I beg to say that the money is placed out on different mortgage securities with moneys of my own, realising as much interest as possible. Had it not been for your sake the money should have been placed in the Government stocks years ago." From 1854 down to the time of his death in 1874 P. regularly paid to the tenant for life 28l. a year by equal quarterly payments of 7l. each. In the year 1868 P. passed his residuary account, showing no assets:—Held, that the letter of January, 1863, and the quarterly payments regularly made by P. both before and after writing that letter, were, under the circumstances, such an admission of assets as to make his estate personally liable. *Payne v. Tanner*, 55 L. J., Ch. 611; 55 L. T. 258; 34 W. R. 714—North, J.

Mistake—Residuary Account—Declaration of Trust.]—Admission of assets is merely a question of evidence, and an executor may bring evidence to show that his admission was the result of a mistake in the account. But where an executor had passed his residuary account, stating that a legacy was "retained in trust" out of the residue :—Held, that he was not entitled to show that he had since discovered that the account had proceeded on a mistake, and that there were not in fact assets for the legacy. *Brewster v. Prior*, 55 L. T. 771; 35 W. R. 251—Kekewich, J.

3. DISTRIBUTION OF ASSETS.

a. Interest on Legacies.

Rate.]—A testator, by his will, gave certain legacies payable five years after his death and interest in the meantime to be paid on them at the rate of 3 per cent. half yearly :—Held, that the rate of interest to be paid was 6 per cent. per annum. *Booker, In re, Booker v. Booker*, 54 L. T. 239—Chitty, J.

Legacy to be paid within Four Years after Testator's Decease.]—A testator directed that certain legacies given by his will should be paid within four years after his decease. The executors paid some of the legacies within one year after the testator's decease, but others of them remained unpaid by reason of the inability of the legatees, being infants, to give receipts. It was not necessary for the convenient administration of the estate that the payment of any of the legacies should be postponed :—Held, that the unpaid legacies carried interest from the expiration of one year after the testator's death. *Olive, In re, Olive v. Westerman*, 53 L. J., Ch. 525; 50 L. T. 355—Kay, J.

Reversionary Interest not realised at once.]—Where it is for the benefit of all entitled that a reversionary interest should not be realised at once, a legatee, whose legacy could not be paid out of any other fund than this reversion, is entitled, not only to six years' interest, but to interest from the expiration of one year from the death of the testatrix. *Blackford, In re, Blackford v. Worsley*, 27 Ch. D. 676; 54 L. J., Ch. 215; 33 W. R. 11—Pearson, J.

Contingent deferred Legacy.]—Where a contingent deferred legacy has been severed from the general estate of the testator, such severance will not entitle the legatee to interim interest thereon unless the severance has been necessitated by something connected with the legacy itself. *Judkin's Trusts, In re*, 25 Ch. D. 743; 53 L. J., Ch. 496; 50 L. T. 200; 32 W. R. 407—Kay, J.

Release—Subsequent Acquisition of Funds.]—A testatrix by her will bequeathed several pecuniary legacies on various persons, who, on the estates proving insufficient to pay the legacies in full, executed a deed of release to the executors. One of the legatees afterwards died, and her share, by the terms of the will, formed part of the residuary estate, which was now sufficient to pay the other legacies in full :—Held, that the legatees would be entitled to interest on the balances at the rate of four per cent. from one

year after the testatrix's death. *Ghost's Trusts, In re*, 49 L. T. 588—Kay, J.

Out of what Fund Payable.]—The testator bequeathed the lands of B., in which his brother R. and his sister had life estates by title paramount, upon trust to sell after the death of his brother and sister, and out of the proceeds to pay, among other legacies, to his said brother R. the sum of 5,000*l.* R. died in the testator's lifetime; and by a codicil the testator bequeathed the 5,000*l.* to R.'s daughter and directed that she should be paid the legal interest thereon from the time of his decease till the said sum of 5,000*l.* be paid in due course of law :—Held, that interest on this legacy from the testator's death was properly paid by the executors out of his residuary personal estate. *Greene v. Flood*, 15 L. R., Ir. 450—M. R.

b. In Other Cases.

Payments made in Mistake—Liability to refund with Interest.]—The decision in *Saltmarsh v. Barrett* (31 Beav. 349), that executors who, acting bona fide, have distributed the assets upon what turns out to be an erroneous construction of the will, are not liable to be charged with interest upon the principal sums wrongly paid, which must be refunded to the estate, dissented from as departing from the principle established in *Attorney-General v. Köhler* (9 H. L. C. 654) and *Attorney-General v. Alford* (4 D. M. & G.) 843. *Hulkes, In re, Powell v. Hulkes*, 33 Ch. D. 552; 55 L. J., Ch. 846; 55 L. T. 209; 34 W. R. 733; 35 W. R. 194—Chitty, J.

Although as a general rule executors are liable to be charged with interest at 4 per cent. on sums improperly paid or improperly retained by them, they are not liable for interest to the legatee (or his representatives) to whom, with full knowledge on his part and in common mistake, the payments which he must refund have thus been erroneously made. *Id.*

Preferential Payment—Specialty Debt.]—The effect of Hinde Palmer's Act being to place simple contract creditors and specialty creditors on an equal footing in the administration of an estate, an executor may, in exercise of his right of preference, pay a simple contract creditor in priority to a specialty creditor of his testator. *Orsmond, In re, Drury v. Orsmond*, 58 L. T. 24—Kekewich, J.

Unregistered Judgment Debt.]—In the administration of an estate an unregistered judgment debt has no priority over simple contract debts. *Illidge, In re, Davidson v. Illidge*, 27 Ch. D. 478; 53 L. J., Ch. 990; 51 L. T. 523; 33 W. R. 18—C. A.

Right of Retainer — Heir-at-Law — Real Estate.]—Where real estate has been sold by the court under 3 & 4 Will. 4, c. 104, the heir-at-law or devisee has no right to retain out of the proceeds the amount of a simple contract debt due to himself. *Ferguson v. Gibson* (14 L. R., Eq. 379) explained. *Id.*

There is nothing in Hinde Palmer's Act to prevent a specialty creditor, where the heirs are bound, if he is the heir-at-law, from retaining the amount of his debt. *Id.*—Per Cotton, L. J.

Insolvent Estate of Deceased Partner—Joint and Separate Creditors—Surplus Interest—Priority.]—Prior to 1856 A. carried on a banking business in partnership with B. On the 13th March, 1856, A. died. Soon afterwards the bank stopped payment, and B. was adjudicated bankrupt. Several actions were commenced for the administration of the estate of A. By an order made in the year 1881 and in one of these actions, it was declared that A.'s separate creditors were entitled to be paid out of the estate in priority to his joint creditors and also that A.'s separate creditors whose debts by law or special contract carried interest, were not entitled to interest in priority to the joint creditors in respect of the principal due to the joint creditors. The joint estate of the banking firm down to A.'s death, and the bank assets from that time until B.'s bankruptcy, and also B.'s separate estate, were administered in bankruptcy. The result of the actions to administer A.'s estate was that dividends amounting to 20s. in the pound were paid to both the separate and the joint creditors of A. on the principal sums due to them respectively, and that a surplus remained which was sufficient to satisfy all the interest on the joint as well as the separate debts:—Held, that the separate creditors, whether their debts did or did not by law carry interest, were entitled to take their interest in priority to the joint creditors. Held, also, that the dividends received ought to be accounted for in ascertaining the amount of interest due, in manner following, viz., by treating the dividends as ordinary payments on account and applying each dividend and the surplus (if any) to the reduction of the principal. *Whitting-stall v. Grover*, 55 L. T. 213; 35 W. R. 4—Chitty, J.

Devised Real Estate—Liability of Devisee on Alienation.]—The liability, under the Act 11 Geo. 4 & 4 Will. 4, c. 47, of the devisee of land, who alienates the land, to the unpaid debts of the testator, is such that, on the alienation, the debts become his own debts to the extent of the value of the land alienated. Consequently, when a woman to whom land had been devised settled it on her marriage, after the passing of the Married Women's Property Act, 1870, the first trust being for herself absolutely until the marriage, and, after its solemnization, on trust for herself for her life, without power of anticipation, with remainder on trusts for the issue of the marriage:—Held, that the testator's personal estate being insufficient to pay his debts, the life interest of the settlor was, notwithstanding the restraint on anticipation, liable to make good the deficiency, to the extent of the value of the devised land; her liability to satisfy the debts of the testator, which arose on her alienation of the land by the settlement, being a debt "contracted by her before marriage," within the meaning of s. 12 of the Married Women's Property Act, 1870, *Sanger v. Sanger*, (11 L. R. Eq. 470) and *London and Provincial Bank v. Bogle* (7 Ch. D. 773) followed. *Hedgely, In re, Small v. Hedgely*, 34 Ch. D. 379; 56 L. J., Ch. 360; 56 L. T. 19; 35 W. R. 472—North, J.

Right of Creditor to follow Assets into hands of Legatees—Acquiescence.]—The right of a creditor whose debt has not been provided for to follow distributed assets into the hands of legatees being an equitable right, will not be

exercisable where the circumstances of the case would make such an exercise inequitable. When, therefore, the mortgagee of a farm, upon the death of his mortgagor, acquiesced in two of the residuary legatees taking the farm and working it, and in the distribution of the personal estate for the purpose of the share of those legatees being expended on the cultivation of the farm, he was held to have released his equitable right to fall back upon the personal estate of his debtor, the mortgage security having proved insufficient. *Blake v. Gale*, 32 Ch. D. 571; 55 L. J., Ch. 559; 55 L. T. 234; 34 W. R. 555—C. A.

— Payment of Legacy de bonis propriis.]—If, in an action against executors for a legacy, the executors admit assets and judgment is given for payment of a legacy de bonis propriis:—Quære, whether an unpaid creditor can call upon the legatee to refund the legacy. Semble, the creditor could recover the legacy in such a case if it was in fact paid out of the testator's assets, but not if it was paid by the executors de bonis propriis. *Brogden, In re, Billing v. Brogden*, 38 Ch. D. 546; 59 L. T. 650; 37 W. R. 84—C. A.

Deceased Domiciled Abroad—Foreign Creditors.]—In the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends pari passu with English creditors. *Klebe, In re, Kannerth v. Geiselbrecht*, 28 Ch. D. 175; 54 L. J., Ch. 297; 52 L. T. 19; 33 W. R. 391—Pearson, J.

Settlement giving Charge of Debts on Specific Real and Personal Estate.]—A testator, by deed, conveyed and assigned certain specified real and personal estate to trustees in trust for himself for life; and, after his death, upon trust to sell and convert, and stand possessed of the net proceeds on trust to pay all the debts which should be due from him; and, after such payments as aforesaid, on trust for his two sons. The testator, by his will, after reciting the deed, devised and bequeathed all the residue of his real and personal estate, not comprised in and subject to the trusts of the deed, to his wife for life, with remainders over:—Held, first, that the personal estate comprised in the deed was the primary fund for payment of debts; secondly, that the real estate comprised in the deed, though charged with payment of all debts, was not liable to exonerate the general personal estate. *French v. Chichester* (2 Vern. 568; 3 Bro. P. C. 2nd ed. p. 16) discussed and explained. *Trott v. Buchanan*, 28 Ch. D. 446; 54 L. J., Ch. 678; 52 L. T. 248; 33 W. R. 339—Pearson, J.

Mortgage—Arrears—Deficient Security—Tenant for Life and Remaindermen.]—A testator bequeathed his residuary personal estate to trustees upon trust for successive tenants for life with remainders to his nephews and nieces and their children absolutely. After his death his trustees invested 8,000*l.*, part of his residuary personal estate, on mortgage. For some time the interest was regularly paid, but afterwards fell into arrear. After a time the mortgaged property was sold and realised only 7,900*l.* At the time of the sale the arrears of interest amounted to 536*l.*:—Held, that the tenants for life were not entitled to receive compound inter-

est out of the fund, and that the fund must be apportioned between the tenants for life and remaindermen in the proportion which the arrears of interest bore to the original principal sum. *Moore, In re, Moore v. Johnson*, 33 W. R. 447—Pearson, J.

Annuity—Tenant for Life—Remainderman—Corpus or Income.]—A testator purchased hereditaments in consideration of the payment by him of an annuity secured by his covenant, and a charge upon the hereditaments purchased. Upon the death of the testator certain persons became under his will entitled to his real and personal estate for life, with remainders over to other persons:—Held, that the annuity ought to be capitalized and paid out of the corpus of the testator's estate, and that past and future payments of the annuity ought to be adjusted on that footing as between the tenants for life and the remaindermen. *Muffett, In re, Jones v. Mason*, 39 Ch. D. 534; 57 L. J., Ch. 1017; 59 L. T. 499; 37 W. R. 9—Chitty, J.

Intestacy—Hotchpot.]—A testator bequeathed all the residue of his property to his wife, whom he appointed sole executrix. She predeceased the testator. One of the testator's daughters had received, on the occasion of her marriage, a sum of 700*l.*; she also died in the lifetime of her father, leaving two children:—Held, that the Statute of Distributions applied, and the sum advanced to the daughter must be brought into hotchpot. *Harte v. Meredith*, 13 L. R., Ir. 341—V.-C.

— Personal Estate — Next-of-Kin — Grandchildren—Per Stirpes or per Capita.]—A share of the residuary estate of a testatrix (a widow), which she had given by her will, lapsed. She had had only two children, a son and a daughter, both of whom died before her. Three children of the son, and one child of the daughter, survived the testatrix:—Held, that, under the Statute of Distributions, the four grandchildren took the lapsed share, so far as it arose from personal estate, per stirpes not per capita. Under the Statute of Distributions the division of personal estate among descendants of an intestate is always to be per stirpes. *Natt, In re, Walker v. Gammage*, 37 Ch. D. 517; 57 L. J., Ch. 797; 58 L. T. 722; 36 W. R. 548—North, J.

The term "next of kindred," in s. 7 of the statute, does not include the issue of children of the intestate, but children and their descendants are all included under the term "children," which means children living at the death of the intestate either themselves or their descendants. *Lockyer v. Wade* (Barnardiston, Ch. 444) followed. *Id.*

Partial Intestacy—Order of Application of Assets.]—A married woman having separate personal estate, and also a general power to appoint personal estate by will, bequeathed and appointed (after legacies) all her property to her executors on trust for payment of her debts, and funeral and testamentary expenses, and certain legacies, and then in trust for persons named. She survived her husband, and after his death became entitled to other personal estate, and died without re-publishing her will:—Held, that the separate personal property and the personal estate accruing after the coverture must contribute

rateably, and before the appointed estate, to the payment of the funeral and testamentary expenses, and any debts contracted by the testatrix after the coverture. *Williams, In re, Green v. Burgess*, 59 L. T. 310—Kekewich, J.

Costs of ascertaining Parties Entitled—Residuary Estate.]—A testator bequeathed his residuary personal estate amongst six persons equally. Three of the residuary legatees predeceased the testator, and their shares lapsed:—Held, that the costs of ascertaining the next-of-kin of the testator entitled to the lapsed shares ought to be paid out of the general residuary estate and not out of the lapsed shares. *Giles, In re*, 55 L. J., Ch. 695; 55 L. T. 51; 34 W. R. 712—Kay, J.

A testator bequeathed certain legacies to the children of A.; A. had no legitimate but three illegitimate children, who claimed the legacies, the executors took out an originating summons to have the question decided:—Held, that the costs of the proceedings must be borne by the residuary estate. *Haseldine, In re, Grange v. Sturdy*, 31 Ch. D. 511; 54 L. T. 322; 34 W. R. 327; 50 J. P. 390—C. A.

— Payment into Court.]—Executors by payment into court under the Trustee Relief Act of a sum of money bequeathed to a class, or by any other severance of the legacy, cannot relieve the residue in their hands from bearing the costs of and incident to an enquiry for the purpose of ascertaining who are the persons entitled to take. *Trick's Trusts, In re* (5 L. R., Ch. 170) and *Birkett, In re* (9 Ch. D. 576) followed. *Gibbons, In re*, 36 Ch. D. 486; 56 L. J., Ch. 911; 58 L. T. 8; 36 W. R. 180—Chitty, J.

IV. EXECUTOR DE SON TORT.

Liability for Rent.]—See *Fielding v. Cronin*, ante, col. 787.

Proceedings against Executors of—Estoppel.]—See *Ennis v. Rochford*, ante, col. 789.

Appointment of Receiver by Co-executor.]—See *Moore, In goods of*, infra, col. 798.

V. PROCEEDINGS BY AND AGAINST.

Ejectment—Lease by Administratrix—Administrator de bonis non.]—An administratrix made a lease, in 1854, of premises forming a portion of the intestate's assets, for a term of twenty-one years. The lease did not purport to be made by her in her representative capacity. The lessee admittedly went into possession under the lease, but never paid any rent. He continued in possession until 1883, when the administrator de bonis non of the intestate brought an ejectment for non-payment of rent. The jury having found that the defendant had continued in possession on the terms of the lease:—Held, that the plaintiff (the administrator de bonis non) was entitled to a verdict for possession and arrears of rent. *Doyle v. Maguire*, 14 L. R., Ir. 24—C. P. D.

Agreement to Compromise Action—Subsequent Death of Plaintiff Intestate—Adoption

by Administrator.]—The plaintiff in an action having, at the instance of the defendant, consented to a compromise of the action, the plaintiff's solicitors suggested that the defendant should make an offer of a money payment in satisfaction of the plaintiff's interest in certain property which was the subject of the action. The defendant's solicitors asked the plaintiff to name a sum which he would accept. A few days later the plaintiff died intestate. His daughter thereupon instructed the plaintiff's solicitors to agree to a compromise of the action on payment by the defendant of 500*l*. The defendant's solicitors replied that the defendant would pay 450*l*. in discharge of all claims. This offer was accepted by the plaintiff's daughter. It was then arranged that a summons should be taken out by consent, staying all further proceedings in the action on the terms agreed upon. Shortly afterwards the defendant's solicitors stated that, the defendant having discovered the property to be less valuable than he originally believed, it was impossible for him to pay 450*l*. The plaintiff's solicitors declined, however, to vary the terms of the compromise. Letters of administration to the plaintiff's estate were subsequently granted to his daughter, and an order was made that the proceedings in the action should be carried on by her as plaintiff. A summons was then taken out, on behalf of the plaintiff, to stay all further proceedings in the action on the terms agreed upon. The defendant refused to consent to such summons:—Held, that the administration related back to the date of the death of the plaintiff intestate, and the plaintiff's daughter was entitled to enforce the agreement to compromise the action, although the same had been entered into before the grant of administration; that the evidence did not show that there had been any repudiation of such agreement; and that therefore the order asked for by the summons must be made. *Baker v. Baker*, 55 L. T. 723—Kay, J.

Option to Purchase, Personal to Testator—Not Transmissible to Executors.]—A testator devised and bequeathed certain real and personal property, including an hotel, to trustees upon trust to pay out of the rents, issues, and income thereof, annuities to his widow and sister, and during their lives and the life of the survivor to divide the residue of the rents, issues, and income equally between his four children; and after the decease of the survivor of his wife and sister he declared that his son should have the option of purchasing the hotel at the price of 10,000*l*., such sum to fall into testator's residuary personal estate; but if the son should decline to purchase the hotel at that price within six months after the decease of the survivor of the testator's wife and sister, he directed that his trustees should sell the hotel, and that the moneys arising from the sale thereof should fall into his residuary personal estate. The son died very soon after his father, the testator, also leaving a will whereby he appointed executors. The testator's wife and sister being also dead:—Held, that the option to purchase the hotel was a right personal to the son, and could not be exercised after his death by his executors. *Cousins, In re, Alexander v. Cross*, 30 Ch. D. 203—C. A.

Actions of Tort—When Cause of Action survives.]—*See* PRACTICE (PARTIES).

Joinder of Parties—Loan by one Executor—Foreclosure Action by the Other.]—One of two executors lent money belonging to his testator's estate, on the security of a charge on real estate, and subsequently became bankrupt and absconded out of the jurisdiction, and it was not known where he was. His co-executor brought a foreclosure action against the borrower, alleging that he had borrowed the money knowing that it belonged to the estate, and that with that knowledge he had given the charge to the solicitors to the estate, one of whom was the absconding executor, and both of whom had left the country together. The absconding executor was not made a party:—Held, that the action was not bad for non-joinder of the absconding executor. *Drage v. Hartopp*, 28 Ch. D. 414; 54 L. J., Ch. 434; 51 L. T. 902; 33 W. R. 410—Pearson, J.

—Forgery of Transfer of Stock by One—Action by Other Co-Executor.]—*See* Barton v. North Staffordshire Railway, ante, col. 778.

Executor intermeddling before Probate—Receiver—Application by Co-Executor.]—Where an executor had, before probate, and without the assent of his co-executor, intermeddled in the estate and made preparations to dispose of a portion of it, the court gave leave to the co-executor to issue a writ against him claiming an injunction to restrain him from dealing with the estate before probate, and praying for the appointment of a receiver. *Moore, In goods of*, 13 P. D. 36; 57 L. J., P. 37; 58 L. T. 386; 36 W. R. 576; 52 J. P. 200—Hannen, P.

Probate not Obtained—Death of Plaintiff before Trial.]—Where, after an order directing the trial of issues of fact before a jury, one of the plaintiffs died within fourteen days of the date fixed for the trial, on the application of his executors, undertaking to apply forthwith for probate, and to produce the same at the trial of the action if obtained, the court made an order continuing the proceedings. *Hughes v. West*, 13 L. R., Ir. 224—V.-C.

—Staying Action.]—A bill of exchange had been indorsed by a testatrix, who was the holder thereof, and paid into her bankers for collection in the usual course of business. Before the bill became due the testatrix died, and when it became due the plaintiffs, as her executors, demanded the return of the bill, or its value. The bankers refused to deliver up the bill, on the ground that the plaintiffs had not taken out probate, but said they were ready and willing to give up the bill to the plaintiffs on their production of probate. Whereupon the plaintiffs, before taking out probate, began an action against the bankers for delivery up of the bill, or its value, and for damages for its detention:—Held, that all proceedings in the action should be stayed as frivolous and vexatious, until the plaintiffs took out probate. *Tarn v. Commercial Banking Company of Sydney*, 12 Q. B. D. 294; 50 L. T. 365; 32 W. R. 492—D.

—Petition to Wind up by Executor.]—The executor of a creditor of a company is entitled

to present a winding-up petition before he has obtained probate; it is sufficient if he has obtained probate before the hearing of the petition. *Masonic and General Life Assurance Company, In re*, 32 Ch. D. 373; 55 L. J., Ch. 666; 34 W. R. 739—Pearson, J.

Administrator against Legatee for Sum paid by Executor before Revocation of Probate.]—P. D., by an alleged will, bequeathed 90*l.* to L., for the purpose of being applied towards building a chapel, and appointed C. executor, who obtained probate. After the grant of probate, C. paid to L. the amount of the legacy, which was applied by L. in accordance with the terms of the will. Subsequently a suit was instituted by M. D. against C., in the Probate Division, for revocation of probate. A consent was entered into between M. D. and C. in that suit, by which it was agreed that the will should be condemned, and that administration of P. D.'s estate should be granted to M. D. The consent provided for the application of certain moneys, and that C. "should have credit for all moneys properly expended, and also a sum of 100*l.* and 20*l.* paid respectively to L. for masses, without prejudice to any claim and his costs." In an action brought by M. D., as administratrix of P. D., to recover from L. the 90*l.* which had been so paid to him:—Held, that having by the consent released the executor, she could not recover from the legatee. *Duane v. Lee*, 14 L. R., Ir. 56—Q. B. D.

Detention of Testator's Goods—Counterclaim.]—In an action by an executor for the detention of goods of his testator taken possession of after the testator's death, the defendant may counterclaim for the funeral expenses of the testator paid by him, and also for a debt due to him from the testator before his death. *Watkin v. Newcomen*, 1 C. & E. 113—Day, J.

Defence of plene Administravit—Interrogatories.]—In an action against a surviving trustee and the executors of a deceased trustee for alleged breaches of trust, the executors pleaded plene administravit, and the plaintiffs having thereupon administered interrogatories, seeking for particulars of their testator's real and personal estate, and their administration of it, the executors' answer was merely a repetition of their defence:—Held, insufficient, and that the plaintiffs were entitled to a further and more specific answer. *St. George v. St. George*, 19 L. R., Ir. 225—M. R.

Judgment against future Assets, quando Acciderint.]—In an action against an administratrix, commenced by a specially indorsed writ, the defendant showed that she was entitled to plead plene administravit, but did not dispute that there were outstanding assets of the deceased. Leave was given to mark judgment of assets quando acciderint. Form of order. *Findlater v. Tuohy*, 16 L. R., Ir. 474—Ex. D.

Action against Deceased—Death before Service—Fresh Action against Executors—Statute of Limitations.]—A writ was issued, but before it was served the defendant died. Within a year from the proof of the will by the executors of the deceased, a fresh writ was issued against them for the same cause of action. In the

meanwhile the period of statutory limitation had expired:—Held, that the executors could not rely on the Statute of Limitations as a defence to the action. *Swindell v. Bulkeley*, 18 Q. B. D. 250; 56 L. J., Q. B. 613; 56 L. T. 38; 35 W. R. 189—C. A.

Decree against Executors to Account—Amendment.]—After the ordinary decree in a suit against trustees, agents, or executors, in which wilful default has not been charged or proved, the court will not give leave to amend or bring a supplemental action charging such default, where the plaintiff had knowledge, or the means of knowledge, of the circumstances on which he proposed to rely, as acts of wilful default. *Blount v. O'Connor*, 17 L. R., Ir. 620—M. R.

Costs—Liability for—Denial of Cause of Action—Plene Administravit Præter.]—Where an executor is sued in respect of a claim against his testator's estate for damages for misrepresentation and breach of warranty, and denies the cause of action, at the same time pleading plene administravit præter, he is liable for costs de bonis propriis, if he fail upon the general issue, notwithstanding that he succeeds upon the plea of plene administravit præter. *Squire v. Arnison*, 48 J. P. 758; 1 C. & E. 365—Grove, J.

Security for Costs of Appeal—Set-off.]—In an administration action P. was found to be heir-at-law. K., who claimed to be heir, appealed against this decision. P. then died, and K. revived against H., his executor and devisee in trust. H. applied for security for the costs of the appeal on the ground of K.'s proved insolvency. K. resisted on the ground that P. had been ordered to pay to him the costs of a previous appeal, which were of sufficient amount to be a security:—Held, that if P. had been the respondent this would have been a sufficient answer, but that H. being only a representative was entitled to be indemnified, and that security must be given. *Knight, In re, Knight v. Gardner*, 38 Ch. D. 108; 53 L. T. 699—C. A.

VI. ADMINISTRATION ACTIONS.

1. ORDER WHEN MADE—JURISDICTION.

Discretion—Direction by Testator that Executors shall commence Administration Action.]—A direction by a testator that his executors shall take proceedings to have his estate administered by the court, does not deprive the court of its discretion to refuse to make an order for administration; but weight ought to be given to such a direction in considering whether the order shall be made. Where such a direction had been given, an order was made in chambers, on the application of one of the executors, more than a year after the death of the testator, declaring that the estate ought to be administered by the court, and directing an inquiry of what the estate then consisted. The defendants (the other executor and a party beneficially interested) moved to discharge this order, on the ground that an order for administration was unnecessary and would cause great and useless expense. *North, J.*, refused to discharge

the order, and his decision was affirmed by the Court of Appeal, who expressed their approval of the limited form in which the order was made. *Stocken, In re, Jones v. Hawkins*, 38 Ch. D. 319; 57 L. J., Ch. 746; 59 L. T. 425—C. A.

— **County Court.**—A person interested in the estate of a deceased person is not entitled as of right to an administration order in a county court, the combined effect of Ord. VI. r. 6, and Ord. XXII. r. 11, of the County Court Rules, 1886, being to place the granting of such order within the discretion of the county court judge. *Pearson v. Pearson*, 56 L. T. 445—D.

Jurisdiction—Scotch Assets—Testator domiciled in Scotland.—A testator domiciled in Scotland, and possessed of a large personal and some heritable property in Scotland, and of a comparatively small personal property in England, by will made in Scotch form appointed several persons to be executors and trustees, some of whom resided in England and some in Scotland. The trustees obtained a confirmation of the will in Scotland, and the confirmation was sealed by the English Court of Probate under 21 & 22 Vict. c. 56. An infant legatee, resident in England, brought by his next friend an action here to administer the estate, and the writ was served upon some of the trustees in England, and, under an order, upon the Scotch trustees in Scotland. The trustees appeared without protest, and took no steps to discharge the order, but obtained an order of reference to inquire whether the further prosecution of the action would be for the benefit of the infant plaintiff; upon which an order (not appealed from) was made for the further prosecution of the action. The trustees removed all the English personalty into Scotland before the action came on for trial:—Held, that the English court had jurisdiction to administer the trusts of the will as to the whole estate, both Scotch and English; and that as no proceedings were pending in a Scotch court (if such were possible) by which the interests of the infant plaintiff could have been equally protected, the jurisdiction was not discretionary, but that the decree was a matter of course. The dicta of Lord Westbury in *Emohin v. Wyllie* (10 H. L. C. 1) disapproved. *Ewing v. Orr-Ewing*, 9 App. Cas. 34; 53 L. J., Ch. 435; 50 L. T. 401; 32 W. R. 573—H. L. (E.). See also INTERNATIONAL LAW, IV.

Rules of 1883—Pending Proceedings.—An administration action was commenced in December, 1882, by an executrix and beneficiary. Pleadings were delivered, from which it appeared that there were several questions between the parties; but it was ultimately arranged that a general administration decree should be taken, upon admissions in the defence, according to agreed minutes, and notice of trial was given on 2nd October, 1883. Upon the case coming on as a short cause upon motion for judgment, North, J., refused to make the proposed decree in face of the provisions of Ord. LV. r. 10, of the rules of 1883, merely because the action had been commenced before they came into operation, and he directed a reference to chambers to inquire whether, under the circumstances of the case, a general administration of the testator's real and personal estate should be ordered.

Llewellyn, In re, Lane v. Lane, 25 Ch. D. 66; 53 L. J., Ch. 602; 49 L. T. 399; 32 W. R. 287—North, J.

— **Limited Accounts and Inquiries—Infant Plaintiff.**—A party interested in the estate of a deceased person, even though that party be an infant, is not entitled, as a matter of course, to an administration judgment at the expense of the estate. Having regard to Rules of Supreme Court, 1883, Ord. LV. r. 10, a party interested is only entitled to an administration judgment where there are questions which cannot be properly determined except by an administration action; but the court has power under that rule to order a limited administration only, that is, to direct particular accounts and inquiries, if it sees that the question can thus be properly determined, the object of the rule being to prevent general administration except in cases of necessity. *Wilson, In re* (infra), considered. *Blake, In re, Jones v. Blake*, 29 Ch. D. 913; 54 L. J., Ch. 880; 53 L. T. 302; 33 W. R. 886—C. A.

Infants were entitled under a will to legacies amounting together to 35,000*l.*, and they were also together entitled, in remainder, subject to the life interests therein of four persons, to seven elevenths of the residuary estate. An originating summons was taken out under Ord. LV. r. 4, by one of the tenants for life and the infants, asking for the administration of the testator's estate. The summons was supported by one of the trustees, but was opposed by the other trustees and all the beneficiaries other than the plaintiffs:—Held, that, notwithstanding the discretion given to the court by Ord. LV. r. 10, the infants were entitled to an order for administration, but that the court had power to direct only such accounts and inquiries to be taken and made as were absolutely necessary for their protection. *Wilson, In re, Alexander v. Calder*, 28 Ch. D. 457; 54 L. J., Ch. 487; 33 W. R. 579—Pearson, J.

Statutory Bar—"Dying Intestate"—"Present Right to Receive."—The operation of 23 & 24 Vict. c. 38, s. 13, is retrospective, so that the limitation of twenty years "next after a present right to receive the same shall have accrued" thereby imposed (in analogy to 3 & 4 Will. 4, c. 27, s. 40) upon claims to recover personal estate of "any person dying intestate, possessed by the legal personal representative of such intestate," is not confined to the case of persons dying intestate after the 31st December, 1860, the time fixed by the section for commencement of the operation of the enactment. Accordingly, a claim by next of kin for general administration of the estate of an intestate who died in 1848 was barred at the end of twenty-one years from that date; and leave to revive an administration suit relating to the same estate in which no proceeding had been taken since the decree in 1855 was refused. But with respect to assets of the intestate not received by the administrator until 1870 (more than twenty years after the death, and within twenty years before the issue of the writ) the claim of the next of kin to administration, limited to such assets, was not barred; there being no "present right to receive" on the part of the next of kin until the assets had been actually recovered by the administrator. *Johnson, In re, Sly v. Blake*, 29 Ch. D. 964; 52 L. T. 682; 33 W. R. 502—Chitty, J.

— **Part Payment.**—Part payment by the administrator out of a particular asset which has so fallen in will not revive the right to sue for general administration which was at the time of payment barred by statute. *Id.*

2. PARTIES.

Creditors, who are—Liability arising from Foreign Law.—Estates in a foreign country were the subject of certain settlements called fidei commiss, somewhat analogous to entails in England, and by the law of the foreign country the possessor of these estates was liable for deterioration whether voluntary or permissive, and entitled to compensation for improvements; and after his death the liability could be enforced in accordance with a special procedure code as between his representatives and his successor. The successor to the estates brought an action in England against the executrix of the late possessor, who was a domiciled Englishman and left property in England, for administration of his estates:—Held, that the plaintiff's claim did not depend simply on tort, but was dependent on an implied contract or implied obligation which by the law of the foreign country every possessor under a fidei commiss takes upon himself when he enters into possession of the property under it, and that therefore the action could be maintained here against his legal personal representative; and that the mere fact that the claim could not be finally established without proceedings being taken in the foreign courts was not a ground for the action being at once dismissed. *Batthyany v. Walford*, 36 Ch. D. 269; 56 L. J., Ch. 881; 57 L. T. 206; 35 W. R. 814—C. A.

Executor de son tort—No Legal Personal Representative.—An order cannot be made for administration of personal estate against an executor de son tort when there is no legal personal representative of the deceased. *McAllister v. McAllister*, 11 L. R., Ir. 533—M. R.

Joint Creditors—Separate Estate of Deceased Partner.—A creditor of a partnership firm brought an administration action against the executor of a deceased partner. Afterwards a separate creditor of the same partner brought an administration action against the executor, and obtained judgment:—Held, on an application by the plaintiff in the first action for the conduct of the proceedings in the second action, that a joint creditor of a firm could not maintain a simple action for the administration of the estate of a deceased partner, and therefore that the first action was not properly constituted. Application of the plaintiff was consequently refused. *McRae, In re, Forster v. Davies, Norden v. McRae*, 25 Ch. D. 16; 53 L. J., Ch. 1132; 49 L. T. 544; 32 W. R. 304—C. A.

Intervention of Party interested by Petition.—Executors carried on the business of their testator after his death in partnership with other persons, but the firm ultimately became bankrupt. An action was commenced for the administration of the testator's estate, and at a later date, a banking company, which had made advances to beneficiaries under the will and taken mortgages of their shares, applied by petition for leave to intervene in the action and

obtain payment of their debt:—Held, that as the banking company were not creditors of the testator, they had taken the most convenient course in applying to intervene by petition. *Dimmock, In re, Dimmock v. Dimmock*, 52 L. T. 949—Kay, J.

Absent Parties—Class Representation—Notice of Proceedings.—Persons interested in an estate the subject of an administration action to which they have not been made parties, and whose rights or interests may be affected by an order directing accounts and inquiries, are not bound by the proceedings under that order—at any rate where they ought to be served—unless they are served with notice of the order, or an order has been made appointing a member of their class to represent them in the action. The practice of the court as to binding absent parties in an administration action discussed. *May v. Newton*, 34 Ch. D. 347; 56 L. J., Ch. 313; 56 L. T. 140; 35 W. R. 363—Kay, J.

Appeal by Residuary Legatee.—Where a person who claims as a creditor against a testator's estate has obtained an order for the administration of the estate against the executor, it is not open to the person entitled under the will to the residue of the estate to appeal against the order. *Youngs, In re, Doggett v. Revett, Vollum v. Revett*, 30 Ch. D. 421; 53 L. T. 682; 33 W. R. 880—C. A.

3. PRACTICE.

Summons—Duty of Court to hear where no Dispute as to Facts.—In 1867 T. P. mortgaged an estate to L. & A. for 1,000*l.*, and at the same time E. P. and C. P. gave to L. & A. a joint and several bond in the penal sum of 400*l.* reciting that the 1,000*l.* had been advanced at the request of E. P. and C. P., and that they had agreed to give as a better security for part thereof, a bond conditioned for payment of 200*l.* and interest. The bond was conditioned to be void if the mortgagor paid the mortgage-money and interest according to his covenant. T. P. paid the interest till December, 1877, after which it fell into arrears, and in 1880 the mortgagees entered into possession. E. P. died in 1883 without having made any payment or given any acknowledgment. L. & A., as creditors under the bond, took out a summons for administration of his estate. E. P.'s representatives disputed the claim on the ground that this was a proceeding to recover money secured on land, and was barred by the lapse of twelve years under the Real Property Limitation Act, 1874. Bacon, V.-C., without giving any opinion on this question, dismissed the summons under the discretion given by Ord. LV. r. 10, on the ground that a disputed debt ought not to be tried on summons:—Held, that as there were no facts in dispute the vice-chancellor ought to have decided the question of law on the summons. *Powers, In re, Lindsell v. Phillips*, 30 Ch. D. 291; 53 L. T. 647—C. A.

Action or Originating Summons.—Semble, a joint creditor who desires to proceed against the separate estate of a deceased partner should do so by action and not by originating summons. *Barnard, In re, Edwards v. Barnard*, 32 Ch. D.

447; 55 L. J., Ch. 935; 55 L. T. 40; 34 W. R. 782—C. A.

An action was brought against the surviving trustee of a will, claiming a declaration that he was not entitled to charge in account with the plaintiff, who was a cestui que trust under the will, the costs of an action brought by the superior landlord in consequence of the failure by the trustee to repair some houses which formed part of the trust property, or to charge commission paid to a collector who had collected the rents of the same property, and also claiming (if necessary) administration of the testator's estate. There was no practical dispute as to the facts:—Held, that the points in dispute between the parties might have been decided upon an originating summons, under Ord. LV. r. 3, and that, although the plaintiff succeeded in his claim, no costs of the action would be given. *Johnson, In re, Wagg v. Shand*, 53 L. T. 136—North, J.

Two legatees having alleged that they had been induced to execute a release indemnifying the executors of a testator's estate without having had independent advice:—Held, that they were entitled to take out an originating summons under Ord. LV. r. 3, of the Rules of Court, 1883, to have the release set aside, the question of the validity of the release being one "arising in the administration of the estate," and "affecting" the rights of the legatees within the meaning of that order. *Garnett, In re, Gandy v. Macaulay*, 50 L. T. 172; 32 W. R. 474—V.-C. B.

Payment into Court.—See *Turner v. Turner*, post, col. 813.

Evidence—Claim against Estate—Corroboration.—A claim against the assets of a deceased person cannot be allowed upon the uncorroborated evidence of the claimant. This rule is of universal application, and does not depend on the character or position of the claimant. *Harnett, In re, Leahy v. O'Grady*, 17 L. R., Ir. 543—V.-C.

There is no rule of law that the uncorroborated evidence of a claimant against the estate of a dead man will be rejected, but it will be regarded with jealous suspicion. *Garnett, In re, Gandy v. Macaulay*, 31 Ch. D. 1—C. A.

There is no rule of law which precludes a claimant from recovering against the estate of a deceased person on his own testimony without corroboration; although the court will in general require such corroboration. *Hodgson, In re, Beckett v. Ramsdale*, 31 Ch. D. 177; 55 L. J., Ch. 241; 54 L. T. 222; 34 W. R. 127—C. A.

Further Consideration—Admission of, after Judgment.—An action was brought by the beneficiaries under the will of a testator against the trustees thereof to administer the estate of the testator. The action was heard as a short cause, when the usual judgment was made directing accounts and inquiries, and the further consideration was adjourned. The judgment contained no special reservation as to costs. When the action came on upon further consideration, the plaintiffs desired to read an affidavit which contained charges against the defendants. The charges related for the most part to the conduct of the defendants between

judgment and further consideration, and partly also to the conduct of the defendants before action brought. The object of the affidavit was to make the defendants liable to pay the costs of the action, or some part thereof, occasioned by reason of the acts complained of in the affidavit and otherwise appearing by the evidence in the action. The defendants objected to this affidavit being read, contending that the court had no jurisdiction to admit it:—Held, that as to the conduct of the defendants between judgment and further consideration, the plaintiffs were entitled to read an affidavit, but that as to the conduct of the defendants before action, no affidavit could be read. Semble, that if persons who had been served with the judgment desired to read on the further consideration an affidavit as to conduct of the defendants before action, they would be entitled to do so. *Revill, In re, Leigh v. Rumney*, 55 L. T. 542—Chitty, J.

Under Ord. XXXVII. s. 1, the court may in an administration action, and after the chief clerk has made his certificate, receive, if he thinks fit, fresh affidavit evidence on further consideration. *May v. Newton*, ante, col. 804.

Right to Cross-examine on Affidavits in support of Summons.—See *Wilson, In re, Alexander v. Calder*, ante, col. 763.

Staying Proceedings—Action against Executor personally—Pending Administration Action.—

A creditor of a deceased person sued the executrix in the county court and obtained judgment for his debt before judgment in an administration action. After judgment for administration and a receiver the creditor obtained from the county court judge an order to commit the executrix:—Held, that the creditor could not be restrained from enforcing his judgment against the executrix; but that the proper course was to direct the receiver to pay the creditor his debt and costs out of the estate, reserving the question whether the payment should be allowed to the executrix. *Womersley, In re, Etheridge v. Womersley*, 29 Ch. D. 557; 54 L. J., Ch. 965; 53 L. T. 260; 33 W. R. 935—Pearson, J.

Satisfaction of Plaintiff's Claim—Infant Defendant.—

Where some of the defendants in an administration action offered to satisfy the whole of the plaintiff's claim and the costs of the action, the court refused to stay the proceedings unless the rights of an infant defendant interested in the suit were also provided for. *Clegg v. Clegg*, 17 L. R., Ir. 118—V.-C.

Certificate—Inquiry as to Debts—Purchase of Debts by Plaintiff's Solicitor.—

The solicitor to the plaintiff in a creditor's action bought up debts; the estate was insolvent:—Held, that the question whether the solicitor was trustee for the creditors of any profit on the purchase could not be raised by the certificate of the chief clerk, in the absence of any direction on the subject in the order under which the certificate was made. *Tillet, In re, Field v. Lydall*, 32 Ch. D. 639; 55 L. J., Ch. 841; 54 L. T. 604; 35 W. R. 6—North, J.

Form of—Separate and Joint Debts.—Where the estate of a deceased partner is being

administered at the suit of a separate creditor, and no partnership creditor is party thereto, the certificate ought to distinguish between the separate debts of the deceased and the debts of the firm in which he was partner, and at some stage of the proceedings the surviving partner ought to be brought before the court, so as to have an opportunity of disputing the finding as to the partnership debts. *Hodgson, In re, Beckett v. Ramsdale*, 31 Ch. D. 177; 55 L. J., Ch. 241; 54 L. T. 222; 34 W. R. 127—C. A.

Debt from Estate to Trustees—Debt due from one Trustee to Estate—Set-off.]—Crombie and Storer were two trustees of an estate administered by the court. Crombie became bankrupt after 1869. A balance of 896l. was found due from Crombie to the estate, and a balance of 745l. was found due from the estate to the two trustees jointly:—Held, that the debt due from the estate to the two trustees could not be set off against the debt due from one; that the plaintiffs were entitled to an inquiry what part of the 745l. found due to the two trustees was, as between the two, due to Crombie the bankrupt, but as that inquiry was not asked for, and as there was evidence showing that all the money was in fact due to Storer, the debt so due must be paid to him. *McEwan v. Crombie or Porter v. Grant*, 25 Ch. D. 175; 53 L. J., Ch. 24; 49 L. T. 499; 32 W. R. 115—North, J.

Receiver—Appointment of—At what Stage.]—In an administration action, commenced by originating summons, a receiver may (in a proper case) be appointed immediately after the service of the summons and before any order for administration has been made. *Francke, In re, Drake v. Francke*, 57 L. J., Ch. 437; 58 L. T. 305—North, J.

An administrator or executor may prefer one creditor to another, and there is no equity which entitles the court to interfere except after judgment for administration. Therefore the plaintiff in a creditor's action for administration is not entitled to interim relief against the executor or administrator unless a case is shown of the assets being wasted. *Harris, In re, Harris v. Harris*, 56 L. J., Ch. 754; 56 L. T. 507; 35 W. R. 710—Chitty, J.

Application to restrain Payment—Summons to review Taxation.]—A motion was made by a plaintiff for an order to stay payment out of court of a sum payable under an order of the court to the defendant's solicitors as taxed costs, until a pending summons by the defendant to review taxation should be disposed of. The grounds of the motion were the defendant's impecuniosity, and also the absence of any liability on the defendant's part to her solicitors for any further sum than taxed costs. The motion was refused, as being an unprecedented attempt to extend the practice as to requiring security to be given for costs. *Barber, In re, Burgess v. Vinnicombe*, 55 L. J., Ch. 624; 54 L. T. 728; 34 W. R. 578—Chitty, J.

Tenant for Life let into Possession—Security.]—It is not now the practice, upon an order on further consideration in an administration action in ordinary cases, to require the tenant for life to give security before being let into possession of settled land and heirlooms, but he is only

required to sign an inventory of the latter. *Temple v. Thring*, 56 L. T. 283—North, J.

Registration as Lis Pendens.]—See LIS PENDENS.

Insolvent Estate—Judicature Act, 1875, s. 10.]—Under s. 28, sub-s. 1, of the Judicature Act (Ireland) (equivalent to the Judicature Act, 1875, s. 10), in administering the estate of a person who has died insolvent, a creditor on the estate whose debt bears interest is entitled to interest only up to the date of the judgment for administration, which by virtue of that section is equivalent to an adjudication in bankruptcy, in cases where the death of the person whose estate is being administered occurred after the commencement of the act. *O'Brien v. Gillman*, 13 L. R., Ir. 6—M. R.

The provision in the Judicature Act (Ireland), s. 28, sub-s. 1, that in the administration of insolvent estates the rules in bankruptcy shall be observed as to the respective rights of secured and unsecured creditors, does not affect unsecured creditors inter se. Therefore, where a creditor obtained judgment against an administratrix before decree for administration, the judge in chambers ordered his demand to be paid in full out of a fund in court, in priority to the other unsecured creditors. *Winehouse v. Winehouse* (20 Ch. D. 545), and *Smith v. Morgan* (5 C. P. D. 337), followed. *Scott v. Murphy*, 13 L. R., Ir. 10—M. R.

— Rights of Mortgagee—Interest on Debt —Proof.]—In the administration of an insolvent estate, a mortgaged property of the testator having been sold in the administration action, and the proceeds of sale paid into court:—Held, that the mortgagee was entitled to have the proceeds of sale applied first in payment of interest on the mortgage debt down to the date of payment, and then in payment of principal, and to prove against the estate for the unpaid balance of principal, but that the amount of the proof could not exceed the amount of principal due at the date of the judgment in the action. *Summers, In re* (13 Ch. D. 136) distinguished. *Talbot, In re, King v. Chick*, 39 Ch. D. 567; 58 L. J., Ch. 70; 60 L. T. 45; 37 W. R. 233—North, J.

— Administration in Bankruptcy.]—See BANKRUPTCY, XX.

4. COSTS.

a. When Estate Insufficient—Priority.

Trustees—Action by Cestui que trust.]—Trustees in an administration action brought by their cestuis que trust, where an order has been made for payment of costs out of the estate, and it appears probable that the estate will not be sufficient to pay all the costs in full, are entitled to an order directing the payment of their costs, charges and expenses in priority to the costs of all other parties to the action. *Dodds v. Tuke*, 25 Ch. D. 617; 53 L. J., Ch. 598; 32 W. R. 424—V.-C. B.

Executor of Defaulting Executor—Defendant appearing in two Capacities.]—Where an action was brought for the administration of a testator's

estate against the executor of a defaulting executor, whose estate was insolvent:—Held, that the defendant being before the court in a double capacity, should have his costs of taking the accounts of the original testator's estate and half the rest of the costs of the action out of the estate. *Palmer v. Jones* (43 L. J., Ch. 349), and *Kitto v. Luke* (28 W. R. 411), followed. *Griffiths, In re, Griffiths v. Lewis*, 26 Ch. D. 465; 53 L. J., Ch. 1003; 51 L. T. 278—C. A.

Plaintiff Creditor—Between Solicitor and Client.—The plaintiff, a creditor, was allowed costs in an administration suit, commenced by summons, as between solicitor and client, where the fund realized was insufficient to pay the creditors in full. *Flynn, In re, Guy v. McCarthy*, 17 L. R., Ir. 457—M. R.

—**Joint and Separate Creditors.**—In an action by a separate creditor, on behalf of himself and all other the creditors of a testator, who was one of a firm of traders, for a general administration of the testator's estate, the general estate was realised and turned out sufficient to pay in full the separate creditors, but insufficient to pay in full the joint creditors of the testator:—Held, that the plaintiff was entitled to costs out of the estate as between solicitor and client. *McRae, In re, Norden v. McRae*, 32 Ch. D. 613; 55 L. J., Ch. 708; 54 L. T. 728—Kay, J.

Residuary Legatee Plaintiff—Between Solicitor and Client.—A residuary legatee plaintiff in an administration action is entitled to his costs as between solicitor and client where the estate is insufficient for payment of legacies, provided it is sufficient for payment of debts, but not otherwise. *Harvey, In re, Wright v. Woods*, 26 Ch. D. 179; 53 L. J., Ch. 544; 50 L. T. 554; 32 W. R. 765—Chitty, J.

It is an established rule that in a legatee's administration action, when the estate is insufficient to pay the legacies in full, the plaintiff is entitled to costs out of the fund as between solicitor and client. *Wilkins, In re, Wilkins v. Rotherham*, 27 Ch. D. 703; 54 L. J., Ch. 188; 33 W. R. 42—Pearson, J.

A residuary legatee who brought an action for administration was, prior to the Rules of 1883, entitled to costs out of the estate unless some special grounds were shown for depriving him of them. *Farrow v. Austin* (18 Ch. D. 58) followed. *McClellan, In re, McClellan v. McClellan*, 29 Ch. D. 495; 54 L. J., Ch. 659; 52 L. T. 741; 33 W. R. 888—C. A.

Plaintiff's Costs—Priority—Secured Creditor.—A secured creditor upon an estate, which upon realization under the order of the court is found deficient, cannot, after proving his claim at chambers, without valuing his security, claim priority over the plaintiff's costs. The time when the creditor's rights are fixed by election is the time when he sends in his proof. *Cloghessy, In re, McDonald v. Cloghessy*, 21 L. R., Ir. 388—M. R.

Executor's Costs—Probate and Administration Actions—Plaintiff's Costs.—An action was brought in the Probate Division by an executor to propound a will. The court pronounced in favour of the validity of the will, and ordered the defendant to pay the costs, which he failed

to do. Subsequently a creditor brought an action for the administration of the testator's real and personal estate, to which the executor was made a defendant. It then appeared that the testator had left no personal estate, but only real estate, which was insufficient to satisfy the creditors in full:—Held, that the executor was not entitled to be paid his costs incurred in the probate action in priority to the debts; but that the estate was distributable in paying (1) the executor's costs in the administration action as between solicitor and client; (2) the plaintiff's costs in that action as between solicitor and client; and (3) the debts. *Pearce, In re, McLean v. Smith*, 56 L. T. 228; 35 W. R. 358—Kay, J.

Where, in a probate suit, the costs of either party are ordered to be paid out of the assets, and subsequently an administration suit is instituted and the estate proves deficient, the probate costs have priority next after the costs of administration suit and before the debts of the deceased. *Kelly v. Kelly*, 21 L. R., Ir. 243—M. R.

A testator by his will made several specific legal devises of real estate, of which one was to J., one of his executors, and another was to L. He devised the remainder of his real estates, and bequeathed his personal estate to trustees, upon trust for sale and conversion, and to stand possessed of the proceeds upon trust, after payment of his debts and funeral and testamentary expenses, to pay certain pecuniary legacies, and he gave the residue of the trust moneys unto and equally between his paternal next of kin. J. alone proved the will. The estates devised to J. and L. had, under the provisions of a settlement, been respectively liable to have two sums of 3,000*l.* and 1,200*l.* respectively raised out of them. The right to those sums had become vested in the testator. An action to administer the testator's estate was brought by W., one of the residuary legatees, against J. and L., the only question in dispute being whether the two sums of 3,000*l.* and 1,200*l.* were raisable as part of the testator's personal estate. It was held that they were not raisable, but that they had become merged in the estates on which they were respectively charged. The result of this decision was, that the personal estate was deficient. An action had been previously brought in the Probate Division, by W. and another residuary legatee, against J., impeaching the validity of the testator's will. The court pronounced for the validity of the will, but ordered that the costs of all parties to the action should be paid out of the personal estate. On the further consideration of the administration action:—Held, that the personal estate and the proceeds of the sale of the residuary real estate must be applied in paying: (1) the costs, as between solicitor and client, of the executor, and his costs, charges, and expenses properly incurred (including his costs of the Probate action); (2) the costs, as between party and party, of the plaintiff, and of the defendant L. rateably; and that, there being a deficiency, the costs of the action (so far as not provided for) must be borne by the specifically devised real estates rateably, according to their respective values at the time of the testator's death. But, that there was no jurisdiction to charge the costs of the Probate action (other than the executor's costs) on the real estate. The above

order was made, though some of the specific devisees were not before the court. But, whether the order could be enforced against the absent specific devisees, quære. *Price, In re, Williams v. Jenkins*, 31 Ch. D. 485; 55 L. J., Ch. 501; 54 L. T. 416; 34 W. R. 291—Pearson, J.

b. In Other Cases.

Of Unnecessary Proceedings.]—The court, in the exercise of its discretion as to costs under Ord. LXV. r. 1, will order the plaintiff—if an infant, then the next friend—to pay the costs of any unnecessary or improper administration proceedings. *Blake, In re, Jones v. Blake*, 29 Ch. D. 913; 54 L. J., Ch. 880; 53 L. T. 302; 33 W. R. 886—C. A.

An administration action was commenced on the 6th of May, 1875, and the action was heard on the 4th November, 1887, upon further consideration. The court, under Ord. LXV. r. 11, of the Rules of Court, 1883, referred the matter to a taxing-master for inquiries, and report as to the delays and as to the costs, amounting to about 4,000*l.*, a sum equal to the whole value of the estate. The taxing-master made his report, disallowing considerable sums; and the case again came on for further consideration. —Held, that the court will not permit the costs occasioned by improper litigation, or by negligent conduct of administration proceedings, to be paid out of an estate under its care; that the amount of costs allowed by a taxing-master, as between the client and his solicitor, is not conclusive of the amount which the court will allow out of the estate. *Brown v. Burdett*, 59 L. T. 388—Kay, J. Affirmed 40 Ch. D. 244; 60 L. T. 520; 37 W. R. 533—C. A. [See Rules of May, 1889, Ord. LXV. r. 27, regulation 38, a, b.

What Property liable to—Descended Real Estate by Forfeiture.]—Real estate which had descended to a testator's heir-at-law, not because it was not originally disposed of by the will, but by reason of a subsequent forfeiture by the devisee under the provisions of the will. —Held, not liable to pay the costs of an action to administer the testator's estate in priority to specifically devised and bequeathed freehold and leasehold estate. *Scott v. Cumberland* (18 L. R., Eq. 578), *Gowan v. Broughton* (19 L. R., Eq. 77), and *Row v. Row* (7 L. R., Eq. 414), distinguished. *Hurst v. Hurst*, 28 Ch. D. 159; 54 L. J., Ch. 190; 33 W. R. 473—Pearson, J.

— Rents and Profits of Realty.]—Costs of an administration suit directed to be paid out of the rents and profits of the real estate. *Biggar v. Eastwood*, 15 L. R., Ir. 219—M. R.

— Legal Personal Representative—No Personal Estate.]—Where, in a creditor's action to administer real and personal estate, it is found, upon taking the accounts, that the deceased had not any personal estate, the personal representative having appeared and been declared entitled to costs, the plaintiff is entitled to have those costs, along with his own, paid out of the real estate. *Barry v. Quinlan*, 21 L. R., Ir. 11—V.-C.

Trustees—Bankruptcy of one—Set-off.]—The insolvent trustee being indebted to the estate,

and the solvent trustee not being responsible for that debt, and the Bankruptcy Act, 1869, having made a debt arising from a breach of trust to continue notwithstanding the bankruptcy. —Held, that a reference be directed to the taxing-master to apportion the costs of the trustees appearing by the same solicitor, and that the costs of the solvent trustee be paid out of the estate, and the costs apportioned as the costs of the insolvent trustee be set off against the amount found due from him to the estate. *McEwan v. Crombie*, or *Porter v. Grant*, 25 Ch. D. 175; 53 L. J., Ch. 24; 49 L. T. 499; 32 W. R. 115—North, J.

Whether under this direction the whole of the common costs of the two trustees would be allowed to the solvent trustee or divided, must depend on the settled practice of the taxing-master's office. *Ib.*

Bankrupt Executor Debtor to Estate.]—A sole executor, who was a defendant to an administration action, became bankrupt after the administration judgment. He was a debtor to the estate in respect of money advanced to him by the testator in his lifetime. —Held, that the executor must have his costs subsequently to the bankruptcy, but that his prior costs must be set-off against the debt due from him. *Basham, In re* (23 Ch. D. 195) followed. *Vowles, In re, O'Donoghue v. Vowles*, 32 Ch. D. 243; 55 L. J., Ch. 661; 54 L. T. 846; 34 W. R. 639—Pearson, J.

Inquiry as to Heir—Summons to vary Certificate—Costs of Claimant.]—In an administration action an inquiry was ordered as to who was the heir of the testator. The chief clerk found that R. K. was the heir, but that, in default of heirs on the paternal side, the heir-at-law was J. S. P. J. S. P. took out a summons to vary the certificate, and the court held that the claimant R. K. had not proved his relationship to the testator. The unsuccessful claimant asked for costs. —Held, that there was no general rule entitling a claimant coming in on an inquiry in chambers in an administration action, and failing, to have his costs out of the estate. The rule is correctly stated in Seton on Decrees, 4th edit., vol. 1, part 1, pp. 66 and 67: "A claimant failing in chambers to make out his claim may be ordered to pay costs". —Held also, that the decision of the court depended upon the special circumstances of each case; that in this case R. K. had not proved that his hearsay evidence upon which he relied was that of a person a member of the family; that the justice of the case would be met by not giving the claimant any costs of the inquiry in chambers, and ordering him to pay the costs of the adjournment into court. *Knight, In re, Knight v. Gardner*, 57 L. T. 238—Kay, J.

Trustee and Executor—Costs as between Solicitor and Client.]—One of two executors and trustees commenced an action against the other for the administration of the estate, and a decree was made. There was no allegation of any misconduct on the part of the defendant. On the action coming on for further consideration, Kay, J., gave the plaintiff his costs as between solicitor and client, but gave the defendant costs only as between party and party, holding that two sets of costs as between solicitor and client ought not to be allowed to the

trustees:—Held, on appeal, that a trustee is entitled to costs as between solicitor and client in an administration action, unless a case of misconduct is made out against him, and that the defendant must have costs as between solicitor and client. *Love, In re, Hill v. Spurgeon*, 29 Ch. D. 348; 54 L. J., Ch. 816; 52 L. T. 393; 33 W. R. 449—C. A.

Executors' Cross-examination of Creditor.]—A., being entitled to a life interest in a fund over which she had a testamentary power of appointment, borrowed, in 1871, from B. 350*l.* on the security of a covenant that 1,250*l.* should be paid one month after her death. She died in 1884, having by her will appointed executors, and directed payment of her debts, and also that C., one of her executors (a solicitor), should be entitled to charge and receive payment for all professional business to be done by him under the will. C. was one of the attesting witnesses. In an administration action by B. on behalf of himself and all other creditors, the estate being insolvent:—Held, that the executors could not be deprived of the costs out of the assets of a cross-examination for the purpose of investigating B.'s claim, though no proceedings to set aside the deed were subsequently taken. *Barber, In re, Burgess v. Vinnicombe*, 31 Ch. D. 665; 55 L. J., Ch. 373; 54 L. T. 375; 34 W. R. 395—Chitty, J.

Further Consideration.]—Although applications for an order on further consideration are by rules of the Supreme Court, 1883, Order LV., r. 2, sub-r. 16, where the estate is insolvent, business to be disposed of in chambers, a plaintiff will not be disallowed his costs of further consideration in court where the distribution of the insolvent estate gives rise to questions of difficulty. *Id.*

Taxation in District Registry.]—See *Wilson v. Alltree*, ante, col. 667.

Summons adjourned into Court by Executor.]—A testator made a voluntary settlement which was admitted to be void against his creditors. The trustee of the settlement paid 580*l.* into court. An administration action was necessary to find out the amount of debts. The claims of the creditors amounted to 504*l.* The chief clerk ordered the clear balance to be paid to the trustee, leaving the creditors only a dividend. The summons was adjourned into court by the defendant the executor:—Held, that the order of the chief clerk was right, and that the defendant must pay the costs of the adjourned summons personally. *Turner, In re, Turner v. Turner*, 51 L. T. 497—V.-C. B.

EXTRADITION.

Trial for Offence other than Extradition Crime proved on Surrender.]—Upon the committal of a fugitive criminal under s. 10 of the Extradition Act, 1870, upon alleged charges of forgery committed in the State of New York, it was suggested that, upon being extradited, the prisoner might

be tried in America for some charge other than the alleged charges of forgery, in respect of which she had been surrendered, and accordingly a rule nisi for habeas corpus was granted:—Held, that the rule must be discharged, since the Government of the United States of America had made provision for s. 3, sub-s. 2, of the Extradition Act, 1870, and that a fugitive criminal would be tried there solely for the offence in respect of which he had been surrendered. Further, that the point had been clearly raised and decided in *The United States v. Rauscher* (12 Davis, Sup. Ct. 407), which, as a decision of the Supreme Court of the United States, was binding on all courts within the Union. *Woodall, In re*, 57 L. J., M. C. 72; 59 L. T. 549; 52 J. P. 646—D.

Crime committed in Foreign Country by Person "in Her Majesty's Dominions."]—N., being in Southampton, wrote and sent certain letters containing alleged false pretences to certain persons carrying on business within the jurisdiction of the German Empire, thereby inducing them to part with certain goods and deliver them to his order to certain persons in Hamburg. N. also sent to the same persons certain alleged forged cheques in payment:—Held, on argument of a rule nisi for a habeas corpus, that N. was a fugitive criminal within the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 26, and was rightly committed by the police magistrate to await the warrant of the secretary of state for his extradition. *Reg. v. Nillins*, 53 L. J., M. C. 157—D.

To satisfy a magistrate in committing a prisoner charged with an extradition crime, under s. 10 of 33 & 34 Vict. c. 52, there must be some evidence that the prisoner committed such crime within the jurisdiction of the country seeking extradition. *Reg. v. Lavaudier*, 15 Cox, C. C. 329—D.

"Apprehension"—Person already in Custody—Arrest without a Warrant.]—Under s. 8 of the Extradition Act, 1870, a fugitive criminal who is already in custody may be detained for an offence coming within the act, even though he was originally arrested without any warrant. The word "apprehension" in s. 8 includes "detention":—Semble, per Brett, L. J., that a constable would be justified in arresting without a warrant a fugitive from a foreign country on reasonable grounds of suspicion that he has committed a crime which would be a felony if committed in the United Kingdom. *Reg. v. Weil*, 9 Q. B. D. 701; 53 L. J., M. C. 74; 47 L. T. 630; 31 W. R. 60; 15 Cox, C. C. 189—C. A.

Committal upon improper Warrant—Other Charges.]—A prisoner was committed to be extradited to France upon a warrant of committal which was found to be bad by the court, but other offences alleged against him were included in the French warrant for his extradition:—Held, that he was entitled to be discharged. *Reg. v. De Portugal, or De Portugal, In re*, 16 Q. B. D. 487; 55 L. J., Q. B. 567; 34 W. R. 42; 50 J. P. 501—D.

Under wrong Name—Jurisdiction.]—T. was received into custody from the Swedish police in Stockholm, where he was in prison, having been arrested under the name of D., under which name he was extradited. D. had previously been

connected with T., and it was proved that T. and D. were different persons :—Held, that the court having jurisdiction to try the indictment, it was immaterial under what name T. was extradited. *Reg. v. Finkelstein*, 16 Cox, C. C. 107—Com. Serj.

FACTOR.

See PRINCIPAL AND AGENT.

FACTORY.

See MASTER AND SERVANT.

FACULTY.

See ECCLESIASTICAL LAW.

FAIRS.

See MARKET.

FALSE PRETENCES.

See CRIMINAL LAW.

FALSE IMPRISONMENT.

See MALICIOUS PROSECUTION.

FALSE REPRESENTATION.

See FRAUD.

FELONY.

See CRIMINAL LAW.

FENCE.

Obligation to Railway to Fence.]—*See* NEGLIGENCE, II., 2.

In Other Cases.]—*See* NEGLIGENCE, II., 4.

FIDUCIARY RELATION.

Between Promoters and Directors and Members of Company.]—*See* COMPANY.

Between Principal and Agent.]—*See* PRINCIPAL AND AGENT.

Between Trustee and Cestui que trust.]—*See* TRUST AND TRUSTEE.

FIERI FACIAS.

See EXECUTION—SHERIFF.

FINES AND RECOVERIES ACT.

Acknowledgment and Examination of Married Woman.]—*See* post, HUSBAND AND WIFE.

Effect of—Application to Rectify Deed.]—The court is not prohibited by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 47, from exercising its ordinary jurisdiction to rectify, on the ground of mistake, a deed of re-settlement which has been enrolled as a disentailing assurance under the act. *Hall-Dare v. Hall-Dare*, 31 Ch. D. 251; 55 L. J., Ch. 154; 54 L. T. 120; 34 W. R. 82—C. A.

— Specific Performance.]—The jurisdiction which the courts of equity had prior to the Fines and Recoveries Act of decreeing specific performance of a contract by a tenant in tail to bar the entail by ordering him to levy a fine or suffer a common recovery for the purpose, and enforcing the order as against the tenant in tail personally by the process of contempt, has not been excluded by s. 47 of the Fines and Recoveries Act, and the court can still as against the tenant in tail himself decree specific performance of a contract to execute a disentailing assurance, although the contract is not enforceable as against the succeeding issue in tail. *Bankes v. Small*, 36 Ch. D. 716; 56 L. J., Ch. 832; 57 L. T. 292; 35 W. R. 765—C. A.

Disentailing Assurance — Copyholds — Post-Nuptial Settlement.]—A feme covert entitled to an equitable estate tail in copyholds at B. exe-

cuted, in February, 1870, a deed declaring that such copyholds should be held in trust for such persons as she and her husband should jointly appoint, and in default for herself in fee. The deed was duly acknowledged, but was not entered upon the court rolls of the manor within six months after execution. By a deed of settlement dated in March, 1870, she and her husband purporting to exercise this joint power, appointed the copyholds at B., and also covenanted to surrender those and other copyholds to which she was entitled in fee, to trustees upon trust to sell, invest the proceeds, and hold the fund (in the events which happened) for her for her separate use for life, then for her husband for life, and then for her children other than her eldest son. No sale or surrender of any of the copyholds was ever made. The feme covert had several children, and after the deaths of her and her husband the trustee of the settlement petitioned that all the copyholds might vest in him for all the estate therein of the eldest son and customary heir, who was an infant; and the court made a vesting order according to the prayer of the petition:—Held, first, that the deed of February, 1870, being a mere declaration of trust by the tenant in tail, and not a "disposition" within the Fines and Recoveries Act, was inoperative as an assurance to bar the estate tail in the copyholds at B. Secondly, that in concurrence with *Honeywood v. Foster* (30 Beav. 1) and *Gibbons v. Snape* (1 De G. J. & S. 621), and upon the construction of the statute, that, taking s. 41, together with ss. 50 and 53 of the Fines and Recoveries Act, a disentailing assurance by an equitable tenant in tail of copyholds, which is not entered upon the court rolls of the manor within six months after execution, is void; and consequently that the power of appointment which the deed of February, 1870, purported to create could not be exercised. Thirdly, that the settlement of March, 1870, was not a disposition by the feme covert within the Act, and could not be treated either as an assignment of her equitable interest in the copyholds or as a valid declaration of trust, or as anything more than a mere covenant to surrender. *Green v. Paterson*, 32 Ch. D. 95; 56 L. J., Ch. 181; 54 L. T. 738; 34 W. R. 724—C. A.

FIRE.

Insurance.]—See INSURANCE.

FISH AND FISHERY.

Right of Crown to grant to Subject—Exclusion of Owner of Soil.]—The Crown can hold a river-bed throughout a manor and the fishery in the river flowing over the same as parcel of the manor, and may grant the manor with the river-bed and fishery to a subject, and the subject may grant the banks of the river with reserva-

tion of the river-bed and fishery. *Devonshire (Duke) v. Pattinson*, 20 Q. B. D. 263; 57 L. J., Q. B. 189; 58 L. T. 392; 52 J. P. 276—C. A.

Salmon—Bye-Law—Validity of.]—By sub-s. 11 of s. 39 of the Salmon Fishery Act, 1873, it was provided that a board of conservators might make bye-laws for the better protection, preservation, and improvement of the salmon fisheries within their district, to regulate during the annual and weekly close seasons the use within any river of nets for fish other than salmon, when such use at such times was prejudicial to the salmon fisheries. A board of conservators made a bye-law that it should not be lawful for any person to use any net whatever inside the bar in any public water of their fishery district, except a trawl net, between the 1st Dec. and the 30th April, both inclusive. Upon an information under the above bye-law against fishermen for using a draft net inside the bar in a public water of the said fishery district on the 13th April, the magistrates found as a fact that trawl nets could not be advantageously used by fishermen in that part of the river, and that certain other kinds of nets could be used without prejudice to the salmon:—Held, that the said bye-law was ultra vires and invalid, and that the conservators had no power under sub-s. 11 of s. 39 of the Salmon Fishery Act, 1873, to make a bye-law which was not a mere regulation, but an absolute prohibition, for a definite time, of the use of nets which were not prejudicial to the salmon fishery. *Pidler v. Berry*, 59 L. T. 230; 53 J. P. 6—D.

— Powers of Water-bailiff—Obligation to produce Appointment.]—A water-bailiff appointed under the Salmon Fishery Acts, 1865, 1873 (28 & 29 Vict. c. 121, and 36 & 37 Vict. c. 71), is bound before attempting to exercise his power of searching boats, &c., used in fishing to produce the instrument of his appointment. *Barnacott or Parnacott v. Passmore*, 19 Q. B. D. 75; 56 L. J., M. C. 99; 35 W. R. 812; 51 J. P. 821—D.

Claim of Right to Fish—Freeholder's Right—Custom of Manor.]—P., as servant of a freeholder, who held a conveyance of the manor and the right of fishery, cut the nets of a copyholder while fishing. P., on being summoned for assault, produced the conveyance, but no evidence was given of the freeholder ever having exercised the right, while evidence was given that all copyholders had the right to fish, and had exercised it for 50 years:—Held, that the justices were right in convicting P., and in overruling the claim of right set up by him in the name of his master. *Priest v. Archer*, 51 J. P. 725—D.

Private Fishery—"Any Fish"—Unlawful Fishing.]—By 24 & 25 Vict. c. 96, s. 24, whoever shall unlawfully take or destroy, or attempt to take or destroy, "any fish" in any private fishery is liable on conviction to a penalty. The respondent took, or attempted to take, "crayfish" in a private fishery:—Held, that he had been guilty of an offence under this section. *Caygill v. Thwaite*, 33 W. R. 581; 49 J. P. 614—D.

— Evidence of Ownership.]—S. was charged

with unlawfully fishing in a river contrary to 24 & 25 Vict. c. 96, s. 24. The prosecutor produced a lease of the lands executed by the preceding owner, and proved execution by the lessee, but the witness of the lessor's signature was not called. The lease contained an express reservation of fishing and the term was still current. Both the original lessor and lessee were dead, but rent had been received and paid under the lease for seven years:—Held, that there was sufficient evidence of a private right of fishing without producing the probate of the original lessor's will, and that the justices ought to convict. *Greenbank v. Sanderson*, 49 J. P. 40—D.

— **Navigable River—Norfolk Broad.**—B. was charged under 24 & 25 Vict. c. 96, s. 24, with unlawfully taking fish in a private fishery. The water was part of a Norfolk broad or lake, 35 miles from the sea. The evidence showed that the tide did not reach the spot, though occasionally the freshwater was backed up so as to rise three or four inches when there was a high tide. Anglers had occasionally been turned off if no consent of the adjoining owners had been obtained by them:—Held, that there was sufficient evidence to support the finding of justices, that there was not a tidal navigable river where the public had a right to fish, but was a private fishery; and the conviction was held right. *Blower v. Ellis*, 50 J. P. 326—D.

Exposing Eels for Sale—Close Season—Eels caught out of England.—The 4th sub-s. of the 11th section of the Freshwater Fisheries Act, 1878, which forbids the sale or exposure for sale of freshwater fish during the close season, applies to fish caught beyond the limits of that part of the United Kingdom to which the act applies. *Price v. Bradley*, or *Bradley v. Price*, 16 Q. B. D. 148; 55 L. J., M. C. 53; 53 L. T. 816; 34 W. R. 165; 50 J. P. 150—D. See now 49 Vict. c. 2.

Rating Fishery.—See POOR LAW.

FIXTURES.

Rating.—See POOR LAW.

First Mortgage of Lands and Buildings—Second Mortgage of same, with Ores, Stock-in-Trade, and Chattels.—The S. Company carried on the business of manufacturing zinc and spelter, sulphuric acid, and zinc oxide on leasehold premises. They had erected a number of cupola and other furnaces for the purposes of their manufacture, which, as between them and their landlords, were admitted to be trade fixtures. In 1880 the company conveyed the land and buildings comprised in its lease to trustees for debenture-holders upon trust to permit the company to carry on business until default in payment of the debentures or winding-up, and then to sell. In 1883 the company executed a second mortgage to trustees for a second set of debenture-holders, which comprised, besides the land and buildings, all stock-in-trade, stock of ores,

and loose plant and material. It appeared that in the course of smelting metals for the company's business small quantities of gold and silver were given off in the form of vapour, and became imbedded in the bricks lining the furnaces. The company having been ordered to be wound up, the trustees of the first mortgage deed entered and sold. The second mortgagees took out a summons that they might be allowed to enter and remove the gold, silver, and other metal embedded in the said bricks, claiming that it was included in their mortgage, and not in the first. It was admitted that the metals could not be extracted without pulling down the furnaces and pounding up some of the bricks:—Held, that the doctrine of trade-fixtures has no application as between mortgagee and mortgagor; that, whatever might have been the case between landlord and tenant, the mortgagee was entitled to everything which his mortgagor, intentionally or not, or for trade purposes or otherwise, had fixed to the mortgaged premises, and the summons must be dismissed with costs. *Tottenham v. Swansea Zinc Ore Company*, 52 L. T. 738—Pearson, J.

When included in Mortgage.—See MORTGAGE (THE CONTRACT).

Removal of Machinery.—See MINES.

Tenants' Fixtures.—See LANDLORD AND TENANT.

Assignment of — Registration.—See BILLS OF SALE, I. 1.

FOOD.

See HEALTH.

FORECLOSURE.

See MORTGAGE.

FOREIGN ENLISTMENT ACT.

See WAR.

FOREIGN JUDGMENTS.

See INTERNATIONAL LAW.

FOREIGN LAW AND FOREIGNER.

See INTERNATIONAL LAW.

FORFEITURE.

Bequest to be forfeited on Bankruptcy.]—See WILL.

Of Life Interest under Marriage Settlement.]—See HUSBAND AND WIFE.

Of Leases.]—See LANDLORD AND TENANT.

FORGERY.

See CRIMINAL LAW.

FRANCHISE.

1. *Parliamentary.*—See ELECTION LAW.

2. *Municipal.*—See CORPORATION.

FRAUD AND MISREPRESENTATION.

1. *Generally*, 821.

2. *Fraudulent Conveyances.*

a. Under 13 Eliz. c. 5, 825.

b. Under 27 Eliz. c. 4, 827.

c. Under Bankruptcy Act.—See BANKRUPTCY, XI. 3.

1. GENERALLY.

Misrepresentations—Ambiguous in Meaning—Onus of Proof.]—In an action for deceit the plaintiff must show, first, that the false statements made to him were fraudulent; secondly, that they were a cause inducing him to act to his prejudice. *Smith v. Chadwick*, 9 App. Cas. 187; 53 L. J., Ch. 873; 50 L. T. 697; 32 W. R. 687; 48 J. P. 644—H. L. (E).

The plaintiff took shares in a company formed to buy up and carry on certain ironworks. The prospectus contained the following statement:—"The present value of the turnover or output of the entire works is over 1,000,000*l.* sterling per annum." The works never had produced an actual turnover or output to the value of

1,000,000*l.* in any year, nor were they producing at that rate at the date of the prospectus, but the machinery was capable of turning out produce to that amount per annum. The plaintiff was asked in interrogatories how he understood the above statement, and replied that he understood the meaning "to be that which the words obviously conveyed." No questions were asked as to this at the hearing in examination or cross-examination:—Held, that the plaintiff was not entitled to recover. *Id.*

Held, by Lord Selborne, L.C., Lords Blackburn and Watson, that the statement was ambiguous, and might refer to the output which the works were capable of producing; that consequently the burden lay upon the plaintiff to show that he understood it to refer to the actual output, and that he had failed to show this. *Id.*

Held, by Lord Bramwell, that the statement could only refer to the actual output, and that the plaintiff had sufficiently shown that he so interpreted it, but that it was not made out that the statement was fraudulent on the part of the defendants. *Id.*

—**Intention—Material Inducement.]—**The directors of a company issued a prospectus inviting subscriptions for debentures, stating that the property of the company was subject to a mortgage of 21,500*l.*, but omitting to state a second mortgage of 5,000*l.* The prospectus further stated that the objects of the issue of debentures were—(1) to purchase horses and vans; (2) to complete alterations and additions; (3) to supply cheap fish. The true object was to get rid of pressing liabilities. The plaintiff advanced 1,500*l.* upon debentures under the erroneous belief that the prospectus offered him a charge, and would not have advanced his money but for such belief, but he also relied upon the false statements contained in the prospectus as to the financial condition of the company:—Held, that the misstatement of the objects for which the debentures were issued was a material misstatement of fact, influencing the conduct of the plaintiff, and rendered the directors liable to an action for deceit, although the plaintiff was also influenced by his own mistake. *Edgington v. Fitzmaurice*, 29 Ch. D. 459; 55 L. J., Ch. 650; 53 L. T. 369; 33 W. R. 911; 50 J. P. 52—C. A.

—**Inference of Fact—Not Presumption of Law—"Renewable Lease."]**—In 1869, P., a member of a firm of solicitors, by his advice induced the plaintiff to invest moneys upon the security of an equitable mortgage of a lease which he represented as renewable, and which had previously been renewed by custom every fourteen years, but the future renewal whereof was prohibited by statute passed in 1868. In 1875 P. fraudulently, and without the knowledge of his partners, gave a legal mortgage of the lease to a third party without notice of the plaintiff's mortgage. The security proved insufficient, and P. having absconded, the plaintiff sought to make P.'s firm liable for the loss sustained by him:—Held, that it is an inference of fact, and not a presumption of law, that if a material representation calculated to induce a person to enter into a contract is made to him he was thereby induced to enter into the contract. Dictum of Jessel, M. R., in *Redgrave v. Hurd* (20 Ch. D. 1, 21) commented on and explained.

Hughes v. Twisden, 55 L. J., Ch. 481; 54 L. T. 570; 34 W. R. 498—North, J.

Contract induced by—Rescission of Contract—Restitutio in Integrum.—The respondent was induced by misrepresentations made without fraud by the appellants to become a partner in a business which either belonged to them or in which they were partners and which was in fact insolvent. The business having afterwards, owing to its own inherent vice, entirely failed with large liabilities:—Held, that the respondent was entitled to rescission of the contract and repayment of his capital, though the business which he restored to the appellants was worse than worthless, and that the contract being rescinded the appellants could not recover against him for money lent and goods sold by them to the partnership. *Adams v. Newbigging*, 13 App. Cas. 308; 57 L. J., Ch. 1066; 59 L. T. 267; 37 W. R. 97—H. L. (E.).

Repudiation or Affirmation of Contract.—A solicitor took money of his client's, and pretended to have invested it upon four mortgages. After his death it was discovered that three of these mortgages were absolutely valueless, and the client took no steps as regards them. He brought an action to enforce the other, which resulted in a compromise out of which he obtained part of the money due:—Held, that as regards this last one he had affirmed the contract, and could not now repudiate the mortgage, but as regards the other three he could. *Murray, In re, Dickson v. Murray*, 57 L. T. 223—Stirling, J.

Effect of, when Interest of Third Parties has intervened.—B. for the purpose of enabling a company to have a fictitious credit in case of inquiries at their bankers, placed money to their credit, which they were to hold in trust for him. Some of the money having been drawn out with B.'s consent, and the company having been ordered to be wound up while a balance remained:—Held, that B. could not claim to have the balance paid to him. *Great Berlin Steamboat Company, In re*, 26 Ch. D. 616; 54 L. J., Ch. 68; 51 L. T. 445—C. A.

Duty of Inquiry—Simplex Commendatio.—The plaintiffs advertised for sale by auction an hotel, stated in the particulars to be held by a "most desirable tenant." The defendants sent their secretary down to inspect the property and report thereon. The secretary reported very unfavourably, stating that the tenant could scarcely pay the rent (400*l.*), rates and taxes. The defendants, relying on the statements in the particulars, authorized the secretary to attend the sale and to bid up to 5,000*l.* The property was bought in at the sale, and the secretary purchased it by private contract for 4,700*l.* It appeared subsequently that the quarter's rent previously to the sale had not been paid; the previous quarter had been paid by instalments, and six weeks after the sale the tenant filed his petition. It appeared, however, that the hotel business was as good during the last year as previously, and that the month of the tenant's failure was the best he had had. The plaintiffs brought an action for specific performance, relying (in answer to the defence and counter-

claim for rescission on the ground of misrepresentation) on the fact that the defendants had made their own inquiries:—Held, that the statement that the property was held by a "most desirable tenant" was not a mere expression of opinion, but contained an implied assertion that the vendors knew of no facts leading to the conclusion that he was not; that the circumstances relating to the payment of rent showed that he was not, and that there was a misrepresentation. *Smith v. Land and House Property Corporation*, 28 Ch. D. 7; 51 L. T. 718; 49 J. P. 182—C. A.

Effect of, in Particulars, etc., on Sale of Land.—See VENDOR AND PURCHASER.

"Legal Fraud."—The expression "legal fraud" considered and explained. *Peek v. Derry*, 37 Ch. D. 541; 57 L. J., Ch. 347; 59 L. T. 78; 36 W. R. 899—C. A. See S. C. in H. L., 33 S. J. 589.

Marriage Settlement—Fraud before Marriage.—In an action to set aside a marriage settlement, the plaintiff alleged, as the ground of his action, that previous to the execution of the settlement made upon the marriage between himself and I. S., the latter stated to him that her first husband had been divorced from her, at her suit, by reason of his cruelty and adultery, and that she had not herself been guilty of adultery; that such statements were made to induce him to execute the settlement and contract the marriage, that in reliance on the representations, he executed the settlement and married I. S.; that he subsequently discovered that the representations were false to the knowledge of I. S., and that she herself had been divorced from her husband at his suit and by reason of her adultery:—Held, on motion by the defendant, that the plaintiff's statement of claim must be struck out under Ord. XXV. 1. 4 as disclosing no reasonable ground of action. *Johnston v. Johnston*, 53 L. J., Ch. 1014; 51 L. T. 537; 32 W. R. 1016—Pearson, J. Affirmed 52 L. T. 76; 33 W. R. 239—C. A.

Valuer—Mortgage—Action by Mortgagee for Misrepresentation.—An intending mortgagee, at the request of the solicitors of an intending mortgagee, applied to a firm of valuers for a valuation of the property proposed to be mortgaged. A valuation at the sum of 3,000*l.* was sent in by the valuers direct to the mortgagee's solicitors, and the mortgage was subsequently carried out. Default having been made in payment by the mortgagor, and a loss having resulted to the mortgagee, he commenced an action against the valuers for damages for the loss sustained through their negligence, misrepresentation, and breach of duty. The court being satisfied on the evidence that the defendants knew at the time the valuation was made that it was for the purpose of an advance, and that the valuation as made was in fact no valuation at all:—Held, that, under the circumstances, the defendants were liable on two grounds: (1), that they (independently of contract) owed a duty to the plaintiff which they had failed to discharge; (2), that they had made reckless statements on which the plaintiff had acted. *George v. Skivington* (5 L. R., Ex. 1), and *Heaven v. Pender* (11 Q. B. D. 503), followed; *Peek v. Derry* (37 Ch. D. 541) discussed. *Cann*

v. *Willson*, 39 Ch. D. 39; 57 L. J., Ch. 1034; 37 W. R. 23—Chitty, J.

Concealment of Fraud—Statute of Limitations.]—See LIMITATION, STATUTES OF.

2. FRAUDULENT CONVEYANCES.

a. Under 13 Eliz. c. 5.

Intent to "delay, hinder, or defraud Creditors."—A master mariner was married at Hong Kong on May 31, 1881. In the following August, an action for breach of promise of marriage was commenced against him, and the writ served upon him at Hong Kong on October 8. At the time of his marriage he was entitled to a legacy of 500*l.*, which had become vested in possession on the death of his mother (who had a life interest in it) on May 11, 1881. On October 17, 1881, being still at Hong Kong, he made a voluntary settlement of the legacy upon trust during the joint lives of himself and his wife for her separate use, remainder for the survivor for life, remainder for the children of the marriage, remainder, in default of children, for himself absolutely. Judgment was obtained against him in the action on July 20, 1882, for 500*l.*, and in November, 1884, he was adjudicated bankrupt. It appeared that when he executed the settlement he was able to pay his debts without the aid of the property comprised in the settlement, and that he did not know that he was entitled to the legacy until a few days before he executed the settlement, and he stated that in executing it he was not influenced by the action which had been commenced against him:—Held, that there was not sufficient evidence to warrant a judge or jury in finding that the settlement was intended to "delay, hinder, or defraud creditors" within 13 Eliz. c. 5. *Freeman v. Pope* (5 L. R., Ch. 538) considered. *Mercer, Ex parte, Wise, In re*, 17 Q. B. D. 290; 55 L. J., Q. B. 558; 54 L. T. 720—C. A.

S., a retail trader, being in difficulties, by deeds, dated July, 1882, assigned to C., wholesale manufacturers, to whom he was indebted, all his stock-in-trade, effects, &c., together with the premises on which the business was carried on—such assignment comprising substantially the whole of his property; and by an agreement of the same date S. agreed to carry on the business in his own name as servant of C. and he continued to carry it on as the apparent owner, although really acting under the directions of C., until March, 1883, when he was adjudicated a bankrupt. The assignment was expressed to be made in consideration of a debt of 3,271*l.* then due from S. to C., which C. thereby released. There was a contemporaneous verbal agreement between S. and C. that C. should undertake the payment of S.'s other creditors, but whether all or only his trade creditors did not appear. At the date of the assignment the only debt due from S. to C. was 1,370*l.*, but all S.'s debts, so far as they could be ascertained, amounted to 3,271*l.* C., either immediately before or after the execution of the assignment, paid out some executions for S., and also some arrears of rent due from him to his landlord, and subsequently made advances and supplied goods for the purposes of the business. C., however, notwithstanding

ing the verbal agreement, did not pay or give any security to a creditor of S. who was pressing him, but induced S. himself to give a promissory note in his own name for his debt:—Held, that the deed was clearly void under the statute of Elizabeth. *Chaplin, Ex parte, Sinclair, In re*, 26 Ch. D. 319; 53 L. J., Ch. 732; 51 L. J. 345—C. A. See also *Godfrey v. Poole*, post, col. 828.

Intention to defeat particular Creditor.]—It is a fraud, within 10 Chas. 1 (Ir.), sess. 2, c. 3, s. 10, for a debtor without consideration, and with intent to defraud or delay a particular creditor, to part with any portion of his property. *Wood v. Dixie* (7 Q. B. 892) explained and distinguished. [10 Chas. 1 (Ir.) sess. 2, c. 3, s. 10 is equivalent to 13 Eliz. c. 5.] *Moroney, In re*, 21 L. R., Ir. 27—C. A.

Ante-nuptial Settlement—Void as against Creditors.]—Although a woman may know that a man is in embarrassed circumstances and that her marrying him at the time may be of service to him and preserve his property, if nevertheless her object in marrying him is not solely for the purpose of preserving his property, but for the ordinary reasons which lead men and women to take that position with regard to each other, an ante-nuptial settlement executed by the husband will not be void. But where the marriage is not an honest marriage and is entered into solely for the purpose of attempting to make a settlement valid which otherwise would be void, and where, but for a desire to defraud the creditors no marriage between the two parties would have taken place, the ante-nuptial settlement will be set aside. Thus where a man executed an ante-nuptial settlement and married a woman with whom he had had an immoral intimacy, and the evidence showed that such marriage was entered into solely with intent to defraud his creditors, the wife being implicated in the transaction:—Held, that the settlement was fraudulent and void as against the creditors. *Cooper, Ex parte, Pennington, In re*, 59 L. T. 774; 5 M. B. R. 216—Cave, J. Affirmed 5 M. B. R. 268—C. A.

—Both Parties to Fraud.]—To avoid an ante-nuptial marriage settlement as a fraud upon creditors it must be shown that both husband and wife were parties to the fraud. *Parnell v. Stedman*, 1 C. & E. 153—Cave, J.

Good Consideration—Wife giving up Equity to a Settlement.]—H. was married to his wife in 1864, and she subsequently became entitled to certain moneys under the wills of her father and grandfather. These moneys she lent to her husband for the purposes of his business, upon the terms that he would execute a settlement of the moneys upon her, which was done. Upon the bankruptcy of H. a proof was tendered upon the settlement and rejected on the ground that this deed was voluntary within the terms of the statute 13 Eliz. c. 5:—Held, that the settlement was not covinous or fraudulent within the 13 Eliz. c. 5, and that there had been a good consideration by reason of the fact that the wife had waived her equity to a settlement. Semble, that the transaction was upheld on the ground of bona fides, and that, if the court had found that the intention of the parties had been that the settlement should make the husband abso-

lute owner, and at the same time secure the moneys to the wife, it would have declared the settlement void as a fraud on the bankruptcy law. *Home, In re, Home, Ex parte*, 54 L. T. 301—Cave, J.

Action by Creditor—Debt under 50*l*.]—A trader insured his stock-in-trade and other effects. These were destroyed by fire. He assigned the policies to trustees on trust, to pay and divide the moneys raised thereunder among all his creditors rateably, and to pay the balance (if any) to himself:—Held, that the assignment was not void under 13 Eliz. c. 5, at the suit of a creditor whose debt was under 50*l*. *Green v. Brand*, 1 C. & E. 410—Lopes, J.

Laches, Effect of.]—A specialty creditor brought an action to set aside a conveyance as fraudulent under 13 Eliz. c. 5, nearly ten years after the death of the grantor. The plaintiff had been aware of the facts during the whole of that period, and gave no satisfactory reason for his delay:—Held, that as the plaintiff was coming to enforce a legal right, his mere delay to take proceedings was no defence, as it had not continued long enough to bar his legal right, the case standing on a different footing from a suit to set aside on equitable grounds a deed which was valid at law. *Maddever, In re, Three Towns Banking Company v. Maddever*, 27 Ch. D. 523; 53 L. J., Ch. 998; 52 L. T. 35; 33 W. R. 286—C. A.

b. Under 27 Eliz. c. 4.

Post-Nuptial Settlement—Leaseholds.]—A corporation, in consideration of a fine paid, granted a lease of a house for forty years from Michaelmas, 1856, at a yearly rent of 5*s*. 6*d*., and subject to covenants for payment of rent, rates, and taxes, and to repair, maintain, and yield up the premises. The lease was assigned to L., who, in 1865, in consideration of natural love and affection, assigned the same, together with other property, to trustees for his wife for her separate use. Notwithstanding this settlement, L. remained in possession of the leasehold premises, and in 1870 he surrendered the lease to the corporation, and, in consideration of a fine paid, procured a new lease to be granted to him in his own name. He afterwards died:—Held, that in taking the new lease L. acted for the benefit of his wife and as agent for her and the trustees of the settlement, and that, although there was no written declaration of trust of the new lease, such lease was "by operation of law" subject to the trusts of the settlement declared in respect of the old lease. *Lulham, In re, Brinton v. Lulham*, 53 L. T. 9; 33 W. R. 788—C. A. Affirming 53 L. J., Ch. 928—Kay, J.

Quære, whether the surrender of the old lease was a "conveyance" within s. 1 of 27 Eliz. c. 4, which would prevail over the previous settlement, assuming such settlement to be a voluntary conveyance within the same statute. *Ib*.

A married woman, having become entitled under a will to freehold and leasehold property for her sole and separate use, joined her husband in making a settlement, whereby the husband and wife conveyed the freeholds, and the husband alone demised the leaseholds, subject to the annual payment of a shilling, if demanded, to trustees, upon trust for the wife for her separate

use for life, remainder to the husband for life, remainder for the children (if any), with ultimate remainder to the wife absolutely. Two years afterwards the husband and wife (there being no children of the marriage) made a mortgage of the property:—Held, that the conveyance by the husband, though binding on the estate by the curtesy which he would have had in his wife's freeholds if there had been issue, in the absence of any conveyance by her, was not sufficient to raise a consideration moving from the husband; and that the settlement was voluntary and void under the statute as against the mortgagee. *Shurmur v. Sedgwick, Crossfield v. Shurmur*, 24 Ch. D. 597; 53 L. J., Ch. 87; 49 L. T. 156; 31 W. R. 884—V.-C. B.

Post-Nuptial Settlement of Lands—Trusts for Children of Marriage—Mortgage.]—By a post-nuptial settlement, lands, of which the wife, before the marriage, had been seised in fee, were settled, subject to successive life estates for husband and wife, upon the children of the marriage, reserving to the husband and wife power of revocation, and power to charge the lands with 1,000*l*. The husband and wife executed a subsequent settlement, in conveying the lands in trust for the wife for her separate use during their joint lives, and, subject thereto, and to an annuity for the survivor, in trust for the children of the marriage. Afterwards both husband and wife purported to mortgage the lands in fee. There were children of the marriage who, after the death of their parents, the mortgagors, contended that the mortgage only affected the life estate limited to their mother by the second settlement:—Held, that the settlements were deeds for value, so that the mortgage could not prevail against the estates in remainder of the children of the marriage; also that the second settlement, operating as a revocation of the first, extinguished the general power to charge 1,000*l*. thereby reserved. *Bell's Estate, In re*, 11 L. R., Ir. 512—Land Judges.

Voluntary Conveyance irrevocable—Subsequent Purchaser for Value.]—Where a debtor conveyed all his real estate upon trust to sell and pay off his debts, and as to any ultimate surplus to pay the same to trustees to be held by them in trust for the separate use of his wife for life, and after her decease in trust for their children in equal shares as tenants in common:—Held, in a suit by a subsequent purchaser for value (at a sale in execution) of the grantor's interest in some lands comprised in the conveyance: (1) That the deed of conveyance was not revocable, there being an ultimate trust for the benefit of wife and children; (2) That it was not void as intended to delay or defeat creditors; (3) That, not being fraudulent in fact, it was not fraudulent in law and void against creditors under 13 Eliz. c. 5, no intention to delay or defeat creditors being shown; (4) That it was not void under 27 Eliz. c. 4, as against a purchaser for value under the New South Wales District Courts Act, 1858, ss. 78 and 79. The subsequent sale for value not being by the voluntary grantor, no presumption arose that the prior grant was fraudulent. *Godfrey v. Poole*, 13 App. Cas. 497; 57 L. J., P. C. 78; 58 L. T. 685; 37 W. R. 357—P. C.

Settlement by Widower—Limitation to first

Wife's Children—Subsequent Mortgage.]—The principle that the children of a widow by a former marriage taking under a settlement made on her second marriage are not to be treated as volunteers, does not extend to the case of the children of a widower. *Cameron and Wells, In re*, 37 Ch. D. 32; 57 L. J., Ch. 69; 57 L. T. 645; 36 W. R. 5—Kay, J.

By a settlement made on the second marriage of a widower, land belonging to him was conveyed in trust for his children by a first marriage absolutely, and personalty belonging to the wife was settled on her absolutely. The husband afterwards mortgaged the land:—Held, that the settlement was voluntary as regards the children of the husband, and that by 27 Eliz. c. 4, the limitation in their favour was void as against the mortgagee. *Id.*

Consideration—Bargain between the Parties.]

—In an action for specific performance of an agreement to sell certain freehold property, a question arose as to whether a post-nuptial settlement was void under 27 Eliz. c. 4, as being a voluntary settlement. Previously to the settlement the property had been settled on the wife for life, with remainder to the husband in fee, and the wife was absolutely entitled to a one-seventh share of certain other property. The settlement contained a recital in the following words: "Whereas the said J. D. and E. D. are desirous that the hereinbefore-recited deed-poll should be altered, and that the property thereby settled should be re-settled as herein-after appearing, and also that the said one-seventh share of the said hereditaments at Whitechapel, so as aforesaid vested in the said E. D., should be included in the new settlement intended to be hereby made," and the wife purported to revoke the deed-poll mentioned, and to join with the husband in re-settling the property upon trusts, giving the husband a life-interest in the whole after her decease, and subject thereto upon trust for third parties:—Held, that there was clear evidence of a bargain between the parties, and that, as both husband and wife gave up something in order to make a re-settlement, the settlement was not voluntary within the statute. *Schreiber v. Dinkel*, 54 L. T. 911—C. A. Affirming 54 L. J., Ch. 241—North, J.

FRAUDS, STATUTE OF.

See CONTRACT—SALE.

FREIGHT.

See SHIPPING.

FRIENDLY SOCIETY.

What is.]—A society is a friendly society under the Friendly Societies Act, 1875, s. 8, although it may not include in its objects all the objects there stated, provided its objects are substantially the same as those in the act. *Knowles v. Booth*, 32 W. R. 432—D.

Registration—Companies Act, 1862, s. 4.]

A society which has been registered under s. 8, sub-s. 5, of the Friendly Societies Act, 1875, pursuant to the special authority of the Treasury, is excepted from the provisions of s. 4 of the Companies Act, 1862. *Peat v. Fowler*, 55 L. J., Q. B. 271; 34 W. R. 366—D.

Whether a Charity.]—See *Pease v. Pattinson*, ante, col. 308.

Jurisdiction of County Court—Amalgamation—Dispute as to Provision.]

—The committee of a friendly society having agreed for the amalgamation of the society with another company, summoned a general meeting in order to pass a special resolution for carrying the amalgamation into effect. Some of the members, who were dissatisfied with the provision proposed to be made for the satisfaction of their claims, filed a plaint in the county court to restrain the society from carrying into effect the amalgamation, and obtained a receiver of the assets of the society, although the resolution for amalgamation had not then been passed. The public officer of the society applied for a writ of prohibition to restrain the proceedings in the county court:—Held, that the county court had no jurisdiction to interfere with the action of the society until the special resolution had been passed and confirmed, and a writ of prohibition was ordered to issue. *Jones v. Slee*, 32 Ch. D. 585; 55 L. J., Ch. 908; 55 L. T. 129; 34 W. R. 692; 51 J. P. 83—C. A.

Dispute between Society and Member—Appeal from Branch to Society.]

—By the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 22, disputes between members of a registered friendly society and the society are to be decided in manner directed by the rules of the society. By sub-s. (d), where no decision is made on a dispute within forty days after application to a society for a reference under its rules, the member or person aggrieved may apply to the county court, which may hear and determine the matter in dispute. A member of a branch of a friendly society, having been excluded therefrom by the branch committee, appealed, under the rules of the branch, to the general committee of the society, who failed to decide the dispute within forty days after application:—Held, that the appeal was a "reference" within the meaning of the subsection, and that a county court had jurisdiction to hear and determine the matter in dispute. *Reg. v. Cattley*, or *Reg. v. Northampton County Court Judge*, 19 Q. B. D. 491; 57 L. T. 108; 55 W. R. 717; 52 J. P. 38—D.

Right of Appeal—Rules.]—In the case of an unregistered society under s. 30, sub-s. 10 of the Act of 1875 (explained by 42 Vict. c. 9),

the right of appeal to a county court or court of summary jurisdiction overrides any rules of the society to the contrary. *Knowles v. Booth*, 32 W. R. 432—D.

— **"Application to County Court."**—By s. 22 of the Friendly Societies Act, 1875, disputes between members of a friendly society and the society or its officers are to be decided in manner directed by the rules of the society, and by sub-s. (d). "where the rules contain no direction as to disputes, or where no decision is made on a dispute within forty days after application to the society for a reference under its rules, the member or person aggrieved may apply either to the county court, or to a court of summary jurisdiction, which may hear and determine the matter in dispute"—Held, that the application to the county court contemplated by sub-s. (d) must be taken to be an application in the form of an action commenced in the county court, and not a reference to the county court judge sitting as an arbitrator, and that there was an appeal from the decision upon such application to the High Court. *Wilkinson v. Jagger*, 20 Q. B. D. 423; 57 L. J., Q. B. 254; 58 L. T. 487; 36 W. R. 169; 52 J. P. 533—D. [*See Schofield v. Vause*, 36 W. R. 170, n.—C. A.]

— **Certiorari.**—The provisions in the Friendly Societies Act, 1875 (ss. 22 (d) and 30, sub-s. 10), for the reference of all disputes between the society and its members to the county court, are permissive only, and not peremptory; and therefore there is, in a proper case, jurisdiction to remove to the High Court by certiorari proceedings in an action commenced against a friendly society by one of its members. *Royal Liver Friendly Society, In re*, 35 Ch. D. 332; 56 L. J., Ch. 821; 56 L. T. 817; 36 W. R. 7—Chitty, J.

Rules—Payment during Sickness—Old Age—Natural Decay.—The respondent, over 80 years of age, belonged to a friendly society, one of the rules of which provided that every member, after paying a certain amount of contributions, falling sick, lame, or blind, or otherwise disabled from work, should be entitled to receive a certain weekly amount from the funds of the society for sixteen weeks, if his illness continued so long, and half pay for the remainder; and another provided that where a member falls sick, lame, or blind, he is to give notice to the stewards, with a certificate from the surgeon of the society stating the cause of his indisposition. The surgeon of the society certified to the appellants (stewards of the society) that the respondent "continued unable to work by reason of natural decay." The respondent drew sick pay for some weeks; then the appellants refused to allow him any more, holding that the certificate did not entitle him to receive it.—Held, that incapacity to work arising from natural decay, as the result of old age, did not entitle the respondent to sick pay under the society's rules. *Dunkley v. Harrison*, 56 L. T. 660; 51 J. P. 788—D.

— **Death of Member intestate — Payment of Death Allowance—Right of Administrator to Recover.**—The deceased, a member of an unregistered friendly society, had, upon making his application for admission to the society,

signed a declaration agreeing to be bound by the rules of the society, and authorizing the deduction from his wages of the sum specified in the rules for securing to himself, or to his representatives in case of his death, the benefits of the society. The rule relating to the payment of death allowances empowered and authorized the committee to pay the allowance to such person or persons as in their discretion they might think fit; and it further provided that the allowance should be paid to certain specified relatives in such proportions as the committee should determine, unless otherwise bequeathed by will, when it was to be paid to the person to whom it had been bequeathed; that, where there were no surviving relatives and no special bequest, only the funeral expenses should be defrayed by the society, and that where the allowance had been once paid neither the committee nor the society should be liable to any further claim in respect of it. Upon the death of the member intestate the society paid the amount of the death allowance to the defendant, his sister. The plaintiff, as administrator of the deceased, having brought an action against the defendant to recover the money so paid to her.—Held, that the rule constituted the contract between the member and the society as to the payment of the money; that the death allowance was not the property of the member during his life, and in the absence of a bequest by will was not assets for the payment of his debts, and that therefore the plaintiff could not recover. *Ashby v. Costin*, 21 Q. B. D. 401; 57 L. J., Q. B. 491; 59 L. T. 224; 37 W. R. 146; 53 J. P. 69—D.

GAMBLING.

See GAMING.

GAME.

Dealer's Licence—Breeding Pheasants.—M., a pheasant-breeder for many years, set pheasants' eggs under barn-door hens in coops, cutting one wing of each bird to prevent escape and facilitate identification. He sold two cock pheasants on 5th February for 1*l.* to one of the public.—Held, that he was subject to the penalty under the 23 & 24 Vict. c. 90 and 24 & 25 Vict. c. 91, s. 17, for dealing in game without a licence. *Harnett v. Miles*, 48 J. P. 455—D.

Ground Game—Right vested in Person other than Occupier.—When at the date of the passing of the Ground Game Act, 1880, land is in the occupation of a tenant with a legal interest, as tenant from year to year, expiring after the commencement of the act, but also with an equitable interest under an agreement prior to the act for a lease for fourteen years, to commence from the expiration of the legal interest, and reserving to the landlord the right to the ground game on the land, such right in the landlord as against the tenant is preserved by the provisions of the saving clause of the act (s. 5):

the phrase "is vested" not being confined to an actual legal vesting a lease in possession, but including an equitable vesting of the right under an agreement for a lease, contract of tenancy, or other contract *bonâ fide* made for valuable consideration. *Allhusen v. Brooking*, 26 Ch. D. 559; 53 L. J., Ch. 520; 51 L. T. 57; 32 W. R. 657—Chitty, J.

By lease dated 4th September, 1865, H. demised to L. the shooting and game of the lands of P. for twenty years from the 1st November, 1863. In 1874 L. assigned to B. and W., who after the expiration of the lease continued to hold the right of shooting as tenants from year to year. By lease dated the 28th June, 1869, H. demised to C. the lands of P. for the term of sixty years, reserving to the landlord the game:—Held, that the case came within s. 5 of the Ground Game Act of 1880, and that C. was not entitled on the expiration of the lease of 1865 to take and kill ground game. *Hassard v. Clark*, 13 L. R., Ir. 391—V.-C.

— Spring Traps—Owner in Possession.]—

By the 6th section of the Ground Game Act, 1880, no person having a right of killing ground game under this act or otherwise, shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset, and the commencement of the last hour before sunrise; and no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes, nor employ poison; and any person acting in contravention of this section, shall, on summary conviction, be liable to a penalty not exceeding 2*l.*:—Held, that the section does not apply to an owner of land doing any of the acts prohibited therein upon his own land. *Smith v. Hunt*, 54 L. T. 422; 50 J. P. 279; 16 Cox, C. C. 54—D.

— Spring Traps—Tenant with Right of Shooting.]—A tenant of land who is under his agreement entitled to the game and right of shooting thereon, is liable to a penalty, under s. 6 of the Ground Game Act, 1880, for employing spring traps in the open for the purpose of killing ground game. *Saunders v. Pitfield*, 58 L. T. 108; 52 J. P. 694; 16 Cox, C. C. 369—D.

Overstocking Land—Injury to Crops—Right of Action.]—Where land is let to a tenant reserving the right of shooting over the land, the tenant may maintain an action against the persons entitled to the right of shooting for overstocking the land with game so as to cause damage to the tenant's crops. *Farrer v. Nelson*, 15 Q. B. D. 258; 54 L. J., Q. B. 385; 52 L. T. 786; 33 W. R. 800; 49 J. P. 725—D.

Prevention of Poaching—Search by Constable in Highway.]—A police constable saw the appellant in a highway with some rabbits slung over his back. The appellant left the highway and ran across a meadow followed by the police constable, and on being overtaken, at a distance from the highway, he threw the rabbits on the ground, and they were then and there taken possession of by the police constable. On appeal against a conviction under 25 & 26 Vict. c. 114, s. 2:—Held, that the conviction was right. *Turner v. Morgan*, (10 L. R., C. P. 587) commented on. *Lloyd v. Lloyd*, 14 Q. B. D. 725;

53 L. T. 536; 33 W. R. 457; 49 J. P. 630; 15 Cox, C. C. 767—D.

Abetting Poachers—Carrier buying Game from Poachers.]—M., a constable at half-past seven in the morning in the month of October, stopped L. driving a carrier's cart on the highway, and after questioning L. searched it. M. found two pair of rabbits (of which L. gave no account), and seized them under 25 & 26 Vict. c. 114, s. 2. L., on being served with a summons, said "I bought them of a man I did not know. This was the first time I have been summoned, I won't have any more of them":—Held, that the evidence was not sufficient to justify the justices in convicting L. of aiding persons unknown, who unlawfully went on land in pursuit of game. *Lawley v. Merriks*, 51 J. P. 502—D.

Trespass in Pursuit—Claim of Right by Tenant.]—B. was tenant of lands, there being no reservation of game by the landlord, and B. let the land to A. to get and cut the hay, and both B. and A. gave leave to P. to shoot game over the land. P. was convicted under 1 & 2 Will. 4. c. 32, s. 30, of trespassing in pursuit:—Held, that the justices were wrong, for the whole right to the game was in B. and A., and P. having the leave and authority of both had a good claim of right to the rabbits. *Pochin v. Smith*, 52 J. P. 4—D.

Night Poaching—Proof of Previous Conviction.]—Where a person is indicted for night poaching after two previous convictions, the previous convictions should not be proved until the jury find a verdict on the facts of the case. *Reg. v. Woodfield*, 16 Cox, C. C. 314—Hawkins, J.

GAMING AND WAGERING.

Betting—Agent employed to make Bets in his own Name—Repudiation of Bet before Payment—Implied Contract to Indemnify.]—The plaintiff, a turf commission agent, was employed by the defendant to make bets for him in the plaintiff's own name. After the plaintiff had so made some bets, but before he had paid those which were lost, the defendant repudiated the bets. On the settling day the plaintiff, who was a member of Tattersall's, paid the bets, as, if he had been a defaulter, he would have been subject to certain disqualifications in connexion with racing matters, and he then sued the defendant for the amount so paid:—Held (Brett, M.R., diss.), that he was entitled to recover the amount so paid. *Read v. Anderson*, 13 Q. B. D. 779; 53 L. J., Q. B. 532; 51 L. T. 55; 32 W. R. 950; 49 J. P. 4—C. A.

— Right of Principal to Recover Money received by Agent—8 & 9 Vict. c. 109, s. 18.]—The plaintiff employed the defendant to make bets for him upon commission. The defendant having done so, received from the losers money in respect of bets so made which were won by him. The plaintiff claimed this money from the defendant, but the defendant refused to pay it on the ground that it was money won upon a wager, and therefore that the plaintiff could not re-

cover, in consequence of the provisions of 8 & 9 Vict. c. 109, s. 18 :—Held, that the plaintiff was entitled to recover ; that the defendant had received the money for the use of the plaintiff ; that the provisions of 8 & 9 Vict. c. 109, s. 18 only apply to the original contract between the two persons who make a bet, and that they do not make void a contract such as that which the plaintiff had made with the defendant. *Bridger v. Savage*, 15 Q. B. D. 363 ; 54 L. J., Q. B. 464 ; 53 L. T. 129 ; 33 W. R. 891 ; 49 J. P. 725—C. A.

Place used for Betting—Racecourse.]—Dog-races were held in an inclosed field hired for the purpose by a committee, the public being admitted to a reserved portion of the field on payment of a small sum. The appellant attended the races, and moved about the reserved portion, making bets with various persons there :—Held, that the appellant did not use a place for the purpose of betting with persons resorting thereto, within the meaning of ss. 1 and 3 of 16 & 17 Vict. c. 119, and therefore was not liable to be convicted for an offence under those sections. *Snow v. Hill*, 14 Q. B. D. 588 ; 54 L. J., M. C. 95 ; 52 L. T. 859 ; W. R. 475 ; 49 J. P. 440 ; 15 Cox, C. C. 737—D.

— Bicycle Grounds—Liability of Manager.]

—The appellant was manager of bicycle grounds. Bicycle races, at which 20,000 spectators were present, took place there. Placards, with the words “No betting allowed,” were posted in the grounds, and twelve police constables were employed there by the manager, but some betting took place about twenty yards from the winning-post where he stood, acting as judge of the races. He was aware that betting would and did take place, but could not have wholly prevented it under the circumstances, although he might have repressed it to a certain extent with the aid of the constables :—Held, that as the business of the grounds was not that of illegal betting within 16 & 17 Vict. c. 119, s. 1, he was not liable to conviction under s. 3, as a “person having the care or management of or in any manner assisting in conducting the business of any . . . place opened, kept, or used for the purposes aforesaid.” *Reg. v. Cook*, 13 Q. B. D. 377 ; 51 L. T. 21 ; 32 W. R. 796 ; 48 J. P. 694—D.

Betting Houses—Advice with respect to

Wagers—Advertisement.]—The Betting Act, 1874, is confined to such bets as are mentioned in the Betting Act, 1853, that is, to bets made in any house, office, or place kept for betting, and the act does not apply to advertisements offering information for the purpose of bets not made in any house, office, or place kept for that purpose. *Cox v. Andrews*, or *Andrews v. Cox*, 12 Q. B. D. 126 ; 53 L. J., M. C. 34 ; 32 W. R. 289 ; 48 J. P. 247—D.

— Unlawful Gaming—Baccarat—Common

Gaming House.]—A. was the proprietor of the Park Club and was also occupier of the premises used by the club, and received the profits. B., C., D., and E. were members of the committee of management, whose duty it was to regulate the internal management of the club, and (amongst other things) to make bye-laws and regulations for the carrying it on and for

the government of its members, who were elected by them. F., G., and H. were members of the club. By the rules and regulations of the club, hazard was not to be played, dice were excluded, and the points at whist were limited to 11 ; all games were to be played for ready money ; and under no pretence were strangers to be admitted to the card-room. An entrance fee of 10 guineas and an annual subscription of 6 guineas was paid by each member of the club. The kitchen was conducted at a loss, and wines and cigars supplied at a slight excess over cost price. The profits accruing to the proprietor arose from the entrance fees and subscriptions, and what was called “card money.” Members’ cheques were cashed by the proprietor to the amount of 200%, for which he charged 1 per cent. The game of baccarat was played nightly. Upon an information charging the eight persons above-named with having committed offences against s. 4 of 17 & 18 Vict. c. 38, A., the proprietor, was adjudged to have been guilty of “keeping and using the Park Club for the purpose of unlawful gaming,” and fined 500%. The four committee-men were adjudged to have been guilty, as persons “having the care or management of and assisting in conducting the business” of the house so kept and used for the purpose of unlawful gaming, and were each fined 500%. The three players were also adjudged to have been guilty of the offence, as persons who “assisted by playing in conducting the business of the house so kept and used for the purpose of unlawful gaming,” and were each fined 100% :—Held, that the proprietor of the club and the four members of the committee were properly convicted ; but that the players, though possibly liable to be indicted for unlawful gaming in a common gaming-house, were not liable to be summarily convicted under this statute. *Jenks v. Turpin*, 13 Q. B. D. 505 ; 53 L. J., M. C. 161 ; 50 L. T. 808 ; 49 J. P. 20 ; 15 Cox, C. C. 486—D.

Per Hawkins, J. :—If the house in question had been opened and used for a double purpose, viz., as an honest sociable club for those who did not desire to play, as well as for the purposes of gaming for those who did, it would not the less be a house opened and kept “for the purpose of gaming.” To constitute “unlawful gaming,” it is not necessary that the games played shall be unlawful games : it is enough that the play is carried on in a “common gaming-house.” The expression “unlawful games” was intended by the legislature to cover and include some games which, being lawful in themselves, were only made unlawful when played in particular places or by particular persons. It makes no difference that the use of the house and the gaming therein is limited to the subscribers or members of the club, and that it is not open to all persons who might be desirous of using it. It is not a public, but a common gaming-house that is prohibited. “Baccarat” is a game of chance, and unlawful within 17 & 18 Vict. c. 38, s. 4. Excessive gaming per se is not any longer a legal offence ; it was not an offence at common law ; and there now exists no statute against it. But the fact that it is habitually carried on in a house kept for the purpose of gaming is cogent evidence for a jury or other tribunal called upon to determine whether the house in which it is carried on is a common gaming-house, so as to make the keeper of it liable to be indicted for a nuisance at common law. *Id.*

Per A. L. Smith, J.:—A "common gaming-house" is a house kept or used for playing therein at any game of chance, or any mixed game of chance and skill, in which (1) a bank is kept by one or more of the players exclusively of the others, or (2) in which any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed or against whom the other players stake, play, or bet. It is immaterial whether the bank is kept by the owner or occupier or keeper of the house or by one of the players. *Id.*

Permitting Gaming on Licensed Premises.]—
See INTOXICATING LIQUORS (OFFENCES).

Lottery—Inclosing Money in Packets.]—H. kept a shop for the sale of sweets and sold penny packets of caramel, several of which contained a halfpenny in addition to a fair pennyworth of sweets. There had been no advertisement as to these inclosures:—Held, that H. was rightly convicted under 42 Geo. 3, c. 119, s. 2, of keeping a lottery. *Hunt v. Williams*, 52 J. P. 821—D.

By 42 Geo. 3, c. 119, s. 2, it is made an offence to keep any office or place to exercise any lottery not authorised by parliament. The appellant erected a tent, in which he sold packets, each containing a pound of tea, at 2s. 6d. a packet. In each packet was a coupon entitling the purchaser to a prize, and this was publicly stated by the appellant before the sale, but the purchasers did not know until after the sale what prizes they were entitled to, and the prizes varied in character and value. The tea was good and worth the money paid for it:—Held, that what the appellant did constituted a lottery within the meaning of the statute. *Taylor v. Smetten*, 11 Q. B. D. 207; 52 L. J., M. C. 101; 48 J. P. 36—D.

Wagering Policies—Want of Insurable Interest—Return of Premiums.]—J. H. effected with the defendant company two policies of insurance on the life of his father, J. H., in which he had no insurable interest. According to the policies the premiums were to be paid weekly. J. H., the son, continued to make these weekly payments for some years. J. H., the father, had at first no knowledge of the insurances effected on his life; but when he became aware of them he objected to their being continued, and gave notice to that effect to the company. J. H., the son, then gave notice to the defendants that the policies were at an end, and claimed the return of the amount of the premiums. The defendants refused to pay, and J. H., the son, brought his action for their recovery, and the county court judge gave judgment for the plaintiff:—Held, that under the circumstances of the case the policies were wagering policies, and consequently the premiums paid in respect of them could not be recovered. *Howard v. Refuge Friendly Society*, 54 L. T. 644—D.

Cheque or Note given for Gambling Transactions—Consideration.]—The plaintiff brought an action to recover the amount due on two promissory notes given by the defendant to B. in respect of certain gambling transactions, on the Stock Exchange, and indorsed over by B. to the plaintiff for valuable consideration:—Held,

that the plaintiff's right to recover was not affected by the fact that he had notice of the notes having been given by the defendant to B. in respect of gambling transactions, the consideration for the notes not being illegal, but falling only within the category of void contracts under 8 & 9 Vict. c. 109. *Lilley v. Rankin*, 56 L. J., Q. B. 248; 55 L. T. 814—D.

A cheque given in payment for counters obtained from the secretary of a club to enable the purchaser to gamble at cards, cannot be sued upon by the secretary. *St. Croix v. Morris*, 1 C. & E. 485—Stephen, J.

GARNISHEE.

See ATTACHMENT OF DEBTS—
INTERPLEADER.

GAS AND GAS COMPANY.

Supply for Consumption outside Company's District—"Supplying gas for Sale"—Point of Delivery.]—Prior to the passing of the Metropolitan Gas Act, 1860, the metropolitan gas companies were not bound to supply gas to their customers, and the districts within which they had statutory powers were so interlaced that inconvenience ensued, e.g., from the frequent taking up of streets. To remedy this the Metropolitan Gas Act, 1860, was passed, which, by s. 6, assigned a certain district to each metropolitan gas company and provided that no other company or person should "supply gas for sale within the said limits" unless authorised by parliament so to do. By s. 14 the supply of gas to the owners or occupiers (requiring such supply) of premises within or partly within the company's premises was made compulsory. The Nine Elms station of the London and South-Western Railway Company was partly within the district of the plaintiff company and partly within that of the defendant company. The defendant company sold to the railway company (on their requiring the same) gas which was used to illuminate the whole of the station. The meter was placed at a point within the defendant company's district, and from this point the gas passed through pipes laid on the railway company's premises to the various points where it was consumed, including all such points as were within the plaintiff company's districts:—Held, that the sale and delivery of the gas took place at the meter, and that the defendant company were not, therefore, infringing s. 6 of the act. *Gas Light and Coke Company v. South Metropolitan Gas Company*, 58 L. T. 899; 36 W. R. 455—C. A. Affirming 56 L. J., Ch. 858—Kekewich, J. Reversed in H. L. [S. P.—*Imperial Gaslight and Coke Co. v. West London Junction Gas Co.*, 56 L. J., Ch. 862, n.—L.J.J.]

Accounts—Special Act—Subsequent General Act containing inconsistent Provisions.]—The

Leamington Priors Gas Company's Act, 1865 (28 Vict. c. cxxviii.), which incorporated the Gasworks Clauses Act, 1847, except so far as it might be varied by any provision of the special act, prescribes by s. 32 a special form in accordance with which the annual accounts of the company were to be made up, in lieu of provisions as to accounts contained in s. 38, of the Act of 1847. By s. 49 of the Act of 1847, undertakers are not to be exempted from any general act relating to gasworks which may be passed in any future session. By s. 1 of the Gasworks Clauses Act, 1871, that act and the act of 1847 are to be construed as one act, and by s. 35 of the Act of 1871, the undertakers are to make an annual statement of accounts in the form prescribed by that act, and to furnish copies of the same to any applicant. The appellants made out their annual statement of accounts in the form prescribed by s. 32 of their special act, and did not furnish to the respondent on application, a copy of an annual statement of their accounts made out in the form prescribed by the act of 1871.—Held, that as the appellants' special act prescribed the form in which the annual statement of accounts was to be made up, the provisions relating to the form of accounts in s. 35 of the Gasworks Clauses Act, 1871, did not apply. *Dudley Gasworks Company v. Warrington* (50 L. J., M. C. 69) distinguished. *Leamington Priors Gas Company v. Davis*, 18 Q. B. D. 107; 56 L. J., M. C. 14; 55 L. T. 734; 35 W. R. 123; 51 J. P. 360—D.

Jurisdiction of Quarter Sessions—Power to re-open Accounts—Costs of Inquiry.—By s. 35 of the Gasworks Clauses Act, 1847, a court of quarter sessions may, on the petition of two gas-ratepayers, appoint some accountant, or other competent person, to examine and ascertain at the expense of the gas company (the amount of the expense to be determined by the court) the actual state and condition of the concerns of the company, and to make a report thereof to the court, and power is given to the court to examine witnesses on oath touching the truth of the said accounts and the matters therein referred to; and if it appear to the court that the profits of the company during the preceding year have exceeded the prescribed rate, the court has power, in case the whole of the reserve fund has been and remains invested, and in case dividends to the amount thereinbefore limited have been paid, to make an order reducing the price of the gas supplied by the company. A petition was under this section presented to the recorder of Hanley praying him to appoint a person to inquire into the actual condition of the undertaking of the prosecutors, and an accountant was appointed. During the inquiry he examined not only the accounts of the then previous year, but re-opened all the accounts of previous years to 1871, and a report based upon this inquiry was sent in by him to the recorder. It was admitted that the whole of the reserve fund was not then and never had been invested, and that the prescribed maximum dividend had not been paid. The recorder, being of opinion that the accounts when amended showed that the company had in point of fact earned enough to pay the prescribed maximum dividend, and to have invested and kept invested the whole of the reserve fund, made an order reducing the price of gas 6d. per 1000 cubic feet.

He further ordered the prosecutor to pay 650l., the expense of the proceedings before the accountant, and to pay to the petitioners 2,433l. 6s. 6d., "their costs of and incident to the petition." Upon an application for a writ of certiorari to quash the order as being made without jurisdiction.—Held, that the order to reduce the price of gas was bad, the power of the recorder being absolutely restricted by s. 35 to cases where the whole of the reserved fund has been invested and the prescribed dividend paid; and that the recorder acted without jurisdiction in ordering the costs of the petitioners to be paid by the prosecutors. *Reg. v. Hanley (Recorder)*, 19 Q. B. D. 481; 56 L. J., M. C. 125; 57 L. T. 444; 36 W. R. 222; 52 J. P. 100—D.

The accountant and the recorder had jurisdiction to inquire into the accounts of past years for the purpose of ascertaining the actual condition of the concern; but, semble, that they had no power to disallow and re-cast them, and by so doing vary the accounts of the year into which they were inquiring. *Id.*

— **Appointment of Engineer to assist Accountant.**—The Court of Quarter Sessions has no jurisdiction, under s. 35 of the Gasworks Clauses Act, 1847, to appoint a gas engineer to assist an accountant appointed thereunder to examine and ascertain the actual state and condition of the concerns of the gas company, and where such order is made a writ of certiorari will lie to bring the order up to be quashed. *Reg. v. Brindley*, 54 L. T. 435; 50 J. P. 534—D.

Application by Consumers—Accumulation of Profits—Reduction of Price.—Certain consumers of gas brought an action against the gas company which supplied them, on the ground that the company had created a reserve fund greatly in excess of that authorised by its special acts, and had carried over from year to year, large undivided profits, thereby avoiding the obligation upon it to reduce the price of the gas which it so supplied.—Held, that no such duty as alleged was imposed by the acts on the company; that the consumers had no control over the affairs of the company, and were not, therefore entitled to raise the question, the shareholders alone being interested; and that the court could not order the reserve fund and undivided profits to be applied in reduction of the price of the gas in the manner suggested. *Mason v. Ashton Gas Company*, 54 L. T. 708; 50 J. P. 628—C. A.

— **"Street, Highway, or Public Place"—Laying Mains on Sea-shore.**—A gas company laid down main pipes between two villages on the sea-shore in an open tract of land above mean high-water mark, which belonged to the owner of the enclosed land fronting the shore. The inhabitants of the villages had always gone to and fro between them along the shore, and at high water passed over this piece of land as they chose and in accordance with the tide, but by no defined track. The owners brought an action for a mandatory injunction to compel the company to remove the pipes.—Held, that the tract of land in question was not a "street, highway, or public place" within the meaning of the Gasworks Clauses Act, 1847. *Maddock v. Wal-*

lasey Local Board, 55 L. J., Q. B. 267; 50 J. P. 404—D.

Support of Mains laid in Highway without Statutory Powers—Subsequent Act giving Authority—Compensation.—A limited gas company, acting without any statutory authority, and without the authority of the landowner, but with the permission of the highway authority, laid pipes under the soil of the highway. Subsequently a gas company was constituted by a private act, which incorporated the Gasworks Clauses Acts, 1847 and 1871. The private act of this company provided for the dissolution of the limited company, and enacted that all the lands, gasworks, easements, mains, pipes, plant, and apparatus placed by, vested in, or which were the property of the limited company immediately before the passing of the act, should be similarly vested in the incorporated company, and the incorporated company were empowered to maintain the existing gasworks and to lay down and maintain additional mains and pipes. The Gasworks Clauses Act, 1847, gives power to undertakers of gasworks to open the soil within their district, to lay and repair pipes therein, and to do other acts necessary for supplying gas, making compensation for any damage done in the execution of such powers. The Gasworks Clauses Act, 1871, renders it compulsory on undertakers of gasworks to supply gas on certain conditions and within certain limits. The defendants, the lessees of the minerals under and adjacent to the highway under which the plaintiffs had laid their pipes, had by working the coal thereunder let down the soil of the highway and caused injury to the plaintiffs' pipes:—Held, that the plaintiffs were entitled to support for their pipes, and that the landowner was entitled to compensation for the burden thus imposed upon him; that the plaintiffs could therefore recover damages by action for any injury caused to their pipes, while the owner of the minerals could recover compensation in an arbitration for the limitation thus put upon the user of his lands. *Normanton Gas Company v. Pope*, 52 L. J., Q. B. 629; 49 L. T. 798; 32 W. R. 134—C. A. Affirming, 47 J. P. 181—D.

Injury to Pipes under Roads by Steam Roller.—The plaintiffs, a gas company, laid down pipes under the surface of certain streets, as they were bound by statute to do, for the purpose of supplying gas to light the street and houses in the streets. The streets were vested in the defendants, the vestry of the parish, by certain statutes which gave them the authority of the surveyor of highways, and with the duty to repair, but without prescribing any particular mode of repair. The defendants used steam-rollers for the repair of the streets, as being a mode of repair most advantageous to both the ratepayers and the public, but the rollers they used were so heavy as to frequently injure the plaintiff's pipes, though the pipes were sufficiently below the surface so as not to have been injured by the ordinary mode of repair if such rollers had not been used:—Held, that the plaintiffs were entitled not only to recover damages for the injury which had been done, but also to have an injunction to restrain the defendants from using steam rollers in such a way as to injure the pipes of the plaintiffs.

Gas Light and Coke Company v. St. Mary Abbott's Vestry, 15 Q. B. D. 1; 54 L. J., Q. B. 414; 53 L. T. 457; 33 W. R. 892; 49 J. P. 469—C. A. Affirming 1 C. & E. 368—Field, J.

Laying Pipe to communicate with Pipe of Company without Consent.—The appellants, on their own premises, substituted for part of a gas pipe belonging to the respondents a larger pipe for the purpose of increasing their supply. This was done without any fraud, waste, or misuse of the gas, but without the respondents' consent, although notice of intention to disconnect the pipe from the meter was duly given under s. 15 of the Gasworks Clauses Act, 1871. Upon summons a stipendiary magistrate convicted the appellants under s. 18 of the Gasworks Clauses Act, 1847:—Held, upon a case stated, that the appellants had within the meaning of that section caused to be laid a pipe to communicate with a pipe belonging to the undertakers without their consent; and that the magistrate rightly convicted them. *Wood v. West Ham Gas Company*, 52 L. T. 817; 33 W. R. 799; 49 J. P. 662—D.

Distress for Money due to Company for Gas.—By their special act (39 & 40 Vict. c. cxix. s. 44) the corporation of Walsall were empowered to "recover from any person any rent or charge due to them by him for gas supplied, by the like means as landlords are for the time being by law allowed to recover rent in arrear":—Held, that, after the filing of a liquidation petition by a customer, the corporation were entitled as against the trustee in the liquidation to levy a distress in respect of a sum due by the debtor for gas supplied to him before the filing of the petition. *Harrison, Ex parte, Peake, In re*, 13 Q. B. D. 753; 53 L. J., Ch. 977; 51 L. T. 878—D.

Held, also, that the corporation were not, within the meaning of s. 34 of the Bankruptcy Act, 1869, "other persons" to whom any rent was due by the debtor, but that, by virtue of s. 44 of the special act, they were entitled to the rights given to landlords by s. 34. The payment to a gas company for gas supplied, though it is called "rent" in some acts of parliament, is not really of the nature of rent, and consequently a gas company does not come within the words "other person to whom any rent is due" in s. 34 of the Bankruptcy Act, 1869. Those words apply only to a person who, though he is not the landlord of the bankrupt, fills a position analogous to that of a landlord, because he is entitled to receive that which is rent strictly so called. *Birmingham Gas Light Company, Ex parte* (11 L. R., Eq. 615), and *Hill, Ex parte* (6 Ch. D. 63), commented on. *Id.*

Gas-stoves let for Hire—Exemption from Distress.—By s. 14 of the Gasworks Clauses Act, 1847, "The undertakers may let for hire any meter for ascertaining the quantity of gas consumed or supplied, and any fittings for the gas . . . and such meters and fittings shall not be subject to distress . . . for rent of the premises where the same may be used":—Held, that a gas-stove let for hire was within the words "fittings for the gas," and therefore was not subject to distress for rent. *Gaslight and Coke Company v. Hardy*, 17 Q. B. D. 619; 56 L. J., Q. B. 168; 55 L. T. 585; 35 W. R. 50; 51 J. P. 6—C. A.

GIFT.

Trust, Creation of.]—See TRUST AND TRUSTEE.

Donatio mortis causâ.]—See WILL.

Setting Aside.]—See UNDUE INFLUENCE.

Freeholds—Advance—Possession of Deeds.]—In 1878 A. entered into a contract for the sale to him of two freehold houses at the price of 650*l*. The deposit of 50*l*. was paid by him, and 360*l*., part of the balance, was obtained from his niece B., to whom he gave his I O U. On the 21st August, 1878, the wife of A. by his direction, wrote to B. as follows: "A. bought two houses yesterday, and he is going to have them settled and signed in your name, and give them to you. I send you the conditions of sale for you to look at, and I should like you to come and see A. . . . Bring your bank book with you, as what you have might as well go into them as for us to pay interest. It is all right, I can assure you. I sent the 50*l*. by cheque last night, on deposit." On the 25th October, 1878, the two houses were duly conveyed to A., and he directed his wife to hand over the title deeds to B., and he also said to his wife that the deeds belonged to B., and were of no use to his wife. The deeds were sent to B., by A.'s wife. Subsequently A. died intestate, and his eldest brother and heir-at-law commenced an action against B., claiming a declaration that he, the plaintiff, was entitled to the rents and profits of the two houses and the delivery up of the title deeds:—Held, that there was evidence of an intention on the part of A. to give the property to B.; but that no gift of it had in point of law been made; but held, that there was sufficient evidence of a contract to create an equitable mortgage in favour of B., and upon which the possession of the title deeds by B. originated; and that there should be a redemption decree upon that footing, the costs of B. being added to her security. *McMahon, In re, McMahon v. McMahon*, 55 L. T. 739—Chitty, J.

Shares—I O U—Intention of Donor.]—A. held certain bank shares in trust for his father B., under a written acknowledgement of the trust. B. indorsed on the acknowledgment: "I transfer these shares to my daughter C. for her sole use and benefit."—B. also held two I O U's, one from A., the second from another person indebted to him. Upon each of these B. indorsed: "I transfer the debt of £ to my daughter C., for her sole use and benefit." B. signed these indorsements, and handed the acknowledgment and I O U's to C. There was no consideration for the transfer. B. did not give any notice of it to A. or the debtor upon the second I O U, and continued till his death, five years later, to receive the dividends on the shares and the interest on A.'s I O U:—Held that, although the indorsements, accompanied by the delivery of the acknowledgment and I O U's were capable, if followed by notice to the trustees and debtors, of operating as equitable assignments, yet as it appeared, having regard to the evidence and especially to B.'s receipt of the subsequent dividends and interest, that he did not intend at the

time of the indorsement to divest himself absolutely of his property in the shares or debts, but attempted at most to effect a disposition to become operative only at his death, and in the meanwhile to be ambulatory and revocable, they did not constitute a complete gift enforceable in equity. *Gason v. Rich*, 19 L. R., Ir. 391—C. A.

GLEBE.

See ECCLESIASTICAL LAW.

GOODS.

Assignment of.]—See BILLS OF SALE.

Selling.]—See SALE.

Converting.]—See TROVER.

GOODWILL.

Definition of.]—The goodwill which attaches to a house from its being well known or situated in a good thoroughfare adds to the value of the house and would pass to the mortgagee under a mortgage of the house; but the goodwill which attaches to the personal reputation of the owner of the house would not pass to the mortgagee. Per Cotton, L. J. *Cooper v. Metropolitan Board of Works*, 25 Ch. D. 472; 53 L. J., Ch. 109; 50 L. T. 602; 32 W. R. 709—C. A.

Sale of—Covenant by Vendor not to carry on Business in his Name.]—A covenant by a vendor of a business and the goodwill thereof, that he would not for a term of years carry on the business of a manufacturer either by himself or jointly with any other persons under the name or style of J. H., or H. Brothers, the name of the business which he had sold, is not a covenant that the vendor would not carry on business as a manufacturer, but against using a particular name or style in trade, and an injunction was granted to restrain a breach of the covenant. *Vernon v. Hallam*, 34 Ch. D. 748; 56 L. J., Ch. 115; 55 L. T. 676; 35 W. R. 156—Stirling, J.

Soliciting Customers—Injunction to Restrain.]—Where a vendor sold his business and commenced a similar business in the same locality and solicited customers of the old house to deal with him, the court, following the decision in *Pearson v. Pearson* (27 Ch. D. 145), and being of opinion that the case of *Labouchere v. Dawson* (13 L. R., Eq. 322) had been overruled by the decision in that case, refused to grant an injunction to restrain such solicitation. *Id.*

T. P., as trustee of a will, carried on a business which had been carried on by the testator under the name of James P. By an agreement made to compromise a suit, James P., a son of the testator and a beneficiary under his will, agreed to sell to T. P. all his interest in the business, and in the property on which it was carried on. And it was provided that nothing in the agreement should prevent James P. from carrying on the like business where he should think fit, and under the name of James P. T. P. brought this action to enforce this agreement, and to restrain James P. from soliciting the customers of the old firm. An injunction was granted on the authority of *Labouchere v. Dawson* (13 L. R., Eq. 322), and the cases in which it had been followed:—Held (dissentiente Lindley, L.J.), that *Labouchere v. Dawson* was wrongly decided, and ought to be overruled, and that even apart from the proviso in the agreement, the plaintiff was not entitled to the injunction which he had obtained:—Held, by the whole court, that the proviso in the agreement authorised the defendant to carry on business in the same way as any stranger might lawfully do, and took the case out of the authority of *Labouchere v. Dawson*, supposing that case to have been well decided. *Pearson v. Pearson*, 27 Ch. D. 145; 54 L. J., Ch. 32; 51 L. T. 311; 32 W. R. 1006—C. A.

— **Right to Use old Name.**—A vendor who had carried on a business under the name of "Madame Elise," which was the name of his wife, sold the goodwill and interest of the business, together with the exclusive right of using the name of "Madame Elise and Company:."—Held, that the purchaser was not entitled to trade under the old name alone, inasmuch as it would lead people to believe that the old business was still being carried on, and might cause the vendor to incur liability. *Chatteris v. Isaacson*, 57 L. T. 177—Kekewich, J.

A firm of solicitors consisting of three partners, carried on business under the style of "Chappell, Son, & Griffith." The senior partner having died, the business was continued by the son and the junior partner under the same style for upwards of three years. The partnership was then dissolved, an agreement being executed providing for the dissolution, but containing no reference to the goodwill of the business or the sale or disposal thereof. After the dissolution, the business of a solicitor was carried on by Chappell, the son, on the premises held by the original firm under the style of "Chappell & Son." Griffith, having taken offices a few doors off, also carried on the business of a solicitor, under the style of "Chappell & Griffith." To this Chappell objected, and having commenced an action to restrain Griffith from carrying on business under the style referred to, moved for an interim injunction. It was proved that immediately before the dissolution of the partnership, Griffith had written to Chappell, stating that he intended to carry on business under the style of "Chappell & Griffith," and making suggestions as to the style Chappell should adopt. Circulars were also forwarded by Griffith to all the clients of the old firm, informing them that he proposed to carry on the business of a solicitor by himself, and stating the style that he intended to adopt:—Held, that the *prima facie* right of the defendant was to use

the name of the old firm, no arrangement having been made as to the goodwill of the business; that from the nature of the business and from the fact that the style of the original firm had been used with a variation, there was practically no risk that the plaintiff would be exposed to injury by what the defendant was doing; and that, therefore, no case had been made for the intermediate interference of the court. *Chappell v. Griffith*, 53 L. T. 459; 50 J. P. 86—Kay, J.

GROWING CROPS.

See **BILLS OF SALE.**

GUARANTEE.

See **PRINCIPAL AND SURETY.**

GUARDIAN.

Of Infants.—See **INFANT.**

Of Poor.—See **POOR LAW.**

HABEAS CORPUS.

Prisoner wishing to argue Case in Person.—The court cannot grant a habeas corpus to a party to a suit, in custody, to enable him to appear in court merely for the purpose of arguing his case in person. *Weldon v. Neal*, 15 Q. B. D. 471; 54 L. J., Q. B. 399; 33 W. R. 581—D.

Appeal to Court of Appeal.—See cases, ante, col. 23.

HARBOURS.

See **SHIPPING.**

HEALTH.

I. ELECTION AND CONSTITUTION OF LOCAL BOARDS, 847.

II. POWERS AND JURISDICTION OF LOCAL BOARDS.

1. Food and Drugs.

a. Adulteration, 848.

b. Sale of Unsound Meat, 851.

2. Streets, 852.

3. Buildings, 855.

4. Sewers, 859.

5. Nuisances and Offensive Trades, 861.

6. Lodging Houses, 864.

7. In other Cases, 864.

III. EXPENSES—PAYMENT AND RECOVERY OF, 866.

IV. RATES, 870.

V. ARBITRATION, 873.

VI. CONTRACTS BY AND WITH LOCAL BOARDS.

1. In General, 874.

2. Liability of Officers for Penalties, 875.

VII. ACTIONS AND PROCEEDINGS AGAINST LOCAL BOARDS, 877.

I. ELECTION AND CONSTITUTION OF LOCAL BOARDS.

Disqualification of Candidate — Composition with Creditors—Time for filling casual Vacancy.]

—A candidate for election as member of a local board of health had assigned all his property by deed to a trustee for the benefit of those of his creditors who should sign the deed, no sum being mentioned in it as a composition to be paid on the debts therein scheduled as due to them, and the creditors signing the deed thereby discharged him from all debts due to them by him:—Held, that he was not disqualified under 38 & 39 Vict. c. 55, Sched. II., r. 5, which provides that a person "who has entered into any composition with his creditors," shall be ineligible "so long as any proceedings in relation to such composition are pending," even though at the time of his election some of his creditors had signed the deed, while others did not sign it till after the election, for that the deed was not a composition with creditors. *Reg. v. Cooban*, infra.

Illegal Practice—Fabricating Voting Paper—Falsely assuming to act on behalf of Voter.]

The respondent, a candidate at an election for members of a local board of health, called at the house of a voter to whom a voting paper had been sent, and asked her how she intended to vote, and to hand him the voting paper, which she did. He then inquired if she knew how to fill it up, and she replied in the affirmative. The respondent thereupon, without any authority, express or implied from the voter, wrote in pencil the initials of the voter against his own name. The voter objected to his doing so. The respondent left the voting paper with the voter, with her initials so written by him against his own name, but with no other mark upon it. The voter subsequently struck out the initials so written by the respondent, and placed her initials against the names of three other candidates, and signed her own name to the voting

paper. It was found that the respondent so pencilled the initials of the voter with the intent of indicating on her behalf that she intended to vote for him, and of inducing and procuring her to vote for him. The respondent was successful at the poll. A petition was lodged against his return, on the ground of illegal practices, inter alia, of fabricating in whole or in part a voting paper, and of falsely assuming to act in the name or on behalf of a voter:—Held, that the act of the respondent did not amount to a fabrication in whole or in part of the voting paper, nor to falsely assuming to act in the name or on behalf of the voter, within the meaning of rule 69 of Sched. II., part I, of the Public Health Act, 1875. *Gough v. Murdoch*, 57 L. T. 308; 35 W. R. 836; 51 J. P. 471—D.

Casual Vacancy—Computation of Time.]—The time specified by r. 65 of Schedule II. of the Public Health Act, 1875, which provides that any casual vacancy on the board occurring "by failure duly to elect," shall be filled up by the board within six weeks, is to be computed from the day on which the retiring member goes out of office, and not from the day on which the election of a member to fill his place is held. *Reg. v. Cooban*, 18 Q. B. D. 269; 56 L. J., M. C. 33; 51 J. P. 500—D.

—Quorum—Lapse of Board—Informality.]

—Seven members of a local board constituted under the Public Health Act, 1875, and consisting of nine members, resigned, so that the quorum of three required by Sched. I. r. 2, was not left. The two remaining members proceeded to fill up the vacancies. The board as thus constituted prescribed a building line under s. 155 of the act:—Held, by Pearson, J., that, as the resignations reduced the number of members to less than a quorum, the board had lapsed, that the two remaining members could not fill up the vacancies, that there was therefore no board, that the building line was therefore not well prescribed, and that Sched. I. r. 9, to the act did not cure the defect:—Held, by the Court of Appeal, that the filling up of vacancies was "business" within the meaning of Sched. I. r. 2, that the two members were not competent to transact it, and that the new members therefore were not duly elected; but that by Sched. I. r. 9, the objection to the building line, founded on the fact that some of the members of the board were not duly elected, was removed. *Newhaven Local Board v. Newhaven School Board*, 30 Ch. D. 350; 53 L. T. 571; 34 W. R. 172—C. A.

II. POWERS AND JURISDICTION OF LOCAL BOARDS.

1. FOOD AND DRUGS.

a. Adulteration.

Scienter of Seller.]—By s. 6 of the Sale of Food and Drugs Act, 1875, "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l*." :—Held, that an offence within that section was committed, although the seller did not know that the article sold was not of the nature, substance, and quality demanded. *Betts v. Armstead*, 20 Q. B. D. 771; 57 L. J., M. C. 100; 58 L. T. 811; 36 W. R. 720; 52 J. P. 471—D.

Representation at Time of Sale.—To constitute an offence under s. 6 of the Food and Drugs Act, 1875, the representation of the "nature, substance, and quality" of the article must be made at the time of the sale. A prior false representation in this respect is no offence within the act, provided a true one is made at the time the sale actually takes place. *Kirk v. Coates*, 16 Q. B. D. 49; 55 L. J., M. C. 182; 54 L. T. 178; 34 W. R. 295; 50 J. P. 148—D.

Tincture of Opium—British Pharmacopœia—Standard of Quality.—Upon a complaint under s. 6 of the Food and Drugs Act, 1875, for selling tincture of opium which was not "of the nature, substance, or quality," of the article demanded by the purchaser, it appeared that the drug which was sold as "tincture of opium" by the defendant was deficient in opium to the extent of one third, and in alcohol to the extent of nearly one half as compared with the standard prescribed by the British Pharmacopœia:—Held, that the defendant was liable to be convicted, although the purchaser had not specifically asked for tincture of opium "prepared according to the recipe in the British Pharmacopœia." *White v. Bywater*, 19 Q. B. D. 582; 36 W. R. 280; 51 J. P. 821—D.

Article sold, wholly different from that Demanded.—The Sale of Food and Drugs Act, 1875, after reciting that it is desirable to amend the law regarding the sale of food and drugs in a pure and genuine condition, provides by s. 6 that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser under a penalty:—Held, that s. 6 was not limited in its application to sales of adulterated articles, but that it applied also to cases in which the article sold was unadulterated but wholly different from that demanded by the purchaser. *Knight v. Bowers*, 14 Q. B. D. 845; 54 L. J., M. C. 108; 53 L. T. 234; 33 W. R. 613; 49 J. P. 614; 15 Cox, C. C. 728—D.

Milk—Skimmed Milk.—It was proved on an information under s. 6 of the Sale of Food and Drugs Act, 1875, that the appellant, who was an inspector under the act, on asking the respondent, a milk seller, for "milk," was supplied by the respondent with milk which had been skimmed, and which was, in consequence, as compared with normal milk as it comes from the cow, deficient in butter fat to an extent of 60 per cent.:—Held, that on these facts it was not proved that any offence had been committed by the respondent against the provisions of s. 6 of the Sale of Food and Drugs Act, 1875. *Lane v. Collins*, 14 Q. B. D. 193; 54 L. J., M. C. 76; 52 L. T. 257; 33 W. R. 365; 49 J. P. 89—D.

Coffee—Mixture with Chicory—Article asked for.—A. went into H.'s shop and asked for half a pound of coffee. H. said she did not keep it, whereon A. pointed to certain tins labelled "coffee and chicory." H. said she sold that as a mixture, and A. asked for half a pound of it which H. sold. The mixture contained about 30 per cent. of coffee. H. was charged with selling coffee not of the nature, etc., of coffee:—Held, that the justices were wrong in convicting H. of

selling coffee, for that she sold only a mixture as she was entitled to do, and in doing which, she committed no offence within s. 6 of 38 and 39 Vict. c. 63. *Higgins v. Hall*, 51 J. P. 293—D.

Notice to Seller—Sufficiency.—W., the seller of spirits, was informed after the purchase that the article was to be examined by the "county analyst" and W. knew that the county analyst was the public analyst of the place:—Held, that this notice to W. was sufficient, though the words "public analyst" were not expressly used by the purchaser. *Wheeler v. Webb*, 51 J. P. 661—D.

Condition Precedent.—The provisions of s. 14 of the Sale of Food and Drugs Act, 1875, do not apply to the purchase of an article unless for analysis, and therefore it is not a condition precedent to the right of a purchaser for consumption to take proceedings for a penalty under the Act that he should have given to the seller the notification required by that section. *Parsons v. Birmingham Dairy Co.* (9 Q. B. D. 172), dissented from. *Enniskillen Union (Guardians) v. Hilliard*, 14 L. R., Ir. 214—Ex. D.

Sale—Corporation.—A sample of milk in course of delivery by the defendant's servant under a contract for the delivery thereof to a workhouse, was procured for analysis by the master of the workhouse, and divided by him into three portions, one of which he retained, another he gave to the defendant's servant, and the third he inclosed in a bottle labelled "milk," and having on it the name of the contractor, and sent it by rail to the public analyst, who analysed it, and gave his certificate as provided by the statute. The defendant having been fined for the act of adulteration:—Held, that a purchase was shown under the Sale of Food and Drugs Acts, 1875, there being a buyer on one side and seller on the other; that the provisions of s. 14 of that statute did not apply, and no notification was necessary as a condition precedent to the bringing of the prosecution; that there was sufficient evidence that the milk taken was the milk submitted to analysis; and that a corporation such as the board of guardians was within the statute. *Id.*

Offer to divide Sample.—E. purchased a pint of milk from C., and after the purchase told C. that he intended to have the milk analysed, and then offered to divide it with the seller who refused to accept it. The milk was found to be adulterated to the extent of nine and a-half degrees of added water:—Held, that it was not necessary for E. before the purchase to offer to divide the milk into three parts in so many words, and that this offer was a substantial compliance with the statute. *Chapell v. Emson*, 48 J. P. 200—D.

Written Warranty—Contract to supply Milk Daily.—By s. 25 of the Sale of Food and Drugs Act, 1875, if the defendant, in any prosecution under this act, prove to the satisfaction of the justices that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, he shall, under certain other specified conditions, be entitled to be discharged from the

prosecution. Upon the hearing of an information against the appellant, for having, contrary to the provisions of the act, sold, on the 12th of April, 1883, certain milk to the respondent, which was not of the nature, substance, and quality demanded by him, as it contained a percentage of water, the appellant proved that he had purchased the article in question under a written contract made with F., on the 24th of March, 1883, whereby F. agreed to sell to the appellant eighty-six gallons of good and pure milk (each and every day) for six months, the said milk to be delivered twice daily:—Held, that this contract did not constitute a written warranty within the meaning of s. 25 in respect of the specific article sold by the appellant to the respondent on the 12th of April; and therefore that the appellant was not entitled to be discharged from the prosecution. *Harris v. May*, 12 Q. B. D. 97; 53 L. J., M. C. 39; 48 J. P. 261—D.

b. Sale of Unsound Meat.

Evidence that Meat was wrongly Condemned—Admissibility.—Meat exposed by a butcher for sale was seized and condemned under the Public Health Act, 1875, ss. 116 and 117, as unfit for the food of man. Upon a charge against the butcher under s. 117 (which enacts that the person to whom the meat seized and condemned belonged shall be liable to a penalty), the justices admitted evidence that the meat was sound and fit for the food of man, and, being satisfied that it was so, dismissed the charge:—Held, that the justices decided correctly. *Waye v. Thompson*, 15 Q. B. D. 342; 54 L. J., M. C. 140; 53 L. T. 358; 33 W. R. 733; 49 J. P. 693; 15 Cox, C. C. 785—D.

Under-bailiff—Person “to whom the same belongs.”—The appellant was an under-bailiff on the estate of N., a large landowner, and it was his duty to receive instructions from, and obey the orders of, the head bailiff. Two cows belonging to N. were slaughtered, as they were affected by disease; the appellant was not present when the cows were slaughtered, but on the same day he was told by the head bailiff to send the meat to Portsmouth, and to go there himself to meet it. The appellant went to Portsmouth on the following day and saw a butcher named B., and on the next day, the head bailiff, having been told that the meat had not been sent off, directed the appellant to take the meat to P. railway-station and consign it to the butcher. The transit of the meat to the P. station was superintended by the appellant, who took charge of it. It was then sent by train in the appellant's own name to the butcher at Portsmouth, the appellant sending a telegram to the butcher, “Two carcasses of meat addressed to you; make best of it.” The butcher replied that the meat, which was then lying at Portsmouth railway-station, was of no use to him. The appellant then sent a telegram to the station-master: “Ask consignee to do the best he can. If he can't dispose of it, ask him to bury it, and charge sender expenses.” The meat was seized while lying at the station, and condemned as unsound. Upon these facts the appellant was convicted, under the 117th section of the Public Health Act, 1875, of exposing unsound meat for

sale, as being the person “to whom the same belonged”:—Held, quashing the conviction, that there was no evidence whatever upon the facts, to show that the appellant was the person “to whom the meat belonged” within the meaning of s. 117 of the act. *Newton v. Monkcom*, 58 L. T. 231; 51 J. P. 692; 16 Cox, C. C. 382—D.

Condemnation day after Seizure—Whether Delay reasonable.—Where unsound meat was seized by the inspector of nuisances at half-past nine in the evening, and he then went in search of a justice, but did not find one till next morning at a quarter-past ten, when an order to condemn the meat was made:—Held, that there had been no unreasonable delay, and that the justices were wrong in dismissing on that ground an information for having unsound meat for sale within the meaning of sections 116 and 117 of the Public Health Act, 1875. *Burton v. Bradley*, 51 J. P. 118—D.

2. STREETS.

“New Street”—Old Country Road.—The term “new street” in the Public Health Act, 1875, s. 157, applies to an old country road near a town which, by the building of houses along it, has become a street in the common sense of the word, notwithstanding that before the building of such houses it was a street within the meaning of s. 4 of the act. *Robinson v. Barton Local Board*, 8 App. Cas. 798; 53 L. J., Ch. 226; 50 L. T. 57; 32 W. R. 249; 48 J. P. 276—H. L. (E).

“Street”—Meaning of, in Section 150 of the Public Health Act, 1875.—S. 150 of the Public Health Act, 1875, applies only to streets which are, in the ordinary and popular sense of the words, “streets;” and the word “street” in that section does not necessarily include every meaning given to it by s. 4 of the Act. *Reg. v. Burnup*, 50 J. P. 598—D.

In summary proceedings to recover expenses under s. 150, it is for the justices, having regard to the surrounding circumstances, and to whether there is any intention of building along a road so as to convert it into a street, to find as a fact whether the road in question is a street in the ordinary and popular sense of the word; and it makes no difference that the section has been applied or may apply to a portion of the road other than that in question. Where the justices find a road or a portion of a road is not a street in the ordinary and popular sense, they will be right in holding that the section is not applicable to the road or portion of a road. *Id.*

A private road may be a street within the meaning of s. 150 of the Public Health Act, 1875. *Midland Railway v. Watton*, *infra*.

The meaning of “street” in s. 150 of the Public Health Act, 1875, includes such of the terms set out in the interpretation clause (s. 4) as are not inconsistent with the context or subject-matter of that section; and such extended meaning, if so applicable, must be read into the word “street” throughout the section, without regard to the particular work to be done under it. *Jovett v. Idle Local Board*, 36 W. R. 530—C. A. Affirming 57 L. T. 928; 36 W. R. 138—D.

— **Question of Law—Direction to Jury.]**—The question whether the place in dispute comes within the interpretation clause is one of law for the judge at the trial, and the question which may properly be left to the jury is whether the said place is "a street in the popular acceptation of the term." *Ib.*—D.

— **Strip of Land added to Highway Repairable by Inhabitants at Large.]**—Owners of land adjoining a highway repairable by the inhabitants at large, erected houses on their land, and threw open to the highway a strip of land in front of them :—Held, that the houses with the strip of land in front, together formed a "street" within the meaning of s. 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which the urban sanitary authority within whose district it was situate could compel the frontagers to pave, channel, and kerb under the provisions of that section. *Richards v. Kessick*, 57 L. J., M. C. 48; 59 L. T. 318; 52 J. P. 756—D.

— **"Highway Repairable by Inhabitants at Large."]**—The promoters of an intended road by deed declared that the road should not only be enjoyed by them for their individual purposes, but "should be open to the use of the public at large for all manner of purposes in all respects as a common turnpike road":—Held, that this was not a dedication of the road to the public, and that the road was not a highway repairable by the inhabitants at large under s. 150 of the Public Health Act, 1875. *Austerberry v. Oldham Corporation*, 29 Ch. D. 750; 55 L. J., Ch. 633; 53 L. T. 543; 33 W. R. 807; 49 J. P. 532—C. A.

— **"Turnpike Road."]**—Semble, an individual cannot, without legislative authority, dedicate a road to the public if he reserves the right to charge tolls for the user; and the mere fact that a number of persons form themselves into a company for making and maintaining a road, and erect gates and bars and charge tolls, does not make the road a "turnpike road" in the sense of a turnpike road made such by act of parliament, and so dedicated to the public. *Ib.*

The owners of a road put up bars upon it and took tolls from the public for the passage of vehicles, horses, and cattle :—Held, that such road was not a turnpike road within the meaning of the exception contained in the definition of "street" given by s. 4 of the Public Health Act, 1875. *Midland Railway v. Watton*, 17 Q. B. D. 30; 55 L. J., M. C. 99; 54 L. T. 482; 34 W. R. 524; 50 J. P. 405—C. A.

— **Power of Local Authority to change Name.]**—By s. 6 (1) of the Towns Improvement Clauses Act, 1847, the Commissioners might, from time to time, cause the houses and buildings in all or any of the streets to be marked with numbers, as they might think fit, and should cause to be put up or painted on a conspicuous part of some house, building, or place at or near each end, corner, or entrance of every such street, the name by which such street was to be known. The Corporation of Dublin adopted a resolution that the name of Sackville Street be changed to O'Connell Street, for the purpose of commemorating by this and other intended alterations in street nomenclature the past historical events of the country and the names of illustrious

men. The householders of Sackville Street, with very few exceptions, objected to the proposed change in its name on the ground of inconvenience and of detriment to their trades and businesses :—Held, in an action by some of the objecting householders, that the corporation had no power, either by statute or at common law, to make the change, and that even if they possessed such power the court had jurisdiction to restrain them from doing so, if satisfied that the proposed change would be injurious to the owners or occupiers of houses in the street. *Anderson v. Dublin Corporation*, 15 L. R., Ir. 410—V.-C.

— **Liability to Fence Lands abutting on Highway.]**—By s. 81 of the Rotherham Borough Extension and Sewerage Act, 1879, "If the corporation are of opinion that danger to the public is likely to ensue by reason of lands abutting on streets not being fenced, the owner of such land shall, when required by the corporation, and to their satisfaction, sufficiently fence off the land from the street, and shall afterwards keep such fence in good repair to the satisfaction of the corporation, and if he fails so to fence or repair as aforesaid, within fourteen days after notice for that purpose given to him by the corporation, the corporation may fence or repair and recover the expenses for so doing from him under the Public Health Act, 1875 :—Held, that this act did not apply to fences by the side of a road which had been a turnpike highway, but applies only to new streets where there are no fences, and which, in the opinion of the corporation, are dangerous to the public. *Rotherham (Mayor) v. Fullerton*, 50 L. T. 364—D.

— **Causing Obstruction—Persons walking abreast on Footpath—Annoying Passengers.]**—Three defendants were convicted by the defendant justices, under s. 28 of the Towns Police Clauses Act, 1847, for obstructing passengers in the public street, and unlawfully preventing persons passing there. It appeared by the evidence of a police constable that the three defendants were standing, with three or four other persons on the pavement, blocking up the same. Several persons had to leave the footpath and go into the road in order to pass. The constable spoke to the defendants, and asked them to move off. They then walked up the street, all three abreast, causing passengers who met them to leave the footpath and go into the road. Again, later in the evening, the constable saw the three defendants walk up and down the street several times. Two ladies were turned off the footpath, and one lady said, "I wonder the police do not put a stop to this," but otherwise no complaints were made, and no persons were called to prove that they had been impeded by the defendants, nor could the names of any persons so obstructed be given by the witnesses for the prosecution. S. 28 of the act provides that "Every person who by means of any cart, carriage, sledge, truck, or barrow, or any animal, or other means, wilfully interrupts any public crossing, or wilfully causes any obstruction in any public footpath, or other public thoroughfare," shall be guilty of an offence under the act, and liable to a penalty :—Held, that the conviction was wrong, and could not be sustained. *Reg. v. Long*, 59 L. T. 33; 52 J. P. 630—D.

3. BUILDINGS.

Building Line—Rebuilding—Board misleading Owners.—The defendants being about to pull down a school and erect a new one, submitted plans to the local board. The local board objected to the plans, giving as a reason that they violated a bye-law, which obliged a person laying out a new street to leave it of a certain width. This bye-law was not applicable, as South Lane, on which the school fronted, was not a new street. The defendants disregarded the objection, commenced their works on the 5th of January, 1885, laid the foundations of the main wall towards South Lane on the 12th, and proceeded rapidly with the erection of it. On the 22nd of January the local board prescribed a building line which did not interfere with the main wall, but would prevent the erection of certain annexes not then commenced, lying between South Lane and the main wall, which annexes were shown on the plans laid before the board. The defendants had ground enough to allow of the annexes being erected elsewhere. The defendants proceeded with the annexes, and the board brought their action to restrain them from building beyond the line, and to compel them to pull down what they had built beyond it.—Held, that where a building is taken down to be rebuilt, a building line may be prescribed under s. 155, for any portion of it which has not been commenced, although other portions have been commenced, unless what has been commenced necessarily involves as a matter of construction a projection beyond the line afterwards prescribed, and that here no such necessity existed, as the annexes could be erected elsewhere. That the commencement of the main building, therefore, did not preclude the board from laying down a line which would prevent the erection of the annexes which had not then been commenced. Held, also, that as the notice given by the board, though ineffectual for the purpose of empowering them to pull down the erection under s. 158, gave the defendants to understand that the board objected on the ground that buildings according to the plan would make the street too narrow, the board had not done anything to induce the defendants to believe that they would not prescribe a building line, and that there was no equity to prevent the board from exercising their powers under s. 155, on the ground that they had misled the defendants. *Newhaven Local Board v. Newhaven School Board*, 30 Ch. D. 350; 53 L. T. 571; 34 W. R. 172—C. A.

“Bringing forward” House—New Buildings on Land never before built upon.—In the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 156,—which enacts that it shall not be lawful in any urban district without the written consent of the urban authority to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof—the expression “house or building” does not include new buildings in course of erection upon land never before built upon. *Williams v. Wallasey Local Board*, 16 Q. B. D. 718; 55 L. J., M. C. 133; 55 L. T. 27; 34 W. R. 517; 50 J. P. 582—D.

New Street—Approval of Local Authority—

Erection of Buildings before whole Street constructed.—The Sunderland Local Improvement Act, 1885, by s. 37 enacts, that it shall not be lawful for any person, except with the consent of the corporation, to erect or build, or begin to erect or build, any new buildings abutting upon any new street or part of a new street, unless the corporation shall have previously approved of the level and available width of such new street or part of a new street, nor until the carriage way and footway of such new street, or part of a new street, shall have been formed to such a level and of such a width, and constructed and sewered to the satisfaction of the corporation in accordance with s. 150 of the Public Health Act, 1875. The appellants, who were builders, gave notice to the Sunderland local authority, the respondents, of their intention to lay out a certain new street, the plans for the construction of which were approved by the respondents. They subsequently gave notice that they intended to erect four new houses in that street, the plans of which were submitted to and approved by the respondents. The appellants began to erect these houses abutting upon or fronting that part of the new street which had been sewered, levelled, paved, metalled, flagged, and channelled to the satisfaction of the respondents; but the whole of the new street had not been constructed and made good to the satisfaction of the respondents within s. 37 of the Sunderland Local Improvement Act, 1885. The appellants were summoned in respect of the infringement of that section, and were fined. They appealed:—Held, on appeal, that the conviction was right, and that, as the appellants had given notice to lay out the whole of a new street, the urban authority, under their local act, were entitled to withhold their consent to the erection of any house or building abutting on the new street unless the whole of the new street were constructed and sewered to their satisfaction. *Woodhill v. Sunderland (Mayor)*, 57 L. T. 303; 52 J. P. 5—D.

New Building—Wooden Building on Wheels.—R. was charged under the W. Improvement Act with unlawfully erecting a new building without notice to the local board. The building was made of wood, thirty feet long and thirteen feet wide, and was brought along the street on wheels, and put at the corner of a new street. It had spouts and a down corner, had a supply of gas, and was used as a butcher's shop:—Held, that the justices were right in treating this as a new building, and subject to the ordinary requirements as to new buildings. *Richardson v. Brown*, 49 J. P. 661—D.

—Question of fact—Bye-laws—Penalty.—Bye-laws were made for the borough of S., under the powers given by s. 34 of the Local Government Act, 1858. This act was repealed by the Public Health Act, 1875, but by s. 326 of the latter act all bye-laws duly made under any of the sanitary acts by this act repealed, and not inconsistent with any of the provisions of this act, shall be deemed to be bye-laws under that act. The 27th bye-law provided that every person who intended to erect any new building should give one month's notice of such intention, and send in a plan of the works to the surveyor for the urban sanitary authority. The 31st bye-law provided that if the owner or

person intending to construct any new building fail to give the required notices, or construct, or cause to be constructed, any buildings contrary to the provisions of any of the said bye-laws, he shall be liable for each offence to a penalty not exceeding 5*l.*; and he shall pay a further sum not exceeding 40*s.* for each day such buildings shall continue or remain contrary to the said provision. The appellant contended that he was not bound to give notice or send a plan of alterations he proposed to make in his house, as the alterations merely consisted in raising the old walls a storey higher, but he sent a plan, as he said, as a matter of courtesy. This plan was disapproved of, and notice of such disapproval was sent to the appellant, but he went on with the buildings. He was then summoned by the respondent, who was the surveyor for the urban sanitary authority, for neglecting to give notice and send plans as required by the bye-laws. The magistrate found that the structure was in fact a comfortable, good-looking dwelling-house, which previously it was not. He also found, as a fact, that the old building was partly pulled down to the ground floor, and that the buildings erected on the site thereof formed a new building intended for occupation, and that they were not adapted for personal occupation previously, and that they were "a new building" within s. 159 of the Public Health Act, 1875. The appellant was convicted and fined 40*s.* and costs, and a further sum of 20*s.* for each day the work should continue or remain contrary to the provisions of the said bye-laws:—Held, that the question whether the alterations constituted a "new building" was a question of fact for the magistrate to decide, and that he had decided as a fact that they did constitute a "new building," and that the penalty of 5*l.* was payable in addition to the penalty of 40*s.* a day, though the information laid against the appellant was only for not having given the notices and plans under the 27th bye-law. *James v. Wyvill*, 51 L. T. 237; 48 J. P. 725.—D. See also *Reay v. Gateshead (Mayor)*, infra.

Bye-laws—Validity—Erection before Kerb put in.—By s. 157 of the Public Health Act, 1875, every urban authority is empowered to make bye-laws "with respect to the level, width and construction of new streets":—Held, that the section did not empower the making of a bye-law that "no person shall commence the erection of a building in a new street unless and until the kerb of each footpath therein shall have been put in at such level as may be fixed or approved by the urban sanitary authority" *Rudland v. Sunderland (Mayor)*, 52 L. T. 617; 33 W. R. 164; 49 J. P. 359.—D.

Retaining Plans Deposited.—It is reasonable for an urban sanitary authority to make a bye-law and regulations enabling it to retain the plans of intended buildings deposited under the Public Health Act, 1875, although such plans be disapproved of and rejected. *Gooding v. Ealing Local Board*, 1 C. & E. 359.—Mathew, J.

Power to Order Removal.—A local board made bye-laws with respect to new streets, by one of which their approval was required for the erection of buildings; and it was provided that if any works were constructed "contrary to the provisions herein contained," the board might

have such works removed, altered, or pulled down:—Held, that the bye-law did not give the board a general power of veto on the construction of buildings, but only of disapproving and ordering the removal of buildings which contravened specific regulations contained in the bye-laws. *Robinson v. Barton Local Board*, 8 App. Cas. 798; 53 L. J., Ch. 226; 50 L. T. 57; 32 W. R. 249; 48 J. P. 276.—H. L. (E.)

—No Approval of Plans—Continuing Penalty—Limitation of Time for Proceedings.]

—On the 11th December, 1885, an information was preferred against the appellant for that he, between the 6th March, 1885, and October, 1885, had commenced the execution of works, the plans of which were not in conformity with the bye-laws, and had erected such works notwithstanding the disapproval of the urban sanitary authority, and permitted the same to continue, notwithstanding written notice of such contravention of the bye-laws. By bye-law 5, s. 9, "If the person intending to construct new houses shall construct, or cause to be constructed, any works, or do any act, or omit to do any act, or comply with any requirements of the local board, contrary to the provisions herein contained, he shall be liable for each offence to a penalty not exceeding 5*l.*, and he shall pay a further sum not exceeding 40*s.* for each and every day during which such works shall continue or remain contrary to the said provisions." The justices convicted the appellant of the offence, and ordered him to pay the penalty of 5*l.* and costs, and also to pay a further sum of 5*s.* per day from the 12th of October, 1885, being the day on which the respondent first served a notice of objection, to the 11th December, 1885, being the day on which the said information was laid:—Held, that the conviction could not be sustained, and that the 9th paragraph of the 5th bye-law was bad, because there was no authority to inflict, by a bye-law, a continuing penalty for merely not pulling down a building actually erected and completed. Held, also, that the said bye-law was ultra vires, because, under s. 115 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), a continuing penalty is to run only for each day after written notice of the offence has been given by the local board. The section does not authorise the infliction of a continuing penalty "for each day during which the works shall continue contrary to the provisions of the bye-laws." Held, also, that the respondents had not taken proceedings in time, and were barred by s. 11 of Jervis' Act (11 & 12 Vict. c. 43), because the original offence of commencing the work was not shown to have been committed within six months of the date of the information. The period of limitation mentioned in s. 158 of the Public Health Act, 1875, applies only to the case of a continuing offence. *Reay v. Gateshead (Mayor)*, 55 L. T. 92; 34 W. R. 682; 50 J. P. 805.—D. See also *James v. Wyvill*, supra.

Open Space at rear of Dwelling-house—Distance across to opposite Property.]—The L. Improvement Commissioners made a bye-law that every person erecting a new building for a dwelling-house should provide in the rear an open space exclusively belonging thereto, to the extent of at least 150 square feet, and should cause the distance across such open space

between every such building and the opposite property at the rear to be at least 20 feet. P. erected a new building to be used as a dwelling-house; in the rear there was a space exclusively belonging thereto of 700 square feet; the distance across such open space to the opposite houses was 52 feet, but as P.'s land was bounded by a public street, the distance from the houses of P. to the edge of the street was only 8 feet:—Held, that on the true construction of the bye-law the public street was the opposite property, and that P. had committed a breach of the bye-law. *Jones v. Parry*, 57 L. T. 492; 52 J. P. 69—D.

— **Prohibition of use unless fit for Human Habitation.**—An urban sanitary authority made the following bye-law under the Local Government Act, 1858 (all bye-laws made under which are deemed to be bye-laws under the Public Health Act, 1875, if not inconsistent with any of the provisions of that act): "No new house shall be occupied until the house drainage has been made and completed, nor until such house has been certified by the local board, or their officer authorised to give such certificate, after examination, to be in every respect fit for human habitation in their or his opinion:—Held, that the bye-law was reasonable and not inconsistent with any of the provisions of the Public Health Act, 1875, and therefore valid. *Horsell v. Swindon Local Board*, 58 L. T. 732; 52 J. P. 597—D.

— **Deviation from Plans — Position of Privies.**—B. was charged with erecting new buildings not in accordance with the plans, in so far as the tub-closets were not in the positions shown on the plans. The closets had been erected from 15 to 27 feet distant from main buildings instead of 2½ feet as shown on the plans:—Held, that the justices were right in holding that tub-closets came within the meaning of "privies" in 21 & 22 Vict. c. 98, s. 34, and that it was an offence against bye-laws to deviate from the plans. *Burton v. Acton*, 51 J. P. 566—D.

4. SEWERS.

What are — Watercourse.—The sewage of certain houses drained into a sewer, and, after passing through the sewer, was for a period of some years allowed to fall into an open watercourse, which, in its turn, flowed into a brook:—Held, that, under the circumstances of the case, the open watercourse was a sewer within the meaning of s. 4 of the Public Health Act, 1875. *Wheatcroft v. Matlock Local Board*, 52 L. T. 356—Denman, J.

The word "sewer" in the Public Health Act, 1875, should receive the largest possible interpretation, and a drain is a "sewer" within the meaning of s. 13 when more than one house has been connected with it. *Acton Local Board v. Batten*, 28 Ch. D. 283; 54 L. J., Ch. 251; 52 L. T. 17; 49 J. P. 357—Kay, J.

Vesting in Local Authority—Made "for his own Profit."—A sewer made by the owner of some only of the houses in a street not yet a highway, though made for the purpose of draining his own amongst other houses, is not a sewer

made by a person "for his own profit" within the meaning of the exception in s. 13 of the Public Health Act, 1875. *Id.*

A street having been laid out by the owners of a building estate, a sewer was made by them for the drainage of the houses in the street. Subsequently, in the year 1868, a local board was formed whose district included such street. The sewer, which discharged into the Thames, was sufficient for the purposes of the drainage of the street, assuming that drainage into the Thames could be continued. In 1884 the local board, having received notice from the Thames Conservators to discontinue the discharge of sewage into the Thames, gave notice under s. 150 of the Public Health Act, 1875, to the frontagers in the street to make a new sewer, and on their default themselves constructed such sewer and sought to charge the expenses upon the frontagers:—Held, that the original sewer was not a sewer made by the owners for their own profit, and therefore had vested in the board under the Public Health Act; that the board not having taken any steps to compel the frontagers to sewer the street within a reasonable time after the sewer became vested in them, must be taken to have been satisfied with the sewer, and could not afterwards proceed against the frontagers under s. 150, but were bound themselves to keep the sewer in repair under s. 15 of the Public Health Act, 1875, and, if it became necessary, to enlarge or alter it under s. 18; and that consequently the expenses of constructing the new sewer were chargeable not on the frontagers but on the general district rate. *Bonella v. Twickenham Local Board*, 20 Q. B. D. 63; 57 L. J., M. C. 1; 58 L. T. 299; 36 W. R. 50; 52 J. P. 356—C. A.

Right of Access to—Compensation.—The B. improvement commissioners in 1843 constructed a sewer through certain lands belonging to a railway company, and through other lands, not the property of the commissioners, which the company subsequently acquired for the purposes of their railway. Nothing was ever done by the commissioners or their successors to acquire any rights with regard to the sewer beyond its construction. Within twenty years from the construction of the sewer the railway company made an embankment for their railway upon the lands and over the sewer. Up to 1879 no repairs had been necessary to the sewer; but in that year it became necessary for the plaintiffs, the successors of the commissioners, to make an open cutting through the embankment in order to do repairs to the sewers, which could not be effected from the inside. In an action upon an injunction under the Lands Clauses Consolidation Act, 1845, to assess compensation claimed by the plaintiffs from the defendants, in respect of the injuriously affecting of the sewer by the embankment:—Held, that the plaintiffs had no title or interest at law in the sewer, or in the lands in which it was situate, sufficient to support the claim:—Held, on appeal, that as a right of access to the sewer had not been expressly given to the improvement commissioners, but had to be implied, the right of access which ought to be implied was not any particular mode of access, but such only as was reasonably necessary for enabling the repair of the sewer to be done, and as that had not been prevented by the defendant's embankment, but only rendered less easy and

convenient, the plaintiffs had no right to compensation. *Birkenhead (Mayor) v. London and North-Western Railway*, 15 Q. B. D. 572; 55 L. J., Q. B. 48; 50 J. P. 84—C. A.

“Works for Sewage purposes.”]—The cleaning, levelling, and cementing the bottom of a pool, into which the effluent from sewage works flows, is a work for sewage purposes within the meaning of s. 32 of the Public Health Act, 1875. *Wimbledon Local Board v. Croydon Sanitary Authority*, 32 Ch. D. 421; 56 L. J., Ch. 159; 55 L. T. 106—C. A.

5. NUISANCES AND OFFENSIVE TRADES.

Chimney sending forth Black Smoke—Furnace constructed to consume Smoke.]—By the 7th sub-s. of s. 91 of the Public Health Act, 1875, “Any fireplace or furnace which does not, so far as practicable, consume the smoke arising from the combustible used therein, and which is used for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gas-work, or in any manufacturing or trade process whatsoever; and any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance, shall be deemed to be a nuisance liable to be dealt with summarily in manner provided by this act: provided that where a person is summoned before any court in respect of a nuisance arising from a fireplace or furnace which does not consume the smoke arising from the combustible used in such fireplace or furnace, the court shall hold that no nuisance is created within the meaning of this act, and dismiss the complaint if it is satisfied that such fireplace or furnace is constructed in such manner as to consume as far as practicable, having regard to the nature of the manufacture or trade, all smoke arising therefrom, and that such fireplace or furnace has been carefully attended to by the person having the charge thereof.” An information was laid against the proprietor of a brewery, for that black smoke was from time to time sent forth from the chimney of his brewery in such quantities as to be a nuisance, and he was convicted and fined thereon:—Held, on case stated, that the proviso applied only to the first part of the sub-section, and not to the latter part, making it an offence to send forth black smoke in such a quantity as to be a nuisance, and that the defendant was not entitled to call evidence as to the construction of the furnace. *Weekes v. King*, 53 L. T. 51; 49 J. P. 709; 15 Cox, C. C. 723—D.

Noxious or Offensive Trade—Fish-Frying.]—By the 112th section of the Public Health Act, 1875 (38 & 39 Vict. c. 55), it is provided that any person who, after the passing of this act, establishes within the district of an urban authority, without their consent in writing, any offensive trade, that is to say, the trade of blood-boiler, or bone-boiler, or fellmonger, or soap-boiler, or tallow-melter, or tripe-boiler, or any other noxious or offensive trade, business, or manufacture, shall be liable to a penalty, &c. A fish-frying business, which is as a fact an offensive business by reason of effluvia arising

therefrom and extending to a distance of two or three hundred yards, is not a noxious or offensive business within the meaning of the section, which only applies where a business is necessarily noxious or offensive. *Braintree Local Board v. Boyton*, 52 L. T. 99; 48 J. P. 582—D.

Swine kept near Dwelling-houses—Bye-law.] A rural sanitary authority, purporting to act under the powers of ss. 44 and 276 of the Public Health Act, 1875, made a bye-law prohibiting the keeping of swine within the distance of fifty feet from any dwelling-house within their district:—Held, that the bye-law was unreasonable, and therefore bad. *Heap v. Burnley Union*, 12 Q. B. D. 617; 53 L. J., M. C. 76; 32 W. R. 660; 48 J. P. 359—D.

An urban sanitary authority, under the powers conferred by the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), made certain bye-laws, one of which was as follows:—No swine shall be kept in any yard within a distance of twenty-one feet from a dwelling-house or public building in which any person may be, or may be intended to be, employed in any manufacture, trade, or business, except with the special permission of the sanitary authority:—Held, that the bye-law was valid. *Lutton v. Doherty*, 16 L. R., Ir. 493—Q. B. D.

Abatement—Jurisdiction to Order Owner to abate, where Premises leased for Years.]—A local authority served the owner of premises with a notice, under s. 94 of the Public Health Act, 1875, requiring him within seven days to abate a nuisance arising from the defective construction of a structural convenience, and for that purpose to execute certain specified works. Having failed to comply with the notice, the owner was summoned under s. 95 before a court of summary jurisdiction, and on the hearing it was proved that the premises in question were occupied by a tenant to the owner under a lease for twenty-one years containing the usual covenants:—Held, that the owner, even although he could not enter upon the premises and execute the works without the tenant's permission, had “made default” in complying with the requisitions of the notice within the meaning of s. 95, and therefore that the justices had jurisdiction to make an order under s. 96, requiring him to abate the nuisance. *Parker v. Inge*, 17 Q. B. D. 584; 55 L. J., M. C. 149; 55 L. T. 300; 51 J. P. 20—D.

Order should specify Work required to be Done.]—An order of justices made under s. 96 of the Public Health Act, 1875, upon the complaint of a local authority, required the owner of premises to abate within a specified time a nuisance arising from untrapped drains, “and to execute such works and do such things as may be necessary for that purpose, so that the same shall no longer be a nuisance or injurious to health”:—Held, that this order was bad, because it did not specify what works and things the owner should execute and do for the purpose of abating the nuisance. *Reg. v. Wheatley*, 16 Q. B. D. 34; 55 L. J., M. C. 11; 54 L. T. 680; 34 W. R. 257; 50 J. P. 424—D.

Power to order Specific Works to be done.]—A sanitary authority had served a notice

under s. 94 of the Public Health Act, 1875, on the owner of premises to abate a nuisance, and had ordered the owner "to lay down a six-inch glazed stone-ware drain pipe, and to connect it with the main sewer in front of his house":—Held, that the justices had jurisdiction under s. 96 to make the order in that form. *Reg. v. Kent Inhabitants*, 55 L. J., M. C. 9, n.—D.

The respondents, an urban sanitary authority, served, under the provisions of s. 94 of the Public Health Act, 1875, upon the appellant, who was the owner of certain houses within the borough to which respectively were attached privies and ashpits which were a nuisance, a notice requiring him to abate the nuisance, "and for that purpose, to deodorise and fill in the privies, privy vaults, and ashpits, convert the same to proper pan water-closets, and connect them with the main sewer." The notice was not complied with. An order was thereupon made by two justices under the provisions of s. 96 of the Public Health Act, in the terms of the notice:—Held, upon a case stated, that the order was a good order, for that by s. 96 it was left absolutely to the justices to order any works or structural alterations which they in their discretion might think necessary for the abatement of the nuisance. *Whitaker v. Derby Urban Sanitary Authority*, 55 L. J., M. C. 8; 50 J. P. 357—D.

A privy openly discharged night-soil and offensive matter on the bank of a river; the sanitary authority served the owner of the premises with a notice to abate the nuisance, and for that purpose to "remove the present pipes and pan, level the floor under the seat of the privy, and provide a galvanized double-handled pail under the seat, the cover of which said seat to be movable, so that the premises should no longer be a nuisance or injurious to health;" and the justices at sessions made an order in the terms of the notice:—Held, that they had jurisdiction to make the order. *Saunders, Ex parte*, (11 Q. B. D. 191), followed, and *Whitechurch, Ex parte* (6 Q. B. D. 545), distinguished or dissented from. *Reg. v. Llewellyn*, 13 Q. B. D. 681; 55 L. J., M. C. 9, n.; 33 W. R. 150; 49 J. P. 101—D.

— **Ditch on Boundary of two Districts.**—A ditch ran along a highway which divided two rural sanitary districts. The ditch was situated in N., but a nuisance was caused in greater part by sewage from premises in W. The W. sanitary authority applied to justices for an order on the N. authority to cleanse the ditch as being in their area:—Held, that the justices were right in ordering W. to cleanse the ditch. *Woburn Union v. Newport Pagnell Union*, 51 J. P. 694—D.

— **Action for Injunction—Right of Local Authority to Sue—Sanction of Attorney-General.**—The Public Health Act, 1875, enacts in s. 107 that any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, "cause any proceedings to be taken" against any person in any superior court of law or equity to enforce the abatement or prohibition of any nuisance under the act:—Held, that such proceedings must be ordinary proceedings known to the law, and that in the absence of special damage a local authority cannot sue in respect of a public nuisance except with the

sanction of the attorney-general by action in the nature of an information. *Wallasey Local Board v. Gracey*, 36 Ch. D. 593; 56 L. J., Ch. 739; 57 L. T. 51; 35 W. R. 694; 51 J. P. 740—Stirling, J.

6. LODGING HOUSES.

What are.]—A local board made bye-laws requiring registration, &c., from the landlord of a lodging-house, and defined "lodging-house" to mean "a house or part of a house which is let in lodgings or occupied by members of more than one family." B. let four unfurnished rooms of her house to M. and his family:—Held, that the justices were wrong in holding that B. did not come within the meaning of the definition as landlord of a lodging-house. *Roots v. Beaumont*, 51 J. P. 197—D.

Resolution to Register—Registration.]—The respondent, having fulfilled the necessary preliminaries under s. 78 of the Public Health Act, 1875, applied to be registered as the keeper of a common lodging-house under s. 76, and the local authority passed a resolution that his house should be registered. The clerk did not carry out this resolution, and no formal registration of the respondent or his house was made, and eight months afterwards the local authority resolved that the respondent should not be registered, and two months later prosecuted him for keeping a common lodging-house without being registered. The justices refused to convict:—Held, upon a case stated, that, for the purpose of the act, the resolution of the local authority constituted registration, and that the justices were right in refusing to convict the respondent. *Coles v. Fibbens*, 52 L. T. 358; 49 J. P. 308—D.

Cancelling Registration—Keeping without License.]—K. was duly entered in the register of the B. urban authority as keeper of a common lodging-house. Two months later the inspector reported that it was kept as a house of bad repute, and the health committee by resolution withdrew the license and ordered K. to clear out his lodgers in a week, and on his refusal he was charged with keeping the house without being registered:—Held, that the justices were right in dismissing the information, as there was no power to cancel the license except for the reasons set forth in the statute. *Blake v. Kelly*, 52 J. P. 263—D.

7. IN OTHER CASES.

Carrying Water-mains—"Surveyor," Report of.]—Section 54 of the Public Health Act, 1875, provides that where a local authority supply water they shall have the same powers for carrying water mains as they have for carrying sewers. Section 16 provides that any local authority may carry any sewer, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into, through, or under any lands within their district:—Held, that "the surveyor" is the person duly appointed surveyor under s. 189, and no other, not even an engineer of the greatest experience whom the

local authority may think fit to consult; and further, that "the surveyor" is the person to determine on the necessity, and therefore if he exercise a bona fide judgment in the matter, the court will not interfere. *Lewis v. Weston Super Mare Local Board*, 40 Ch. D. 55; 58 L. J., Ch. 39; 59 L. T. 769; 37 W. R. 121—Stirling, J.

Delegation to Police of Right to Prosecute.]—A local board acting under an act which embodied the provisions of s. 259 of the Public Health Act, 1875, passed a resolution that "in pursuance of the power vested in the board by s. 259 of the Public Health Act, 1875, the superintendent and the sergeants of the county police, for the time being acting within the district, be authorised as officers of the board to institute and prosecute all such proceedings as may be necessary under the specified clauses of the local act. In an information preferred by the superintendent of police against the appellant for an offence under the act:—Held, that the local board had no power under s. 259 of the Public Health Act, 1875, to delegate the prosecution to the police, who are not officers of the board, nor under their control. *Kyle v. Barbor*, 58 L. T. 229; 52 J. P. 501, 725; 16 Cox, C. C. 378—D.

Stopping up Highways—Employment of Solicitor.]—The U. Land Company being desirous of diverting certain public footways on their estate in the parish of T., requested the T. Local Board of Health to assent to such diversion, and to take the necessary steps to have the said footways closed. The T. Local Board assented, and instructed their solicitors to take the necessary steps, and this having been done, paid their bill of costs, and recovered the amount summarily as "expenses" within the meaning of s. 84 of the Act of 1835:—Held, on a case stated, that the words of s. 144 of the Public Health Act, 1875, "may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint," did not empower the local board to employ a solicitor to do the ministerial acts in question, and that therefore the solicitor's charges were not "expenses" payable by the land company under s. 84 of the Act of 1835. *United Land Company v. Tottenham Local Board*, 51 L. T. 364; 48 J. P. 726—D.

Promoting Bill in Parliament.]—A rural sanitary authority has no power to charge the rates with the expenses of promoting a bill in Parliament. *Cleverton v. St. Germain's Union*, 56 L. J., Q. B. 83—Stephen, J.

A rural sanitary authority, being unable to acquire by purchase land and water rights necessary for the purpose of procuring a water supply for their district, which it was the duty of the authority to do under the Public Health Act, instructed their solicitor to promote a bill in Parliament for the purpose of obtaining powers to purchase the land and water rights compulsorily:—Held, that the rural sanitary authority had no power to promote such a bill, and that therefore their solicitor could not recover his costs from them. *Id.*

Register of Owners and Proxies—Poll.]—The town council of a borough is not bound, under the Public Health Act, 1875, sched. II. r. 19, to keep a register of owners and proxies for the purpose of taking a poll in the borough with

respect to the application, under 35 & 36 Vict. c. 91, of the borough funds in opposing local and personal bills in parliament. *Ward v. Sheffield (Mayor)*, 19 Q. B. D. 22; 56 L. J., Q. B. 418—Cave, J.

III. EXPENSES — PAYMENT AND RECOVERY OF.

Who liable—Vendor or Purchaser.]—Leasehold houses in an urban district, abutting partly on a private road, were sold on an open contract; at the date of the sale works had been done by the local board of the district on the road under s. 150 of the Public Health Act, 1875; the final demand for payment of the sum apportioned in respect of the premises was served after the purchase ought to have been completed:—Held, that the apportioned expenses became a charge on the premises at the date of completion, and as between the vendor and purchaser were payable by the vendor. *Bettesworth and Richer, In re*, 37 Ch. D. 535; 57 L. J., Ch. 749; 58 L. T. 796; 36 W. R. 544; 52 J. P. 740—North, J.

Landlord or Tenant.]—A lessee covenanted to pay the tithe or rent charges in lieu of tithes and tax (if any), sewers' rates, main drainage rates, and all other taxes, rates, and assessments, and impositions and outgoings whatsoever then or thereafter to be charged or imposed on or in respect of the said premises or any part thereof:—Held, that the lessee was not liable to pay the amount charged by the urban authority for sewerage, levelling, and paving the road on which the demised premises abutted, under s. 150 of the Public Health Act, 1875. *Hill v. Edward*, 1 C. & E. 481—Mathew, J.

Owner—Agent for collection of Rents.]—By ss. 98 and 99 of the St. Helen's Improvement Act, 1869 (32 & 33 Vict. c. 120), the corporation of St. Helen's are, upon failure of the owners of property fronting on a new street to drain, pave, &c., the roadway and paths pursuant to an order, empowered to do the work themselves, and to charge the expenses thereby incurred upon such owners in proportion to their respective frontages; and by the interpretation clause, s. 4, "owner" is declared to mean "the person for the time being receiving the rack-rent of the lands in connexion with which the said word is used, whether on his own account or under or by virtue of any mortgage or charge, or as agent or trustee for any other person, . . . and shall include every successive owner from time to time of such land for any part of the time during which the enactment wherein that term is used operates in relation to such land":—Held, that an "agent" employed to collect the rents of the property charged by the apportionment is an "owner" within the act, and is liable to be called upon to pay, whether he has money of his principal in hand or not, at any time whilst the sum assessed upon the premises remains unpaid. *St. Helen's (Mayor) v. Kirkham*, 16 Q. B. D. 403; 34 W. R. 440; 50 J. P. 647—Lopes, J.

"Successive Owners"—Mortgagee in Possession—Right to Sue—Concurrent Remedies.]—In 1879 the owner of premises abutting

on H. street and E. street, Blackburn, mortgaged them to the defendant. In 1880 the plaintiffs, the Corporation of Blackburn, paved H. street. In 1881 the mortgagor, in accordance with the provisions of the Blackburn Improvement Act, 1870, executed a charge on the premises in favour of the corporation, for the payment by instalments of his apportionment of the expenses thereof. In 1882, and prior to the commencement of the operation of the Blackburn Improvement Act, 1882, the corporation paved E. street, and in 1883 the mortgagor further charged the premises, in accordance with the provisions of the Blackburn Improvement Act, 1882, with the payment by instalments of the expenses thereof. The mortgagor made default in payment of the instalments. On the death of the mortgagor in 1883 the defendant took possession of the premises under his mortgage. In an action by the corporation against the mortgagee to recover the unpaid instalments under s. 247 of the Blackburn Improvement Act, 1882, which entitles the corporation to institute an action at law against "successive owners" of premises, for the recovery of the expenses of paving streets abutting thereon:—Held, that the defendant being mortgagee in possession, was a "successive owner" within the meaning of s. 247; and that the execution of a charge in favour of the corporation did not preclude them from the remedy of action at law to recover the expenses; and that the Act of 1882 was applicable to the recovery of expenses incurred prior to the commencement of the operation of that act. *Blackburn Corporation v. Micklethwait*, 54 L. T. 539; 50 J. P. 550—D.

Premises "fronting, adjoining, or abutting."—A. B. owned plots of land and cottages thereon, separated from a street by a wall five feet high, which belonged with the land on which it stood to another person. There was a public footway which went between the plots of land, and through an opening in the wall into the middle of the street. The backs only of the cottages fronted the street, and the only way for vehicles from the cottages to the street was by a small roadway, which, without touching that part of the street which had been paved, came into a highway which joined one end of such street. With the exception of the public footway this roadway was the only access from the cottages to the street:—Held, that A. B. was not the owner of premises "fronting, adjoining, or abutting" on the street within the meaning of s. 150 of the Public Health Act, 1875, and therefore was not liable to contribute to the expenses of sewerage and paving the street under that section. *Lightbound v. Bebington Local Board*, 16 Q. B. D. 577; 55 L. J., M. C. 94; 53 L. T. 812; 34 W. R. 219; 50 J. P. 500—C. A.

Summary Proceedings—Right to dispute Liability before Justices.—In proceedings before justices under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, to recover from an owner of premises fronting a road his proportion of expenses incurred by the local authority in sewerage, levelling, and paving it, the owner may dispute his liability by showing that the road is not a "street," or that it is a "highway repairable by the inhabitants at large." *Eccles v. Wirral Sanitary Authority*, 17 Q. B. D. 107;

55 L. J., M. C. 106; 34 W. R. 412; 50 J. P. 596—D.

Apportionment of Expenses—When conclusive.—Where the apportionment of street improvement expenses by the surveyor under s. 150 of the Public Health Act, 1875, has not been disputed by a frontager in the manner pointed out by s. 257 of the act, such apportionment is conclusive, and the frontager cannot set up, as a defence to proceedings for the recovery of the sum apportioned, that he has been charged in respect of a greater extent of frontage than he possesses. *Midland Railway v. Watton*, 17 Q. B. D. 30; 55 L. J., M. C. 99; 54 L. T. 482; 34 W. R. 524; 50 J. P. 405—C. A.

Notice to Pave—Alteration in Work done—Validity of Notice.—Under s. 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), an urban sanitary authority gave notice to the owner of premises to pave part of a street upon which his premises abutted, specifying the materials and mode and (inter alia) requiring him to lay down concrete. The owner having failed to comply, the sanitary authority did the work themselves, but finding that the concrete would be an unnecessary expense, omitted it:—Held, that the omission to follow strictly the terms of their own notice did not prevent the sanitary authority from recovering from the owner his proportion of the expenses incurred. *Acton Local Board v. Lewsey*, 11 App. Cas. 93; 55 L. J., Q. B. 404; 54 L. T. 657; 34 W. R. 745; 50 J. P. 708—H. L. (E.).

The S. urban sanitary authority gave notice to K., an owner of land adjoining a new street, to sewer the road and lay an 18-inch pipe. K. having neglected to do so, the authority in course of carrying out the work, found a 12-inch pipe sufficient, and used it, and it saved expense to K. on the apportionment:—Held, that the magistrate was right in holding that the apportioned expenses of the altered work were recoverable under s. 150 of the Public Health Act, 1875, the alteration being not a material matter nor invalidating the notice. *Kershaw v. Sheffield (Corporation)*, 51 J. P. 759—D.

Omission of Notice to Frontagers—Charge on Lands—Waiver of Notice.—The plaintiffs incurred expenses in paving a street without having served on the defendants, who were frontagers, a notice under s. 69 of the Public Health Act, 1848 (to which s. 150 of the Public Health Act, 1875, now corresponds), requiring them to do the work themselves. The plaintiffs claimed in an action a declaration that the expenses were a charge on the defendant's property, under s. 62 of the Local Government Act, 1858 (to which s. 257 of the Public Health Act, 1875, corresponds). It was proved that B., a predecessor in title of the defendants, had taken from the plaintiffs a receipt for a payment in respect of the same expenses:—Held, that the plaintiffs were not entitled to a declaration, inasmuch as the service of the notice under s. 69 was a condition precedent to liability on the part of the defendants in respect of the expenses, and that the payment by B. could not operate as a waiver of the omission to give the notice. *Farnworth Local Board v. Compton*, 34 W. R. 334—C. A.

Road "made good" and afterwards Paved—"Theretofore."]—In 1857 a local act was passed which incorporated s. 53 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34). In 1874 the appellants, in their capacity as the corporation of P., bought some land of the respondents abutting upon a country high road within the district to which the local act applied, and in pursuance of an agreement then made with the respondents, at their own expense widened and improved the road and laid out a footpath along the side, and gravelled, channelled, and kerbed the footpath. In 1879 the appellants, in their capacity as the urban authority, paved and flagged the footpath and sought to recover the expense of so doing from the respondents as adjoining owners under the powers of s. 53. The jury found that before the paving and flagging in 1879 the road was not a street in the popular sense of the term, and that the footpath had been "made good" within s. 53.—Held, that the respondents were not liable, upon the ground that the footpath had been "theretofore made good" within the meaning of s. 53, but without deciding whether the road was a "street" within the meaning of that section. The word "theretofore" in s. 53 refers to the period before the work is done by the commissioners, not to the period before the passing of the special act. *Portsmouth (Mayor) v. Smith*, 10 App. Cas. 364; 54 L. J., Q. B. 473; 53 L. T. 394; 49 J. P. 676—H. L. (E.).

Liability where Contract over £50 not under Seal.]—In an action by a local authority to recover from the defendant his proportion of the cost of sewerage, paving, &c., a street under the powers of the Public Health Act, 1875, s. 150, it appeared that part of the work, to an amount exceeding 50*l.*, had been done by contractors employed by the local authority, but that no written contract under the common seal of the authority had been made with them as provided by s. 174.—Held, that the defendant was nevertheless liable. By A. L. Smith, J., that the objection, if valid, would have been an objection to the apportionment, which could only be raised in the time and manner provided by s. 257. *Bournemouth Commissioners v. Watts*, 14 Q. B. D. 87; 54 L. J., Q. B. 93; 51 L. T. 823; 33 W. R. 280; 49 J. P. 102—D.

Limitation of Time—Alternative Remedy in County Court.]—The Leeds Improvement Act, 1877, s. 96, provided that summary proceedings before justices for the recovery of expenses must be brought within one year. Section 109 provided that when any person neglected to pay any sum due to the corporation, such sum might be recovered in any court of competent jurisdiction for the recovery of debts of the like amount. Other remedies were given for the recovery of these sums, one by an act of 1842, by way of distress, in which there was no limit of time, and another by an act of 1866, by way of action at law.—Held, that the limitation of one year did not apply to proceedings by way of action of debt in the county court. *Tottenham Local Board v. Rowell* (1 Ex. D. 514) distinguished. *Leeds (Mayor) v. Robshaw*, 51 J. P. 441—D.

Erroneous Notice—Fresh Apportionment—Charge on Premises.]—An urban sanitary authority, acting under s. 150 of the Public Health

Act, 1875, served the defendant and other frontagers of a new street with notices requiring them to execute certain works, including a particular work which could not legally be included in such notices. The notices not being complied with, the urban authority did the works and apportioned the expenses incurred by them in so doing on the frontagers. A summons to recover from the defendant the sum of 650*l.*, the amount charged to him under the apportionment, having been dismissed by the magistrates, the urban authority made a second apportionment, deducting the expense of the work which had been wrongly included, the amount charged to the defendant therein being 579*l.* They then brought an action under s. 257 of the Public Health Act to establish a charge on the defendant's premises for 579*l.*, or in the alternative, for 650*l.*—Held, that the urban authority had power to make a second apportionment; and that, notwithstanding the dismissal of the summons, they were entitled to a charge on the premises for 579*l.* *Manchester (Mayor) v. Hampson*, 35 W. R. 334—D. See S. C. in C. A., 35 W. R. 591.

Part of Works executed on Street—Part on Land of Private Owners—Appeal to Local Government Board.]—Upon the hearing of a complaint preferred before a police magistrate by the urban authority of the district, acting under s. 150 of the Public Health Act, 1875, to recover the amount apportioned upon a frontager in respect of expenses incurred by the urban authority in sewerage, &c., a street, the frontager objected that the plans referred to in the notice requiring him to execute the work, showed that part of the work in respect of which, upon his failure to comply with the notice, the expenses were incurred, was executed upon land belonging to private owners.—Held, that as part of the work was executed on a street, the urban authority had power to fix the sum to be apportioned, and the magistrate had jurisdiction to entertain the complaint, and could only make an order for payment of the apportioned sum, and if the frontager was aggrieved by what the urban authority had done, his only remedy was to appeal to the Local Government Board under s. 268 of the Public Health Act, 1875. *Wake v. Sheffield (Mayor)*, or *Reg. v. Sheffield (Recorder)*, 12 Q. B. D. 142; 53 L. J., M. C. 1; 50 L. T. 76; 32 W. R. 82; 48 J. P. 197—C. A.

Whether payable by Owners or out of District Rate.]—See ante, col. 860.

IV. RATES.

Property Liable—"Land used as Market Gardens or Nursery Grounds."]—By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 1 (b), "the occupier of any land used as . . . market gardens or nursery grounds . . . shall be assessed in respect of the same in the proportion of one-fourth part only of the net annual value thereof." The appellant, a market-gardener and nurseryman, was the occupier of a piece of land upon which were built sixteen greenhouses or glasshouses, which practically covered the surface of the land: they were built on brick foundations, and were used by the appellant for the purpose of growing fruit and vegetables for sale in the course of his busi-

ness:—Held, that the land with the greenhouses upon it constituted a market garden or nursery ground within the meaning of the act, and that the appellant was liable to be rated to the general district rate in the proportion of one-fourth part only of the net annual value of the property. *Purser v. Worthing Local Board*, 18 Q. B. D. 818; 56 L. J., M. C. 78; 35 W. R. 682; 51 J. P. 596—C. A.

—“Public Charity,” House used for Purposes of—Exemption.]—By a Local Improvement Act, 6 Geo. 4, c. 132, s. 103, the commissioners of a town were authorised to make district rates for defraying the expenses of the Act, provided that none of the rates or assessments which should be made by virtue of this act should be laid upon or in respect of “any houses or buildings used and occupied exclusively for the purposes of public charity”:—Held, that an orphanage founded and used for the purpose of boarding, lodging, clothing, and educating the children of deceased railway servants, and supported partly by subscriptions from railway servants, but mainly by donations from the public, was open to such an extensive class of the community of the kingdom that the premises were used and occupied exclusively for the purposes of “public charity,” within the proviso of the act, and therefore exempt from rateability under it. *Hall v. Derby Sanitary Authority*, 16 Q. B. D. 163; 55 L. J., M. C. 21; 54 L. T. 175; 50 J. P. 278—D.

—Borough Rates—Limitation of Amount by Local Act.]—By the St. Helen's Improvement Act, it is provided that no borough rate levied thereunder shall exceed in any year the sum of 1s. in the pound, provided that, with the consent of a majority of the persons liable to be rated thereto, the corporation may increase such rate above the amount by the act limited. The act further provides that no such increase shall be leviable upon the owner or occupier of any coal mine in respect thereof, or upon any person assessable in the proportion of one-fourth only of any rate, other than the highway rate, in respect of his property or of premises occupied by him:—Held, that this was not an exemption of property from rateability, but a limit imposed upon the borough rate leviable upon colliery, &c., property; and that, though the limit still exists so far as any rate leviable by the corporation for borough purposes is concerned, s. 227 of the Public Health Act, 1875, prevents its applying to rates leviable by the corporation for the purposes of the act, and that the corporation are unrestricted in the amount of any rate leviable by them thereunder. *St. Helen's Corporation v. St. Helen's Colliery Company*, 48 J. P. 39—D.

Joint Board—Component Districts—Expenses of carrying out Provisional Order—Apportionment.]—A provisional order of the Local Government Board, confirmed by a local act, provided that the expenses incurred by the joint board for the district should be defrayed out of a common fund, to be contributed by the component districts in manner provided by s. 283 of the Public Health Act, 1875, and that the contributions of certain of the component districts should be contributed and raised as if they were required to defray “special expenses” within the mean-

ing of the Public Health Act, 1875:—Held, on a special case, that the joint board should apportion the contributions of the component districts according to the rateable values of the properties in such districts, to be ascertained according to the valuation list, and that the rateable values of tithes, tithe commutation rent-charges, land used as arable, meadow or pasture ground only, or as woodlands, market gardens, or nursery grounds, or covered with water, or used as a canal or towing path, or as a railway, should be taken at the full value appearing in the valuation list, and not at one-fourth thereof. *Darent Valley Sewerage Board v. Dartford Union*, 19 Q. B. D. 270; 56 L. J., Q. B. 615; 57 L. T. 233; 36 W. R. 43—D.

Retrospective rate—Balance of past Debt.]—A retrospective rate is, as a rule, bad, whether made to meet expenses incurred in constructing and cleaning sewers, or in the relief of the poor. A rate made in 1885 for sewerage work done under the Public Health Act of 1872 held bad. *Saul v. Wigton Sanitary Authority*, 56 L. T. 438; 35 W. R. 252; 51 J. P. 406—D.

Jurisdiction of Justices—On Mortgagor—Mortgagee in Possession.]—The R. improvement commissioners made a rate in 1876 on P. the owner, for improvement expenses, and he paid part thereof and died, having, at the date of the rate, executed a mortgage to B. B. entered into possession in 1882, and in 1885 the justices issued a distress warrant against B. for the unpaid rate made on P.:—Held, that the justices had no power to issue a distress warrant against B., who was not named in the rate. *Rochdale Building Society v. Rochdale (Mayor)*, 51 J. P. 134—D.

—Sufficient Cause for Non-Payment.]—A district rate, based on a new valuation list duly approved by the assessment committee, was levied on the property of the appellants by the respondents under the powers of s. 211 of the Public Health Act, 1875. Subsequently the appellants obtained from the assessment committee a reduction in the valuation; but being still dissatisfied with the amount, they gave notice of appeal to quarter sessions. Pending the hearing of the appeal the respondents took out a summons under s. 256 of the Public Health Act, 1875, calling on the appellants to show cause why the rate should not be paid:—Held, that the rate being based on a valuation which had been admitted by the assessment committee to be excessive, there was sufficient cause for non-payment of the rate within the meaning of s. 256. *Sheffield Waterworks Company v. Sheffield (Mayor)*, 55 L. J., M. C. 40; 54 L. T. 179; 34 W. R. 153; 50 J. P. 6—D.

On an application before justices for an order for payment of a rate under s. 265 of the Public Health Act, 1875, the rate being good on the face of it, and the property in respect of which the occupier is rated being within the district of the rating authority, the justices' duty is merely ministerial, and they have no jurisdiction to inquire into the validity of the rate. *Reg. v. Hannam*, 34 W. R. 355—C. A.

On an application under s. 256 of the Public Health Act, 1875, to enforce a general district rate, good on the face of it, the justices may not refuse to make an order for payment of the rate on the ground that there is a concurrent

rate made for the same purpose. *Sandgate Local Board v. Pledge*, 14 Q. B. D. 730; 52 L. T. 546; 33 W. R. 565; 49 J. P. 342—D.

— **Stating Special Case.**—A special case may be stated by justices under the 33rd section of the Summary Jurisdiction Act, 1879, upon an application to enforce payment of a general district rate under the 256th section of the Public Health Act, 1875. *Id.*

Bankruptcy—Preferential Claim.—On 12th Jan., 1887, at the time of filing his petition the bankrupt was tenant of a house under a lease for twenty-one years. The trustee in bankruptcy did not disclaim, but on the 1st Feb., 1887, he sold his interest in the lease, the bankrupt remaining in occupation as tenant under the purchaser. There was due from the bankrupt at the date of the receiving order, a local board rate made on 8th October, 1886, for the half year from the 30th September, 1886, to 25th March, 1887, and payable in advance.—Held, that the estate of the bankrupt was liable to pay the rate for the whole half-year. *Ystrad-fodwg Local Board, Ex parte, Thomas, In re*, 57 L. J., Q. B. 39; 58 L. T. 113; 36 W. R. 143; 4 M. B. R. 295—Cave, J.

V. ARBITRATION.

Appointment of Arbitrators invalid—Their Appointment of Umpire.—The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 180, enacts that "With respect to arbitrations under this act, the following regulations shall be observed: (1) Every appointment of an arbitrator under this act when made on behalf of the local authority shall be under their common seal, and on behalf of any other party under his hand..." (2) Every such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same." In an arbitration under the act one arbitrator was appointed by the local authority under their common seal, and another arbitrator was appointed by the claimant, but not in writing under his hand. The arbitrators disagreed and appointed an umpire who made an award in favour of the claimant.—Held, that the provisions of the statute not having been complied with, the appointment of the arbitrators and consequently their appointment of the umpire, and his award were invalid, and neither the original submission nor the appointment of the umpire nor the award could be made an order of court. *Gifford and Bury Town Council, In re*, 20 Q. B. D. 368; 57 L. J., Q. B. 181; 58 L. T. 522; 36 W. R. 468; 52 J. P. 119—D.

Jurisdiction of Arbitrator when Liability is disputed.—When a claim for compensation is made against a local authority for damage caused by the exercise of the powers conferred upon them by the Public Health Act, 1875, the arbitrator has jurisdiction to hold the arbitration and make his award as to the fact of damage, and the amount of compensation under ss. 179, 180, 308, although the local authority bona fide dispute their liability to make compensation at all under the act. Their proper course is to raise the question of liability in their defence to an action upon the award. *Brierley Hill Local*

Board v. Pearsall, 9 App. Cas. 595; 54 L. J., Q. B. 25; 51 L. T. 577; 33 W. R. 56; 49 J. P. 84—H. L. (E.).

Power to enlarge Time for making Award.—The court cannot enlarge the time for making an award under the Public Health Act, 1875 (38 & 39 Vict. c. 55), beyond the period limited in s. 180. *Mackenzie and Ascot Gas Company, In re*, 17 Q. B. D. 114; 55 L. J., Q. B. 309; 34 W. R. 487—D.

Award referred back to Deal with Costs.—An arbitrator or umpire appointed to determine a dispute under ss. 179 and 180 of the Public Health Act, 1875, must in his award deal with the costs of and consequent upon the reference, which are placed in his discretion by sub-s. 13 of the latter section, and if he fails to do so the court will remit the award to him for the purpose of determining the question of costs. *Peake v. Finchley Local Board*, 57 L. T. 882—D.

Taxation of Costs.—Two local authorities, whose districts were adjacent, agreed to carry out a joint sewerage scheme by an agreement, in which it was stipulated that all disputes as to the matters comprised therein should be settled by arbitration in the manner provided by sections 179 and 180 of the Public Health Act, 1875. An award was made which provided that one of the authorities should pay to the other the costs of the reference and award, without stating the amount of such costs. Upon motion for an order directing the taxation of the costs.—Held, that as the submission to arbitration had been made a rule of court, the taxing-master was bound to tax the costs upon the application of the successful party, and that it was not obligatory to bring an action upon the award in order to enable him to do so. *Chesterfield Corporation and Brampton Local Board, In re*, 50 J. P. 824—D.

Enforcing Award.—An award of an umpire appointed under the 180th section of the Public Health Act, 1875 (38 & 39 Vict. c. 55), awarding compensation for damage to land under the 308th section of the act, cannot, although duly made a rule of court under the 180th section, be enforced by motion in the manner in which awards are ordinarily enforced. *Walker and Beckenham Local Board, In re*, 50 L. T. 207; 48 J. P. 264—D.

When Compensation the appropriate Remedy.—See *Sellors v. Matlock Bath Local Board*, post, col. 878.

VI. CONTRACTS BY AND WITH LOCAL BOARDS.

1. IN GENERAL.

Amount exceeding £50 not under Seal—Confirmation under Seal before Completion.—It is competent for an urban authority, honestly and for the advantage of their district, to confirm under their seal a previous contract not under seal for an amount exceeding 50*l.* before such contract is completely executed, so as to render the contract valid within s. 174 of the Public Health Act, 1875. *Melliss v. Shirley Local*

Board, 14 Q. B. D. 911; 54 L. J., Q. B. 408; 52 L. T. 544—*Cave, J.* See S. C. in C. A., *infra*.

— **Amount uncertain at Time of Contract.**]

—A contract not under seal, made by an urban authority, whereof the value or amount in fact exceeds 50%, is invalid by reason of s. 174 of the Public Health Act, 1875, notwithstanding that at the time of entering into the contract it was uncertain what would be the value or amount of the contract when executed. *Eaton v. Basker* (7 Q. B. D. 529) distinguished. *Ib.*

— **Effect of, on Liability for Expenses.**]

See *Bournemouth Commissioners v. Watts*, ante, col. 869.

**Contract by Board binding Successors—Im-
provident Bargain—Change of Circumstances.**]

—Under the Public Health Act, 1848, s. 48, the owner of land adjoining a district by deed agreed with the local board to do certain works and pay 10% a year, and the board gave him leave to drain through their drain all sewage from the property and houses then belonging to the landowner, and from any houses thereafter to be erected on the property. Many more houses were afterwards erected, and the urban sanitary authority (which had succeeded the local board) were, under a new act of parliament, prevented from passing as before the sewage through the drain into the Thames:—Held, that the deed was not ultra vires, and that the board could bind their successors as to the sewage of houses not then in existence. *New Windsor (Mayor) v. Stovell*, 27 Ch. D. 665; 54 L. J., Ch. 113; 51 L. T. 626; 33 W. R. 223—*North, J.*

Held, that though the board were trustees for the ratepayers, they had exercised their discretion, and the agreement did not appear at the time improvident, and its turning out badly for them did not affect it:—Held also, that the law being altered so as to prevent the discharge of sewage into the Thames was no ground for setting aside the deed. *Ib.*

**Illegality—Contract with Local Authority by
Officer or Servant.**]

—S. 193 of the Public Health Act, 1875, provides that officers or servants employed by a local authority shall not in anywise be concerned or interested in any contract with such authority for any of the purposes of the Act, and that, if any such officer or servant is so concerned or interested, he shall be incapable of afterwards holding or continuing in any office or employment under the act, and shall forfeit the sum of 50l.:—Held, that the effect of this section is to render such a contract illegal, and to prevent an officer or servant of a local authority from suing on the contract. *Melliss v. Shirley Local Board*, 16 Q. B. D. 446; 55 L. J., Q. B. 143; 53 L. T. 810; 34 W. R. 187; 50 J. P. 214—C. A.

Seemable, that if, after the making of a contract with a local authority, an officer of the authority became interested in it, s. 193 would not avoid the contract. *Ib.*

2. LIABILITY OF OFFICERS FOR PENALTIES.

“Interested in Bargain or Contract”—Demise
of Rooms to Local Board—“Allowance.”]—A

demise of rooms is a “bargain or contract” within the meaning of s. 193 of the Public Health Act, 1875, and if an officer, employed by a local board constituted under that statute, lets rooms to the board at a rent payable by it to him, although the rooms are used by it in the transaction of its business, he becomes liable to the penalty imposed by that section; for the rent payable by the local board cannot be considered as an “allowance” to the officer in addition to his salary within the meaning of ss. 189, 193, it being unconnected with the performance of any services in the course of his employment under the board. *Burgess v. Clark*, 14 Q. B. D. 735; 33 W. R. 269; 49 J. P. 388—C. A. But see 48 & 49 Vict. c. 53.

— **Shareholder in Company—Contract be-
tween Company and Local Board.**]

—An officer of a local board, who is a shareholder in a company having a contract with the board, is, so long as the contract exists, “interested in a bargain or contract” with the board within the meaning of the Public Health Act, 1875, s. 193, and if the contract is capable of producing any profit to the shareholders of the company, he is liable to the penalty imposed by that enactment. *Todd v. Robinson*, 14 Q. B. D. 739; 54 L. J., Q. B. 47; 52 L. T. 120; 49 J. P. 278—C. A. But see 48 & 49 Vict. c. 53.

— **Percentage payable by Contractor.**]

—By the terms of contracts entered into with a local authority for the purpose of the Public Health Act, 1875, the surveyor to the local authority was to receive from the contractors, in respect of bills of quantities to be prepared by him, percentages on the amounts he should certify to be due to such contractors respectively by the local authority:—Held, that in respect of each contract the surveyor was liable to a penalty as having been “concerned or interested” therein within the meaning of s. 193 of the Public Health Act, 1875. *Whiteley v. Barley*, 21 Q. B. D. 154; 57 L. J., Q. B. 643; 60 L. T. 86; 36 W. R. 823; 52 J. P. 595—C. A.

Allowance in Addition to Salary.]

—A local authority employed their surveyor, apart from his ordinary duties, to superintend the construction of certain drainage works as their engineer, and agreed to remunerate him by a percentage on the outlay:—Held, that the surveyor was liable to the penalty imposed by s. 193 of the Public Health Act, 1875. *Ib.* See *Burgess v. Clark*, supra.

— **Acceptance of Fee under Colour of Office**

—**Extra Work.**]

—The defendant, a solicitor, was town clerk of Bury St. Edmunds, and on the town council becoming the local sanitary authority was appointed clerk to the sanitary authority. By a resolution of the town council dated the 6th May, 1879, his salary was paid at 365l. per annum, including all legal charges, except for contentious matters, travelling expenses, and expenses out of pocket. About 1883 large sewage works were promoted, and subsequently carried out by the town council as the local sanitary authority, which works were carried on for three years and a quarter. During that time the defendant, as such town clerk and officer of the sanitary authority, drew his annual salary of 365l., but was engaged in conducting the extra

legal work caused by the carrying through of the sewage scheme, which was opposed by some members of the town council and of the inhabitants. In December, 1887, on the recommendation of the sewage and irrigation committee, the town council resolved that the defendant be paid the sum of 500 guineas in addition to his salary of 365*l.* for his services in providing mortgages, contracts, attending and conducting an inquiry before the Local Government Board inspector, and other work as a solicitor, and the defendant was paid the said sum. The plaintiff brought his action to recover the statutory penalty of 50*l.* against the defendant for having, under the colour of his office, or appointment as officer of the urban sanitary authority, accepted such fee of 525*l.* contrary to the provisions of s. 193 of the Public Health Act, 1875:—Held, that under the circumstances of the case the acceptance by the defendant of the sum of 525*l.* was not an acceptance under the colour of his office or employment of a fee or reward other than his proper salary, wages, or allowances, within the meaning of s. 193 of the Public Health Act, 1875. *Edwards v. Salmon*, 59 L. T. 416—Pollock, B. Affirmed 33 S. J. 630—C. A.

Remission of Penalties.—Under 22 Vict. c. 32—which enables the Crown to remit penalties imposed by statute on convicted offenders—there is no power to remit the penalty to which the officers of local authorities are liable under s. 193 of the Public Health Act, 1875, for being interested in any contract made with such local authorities. *Todd v. Robinson*, 12 Q. B. D. 530; 53 L. J., Q. B. 251; 50 L. T. 298; 32 W. R. 858; 48 J. P. 694—D. See 47 & 48 Vict. c. 74.

VII. ACTIONS AND PROCEEDINGS AGAINST LOCAL BOARDS.

Action by Officer on Contract with Board—Illegality.—See *Melliss v. Shirley Local Board*, ante, col. 875.

Guardians of the Poor acting as Rural Sanitary Authority—Limitation of Actions.—Section 1 of the Act 22 & 23 Vict. c. 49, enacts that any debt, claim, or demand which may be lawfully incurred by or become due from the guardians of any union or parish shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards. By s. 9 of the Public Health Act, 1875, the guardians of a rural union shall form the rural sanitary authority of that district, and “all statutes, orders, and legal provisions applicable to any board of guardians shall apply to them in their capacity of rural authority under this Act for the purposes of this Act”:—Held, that s. 9 of the Public Health Act, 1875, does not extend the limitation of time imposed by s. 1 of the previous Act to debts contracted by guardians in their capacity of rural authority, but that that limitation still remains applicable only to debts contracted by guardians as such. *Dearle v. Petersfield Union*, 21 Q. B. D. 447; 57 L. J., Q. B. 640; 60 L. T. 85; 37 W. R. 113; 53 J. P. 102—C. A.

Indictment for Non-repair of Highway—Urban Sanitary Authority.—An indictment

will lie, under s. 10 of the Highway and Locomotives (Amendment) Act, 1878, against an urban sanitary authority, acting as the highway authority of the district, for non-repair of a highway. *Reg. v. Wakefield (Mayor)*, 20 Q. B. D. 810; 57 L. J., M. C. 52; 36 W. R. 911; 52 J. P. 422—D.

An indictment against a municipal corporation for non-repair of a highway alleged that the highway was in decay, and that the corporation, “acting by the council as the sanitary authority for the urban district,” ought to repair and amend the same, &c.; but there was no allegation to show how the defendants were liable, nor did the indictment conclude with the words “against the form of the statute.” At the trial the judge intimated his willingness to make any amendment within his power, but no amendment was in fact made. A verdict having been found for the Crown:—Held, that the indictment was bad, but that, even assuming the necessary amendments to be made, the defendants were entitled to judgment, there being nothing in the Public Health Act, 1875, to make the urban sanitary authority liable to indictment for non-repair, in the same sense as that in which the parish or other persons liable *ratione tenuræ* were liable. *Reg. v. Poole (Mayor)*, 19 Q. B. D. 602, 683; 56 L. J., M. C. 131; 57 L. T. 485; 36 W. R. 239; 52 J. P. 84; 16 Cox, C. C. 323—D.

Notice of Action—Act “done under the Provisions of this Act.”—The effect of the Public Health Act, 1875, which makes improvement commissioners under local acts urban sanitary authorities, is to reconstitute them as new bodies under the Act, vesting in them as such new bodies the powers given by the local acts as well as those given by the Public Health Act; and such commissioners in subsequently doing any act in the exercise of the powers originally conferred by their local acts are acting under the Public Health Act, 1875, and consequently are entitled in respect of such Act to any protection or privileges given by that Act to members of local authorities acting under its provisions. *Lea v. Facey*, 19 Q. B. D. 352; 56 L. J., Q. B. 536; 58 L. T. 32; 35 W. R. 721; 51 J. P. 756—C. A.

A person who is in fact disqualified from being a member of a local authority but who acts in the bona fide belief that he is a member is entitled to notice of action under s. 264 of the Public Health Act, 1875. *Id.* And see next case.

Nuisance by Erecting Urinal—Compensation—Notice of Action.—A local board, assuming to act under the authority of s. 39 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), erected a public urinal partly upon a highway and partly upon a strip of land belonging to the plaintiff, and so near to other adjoining land of the plaintiff as to be a nuisance to her and her tenants, and to depreciate the value of her property:—Held, that the plaintiff was entitled to a mandatory injunction to restrain the board from continuing the urinal upon her land or so near thereto as to cause injury or annoyance to her or her tenants:—Held also, that it was not a matter in respect of which the plaintiff’s remedy was by compensation under s. 308 of the act. In such a case notice of action under s. 264 is not required. *Sellors v. Matlock Bath*

Local Board, 14 Q. B. D. 928 ; 52 L. T. 762—Denman, J.

Erection of Kerb-Stones—Access to Land—Compensation.]—The plaintiff owned land abutting upon the highway, upon which an inn and some stabling were erected. These stood back from the highway, and in front of them was an open space (forming part of the same land) which had been left open to and on a level with the highway until the defendants, in exercise of their powers under s. 149 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and for the convenience of the public, placed kerb-stones and a raised footpath at the side of the highway, leaving openings so that carriages could still pass at convenient places to and from the plaintiff's land and premises:—Held, that the plaintiff was not entitled to a mandatory injunction directing the defendants to remove the kerb-stones, and that in the absence of any unreasonable conduct the remedy for any injury caused by the kerb-stones would be by compensation under s. 308 of the act. *Id.*

Compulsory Powers of Purchase—Omission to take Lands specified in Notice.]—When a local authority, in exercise of their powers, serve on the owner of land intended to be taken by them for the purposes of the Public Health Act, 1875, the notice required by s. 176 of that act, they are not bound to proceed with such notice. Their omission, therefore, to take the lands specified in such notice, gives the owner of the lands no right of action against them, notwithstanding the confirmation of a provisional order empowering them to take such lands. *Burges v. Bristol Sanitary Authority*, 50 J. P. 455—D.

Contagious Diseases (Animals)—Slaughtering diseased Animals — Compensation.]—By the 42nd section of the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), it is provided that every local authority shall, from time to time, appoint so many inspectors and other officers as they think necessary for the execution and enforcement of this act, and shall assign to those inspectors and officers such duties and salaries or allowances, and may delegate to any of them such authorities and discretion as to the local authority may seem fit, and may at any time revoke any appointment so made. The local authority failed to appoint an inspector, and disease having broken out amongst the plaintiff's cattle, some of them died. The local authority did not slaughter any of the plaintiff's cattle, nor did they pay him any compensation:—Held, that the plaintiff could not maintain an action for damages nor for a peremptory mandamus. *Mulcahy v. Kilmacthomas Guardians*, 18 L. R., Ir. 200—Q. B. D.

Supply of Water unfit for Use.]—See *Milnes v. Huddersfield (Mayor)*, post, WATER.

Action by Solicitor—Work done ultra vires.]—See *Cleverton v. St. Germain's Union*, ante, col. 865.

Action for Injunction—Sanction of Attorney-General.]—See *Wallasey Local Board v. Gracey*, ante, col. 864.

HEIRLOOMS.

Sale under Settled Land Act, 1882.]—See SETTLEMENT.

Security—Inventory.]—A tenant for life of heirlooms will not be required to give security for the heirlooms, but only to sign an inventory, unless there is reason to suppose that the heirlooms will be in danger in his possession. *Temple v. Thring*, 56 L. J., Ch. 767—North, J.

HIGHWAY.

See WAY.

HOTEL.

See INNKEEPER.

HOUSE.

Inhabited House Duty.]—See REVENUE.

HOUSE OF LORDS.

Appeal to.]—See APPEAL.

HUSBAND AND WIFE.

I. MARRIAGE.

1. *Validity*, 881.
2. *Proof and Effect of*, 882.
3. *Breach of Promise to Marry*, 883.
4. *Legitimacy of Children*, 883.
5. *Suits for Nullity*, 884.
6. *Dissolution—Domicil.*—See INTERNATIONAL LAW.
7. *Bigamous.*—See CRIMINAL LAW.

II. RESTITUTION OF CONJUGAL RIGHTS, 888.

III. JUDICIAL SEPARATION AND DIVORCE.

1. *Cruelty*, 890.
2. *Desertion*, 890.
3. *Bars to*, 892.
4. *Jurisdiction*, 894.
5. *Procedure and Practice*, 894.

6. *Intervention of Queen's Proctor and Others*, 897.
7. *Costs*, 899.
8. *Alimony and Maintenance*.
 - a. *Pendente lite*, 901.
 - b. *Permanent Alimony*, 902.
9. *Custody of and Access to Children*, 903.
10. *Parliamentary Bills of Divorce*, 904.
11. *Order by Justices for Judicial Separation*, 905.
12. *Effect of Decree*, 906.
13. *Variation of Settlements and Deeds*, 907.

IV. SEPARATION DEEDS AND AGREEMENTS, 910.

V. HUSBAND'S RIGHTS AND LIABILITIES, 913.

VI. CONTRACTS BETWEEN HUSBAND AND WIFE, 915.

VII. GIFTS TO HUSBAND AND WIFE, 916.

VIII. WIFE'S PROPERTY, RIGHTS AND LIABILITIES.

1. *Equity to a Settlement*, 917.
2. *Dower*, 919.
3. *Policies of Insurance*, 919.
4. *Separate Estate*.
 - a. What is—Creation of, 921.
 - b. Liability of, 925.
 - c. Proceedings against, 930.
 - d. Removing Restraint on Anticipation, 932.
5. *Maintenance by Husband*, 933.
6. *Other Property*, 935.
7. *Dealings with Property*.
 - a. Examination—Fines and Recoveries Act, 935.
 - b. In other cases, 937.

IX. ACTIONS AND PROCEEDINGS BY AND AGAINST MARRIED WOMEN, 940.

X. MARRIAGE SETTLEMENTS.

1. *What included in*.
 - a. After-acquired Property, 944.
 - b. In other Cases, 951.
2. *Construction*.
 - a. In General, 952.
 - b. Election, 960.
 - c. Forfeiture Clauses, 961.
3. *Enforcing Covenants*, 961.
4. *Rectification and Cancellation*, 962.
5. *Variation, after Decree for Divorce*. —See III. 13.
6. *Fraudulent in Bankruptcy*. —See BANKRUPTCY, XI. 3.
7. *Under 13 Eliz. c. 4, and 27 Eliz. c. 5*. —See FRAUD AND MISREPRESENTATION.
8. *Of Infants—Infants' Settlement Act*. —See INFANT.

I. MARRIAGE.

1. VALIDITY.

Domiciled Englishman, with Woman of Uncivilized Tribe, according to Native Custom.—A

union formed between a man and a woman in a foreign country, although it may there bear the name of marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom, and be in its essence "the voluntary union for life of one man and one woman to the exclusion of all others." *Bethell, In re, Bethell v. Hildyard*, 38 Ch. D. 220; 57 L. J., Ch. 487; 58 L. T. 674; 36 W. R. 503—Stirling, J.

C. B., whose domicile was English, in 1878 went to South Africa, and afterwards resided at Mafeking in Bechuanaland. In 1883 he went through the ceremony of marriage with T., a woman of the Baralong tribe, according to the customs of the tribe, among whom polygamy is allowed. C. B. and T. lived together as husband and wife. He was killed in the colony in 1884, and about ten days after his death T. gave birth to a female child. C. B., in a document which he wrote and signed in 1883, made some provision for T. and for a child out of the proceeds of sale of his property in the colony. He refused to be married to T. in a church on the ground that he was a Baralong. He never mentioned the marriage to any of his friends in England, and there was no evidence that he ever introduced or spoke of T. as his wife, but that he called her "that girl of mine." He was in receipt of about £600 a year, the rents of estates in England, devised to him for life with remainder to his lawful child or children:—Held, that the union of C. B. and T. was not a marriage in the Christian, but in the Baralong sense, and that it was not a valid marriage according to the law of England. *Id.*

2. PROOF AND EFFECT OF.

Proof of.]—Where a marriage is proved to have been solemnized de facto 110 years ago by people who intended that it should be a good marriage, and it is done bona fide and openly, the maxim omnia præsuntur rite esse acta applies. *Lauderdale Peerage, The*, 10 App. Cas. 692—H. L. (Sc.).

A., then ill of the malady of which he died, and two days before his death, was married in 1772 in New York to B. by C., an ordained clergyman of the Church of England, then assistant minister of Trinity Church, New York. There was produced, inter alia, in support of the marriage, from the custody of the family a certificate signed by C. that he had married A. and B. according to the rites of the Church of England as by law established, and an affidavit signed by the mayor of New York, to the effect that C. had made oath of the truth of the statements in the certificate; a will of date anterior to the marriage, by which A. left all his property to B. and the children then born; copies of letters showing that one of the executors wrote to his co-executor in England, a brother of A., stating that he was a witness to the ceremony of marriage; that B. signed herself in A.'s surname; that the children were recognised and taken care of by members of the family as A.'s children; and also War Office records showing that B. received a pension as A.'s widow:—Held, that there was ample proof of a legal marriage. *Id.*

Effect of—Severance of Joint Tenancy—Wife's Chose in Action.—Marriage does not operate as a severance of the wife's joint tenancy in a chose in action (Bank stock) which has not been reduced into possession by the husband. *Baillie v. Treharne* (17 Ch. D. 388) disapproved. *Butler's Trusts, In re, Hughes v. Anderson*, 38 Ch. D. 286; 57 L. J., Ch. 643; 59 L. T. 386; 36 W. R. 817—C. A.

3. BREACH OF PROMISE TO MARRY.

Action against Personal Representatives of Promisor—Survival of Cause of Action—Special Damage.—An action for breach of promise of marriage, where no special damage is alleged, does not survive against the personal representatives of the promisor. The special damage which would cause the right of action to survive must be damage to the property, and not to the person, of the promisee, and must be within the contemplation of both parties at the date of the promise, and the action can be brought against the executors for such special damage only and not for general damages. *Finlay v. Chirney*, 20 Q. B. D. 494; 57 L. J., Q. B. 247; 58 L. T. 664; 36 W. R. 534; 52 J. P. 324—C. A.

Action against Infant—Ratification.—The plaintiff and defendant, who were both under age, became engaged to be married in April, 1886. In September, 1886, the defendant came of age. In October, 1886, the plaintiff's father made an assignment of his property to his creditors, and immediately afterwards informed the defendant of the fact, and told him if he wished to be released from his engagement he could. The defendant then refused to be released, and said he was quite willing to marry the plaintiff, and asked her whether she thought they were old enough; to which the plaintiff replied they had better wait awhile. The defendant subsequently broke off the engagement, and refused to marry the plaintiff:—Held, that there was evidence to go to the jury that there had been a new promise to marry made by the defendant after he came of age. *Holmes v. Brierley*, 36 W. R. 795—C. A. Reversing 59 L. T. 70; 52 J. P. 711—D.

4. LEGITIMACY OF CHILDREN.

Evidence of Husband—Non-Access.—W., by will, bequeathed 1,500*l.* to trustees in trust for C., the wife of J., for life, and after her death to divide the same equally among the children of the marriage. J. deserted C., who subsequently cohabited with M., and during such cohabitation A. was born. On the death of C., A., an infant, by her next friend, applied for maintenance out of the fund, whereupon J. filed an affidavit denying the legitimacy of A. upon the ground, among others, of non-access to his wife:—Held, that this was not a "proceeding instituted in consequence of adultery" within the meaning of s. 3 of the Evidence Further Amendment Act, 1869, and therefore, the evidence of the husband as to non-access was not admissible. *Nottingham Guardians v. Tomkinson* (4 C. P. D. 343) followed. *Walker, In re, Jackson, In re*, 53 L. T. 660; 34 W. R. 95—Kay, J.

Statements by Wife as to Paternity.—Where the legitimacy of a child born in wedlock is in issue, previous statements by the mother that the child is a bastard are admissible as evidence of her conduct, although she could not be allowed to make such statements in the witness-box. *The Aylesford Peerage*, 11 App. Cas. 1—H. L. (E.).

Presumption—Duration of Pregnancy.—The presumption in favour of the legitimacy of a child born in wedlock is not a presumption *juris et de jure*, but may be rebutted by evidence, which must be clear and conclusive and not resting merely on a balance of probabilities. Thus in a suit for declaration of legitimacy where a child had been born 276 days after the last opportunity of intercourse between the husband and wife, and where there was evidence in the wife's conduct tending to show that she regarded the child as the offspring of her paramour, the president directed the jury that it was for them to say whether, on the whole of the evidence given on behalf of those who asserted illegitimacy, the conviction had been brought home to their minds that the husband was not the father of the child; and read to them the opinion of Lord Lyndhurst in *Morris v. Davies* (5 Cl. & F. 163). The jury found that the child was illegitimate:—Held, that the direction was right, and that the verdict was not against evidence. *Bosville v. Attorney-General*, 12 P. D. 177; 56 L. J., P. 97; 57 L. T. 88; 36 W. R. 79—D.

Inquiry as to—Variation of Settlements.—On a petition for variation of settlements after a decree of dissolution of marriage, the court refused to order an inquiry into the legitimacy of a child born between the date of the decree nisi and decree absolute. *Pryor v. Pryor*, 12 P. D. 165; 56 L. J., P. 77; 57 L. T. 533; 35 W. R. 349—Hannen, P.

Divorce from Lunatic—Suit to perpetuate Testimony.—A lunatic's wife was divorced for adultery, and it was alleged that the last child born before the divorce was illegitimate. The committee presented a petition for leave to prosecute a suit to perpetuate testimony as to the child's illegitimacy:—Held, that the proper course was for the court to direct a settlement of part of the lunatic's property on his children, so as to give the legitimate children an interest in the property which would entitle them to raise the question of the legitimacy of the child last born and bring a suit to perpetuate the testimony on the subject. *Stoer, In re*, 9 P. D. 120; 51 L. T. 141; 32 W. R. 1005—C. A.

5. SUITS FOR NULLITY.

Insanity—Onus of Proof.—The burden of showing that the respondent was insane at the time of the marriage lies upon the party asserting it, and the court has to determine whether the respondent was capable of understanding the nature of the contract, and the duties and responsibilities which it creates, and was free from the influence of morbid delusions upon the subject. *Durham v. Durham*, 10 P. D. 80—Hannen, P.

Impotence—Delay—Sincerity.—At the end of

seven years' cohabitation a marriage had not been consummated through the impotence of the alleged husband. The alleged wife subsequently cohabited with another man, and upon the alleged husband discovering her misconduct she instituted a suit for nullity of marriage against him, and he a suit for dissolution of marriage against her:—Held, that the proof of impotence being clear, her conduct did not show such a want of sincerity as to deprive her of her right to have the marriage annulled. When the impotence is undoubted mere delay is not sufficient to disentitle the injured party to relief. *M. (falsely called D.) v. D.*, 10 P. D. 75; 54 L. J., P. 68; 33 W. R. 657—Hannen, P.

In a suit for nullity of marriage on the ground of impotency, there may be facts and circumstances proved, which so plainly imply on the part of the complaining spouse a recognition of the existence and validity of the marriage, as to render it most inequitable, and contrary to public policy, that he or she should be permitted to go on to challenge it with effect; but the doctrine, designated as the "doctrine of want of sincerity" in an action of this kind, has been too much extended in recent English decisions, and that doctrine, apart from "approbate," and "reprobate," has never been recognised by the law of Scotland. *G. v. M.*, 10 App. Cas. 171; 53 L. T. 398—H. L. (Sc.).

Delay in raising a suit of nullity on the ground of impotency is a material element in the investigation of a case which, upon the facts, is doubtful; but there is no definite or absolute bar arising from it. *Id.*

— **Triennial Cohabitation.**—The canon law rule of triennial cohabitation has not been recognised in England beyond this point, that where a husband or a wife seek a decree of nullity propter impotentiam, if there is no more evidence than that they have for a period of three years lived together in the same house and with ordinary opportunities of intercourse, and it is clearly proved that there has been no consummation, then if that is the whole state of the evidence, inability on the part of the one or of the other will be presumed. On the other hand, the presumption to be drawn from the fact of non-consummation after three years' cohabitation is capable of being rebutted. And, also, every case need not be fortified with the presumption; for although no presumption can be raised from the absence of consummation within a less period than three years, yet positive evidence may be given, from which the same inference of inability may be drawn. *Id.*

— **Of Petitioner.**—An impotent man cannot maintain a nullity suit merely on the ground of his own impotency; but if a woman altogether repudiates the relation of wife and the obligations of the marriage contract, the impotent man may show that there is no verum matrimonium, and maintain such a suit. *A. v. A. (falsely called B.)* 19 L. R., Ir. 403—Mat.

— **Evidence — Marriage Voidable.**—A marriage was declared null and void on the ground of impotency, after cohabitation of little more than six months, on strong medical testimony. A marriage is not void but voidable only, on the ground of impotency. *Id.*

Duress—Mental Prostration—Incapacity to resist Coercion.—The petitioner, a young woman of twenty-two years of age, entitled to a sum of 26,000*l.* in actual possession and a considerable sum in reversion, had become engaged to the respondent, and shortly after coming of age was induced by him to accept bills to the amount of 3,325*l.* The persons who had discounted these bills subsequently issued writs against her, and threatened to make her a bankrupt. The distress caused by these threats seriously affected her health, and reduced her to a state of bodily and mental prostration, in which she was incapable of resisting coercion and threats, and being assured by the respondent that the only method of evading bankruptcy proceedings and exposure was to marry him, she reluctantly went through a ceremony of marriage with him at a registrar's office. In addition to other threats of ruining her, the respondent immediately before the ceremony threatened to shoot her, if she showed that she was not acting of her free will. The marriage was never consummated, and the petitioner and the respondent separated immediately after the ceremony:—Held, that there was not such a consent on the part of the petitioner as the law requires for the making of a contract of marriage, and that the ceremony before the registrar must be declared null and void. *Scott v. Sebright*, 12 P. D. 21; 56 L. J., P. 11; 57 L. T. 421; 35 W. R. 258—Butt, J.

Agreement not to sue—Consideration—Bar.—In a petition by husband against wife praying that the marriage celebrated between them might be declared null and void on the ground of her incapacity, the respondent pleaded that she and the petitioner after a year's cohabitation had agreed to live apart, and had bound themselves not to make any claim against each other either in a court of law or equity; and that if either party should break the agreement the other should be entitled to an injunction to restrain such breach. That it was further agreed that if the respondent committed a breach of the agreement the petitioner should be entitled to proceed in this court for a declaration of nullity. Averment that there had been no breach of the agreement on the part of the respondent:—Held, that the respondent's agreement not to sue was a sufficient consideration for the husband's engagement to do the like, and that such an agreement although not by deed was therefore a bar to the petition for declaration of nullity. *Aldridge v. Aldridge*, or *A. v. M.*, 13 P. D. 210; 58 L. J., P. 8; 59 L. T. 896; 37 W. R. 240—Hannen, P.

Interrogatories to Party — Jurisdiction of Divorce Division.—In a suit for nullity of marriage the court has power to order interrogatories. *Euston v. Smith*, 9 P. D. 57; 32 W. R. 596—Hannen, P.

In a suit for nullity of marriage, the court has power to give leave to administer interrogatories between the parties to the suit; for suits of that kind were formerly within the jurisdiction of the ecclesiastical courts, which had power to allow interrogatories to be administered between the parties, and now all the jurisdiction of the ecclesiastical courts as to suits for nullity of marriage (including matters of practice and procedure) is vested in the Probate, Divorce, and Admiralty Division. And, further, even if

the power to allow interrogatories to be administered between the parties did not otherwise exist, it would be conferred upon the Probate, Divorce, and Admiralty Division by the Supreme Court of Judicature Act, 1873; for at the time of passing that statute the superior courts of common law and the Court of Chancery had power to allow interrogatories to be administered between the parties to a suit; and by s. 16, all the jurisdiction of those courts, including the ministerial powers and authorities incident thereto, was transferred to and vested in the High Court of Justice, and by s. 23 the jurisdiction transferred to the High Court may (so far as regards procedure and practice) be exercised in the same manner as it might have been exercised by any of the courts whose jurisdiction has been transferred. *Harvey v. Lovelock*, 10 P. D. 122; 54 L. J., P. 1; 33 W. R. 188—C. A.

— **Application to whom made.**—Semble, that inasmuch as proceedings for divorce and for other matrimonial causes are excluded from the operation of the rules of the Supreme Court, 1883, by Ord. LXVIII. r. 1 (*d*), an application for leave to administer interrogatories between the parties to a suit ought not to be made to a registrar of the Divorce Division; but it ought to be made in the first instance to one of the judges of the court. *Id.*

Cross Suits for Nullity and Dissolution—Cross-examination.—The parties had presented cross suits, one for nullity of marriage on the ground of the man's impotence, the other for dissolution on the ground of the woman's adultery:—Held, in the course of the nullity suit that the woman might be cross-examined as to her adultery with the co-respondent in the dissolution suit. *M. (falsely called D.) v. D.*, 10 P. D. 175; 34 W. R. 48—Hannen, P.

Alimony—Decree Nisi.—In a suit for nullity alimony continues payable after the decree nisi until the decree is made absolute. *S. (falsely called B.) v. B.*, 9 P. D. 80; 53 L. J., P. 63; 32 W. R. 756—Hannen, P.

Provision for Children—Postponement of making Decree Absolute.—A decree nisi was made declaring a de facto marriage void, as not having been solemnized according to law. Shortly before the expiration of the period of six months, a petition was presented for a provision for the child of the marriage. On a motion to make the decree absolute, the court held that a provision for the child ought to be inserted in the final decree, and refused to make the decree absolute until materials were furnished for deciding what provision ought to be made:—Held, on appeal, that under 23 & 24 Vict. c. 144, s. 7, there is no absolute right to have a decree made absolute at the end of the six months, and that although the judge might have made a provision after the decree absolute, he had jurisdiction to suspend the making the decree absolute for the purpose of inserting in it the provision which he considered necessary, and the court would not interfere with his discretion, there being nothing to show that he had exercised it unreasonably. The act 20 & 21 Vict. c. 85, s. 35, enables the court to order a provision to be made for the children of a marriage which the court has declared to be void. *Langworthy v. Langworthy*,

11 P. D. 85; 55 L. J., P. 33; 54 L. T. 776; 34 W. R. 356—C. A.

Variation of Settlements—Re-transfer of Property.—After a decree declaring a marriage null, the court upon a petition for variation of settlements, made an order that the property brought into settlement should be reconveyed to the parties, in the proportion in which they had respectively contributed to the settled fund, and freed from all the trusts of the settlement. *A. (falsely called M.) v. M.* (10 P. D. 178), followed. *Leeds v. Leeds*, 57 L. T. 373—Butt, J.

By a settlement executed in contemplation of marriage, certain property belonging absolutely to the wife was assigned to trustees upon trust for the wife till the solemnisation of the marriage, and after the solemnisation thereof to pay the income to the wife for her separate use, and after her death to pay the income, with certain exceptions, to the husband for life, and after the death of the husband and wife, in trust for the issue of the marriage, and in default of issue to such persons as the wife should appoint, and in default of appointment for the next-of-kin of the wife. The wife obtained a decree declaring the marriage null and void on the ground of her husband's impotence, and afterwards presented a petition for variation of the marriage settlements. The court made an order extinguishing the husband's life interest under the settlements, and afterwards made a further order directing the trustees to retransfer or otherwise put under the petitioner's legal control all the property brought into settlement, for her own use and benefit, free from the trusts of the settlements. *A. (falsely called M.) v. M.*, 10 P. D. 178; 54 L. J., P. 31; 33 W. R. 232—Butt, J.

II. RESTITUTION OF CONJUGAL RIGHTS.

Notice or Demand prior to Citation—Form of Notice.—The written demand for cohabitation and restitution of conjugal rights required to be made before commencing proceedings upon the party to be cited need not be made by the petitioner himself, and therefore where it was made by the petitioner's solicitor at the petitioner's request, such demand is sufficient. Though no hard and fast rule can be laid down as to the form of such demand, yet, as a general rule the demand should be conciliatory in its tenour, and therefore where there had been no previous friendly negotiations on the subject, a demand for the restitution of conjugal rights couched in the form of a formal lawyer's letter, is not a compliance with the true meaning of r. 175 of the Rules in Divorce Causes. *Field v. Field*, 14 P. D. 26; 53 L. J., P. 21; 59 L. T. 880; 37 W. R. 134—C. A.

Service of Petition.—The court has no power to allow service abroad of a petition for restitution of conjugal rights. *Chichester v. Chichester*, 10 P. D. 186; 34 W. R. 65—Hannen, P.

Decree for Restitution—Sufficient Obedience.—The duty of the court to issue an attachment for non-obedience of a decree for restitution of conjugal rights is the same since the Divorce Acts as it was before. It is not a sufficient compliance by a husband with a decree for

restitution of conjugal rights that he has provided his wife with a suitable establishment and sufficient income. *Weldon v. Weldon*, 9 P. D. 52; 53 L. J., P. 9; 32 W. R. 231—D. See, now, 47 & 48 Vict. c. 68.

Disobedience to Order—Contempt—Attachment.—A respondent being in contempt for non-obedience of an order for restitution of conjugal rights, the petitioner applied for a writ of attachment against him:—Held, that since the passing of the Matrimonial Causes Act, 1884, the writ could not be issued notwithstanding that the contempt existed prior to that act:—Held, also, that the writ could not issue for non-payment of costs. *Weldon v. Weldon*, 54 L. J., P. 60; 52 L. T. 233; 33 W. R. 427; 49 J. P. 517—C. A. Affirming 10 P. D. 72—Hannen, P.

Neglect to comply with Decree—Judicial Separation.—Where a husband had refused to comply with a decree ordering him to resume cohabitation within fourteen days of the service thereof, the court, under the 5th section of the Matrimonial Causes Act of 1884, granted a decree of judicial separation, although the period of two years had not elapsed. *Harding v. Harding*, 11 P. D. 111; 55 L. J., P. 59; 56 L. T. 919—Hannen, P.

Effect of non-compliance with Order—Equivalent to Desertion.—See *Bigwood v. Bigwood*, post, col. 892.

Effect of Separation Deed—Covenant not to Sue.—A separation deed, executed by a husband and wife, containing a covenant by trustees for the wife not to sue her husband for the restitution of conjugal rights, is a bar to a suit by the wife for the restitution of conjugal rights. *Marshall v. Marshall* (5 P. D. 19), approved. *Clark v. Clark*, 10 P. D. 188; 54 L. J., P. 57; 52 L. T. 234; 33 W. R. 405; 49 J. P. 516—C. A.

The parties in a suit for restitution of conjugal rights had been living apart under a deed of separation by which the wife covenanted not to take any proceedings to compel her husband to cohabit with her. The husband, who had not fulfilled his covenant to pay his wife 200*l.* a year, did not appear in the suit. The court notwithstanding the covenant in the deed, granted the wife a decree of restitution. *Tress v. Tress*, 12 P. D. 128; 56 L. J., P. 93; 57 L. T. 501; 35 W. R. 672; 51 J. P. 504—Hannen, P.

Custody of Child—Service of Order—Disobedience.—A husband obtained a decree for restitution of conjugal rights, which was not complied with, and the court afterwards made an order giving the petitioner the custody of the only child of the marriage. A copy of the order for custody was left at the house where the respondent was residing, but the respondent had not given up the child to the petitioner. The court, being satisfied that the order as to the custody of the child had come to the knowledge of the respondent, ordered a writ of sequestration to issue against her for non-compliance with the order, without a previous writ of attachment, and ordered the respondent to pay the costs of the motion. *Allen v. Allen*, 10 P. D. 187; 54 L. J., P. 77; 33 W. R. 826—Hannen, P. See, also, *Hyde v. Hyde*, post, col. 903.

Misconduct of Wife—Effect of Violence and Threats.—Violent and uncontrollable temper, habitual intemperance, violent conduct in the presence of the husband's guests, assaults on him, acts or threats of violence and offensive language, and false and scandalous statements against his daughters, by which he was obliged to remove them from his house, acts of violence towards his servants—all tending to affect his health and social position—constitute a legal defence to a suit by a wife for restitution of conjugal rights. The court accordingly refused to set aside and amend the respondent's answer pleading them, as vague, irrelevant, and raising immaterial issues, but ordered the respondent to give particulars of the alleged violence, &c. Cruelty may consist of the aggregate of acts alleged in a pleading, and each paragraph need not allege an independent act of legal cruelty, sufficient in itself to warrant the relief sought. *D'Arcy v. D'Arcy*, 19 L. R., Ir. 369—Mat.

III. JUDICIAL SEPARATION AND DIVORCE.

1. CRUELTY.

Condonation—Revival.—A wife, who had suffered such acts of cruelty from her husband as would probably have been sufficient to enable her to have then obtained a decree for judicial separation, returned to his house and lived with him for five years, during which time he treated her with continual unkindness, though he never struck her. His wife was eventually so terrified by his conduct that she finally left her husband:—Held, that even if these later acts did not amount to legal cruelty, they did nevertheless constitute such a revival of the earlier cruelty as to warrant the court in pronouncing a decree for judicial separation. *Mytton v. Mytton*, 11 P. D. 141; 57 L. T. 92; 35 W. R. 368; 50 J. P. 488—Butt, J.

2. DESERTION.

What amounts to.]—A husband, in 1880, ceased to reside with his wife on the pretence that his business compelled him to be absent, but he supplied her with necessaries and corresponded with her and visited her occasionally, and a child was born in February, 1884. In January, 1884, the wife discovered that he had for two years been living with another woman:—Held, that his conduct did not amount to desertion for two years. *Farmer v. Farmer*, 9 P. D. 245; 53 L. J., P. 113; 33 W. R. 169—Hannen, P.

Seemingly, that desertion commenced from the time when his wife discovered the adultery, and that after a lapse of two years from that time she would be entitled to a dissolution of her marriage. *Id.*

At the trial of a petition by the wife for divorce from her husband on the ground of adultery and desertion, it appeared that they were married in 1866, and that after four years' cohabitation it was agreed between them, on the husband falling into difficulties, that a house and shop should be taken for the wife, and that she should carry on business in a separate name. From this time the parties had never lived together, though the husband

occasionally visited his wife, and slept with her, and he made her an allowance. His visits were always as far as possible made in secret, and though his wife remonstrated, he refused to recommence open and avowed cohabitation. In 1885 the wife had reason to suspect that her husband was carrying on adulterous intercourse, and she never afterwards cohabited with him. In 1888 she obtained positive proof of his adultery, and thereupon commenced the present suit:—Held, that in the circumstances there was sufficient evidence of desertion for two years without reasonable cause by the husband. *Garcia v. Garcia*, 13 P. D. 216; 57 L. J., P. 101; 59 L. T. 524; 52 J. P. 584—Butt, J.

— **Husband sentenced to Penal Servitude.]**

In a wife's suit for dissolution on the ground of adultery and desertion, it appeared that the respondent when he left his wife stated to her that he was going to Ireland for a week's shooting, but in fact he went to Australia to escape arrest on a charge of embezzlement. Up to the time of his flight he had been carrying on an adulterous intercourse with a woman with whom he had made arrangements to go away, and he was found living in adultery with another woman at Sydney. Subsequently he was brought back to this country in custody, tried, and sentenced to ten years' penal servitude:—Held, that the circumstances under which the respondent left his wife constituted desertion, and that the desertion would continue notwithstanding the fact that he was brought back to this country in custody and prevented by his imprisonment from returning to his wife. *Drew v. Drew*, 13 P. D. 97; 57 L. J., P. 64; 58 L. T. 923; 36 W. R. 927—Hannen, P.

— **Husband's want of Means—Mutual Separation—Correspondence.]**

A husband and wife agreed to separate owing to the husband's inability to maintain his wife. They continued to correspond, and numerous letters passed between them, in some of which the husband taunted his wife with not getting a divorce, and said it was cruel of her and her friends to "fetter" him. He also made frequent requests for pecuniary assistance. The wife offered to return to her husband, when he informed her in one of his letters that he was ill; but he wrote and refused her. The husband's letters ceased in July, 1885. The wife wrote four times in answer to the last letter from him, but received no reply. She subsequently made inquiries and discovered that, while the correspondence had been going on and since it ceased, the respondent had been residing at various places and keeping up an adulterous connexion, and that he was living under his mother's roof with a woman who was not his wife:—Held, that this conduct constituted desertion, and, coupled with the adultery, entitled the wife to a decree of divorce. *Smith v. Smith*, 58 L. T. 639—Hannen, P.

— **Decree for Restitution of Conjugal Rights—Refusal to Obey—Adultery revived.]**

In a petition by a wife for divorce on the ground of adultery and desertion it appeared that the husband had failed to comply with a decree for restitution of conjugal rights, and that he had also been guilty of adultery before the date of the decree:—Held, that sufficient proof of

adultery and desertion had been given to satisfy s. 5 of the Matrimonial Causes Act, 1884, and that the wife was entitled to a decree for divorce. *Bigwood v. Bigwood*, 13 P. D. 89; 57 L. J., P. 80; 58 L. T. 642; 36 W. R. 928—Hannen, P. See also *Harding v. Harding*, ante, col. 889.

Proof insufficient—Adjournment—Supplemental Petition.]

In a suit by the wife for dissolution of the marriage on the ground of adultery coupled with desertion, the adultery was proved, but the evidence of desertion fell short of the required period of two years by several months. The hearing was adjourned, and twelve months afterwards the respondent not having returned to cohabitation, the petitioner filed a supplemental petition charging desertion, on proof of which the court granted a decree nisi. *Wood v. Wood*, 13 P. D. 22; 57 L. J., P. 48—Hannen, P.

Petition filed before Cause of Action complete.]

Where the statutory period of two years necessary to found a charge of desertion is not complete at the time when proceedings for divorce are commenced, such charge can only be pleaded and acted upon by being made the subject of a fresh petition. *Lapington v. Lapington*, 14 P. D. 21; 58 L. J., P. 26; 59 L. T. 608; 37 W. R. 384; 52 J. P. 727—Butt, J.

3. BARS TO.

Condonation of Adultery—Scotch Law.]

By the law of Scotland full condonation of adultery (remission expressly or by implication in full knowledge of the acts forgiven), followed by cohabitation as man and wife, is a remission *injuris absolute* and unconditional, and affords an absolute bar to any action of divorce founded on the condoned acts of adultery. Nor can condonation of adultery—cohabitation following—be made conditional by any arrangement between the spouses. Although the condoned adultery cannot be founded on, condonation does not extinguish the guilty acts entirely, and they may be proved so far as they tend to throw light upon charges of adultery posterior to the condonation. The doctrine laid down in *Durant v. Durant* (1 Hagg. Ecc. Rep. at p. 761) not approved without qualification. *Dent v. Dent* (4 Sw. & Tr. 106), direction of Lord Penzance to the jury, questioned on principle, and distinguished from *Blandford v. Blandford* (8 P. D. 19). *Collins v. Collins*, 9 App. Cas. 205; 32 W. R. 500—H. L. (Sc.).

A wife confessed to several acts of adultery with E. Her husband forgave her and resumed cohabitation on the alleged condition that she should not speak or hold any communication with E. again. Subsequently she met E. by appointment several times under suspicious circumstances; but, admittedly, no act of adultery could be proved. The husband sued for a dissolution of the marriage on the ground that the condoned adultery was revived by the wife's subsequent conduct:—Held, that to obtain a divorce he must prove adultery subsequent to the condonation, and no less. *Id.*

See Lord Watson's opinion, for the terms of a remission of adultery which would not

constitute plena condonatio in the law of Scotland. *Ib.*

Revival of Adultery.]—Per Lord Blackburn :—The doctrine of revival of adultery as a ground on which a divorce has been granted is to be strongly objected to as varying the status of married persons. On principle, a reconciliation being entered into with full knowledge of the guilt and with free and deliberate intention to forgive it, where that reconciliation is followed by living together as man and wife, the status of the couple ought to be the same and not more precarious than if there was a new marriage. *Ib.*

Per Lord Blackburn :—Assuming it to be now established English law that any matrimonial offence, though forgiven, may be revived by any other matrimonial offence of which the courts take cognizance, it is very modern law, and not so obviously just and expedient that this House ought to infer that it either was or ought to have been introduced into the law of Scotland. *Ib.* See *Bigwood v. Bigwood*, supra.

Revival of Cruelty.]—See *Mytton v. Mytton*, ante, col. 890.

Adultery of Petitioner—Condonation—Discretionary Bar.]—In a suit by the husband for divorce on the ground of his wife's adultery with the co-respondent, the jury found that the wife and the co-respondent had committed adultery, and assessed the damages at 300*l.* The wife in her answer made a counter-charge of adultery committed by her husband, in the house in which he resided with his wife, with a domestic servant in their employment five years before. The husband admitted the charge, but pleaded and proved that his wife had condoned the offence and continued to live with him :—Held, that under the circumstances the husband's adultery disentitled him to a decree, and his petition being accordingly dismissed, that he was not entitled to the damages. *Storey v. Storey*, 12 P. D. 196 ; 57 L. J., P. 15 ; 57 L. T. 536 ; 36 W. R. 190 ; 51 J. P. 680—Hannen, P.

In a husband's suit for dissolution, the wife's adultery was proved, and the husband confessed to an act of adultery in the year 1874, which he alleged had been committed under the influence of liquor, and which had been condoned by the wife :—Held, that the petition must be dismissed. *Grosvenor v. Grosvenor*, 34 W. R. 140—Butt, J.

— Husband found guilty of Cruelty—Right of Wife to Relief.]—A judicial separation can only be granted where the petitioner comes to the court with a pure character, and is free from all matrimonial misconduct. Accordingly, where a husband and wife had both been found guilty of adultery, and the husband had also been found guilty of cruelty :—Held, that the Court had no jurisdiction to make a decree of judicial separation on the ground of such cruelty, however aggravated its character might be. *Drummond v. Drummond* (30 L. J., P. 177) approved. *Otway v. Otway*, 13 P. D. 141 ; 57 L. J., P. 81 ; 59 L. T. 153—C. A.

A husband obtained a decree nisi by reason of his wife's adultery, but the decree was rescinded, and his petition dismissed by reason of his cruelty and adultery. The parties lived together again, and he committed other acts of cruelty, and was

also guilty of rape, when the wife filed a petition for dissolution of the marriage. The court under the circumstances granted the wife a decree nisi. *Collins v. Collins*, 9 P. D. 231 ; 53 L. J., P. 116 ; 33 W. R. 170—Butt, J.

Conduct conducing to Adultery—Delay.]—In a suit by the husband for divorce on the ground of adultery, which was not defended, the husband admitted that on his wife becoming addicted to habits of intoxication he left her, after eleven years of cohabitation, broke up his home and sold his furniture with the intention of getting rid of her. He made her no allowance and never saw her until eight years after the separation, when he met her by accident. Five years after that meeting he filed the petition. The adultery was proved :—Held, that the conduct of the husband disentitled him to a divorce, and that the petition must be dismissed. *Heyes v. Heyes*, 36 W. R. 527—D. Affirming, 13 P. D. 11 ; 57 L. J., P. 22 ; 57 L. T. 815 ; 51 J. P. 775—Butt, J.

The parties to a marriage separated by mutual consent after a few days' cohabitation, and lived apart for sixteen years. The petitioner allowed his wife a small sum monthly, but never saw her. Subsequently he ascertained that she was living in adultery, and instituted a suit for dissolution ; but the court held that he had been guilty of conduct conducing to the adultery, and dismissed the petition. *Hawkins v. Hawkins*, 10 P. D. 177 ; 54 L. J., P. 94 ; 34 W. R. 47—Hannen, P.

Separation Deed—No Covenant not to Sue.]—See *Moore v. Moore*, post, col. 910.

4. JURISDICTION.

Of English Courts.]—See INTERNATIONAL LAW, III.

5. PROCEDURE AND PRACTICE.

Affidavit verifying Petition—Petitioner absent.]—The court will not allow the affidavit verifying a petition for divorce to be sworn by another person when the petitioner is absent from the country of his own free will. *Bruce, Ex parte* (6 P. D. 16), distinguished. *Taritt, Ex parte*, 34 W. R. 368—Butt, J.

Security for Costs—Attachment.]—The provisions of the Debtors Act, 1869, do not apply to a case where a party has been ordered to find security for costs, and disobedience of the order is a contempt of court to be enforced by attachment. *Lynch v. Lynch*, 10 P. D. 183 ; 54 L. J., P. 93 ; 34 W. R. 47—Hannen, P.

Cruelty—General Charge—Particulars.]—Evidence of an act of actual violence is not admissible where only a general allegation of cruelty has been made in a petition. Where evidence was offered that the husband had struck his wife a blow, and no such specific charge had been made in the petition, the court allowed the hearing to be adjourned in order that particulars might be furnished. *Brook v. Brook*, 12 P. D. 19 ; 56 L. J., P. 108 ; 57 L. T. 425 ; 35 W. R. 351—Butt, J.

Proof of Identity of Co-respondent—Unde-fended Action.]—In undefended divorce actions the co-respondent must at the trial be proved to be the person served with the citation, unless an order has been obtained for leave to proceed without making a co-respondent. *Duff v. Duff*, 58 L. T. 389; 52 J. P. 232—Butt, J.

Damages against a Co-respondent—Principle of Assessment.]—In assessing damages against a co-respondent the jury is not to seek to punish him, but is only to give compensation for the loss which the husband has sustained, and is to consider whether this loss has been caused by the action of the co-respondent. In a case where the wife has not been seduced away from the husband by the co-respondent, the jury must take into consideration the conduct of the husband and the protection or assistance which he may have afforded to her after the separation. The means of the co-respondent are not in any way to be considered as a measure of damages. *Keyse v. Keyse*, 11 P. D. 100; 55 L. J., P. 54; 34 W. R. 791—Hannen, P.

— Condonation.]—Condonation of the wife's adultery is no answer to the husband's claim for damages against the co-respondent. *Norris v. Norris* (4 Sw. & Tr. 237) distinguished. *Pomero v. Pomero*, 10 P. D. 174; 54 L. J., P. 93; 34 W. R. 124—Butt, J.

— Where Petition dismissed.]—See *Storey v. Storey*, ante, col. 893.

— Order to pay into Court—Attachment.]—A co-respondent disobeyed the order of the court to pay into the registry the damages which had been found against him, and as there was no one to institute proceedings against him under the Debtors Act, 1869, the court ordered the damages to be paid to the petitioner, he undertaking to pay them into court. *Gyte v. Gyte*, 10 P. D. 185; 34 W. R. 47—Hannen, P. See next case.

— Receiving Order—"Judgment Creditor"—Order for Payment to Husband.]—In a divorce suit by a husband a decree for dissolution of the marriage was made whereby F., the co-respondent, was ordered to pay into court the amount of damages assessed by the jury. A further order was made that F. should pay the money to the husband for the purposes of settlement upon the children of the marriage. F. failed to pay, whereupon the husband applied to the judge in bankruptcy for a committal order under s. 5 of the Debtors Act, 1869. F. had means sufficient to pay part only of the money. The judge, acting under s. 103, sub-s. 5, of the Bankruptcy Act, 1883, made a receiving order in lieu of an order for committal:—Held, that the judge had no jurisdiction to make the order, inasmuch as the husband, being a mere receiver or collector for the court of money not to be applied for his own benefit, was not a "judgment creditor" within the meaning of s. 103, sub-s. 5, of the Bankruptcy Act, 1883; but that an order should be made against F., under s. 5 of the Debtors Act, 1869, for payment of the money by instalments. *Fryer, Ex parte, Fryer, In re*, 17 Q. B. D. 718; 55 L. J., Q. B. 478; 55 L. T. 276; 34 W. R. 766; 3 M. B. R. 231—C. A.

Execution of Deed by Person nominated by

the Court.]—The jurisdiction given by the Judicature Act, 1884, s. 14, where any person neglects or refuses to comply with an order directing him to execute any instrument, to order the execution of the instrument by some person, nominated by the court to do so, may be exercised by the Probate Division of the High Court of Justice; and the order may be made upon a motion for attachment for non-compliance without formal service of a fresh notice of motion, provided the person to be affected by the order has by himself or his solicitor received notice that the application to the court will be made in the alternative form. *Howarth v. Howarth*, 11 P. D. 95; 55 L. J., P. 49; 55 L. T. 303; 34 W. R. 633—C. A. Affirming 50 J. P. 376—Hannen, P.

Attachment—Substituted Service.]—In the Probate Division when personal service of notice of motion to attach for non-compliance with an order cannot be effected, and the original order has been duly served, substituted service by analogy to the practice in the other divisions of the High Court, is sufficient. *Ib.*

— Contempt of Court—Publication of Advertisements.]—A co-respondent in a suit for divorce, immediately after the service of the citation, caused advertisements to be published denying the charges made in the petition, and offering a reward for information which would lead to the discovery and conviction of the authors of them:—Held, that these advertisements constituted a contempt of court. *Brodrick v. Brodrick*, 11 P. D. 66; 55 L. J., P. 47; 56 L. T. 672; 34 W. R. 580; 50 J. P. 407—Hannen, P.

In a suit for divorce on the wife's petition on the grounds of adultery and cruelty, the husband caused to be printed and published about the district in which the wife and her family resided a notice purporting to be signed by him, offering a reward of 25*l.* for evidence of the confinement of a young married woman of a female child, "probably not registered":—Held, that this was a contempt of court as tending to prejudice the petitioner, and discrediting her in the assertion of her rights, and a writ of attachment ordered to issue. *Pool v. Sacheverel* (1 P. Wm. 675) questioned. *Butler v. Butler*, 13 P. D. 73; 57 L. J., P. 42; 58 L. T. 563—Butt, J.

Decree Nisi—Rescission—Reconciliation.]—In a suit for dissolution at the instance of the wife, a decree nisi had been pronounced, but subsequently the parties came together again, and on the wife's application the decree nisi was rescinded on proof that notice had been given to the husband. *Troward v. Troward*, 32 W. R. 864—Butt, J.

— Death of Petitioner after—Revivor.]—A husband who had obtained a decree nisi for dissolution of his marriage died before the time for making it absolute had arrived:—Held, that the legal personal representative of the husband could not revive the suit for the purpose of applying to make the decree absolute. *Stanhope v. Stanhope*, 11 P. D. 103; 55 L. J., P. 36; 54 L. T. 906; 34 W. R. 446; 50 J. P. 276—C. A.

Rehearing.]—By r. 62 of the Rules in Divorce

and Matrimonial Causes, an application for the rehearing of a cause should be made to a divisional court. *Heyes v. Heyes*, 36 W. R. 527—D.

New Trial—Misdirection—Grounds in Notice of Motion.]—Ord. XXXIX. r. 3—which requires that when a new trial is applied for on the ground of misdirection the particulars of the alleged misdirection should be specifically stated in the notice—is applicable to proceedings in a divorce suit. *Murfett v. Smith* (12 P. D. 116), followed. *Taplin v. Taplin*, 13 P. D. 100; 57 L. J., P. 79; 53 L. T. 925; 37 W. R. 256; 52 J. P. 406—D.

— When Granted.]—Whether the rules as to granting a new trial on the ground of fresh evidence discovered showing misconduct in the petitioner are the same as in a case between ordinary litigants, quære. *Howarth v. Howarth*, 9 P. D. 219; 51 L. T. 872—C. A.

— Time for Appealing.]—An appeal from a decision of a judge of the Probate Division granting or refusing a new trial in the Divorce Court must be made within 14 days in accordance with the Divorce Court Act, 1860 (23 & 24 Vict. c. 144), s. 2. *Ahier v. Ahier*, 10 P. D. 110; 54 L. J., P. 70; 52 L. T. 744; 33 W. R. 770—C. A.

The court has no power to extend the time for appealing limited by statute. *Ib.*

Appeal—Court of Appeal to House of Lords—Time.]—Since the Judicature Act of 1881, an appeal to the House of Lords in a matrimonial cause (where an appeal lies) can only be from a decision of the Court of Appeal; and such an appeal must be brought within one month after the decision appealed against is pronounced by the Court of Appeal, if the House of Lords is then sitting, or if not, within fourteen days after the House of Lords next sits. *Cleaver v. Cleaver*, 9 App. Cas. 631—H. L. (E.)

6. INTERVENTION OF QUEEN'S PROCTOR AND OTHERS.

In what Cases—"Material facts not brought before the Court."]—A wife sued for dissolution of marriage on the ground of adultery and cruelty. The husband alleged that the wife had been guilty of adultery. At the trial a decree nisi for dissolution was made. The husband applied for a new trial on the ground that fresh evidence had been discovered to show the wife's adultery before the decree nisi, and filed affidavits alleging facts not known at the trial which went to prove adultery. He obtained a rule nisi, but the rule was discharged on argument. The husband appealed. Immediately afterwards an uncle of the husband entered an appearance as intervener, and filed affidavits which were substantially the same as those used on the application for a new trial. There was nothing to show that he was acting on behalf of or in collusion with the respondent. The wife moved to make the decree for dissolution absolute. This was refused, but leave was given her to move the court to reject the intervention. The husband abandoned his appeal from the refusal of a new trial. After this the motion of the wife to reject the inter-

vention of the uncle was heard by the president and refused. The wife appealed:—Held, by the Court of Appeal, that the act 23 & 24 Vict. c. 144, s. 7, authorises intervention by any person where material facts have not been brought before the court, whether by intention or through accident. Whether, where the petitioner, after the decree nisi, is guilty of conduct disentitling him or her to have the decree made absolute, the right to intervene is confined to the Queen's proctor, quære. *Howarth v. Howarth*, 9 P. D. 219; 51 L. T. 872—C. A.

The words "not brought before the court" mean, not brought before the court at a time when the court can act upon them for the purpose of seeing whether a decree nisi ought to be made, and that the bringing them before the court on an application for a new trial is not bringing them before the court within the meaning of this clause, so as to prevent an intervention. *Ib.*

Where a respondent is not entitled to a new trial, intervention on the ground of fresh evidence as to acts prior to the decree nisi will not be allowed if the intervener is merely acting on behalf of and in collusion with the respondent; but the fact that he is a near relative of the respondent is no ground for rejecting the intervention:—Held, therefore, that in the present case, the facts alleged being undoubtedly material, and the affidavits making a case which showed that there was ground for investigating them, the intervention had rightly been allowed. *Ib.*

— Queen's Proctor.]—In a husband's petition for dissolution of marriage, where specific charges of adultery have been investigated and decided in the affirmative, the Queen's Proctor is entitled to intervene for the purpose of showing that the finding is wrong, by reason of material facts not having been brought to the knowledge of the court. *Crawford v. Crawford*, 11 P. D. 150; 35 W. R. 31—Hannen, P.

Where specific charges of adultery have been investigated and decided in the affirmative, the Queen's Proctor is entitled to intervene for the purpose of showing that the finding ought to have been the other way, in consequence of material facts not having been brought before the court; and if he comes to the conclusion, from material facts brought to his notice, that a decree nisi has been obtained contrary to justice, it is his duty to bring such facts to the knowledge of the court. *Crawford v. Crawford*, 55 L. J., P. 42; 55 L. T. 304; 34 W. R. 677—C. A.

Restoration of Co-respondent to Suit.]—At the trial of a husband's petition for a dissolution of marriage the petitioner deposed to a confession made to him by his wife of the commission of adultery with the co-respondent. The judge granted a decree nisi, but held that there was no evidence against the co-respondent, who was dismissed from the suit, with costs. The co-respondent was not called to disprove the charges of adultery. The Queen's Proctor afterwards entered an appearance and filed a plea, alleging that the decree was pronounced contrary to the justice of the case by reason of material facts not being brought before the court; that certain witnesses who were known

by both parties to be in court, and whose evidence was material, were not called; and that, apart from the alleged confession by the respondent, there was no evidence of adultery:—The court refused to strike out the Queen's Proctor's plea, and also refused leave to the respondent and the co-respondent to appear on the rehearing of the suit. *Ib.*

Pleading.—It is sufficient for the Queen's Proctor to allege in his plea that the decree was pronounced contrary to the justice of the case by reason of material facts not being brought to the knowledge of the court. *Crawford v. Crawford*, 11 P. D. 150; 35 W. R. 31—Hannen, P.

Costs of Queen's Proctor as against Co-respondent.—See *Blackhall v. Blackhall*, *infra*.

7. COSTS.

Wife's Petition—Security for Costs.—Where the wife had, prior to the hearing, obtained an order under Rule 126 for a reference to the Taxing-master to fix a sum to be lodged in court, or secured by the husband, to cover her costs of the trial; but her solicitor took no steps to have the order carried out, and proceeded to trial without any sum being lodged or secured:—Held, that if the wife failed to establish her case, she was not entitled to costs against her husband. *Carnegie v. Carnegie*, 15 L. R., 1r. 513—Mat.

At the hearing of a suit for divorce preferred by the wife, the charges of cruelty were withdrawn, and those of adultery were not proved and the petition was accordingly dismissed. No order had been made upon the husband to secure any sum for his wife's costs. The court refused to order the respondent to pay the costs of the petitioner. *Thompson v. Thompson*, 57 L. T. 374—Butt, J.

Adultery proved—Appeal.—A husband and wife who were married before 1882, presented cross petitions for dissolution of marriage, the wife's petition being presented before that of her husband. They were both found guilty of adultery, and the husband was also found guilty of cruelty of an aggravated character. The judge refused to decree dissolution of marriage, but granted the wife a decree for judicial separation, and gave her her costs. The husband having appealed, the Court of Appeal discharged the order for judicial separation:—Held, that the wife was entitled, notwithstanding her adultery, to her costs both in the court below and on the appeal. *Semble*:—If the wife had been herself the appellant, and had been unsuccessful, she would not have had her costs of the appeal. *Otway v. Otway*, 13 P. D. 141; 57 L. J., P. 81; 59 L. T. 153—C. A.

Husband's Petition — Order against Guilty Wife.—On a husband's petition a decree was pronounced on account of the wife's adultery with costs against the co-respondent. It was proved that the wife was possessed of separate property and an order was made against the wife for the costs of the suit. *Millward v. Millward*, 57 L. T. 569; 51 J. P. 616—Hannen, P.

The court has absolute discretion to make such order as to costs as to it may seem just, and will not enquire whether at the time the wife committed the wrongful act, she had or had not any separate estate, but will only consider what is just at the time when it has to arrive at a decision; if the court finds that at that time there is property of the guilty wife upon which an order for costs, if made, can operate, the guilty wife, like any other unsuccessful litigant, will be condemned in costs. *Hyde v. Hyde*, 59 L. T. 523—Hannen, P.

— Notice of Application.—Where on a husband's petition for divorce, application was made to condemn the wife, who had not appeared to defend the suit, in costs, the court declined to entertain the application until she had received notice of it. *Field v. Field*, 13 P. D. 23; 58 L. T. 90; 36 W. R. 720; 52 J. P. 56—Hannen, P.

Against Co-respondent—Queen's Proctor.—The court refused to condemn a co-respondent, who had not been dismissed from the suit, in the costs of an unsuccessful intervention by the Queen's Proctor under 23 & 24 Vict. c. 144, s. 7. *Blackhall v. Blackhall*, 13 P. D. 94; 57 L. J., P. 60; 59 L. T. 151; 36 W. R. 926—Butt, J.

Agreement to Pay—Power to make Agreement an order of Queen's Bench Division.—An action for judicial separation in the Divorce Division was compromised by the parties, and an agreement of compromise signed by them which provided that a separation deed should be executed; that the agreement might be made a rule of the High Court, and that the respondent should pay the petitioner's taxed costs. A separation deed was afterwards executed, but the respondent refused to pay the taxed costs, and the agreement was made an order of the Queen's Bench Division for the purpose of enforcing payment:—Held, that there was power to make the agreement an order of court in the Queen's Bench Division, and that as the agreement of compromise had been reduced to an agreement to pay costs, the discretion of the court to make the order had been rightly exercised. *Smythe v. Smythe*, 18 Q. B. D. 544; 56 L. J., Q. B. 217; 56 L. T. 197; 35 W. R. 346—D.

Injunction to restrain Parting with Property —Reconciliation — Continuing Injunction.—A judicial separation having been pronounced at the suit of the wife, an interim injunction was obtained against the husband restraining him from dealing with certain property belonging to him. Subsequently a reconciliation took place. The wife's solicitor applied to have the injunction continued until a receiver of the property should be appointed or until the balance of his costs was paid; the court refused to continue the injunction or to appoint a receiver. *Hawes v. Hawes*, 57 L. T. 374—Butt, J.

Charging Order—Solicitor—Permanent Maintenance.—A sum secured to the wife on a dissolution of marriage under s. 32 of the Divorce Act, 1857, is not alimony, and is property in respect of which the court has jurisdiction to grant the wife's solicitor a charging order for costs under s. 23 of the Solicitors Act, 1860; but the court will not grant such an order unless the

solicitor make out a *prima facie* case of inability to obtain payment in any other way. *Harrison v. Harrison*, 13 P. D. 180; 58 L. J., P. 28; 60 L. T. 39; 36 W. R. 748—C. A.

8. ALIMONY AND MAINTENANCE.

a. Pendente lite.

Arrears—Application of Ord. XIV.]—A claim for arrears of alimony pendente lite is not a claim for "a debt or liquidated demand in money," within the meaning of Ord. III. r. 6, so as to entitle the plaintiff to judgment under Ord. XIV. r. 1. *Bailey v. Bailey*, 13 Q. B. D. 855; 53 L. J., Q. B. 583—C. A. Affirming, 50 L. T. 722; 32 W. R. 856—D.

Wife found Guilty of Adultery.]—Where alimony pendente lite has been allotted to a wife in a petition for divorce, such alimony ceases upon a verdict finding her guilty of adultery, but the court may in its discretion make an order for the alimony to continue. *Wells v. Wells* (3 Sw. & Tr. 542) discussed. *Dunn v. Dunn*, 13 P. D. 91; 57 L. J., P. 58; 59 L. T. 385; 36 W. R. 539—C. A.

Nullity—Payment continues till Decree Absolute.]—*See S. (f. c. B.) v. B.*, ante, col. 887.

Separation Deed—Covenant not to Molest.]—By a separation deed the husband covenanted to make an allowance to the wife determinable upon her molesting him. The husband subsequently discontinued the allowance on the ground that the wife had broken her covenant not to molest him. The wife afterwards instituted a suit for judicial separation and applied for an allowance of alimony pendente lite:—Held, that she was entitled to such allowance. *Wood v. Wood*, 57 L. J., Ch. 1; 57 L. J., P. 31; 57 L. T. 746; 36 W. R. 33—C. A.

Substituted Service of Petition.]—On a motion for substituted service of a petition for alimony pendente lite, in a case where substituted service of the petition for divorce had previously been ordered by service upon the respondent's agents, the court granted the motion, and as it appeared that a copy of the petition for alimony had already been sent in a registered letter to the agent's address, ordered that further service should be dispensed with. *Odevaine v. Odevaine*, 58 L. T. 564; 52 J. P. 280—Butt, J.

Injunction to restrain Removal of Property.]—The court will not, in order to protect a wife's right to alimony, restrain a husband from removing his property out of the jurisdiction of the court before an order for alimony has been made. *Newton v. Newton*, 11 P. D. 11; 55 L. J., P. 13; 34 W. R. 123—Hannen, P.

Not a "final Judgment"—Order for payment.]—An order for the payment of alimony pendente lite is not a "final judgment" against the husband within the meaning of sub-s. 1 (g) of s. 4 of the Bankruptcy Act, 1883, and a bankruptcy notice cannot be issued against the husband in respect of arrears due under such an order. *Moore, Ex parte* (14 Q. B. D. 627) distinguished. *Henderson, Ex parte, Henderson,*

In re, 20 Q. B. D. 509; 57 L. J., Q. B. 258; 58 L. T. 835; 36 W. R. 567; 5 M. B. R. 52—C. A.

Order for Alimony—Payment by Instalments.]—On January 30, 1888, an order for alimony pendente lite, and on February 1, 1888, an order for permanent alimony was made in the Probate and Divorce Division. The sum of 130*l.* being due under these orders, a judgment summons in respect thereof was issued by the wife:—Held, that a receiving order in lieu of committal could not be made by the court against the husband under s. 5 of the Debtors Act, 1869, and that an order directing payment by monthly instalments of 10*l.* should be made. *Otway, Ex parte, Otway, In re*, 58 L. T. 885; 36 W. R. 698; 5 M. B. R. 115—Cave, J.

Non-payment—Order for Attachment.]—Where, in an order for payment of alimony, the periods for payment are specified, an absolute order for an attachment under the Debtors Act may be made, without any preliminary order for payment by instalments. *Daly v. Daly*, 17 L. R., Ir. 372—Mat.

b. Permanent Alimony.

Proof in Bankruptcy—"Future Debt or Liability."]—A liability to pay alimony in weekly sums by an order made in divorce under s. 1 of 29 & 30 Vict. c. 32, is not "a future debt or liability" provable in bankruptcy under the Bankruptcy Act, 1883, s. 37, sub-s. 3; and, notwithstanding the bankruptcy of the person liable, payment may be enforced as of a debt due in pursuance of an order of a competent court under s. 5 of the Debtors Act. *Linton, Ex parte, Linton, In re*, 15 Q. B. D. 239; 54 L. J., Q. B. 529; 52 L. T. 782; 33 W. R. 714; 49 J. P. 597; 2 M. B. R. 179—C. A.

Receiving Order in lieu of Committal.]—See Otway, Ex parte, supra.

Husband and Wife entitled to Property in Reversion—Dum Casta et Sola Clause.]—The court in allotting permanent maintenance will not interfere with reversionary interests, except under special circumstances, where for instance it would be otherwise impossible to secure a provision for the wife. On a petition for permanent maintenance and variation of settlements, after decree absolute at the wife's suit for adultery and cruelty, the registrar found that the respondent would come into possession on the death of a person aged ninety years of a sum which would about double his income. The wife, in addition to the income arising out of a fund in settlement in which she had the first interest, was entitled to a sum in reversion which would also about double her income. The husband had brought nothing into settlement, and the registrar proposed that he should secure to his wife a present annual payment bringing up her income to a third of the joint income, and that on his reversion falling in he should secure a further sum bringing up her future income to the same proportion, taking her reversion also into consideration. The court refused to confirm this recommendation, but allotted the wife an annual sum equal to one-third of the husband's present income, leaving

the reversionary interests of both parties untouched. The court also declined to insert a *dum sola et casta vixerit* clause in the order. *Harrison v. Harrison*, 12 P. D. 130; 56 L. J., P. 76; 57 L. T. 119; 35 W. R. 703—Butt, J.

Assignment of Allowance out of Lunatic's Estate.—On a decree for judicial separation an order was made for payment of 60*l.* a year to the wife as permanent alimony. The husband was afterwards found lunatic by inquisition, and by an order in lunacy and chancery the dividends of a sum of stock to which he was entitled in a chancery suit were ordered to be carried to his account in the lunacy, and 60*l.* a year to be paid out of them to his wife in respect of her alimony till further order. The wife assigned the annuity to a purchaser, who presented a petition in lunacy, and in the suit, to have the annuity paid to her:—Held, that the petition must be refused, on the ground that whether the annuity was considered as alimony or as an allowance made to the wife by the court in lunacy, it was not assignable. *Robinson, In re*, 27 Ch. D. 160; 53 L. J., Ch. 986; 51 L. T. 737; 33 W. R. 17—C. A.

Charging Order for Costs.—See *Harrison v. Harrison*, ante, col. 901.

9. CUSTODY OF AND ACCESS TO CHILDREN.

Personal Service of Order—Writ of Sequestration—Discovery in aid of Execution.—On the application by a husband, who had obtained a decree nisi for divorce against his wife, an order was made that the wife should deliver up into the custody of the husband the children of the marriage. The wife knew of the order, but evaded service of it, and disobeyed it. On the application of the husband an order was then made declaring the wife contumacious and in contempt, and directing that a writ of sequestration should issue against the estate and effects of the wife, and that her mother, sister, and brother-in-law should attend the court to be examined as to her whereabouts:—Held, on appeal—first that as the wife knew of the order for delivery up of the children, and evaded service of it, personal service of the order upon her was not necessary to give the court jurisdiction to issue the writ of sequestration; secondly, that the general form of the writ of sequestration against "the estate and effects" of the wife, without any express limitation therein to separate property of the wife not subject to a restraint on anticipation, was right, but that the writ would only operate on her separate property which was not so subject; thirdly, that the court had no jurisdiction to order the attendance of third parties for examination. *Scott v. Morley* (20 Q. B. D. 120), distinguished. *Miller v. Miller* (2 L. R., P. 54), explained. *Hyde v. Hyde*, 13 P. D. 166; 57 L. J., P. 89; 59 L. T. 529; 36 W. R. 708—C. A. See also *Allen v. Allen*, ante, col. 889.

Under Guardianship of Infants Act.—See INFANT.

Postponement of Decree Absolute.—A decree nisi having been pronounced on petition of the

wife, to whom was entrusted the custody of the only child of the marriage, the court was moved to declare the respondent to be "a person unfit to have the custody" of such child within s. 6 of 49 & 50 Vict. c. 27. The court postponed making the decree absolute and adjourned the application for further materials. *Robinson v. Robinson*, 57 L. T. 118; 51 J. P. 39—Butt, J.

Access to Children—Separation Deed.—See *Hunt v. Hunt*, post, col. 913.

10. PARLIAMENTARY BILLS OF DIVORCE.

Personal Service out of the Jurisdiction—Affidavit of Service.—The respondent in a divorce bill being out of the jurisdiction and the petitioner in poor circumstances, the House dispensed with the attendance at the bar of a witness to prove personal service of the bill and the several orders of the House on the respondent; and ordered that an affidavit proving such personal service, and sworn under 18 & 19 Vict. c. 42, before the British minister or consul at the place where the respondent resided, should be deemed sufficient proof of such service. *Joynt's Divorce Bill*, 13 App. Cas. 741—H. L. (D.).

Bastardising Clause.—A paragraph in a divorce bill contained allegations tending to bastardise a child to which the wife had given birth during the marriage. There was access at the natural period of the conception of the child:—Held, that such paragraph was inadmissible and must be struck out of the bill. *Hewat's Divorce Bill*, 12 App. Cas. 312—H. L. (D.).

Service of Notice of Second Reading—Substituted Service.—In proceedings upon a divorce bill application was made in May, 1886, to dispense with personal service on the respondent on the ground that his address was unknown to the petitioner, that a solicitor who had previously acted for the respondent had admitted that he knew of his address but had refused to divulge it, and that the respondent had been last heard of in February, 1886, being then at Montreal, in Canada:—Held, that the application was premature, and must be refused. *Gifford's Divorce Bill*, 12 App. Cas. 361—H. L. (D.).

Where on a bill for divorce it appeared that the respondent's address was concealed, and the House ordered substituted service, service was ordered to be made on the respondent's solicitor, on the respondent's parent, and also on the person with whom the respondent appeared to be residing. *A.'s Divorce Bill*, 12 App. Cas. 364—H. L. (D.).

Adultery—Impotence—Provision for Wife.—Where, on a bill of divorce by the husband on the ground of the wife's adultery, the adultery was proved, but it appeared that the husband had not fulfilled his duty by providing a home for the wife when she was separated from him by order of his medical attendant, the House in passing the bill directed that a clause should be added making provision for the wife. *A.'s Divorce Bill*, 12 App. Cas. 364—H. L. (D.).

Allowance to Wife.—Where upon a bill for

divorce by the husband it appears that the wife has no means to defend herself, the House will order the husband to pay her a small sum in order that she may make her defence. *A's Divorce Bill*, 12 App. Cas. 364—H. L. (D.).

Cruelty.—Acts which would if done in England be held by the High Court of Justice to constitute legal cruelty, will also be held to constitute legal cruelty in divorce bills. *Gifford's Divorce Bill*, 12 App. Cas. 361—H. L. (D.).

Wife's Bill—Adultery coupled with Cruelty.—The same evidence which since the Divorce Act, 1857, enables the Divorce Court to pronounce a decree for dissolution of marriage will be considered by the House of Lords sufficient ground for passing a divorce bill relating to Ireland, where that act does not apply. *Westropp's Divorce Bill*, 11 App. Cas. 294—H. L. (D.).

11. ORDER BY JUSTICES FOR JUDICIAL SEPARATION.

Jurisdiction.—Magistrates at petty sessions have power to order a judicial separation for an aggravated assault, even though they only inflict the penalty of fine or imprisonment for a common assault. *Woods v. Woods*, 10 P. D. 172; 33 W. R. 323; 50 J. P. 199—Butt, J.

Resumption of Cohabitation, Effect of.—Upon the conviction of a husband for an aggravated assault on his wife, justices made an order, under s. 4 of the Matrimonial Causes Act, 1878, that the wife should be no longer bound to cohabit with her husband, and that he should pay to her a weekly sum for her maintenance. The wife subsequently resumed cohabitation with her husband for a time, and then again left him:—Held, that the order was annulled by reason of the subsequent resumption of cohabitation, and therefore that the wife could not enforce payment of weekly sums alleged to have become due under it after she again left her husband. *Haddon v. Haddon*, 18 Q. B. D. 778; 56 L. J., M. C. 69; 56 L. T. 716; 51 J. P. 486—D.

Application to vary Order—Evidence of Wife's Adultery.—Where an order has been made under section 4 of the Matrimonial Causes Act, 1878, authorising a wife to refuse to cohabit with her husband, the presumption of non-access applies from the date of the order as in the case of a judicial separation; and the justices on an application to vary the order on account of the wife's adultery cannot refuse to receive the direct evidence of the husband or the admissions of the wife in proof of the paternity of a child born more than nine months after the separation. *Hetherington v. Hetherington*, 12 P. D. 112; 56 L. J., P. 78; 57 L. T. 533; 36 W. R. 12; 51 J. P. 119; 294—Hannen, P.

Application to Discharge Order for Payment—How made.—Where an order has been made under the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 4, for the payment of money by the husband or custody of children by the wife, an application to discharge the order on the ground that the wife has been guilty of adultery

must be made to the court or magistrates by whom the order was made, and not to the Probate and Admiralty Division. *Id.*

Appeal to what Court.—An order under s. 4 of the Matrimonial Causes Act, 1878, or a refusal by the justices to vary such order, is subject to appeal to the Probate and Admiralty Division, although the justices have stated a case for the opinion of the Queen's Bench Division, which has not been determined. *Id.*

A husband having been convicted of an aggravated assault on his wife was sentenced to one month's imprisonment and the justices ordered a judicial separation and an allowance to the wife of £2 a week: notice of appeal to quarter sessions against the conviction was given, and pending the appeal the husband applied to the Probate, Divorce and Admiralty Division to have the order varied:—Held, that the court would hear the appeal, though the appeal to quarter sessions was pending. *Goodwin v. Goodwin*, 51 J. P. 583—Butt, J.

Power to Order Maintenance.—*See post*, cols. 933, 934.

12. EFFECT OF DECREE.

Judicial Separation—Wife's Property—Property subsequently acquired.—A wife who has obtained a decree for judicial separation is to be considered as a feme sole with respect to such property only as she may acquire or which may come to or devolve upon her after the decree: s. 25 of the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), not applying to property to which the wife was entitled in possession at the date of the decree. *Cooke v. Fuller* (26 Beav. 99) distinguished. *Waite v. Morland*, 38 Ch. D. 135; 57 L. J., Ch. 655; 59 L. T. 185; 36 W. R. 484—C. A.

Covenant to Settle After-acquired Property.—Where a marriage settlement contained a covenant to settle all property (except jewellery and money up to 200*l.*) which the wife, or her husband in her right, might acquire "during the intended coverture," and after a decree for judicial separation the wife became entitled to certain stocks:—Held, that by virtue of s. 25 of the Divorce Act, 1857, the stocks belonged to her as a feme sole, and that the covenant to settle "during the coverture" had become inoperative. *Daves v. Creghe*, 30 Ch. D. 500; 54 L. J., Ch. 1096; 53 L. T. 292; 33 W. R. 869—V.-C.B.

Divorce—Bequests in Wills—"Wife."—A testator left shares in his residuary estate in trust for his sons for life, and from and after the decease of each son, in trust to permit any wife of such son to receive the income of his share during her life. One of the sons married, was divorced from his wife and died:—Held, that the divorced wife was not entitled to the life interest in his share. *Bullmore v. Wynter* (22 Ch. D. 619) disapproved. *Hitchins v. Morrison*, 40 Ch. D. 30; 53 L. J. Ch. 80; 59 L. T. 847; 37 W. R. 91—Kay, J.

"Sole and Unmarried."—A testatrix, by her will made in 1860, bequeathed a fund to

trustees, on trust to pay the income to her husband for his life, and on his death to divide the fund into four equal parts, and, as to one of the parts, "upon trust to pay the same to J. H., spinster, if she be then sole and unmarried, but, if she be then married," the testatrix directed her trustees to pay the income of the fourth part to J. H., for her life, for her separate use, and after her death to hold it on trust for her children. In June, 1878, the testatrix died, and her husband died in April, 1883. In April, 1861, J. H. married, and in November, 1878, a decree absolute was made for the dissolution of her marriage. There were three children of the marriage. J. H. did not marry again:—Held, that the words "then sole and unmarried" meant "not having a husband" at the time of the death of the tenant for life, and that in the events which had happened, J. H. was absolutely entitled to the one-fourth share. *Lesingham's Trusts, In re*, 24 Ch. D. 703; 53 L. J., Ch. 333; 49 L. T. 235; 32 W. R. 116—North, J.

13. VARIATION OF SETTLEMENTS AND DEEDS.

After Decrees for Nullity.—*See ante*, col. 888.

Motion to confirm Registrar's Report.—A motion to confirm a registrar's report ordering a variation of a settlement after a decree for dissolution of the marriage, need not be made within fourteen days after notice of the filing of the report in the registry by the petitioner. *Farrington v. Farrington*, 11 P. D. 84; 55 L. J. P. 69—Butt, J.

Concurrent Jurisdiction of Chancery Division.]

—The Chancery Division has the same jurisdiction as the judge of the Probate Division to modify settlements, but where the matter has already been gone into in that division, a judge of the Chancery Division will not interfere. After dissolution of marriage on the husband's petition, an order was made that trustees of the marriage settlement should pay an annual sum out of settled real property of the wife to the husband for the maintenance of the infant child of the marriage. The husband having died, the widow became absolutely entitled to the property, and a further order directed that the trustees of the settlement should pay the annuity to the guardians of the infant. There were, in fact, no trustees at that time. The annuity was subsequently declared to be perpetual. On the application by the child of the marriage, the court ordered execution of a deed securing the annuity on the settled property, but allowed no costs of the application, as the order might have been obtained by summary process in the Probate Division. *Blackett v. Blakett*, 51 L. T. 427—North, J.

Wife's Costs not Considered.—Where a marriage has been dissolved on the ground of the wife's adultery, the court will not, when directing the variation of the marriage settlements, take into consideration the amount of costs incurred by the wife. *Noel v. Noel*, 10 P. D. 179; 54 L. J., P. 73; 33 W. R. 552—Hannen, P.

Payment of Annual Sum to Husband.]—Upon application to vary a marriage settlement after a decree for divorce on the husband's petition, it appeared that the wife's income under the settlement amounted to 1,050*l.* a year. The husband possessed an income of about 600*l.* a year, part of which arose from money received from the respondent. There were no children of the marriage. The court varied the trusts of the settlement by ordering the trustees to pay the husband 300*l.* a year during the joint lives of husband and wife. *Farrington v. Farrington*, 11 P. D. 84; 55 L. J., P. 69—Butt, J.

Freedom from Trusts—Child born.]—On a petition for variation of settlements after a decree for dissolution of marriage by reason of the wife's adultery, where a child had been born between the date of the decree nisi and decree absolute, and fourteen months after the wife had eloped from her husband, the court refused to transfer funds in settlement to the parties free from the trusts of the settlement. *Pryor v. Pryor*, 12 P. D. 165; 56 L. J., P. 77; 57 L. T. 533; 35 W. R. 349—Hannen, P.

—**Division of Trust Fund.]**—By a post-nuptial settlement a husband assigned certain property to trustees on trust to pay him the income during his life, or until he had incurred a forfeiture, and on a determination of his interest, to his wife for her life, with further discretionary trusts for the benefit of the husband's next of kin, or for the benefit of a second wife, or the issue of a second marriage. The husband became bankrupt, and by a compromise sanctioned by the Chancery Division a portion of the fund was assigned to his trustee in bankruptcy, and his interest in the remainder was assigned to the trustees of the settlement. Subsequently the marriage was dissolved on account of the wife's adultery, and on a petition for variation of settlements the registrar proposed that the trusts of the settlement should be extinguished, and that seven-twelfths of the fund should be paid to the husband, and five-twelfths to the wife. Both parties agreed to this, but the trustees of the settlement objected, and the court refused to sanction a division of the fund, but ordered that the income of five-twelfths of it should be paid to the wife, and that in all other respects the trusts of the settlement should remain in force. *Smith v. Smith*, 12 P. D. 102; 56 L. J., P. 51; 57 L. T. 375; 35 W. R. 459—Hannen, P.

Power to deal with Capital—Discretion of Judge.]—On a petition for variation of a settlement the judge refused to give the wife, the petitioner, any part of the capital of the fund, which had been all settled by the husband, although there were no children of the marriage, or to order payment of the petitioner's costs out of the funds. And he gave a portion only of the income to the wife.—The Court of Appeal affirmed the decision, holding that although the court had undoubted jurisdiction to deal with the capital, it was not for the benefit of the wife to give her any portion of it; and the court refused to interfere with the discretion of the judge as to the amount of income awarded to her. *Ponsonby v. Ponsonby*, 9 P. D. 122; 53 L. J., P. 112; 51 L. T. 174; 32 W. R. 746—C. A.

Power of Appointing New Trustees.]—In the variation of settlements the court has jurisdiction to extinguish a joint power of appointment of new trustees. *Oppenheim v. Oppenheim*, 9 P. D. 60; 53 L. J., P. 48; 32 W. R. 723—Butt, J.

— Wife's Power of Appointment.]—In a petition for variation of settlements after a decree of dissolution on account of the wife's adultery, the registrar by his report recommended that the power of appointment over the fund given to the wife by the settlement should be extinguished, and that she should be deprived of the power of appointing or joining in the appointment of new trustees. The petitioner had signified his willingness that the respondent should continue to receive 100l. a year out of 150l. settled on her. The court confirmed the first of these recommendations, but disallowed the second, on the ground that as the respondent was to continue to receive an income from the fund she had an interest in the appointment of trustees. An order extinguishing the power of appointment of funds in the settlement is an order made, within the words of the section, "with reference to the application of the whole or a portion of the property settled." *Bosville v. Bosville*, 13 P. D. 76; 57 L. J., P. 62; 58 L. T. 640; 36 W. R. 912—Butt, J. And see next case.

Wife's Interest Extinguished—Payment of Half of Property—Reversion—Power of Appointment.]—Property was brought into settlement by both the husband and the wife, with a joint power of appointment in favour of the children of the marriage; but with regard to the wife's property, which included a reversionary interest, the settlement gave her, in certain events, a power of appointment in favour of a second or subsequent marriage. The marriage was dissolved on the ground of the wife's adultery, the husband having the custody of the two children of the marriage. The court varied the settlements by absolutely extinguishing the wife's interest in the property brought into settlement by the husband, thus leaving their respective incomes nearly equal. The court further ordered that one-half of the wife's property should be paid to the husband and children, without taking into account the amount of the wife's costs of the suit; and also that one-half of the wife's reversionary interest should, upon its falling into possession, be assigned to the husband and children. The court also extinguished the wife's power of appointment under the joint power, and varied the wife's power of appointment over her own property in favour of a future husband or the children of a future marriage, by restricting its benefit to any husband married after the death of the petitioner, and to children of a subsequent marriage born after the death of the petitioner. *Noel v. Noel*, 10 P. D. 179; 54 L. J., P. 73; 33 W. R. 552—Hannen, P.

Inquiry as to Legitimacy of Child.]—See *Pryor v. Pryor*, ante, col. 884.

Dealing with Reversionary Interests.]—See *Harrison v. Harrison*, ante, col. 903.

Power to vary Separation Deeds.]—See *Clifford v. Clifford*, infra.

IV. SEPARATION DEEDS AND AGREEMENTS.

Effect of—Alimony pendente lite—Covenant not to molest.]—See *Wood v. Wood*, ante, col. 901.

Power of Court to vary, after Dissolution of Marriage.]—In June, 1881, a deed of separation was executed by which the husband agreed to pay, for the benefit of the wife, 52l. a year. Shortly after the separation she committed adultery, and in November, 1882, a decree for dissolution of the marriage was made absolute. In April, 1883, the husband obtained leave to present a petition to vary the deed, on payment of all arrears up to that time. There were three children of the marriage, who were living with the husband. A petition having been presented, the matter was referred to the registrar, who reported that the wife had no means of support, and that the husband's income was about 270l. a year. Butt, J., treated the case as one of alimony depending mainly on the husband's means, and refused to vary the deed. But held, on appeal, that the case was not to be treated as one of alimony, but one in which the court had a discretion as to the amount of allowance which ought to be made to the wife under all the circumstances; and that, having regard to the circumstances, and the conduct of the wife in the suit, the husband ought to be allowed to retain one-half of the allowance provided by the deed. *Clifford v. Clifford*, 9 P. D. 76; 53 L. J., P. 68; 50 L. T. 650; 32 W. R. 747—C. A.

Effect of Reconciliation upon.]—A husband and wife when before the Divorce Court, made an agreement in writing that if judicial separation were decreed, the wife should be permitted to enjoy during her life certain furniture; but that if she annoyed her husband her enjoyment of it should cease. Judicial separation was decreed, and the wife took possession of the furniture. The husband and wife afterwards resumed cohabitation.—Held, in an action by the wife to recover the furniture, that the agreement came to an end when cohabitation was resumed; and that as the wife was entitled to the furniture during separation only, she took nothing under 20 & 21 Vict. c. 85, s. 25, which relates to property acquired by the wife during separation. Dictum in *Randle v. Gould* (8 E. & B. 457) questioned. *Nicol v. Nicol*, 31 Ch. D. 524; 55 L. J., Ch. 437; 54 L. T. 470; 34 W. R. 283; 50 J. P. 468—C. A.

No covenant not to sue or to Condone—Judicial Separation.]—In a suit by the husband for dissolution on the ground of his wife's adultery, the wife in her answer made a counter-charge of desertion, and prayed for a judicial separation. It appeared that the husband left his wife in November, 1884, and in January, 1887, a deed was executed by which the wife agreed to live apart from her husband, but there was no covenant not to sue and no agreement to condone past offences. The jury found all the issues in favour of the wife:—Held, that the deed was not a bar to the wife's remedy, and that she was entitled to a decree of judicial separation. *Moore v. Moore*, 12 P. D. 193; 56 L. J., P. 104;

57 L. T. 568; 36 W. R. 110; 51 J. P. 632—Butt, J.

Action by Wife on Agreement—Maintenance—No Trustees.]—*See Macgregor v. Macgregor*, post, col. 916.

Covenant with Trustees to Maintain Children—Right of Child to sue—Cestui que trust—Stranger suing on Covenant.]—To entitle a third person, not named as a party to a contract, to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of cestui que trust under the contract. By a deed of separation between husband and wife, the husband covenanted with the trustees to pay to them an annuity for the use of the wife and two eldest daughters, and also to pay to the trustees all the expenses of the maintenance and education of the two youngest daughters, provided that the trustees permitted them to go to such school as the husband should direct, and provided also that the covenants by the trustees were duly observed and performed: provided also that the two youngest daughters should live at such place (being reasonable and proper for the purpose) as the husband should direct, and should be maintained and educated at his expense, the husband and wife to have all reasonable access to them. And the trustees covenanted with the husband that they would, during the continuance of the separation, keep him indemnified against all liability for the maintenance of the wife and two eldest daughters, and against all molestation by them, and that the wife would not take any proceedings against the husband for alimony, except as aforesaid; and that they, the trustees, would, on the husband defraying all the expenses connected therewith, carry out his desires as to the school at which the two youngest daughters should be educated, and the place at which they should live, and would permit them, if they so desired, and without any interference on the part of the wife, to accept any invitation of the husband to reside with him. On one of the two youngest daughters subsequently attaining sixteen, the husband refused any longer to maintain her, whereupon she brought an action, by her next friend, against the husband and the trustees of the separation deed to enforce the husband's covenant, the trustees having refused to allow their names to be used as plaintiffs:—Held, that upon the construction of the deed, the plaintiff was not in the position of cestui que trust under the covenant so as to entitle her to maintain the action, but liberty was given to her, under the Rules of the Supreme Court, 1883, Ord. XVI. r. 2, to amend the writ, by adding the trustees, the wife, and the other daughters, or any of them, as plaintiffs. *Touche v. Metropolitan Railway Warehousing Company* (6 L. R., Ch. 671) considered. *Gandy v. Gandy*, 80 Ch. D. 57; 54 L. J., Ch. 1154; 53 L. T. 306; 33 W. R. 803—C. A.

The trustees refusing to be joined as co-plaintiffs, the statement of claim was amended by making the wife a co-plaintiff:—Held, that she had such an interest as entitled her to sue, the deed being an arrangement between the husband and wife, and the trustees being introduced on her behalf in order to get over the difficulty that the husband and wife could not at law sue each

other, so that the trustees were to be considered trustees for the wife, and if they refused to sue, she could sue in equity. *Ib.*

Party taking Advantage of and Repudiating Deed.]—After the separation deed the husband committed adultery, and a decree was made for judicial separation, giving the custody of the two youngest daughters to the wife. After this the wife applied for increased alimony, which was granted by the president, but his decision was reversed on appeal (7 P. D. 168), both the arguments and the judgment of the Court of Appeal proceeding on the footing (though the court did not expressly decide the point) that the husband remained liable under the deed to pay for the maintenance and education of the two youngest daughters. He now contended that his covenant was put an end to by the custody of the youngest daughters being given to his wife:—Held, that he was not at liberty to retain the benefit of a decision given on the footing that his liability under the covenant continued, and at the same time to insist that his liability under it had determined, and the appeal was ordered to stand over, with liberty to the wife to apply to the Divorce Court for increased alimony, if she should be so advised. *Ib.*

Absolute Covenant to pay Annuity—Adultery by Wife.]—In a separation deed a covenant, by which the husband undertakes to pay his wife an annuity without restricting his liability to such time as she shall be chaste, is good, and is not against public policy, and the covenant remains in force and the annuity continues payable, although the wife afterwards commits adultery. But, *semble*, per Cotton, L. J., on the authority of *Evans v. Carrington* (2 De G. F. & J. 481), that if the covenant had been inserted in the separation deed with the intent that the wife might be at liberty to commit adultery, the deed would have been void. *Fearon v. Aylesford (Earl)*, 14 Q. B. D. 792; 54 L. J., Q. B. 33; 52 L. T. 954; 33 W. R. 331; 49 J. P. 596—C. A.

Covenant against Molestation—Independent Covenants—Molestation, what is.]—Covenants in a separation deed, by which respectively the husband has covenanted to pay an annuity to a trustee for the wife, and the trustee has covenanted that the wife shall not molest the husband, must be construed as independent covenants in the absence of any express terms making them dependent, and therefore a breach of the covenant that a wife shall not molest the husband, is not an answer to an action for the annuity. Neither adultery alone by the wife, nor adultery by her followed by the birth of an illegitimate child, is a breach of a covenant in a separation deed against molestation by the wife. But, *semble*, adultery by the wife followed by the birth of an illegitimate child whom she puts forward as the child of her husband, especially if this is done with intent to claim a title or property to which the legitimate offspring of her husband would be entitled, is evidence of a breach of a covenant against molestation by her.—By Brett, M.R., in order to constitute a breach of the covenant in a separation deed against molestation by a wife, some act must be done by her or by her authority with intent to annoy her husband and which is in fact an annoyance to him, or at least some act

must be done by her or by her authority with a knowledge that it must of itself without more annoy her husband, or annoy a husband with reasonable and proper feeling. *Ib.*

Covenant as to Custody of Children—Access.]

—By a deed of separation made in 1880 between H., a medical officer in the army, and his wife, provision was made as to the custody of their four children (of whom the eldest was eleven and the youngest three years of age) during the approaching absence of the husband in India, after which he was to resume the entire custody of them, but he covenanted that full and free liberty of access to them should be always accorded to the wife, to the extent at least of her having the opportunity of spending one day in every fortnight with them. In 1884 he was ordered to Egypt and proposed to take the first and third of the children with him. Mrs. H. applied for an injunction to restrain him from doing so:—Held, that the covenant did not bind H. to keep the children in a place where Mrs. H. could conveniently have access to them, and did not preclude him from taking them with him to any place where he might be ordered in the course of his duties, and that the injunction must be dissolved, there being no case made that he was removing them for the purpose of preventing Mrs. H. from having access to them. *Hunt v. Hunt*, 28 Ch. D. 606; 52 L. T. 302; 33 W. R. 157—C. A.

Effect of on Restitution of Conjugal Rights.]

—See ante, col. 889.

V. HUSBAND'S RIGHTS AND LIABILITIES.

Chattels Real of Wife not vested in Possession during Coverture.]

—A wife entitled to a term, subject to a life estate therein, predeceased her husband during the subsistence of the life estate:—Held, that it was not necessary for the husband to take out letters of administration to her in order to complete his title to the leaseholds. *Bellamy, In re, Elder v. Pearson*, 25 Ch. D. 620; 53 L. J., Ch. 174; 49 L. T. 708; 32 W. R. 358—Kay, J.

Partial Intestacy—Devolution of Separate Estate.]

—The Married Women's Property Act, 1882, does not affect the right of the husband to succeed, on the death of the wife, to her undisposed-of separate personality. *Lambert, In re, Stanton v. Lambert*, 39 Ch. D. 626; 57 L. J., Ch. 927; 59 L. T. 429—Stirling, J.

A married woman who died on the 13th of September, 1887, leaving a husband and three children surviving, made a will on the 7th of September, 1887, in exercise of a power of appointment, and appointed executors. The will did not purport to dispose of any other property. At her death she was entitled to separate personal estate not included in the power. Probate of the will was granted under the Amended Probate Rules of April, 1887, in the ordinary form without any exception or limitation:—Held, that the executors were trustees for the husband of the undisposed-of property, and that the probate duty and the costs connected with probate ought to be apportioned rateably between the appointed and the undisposed-of property. *Ib.*

Executor of Wife—Retainer for Funeral Expenses—Estate insufficient.]—A husband, executor of his wife's will made under a testamentary power of appointment, is entitled to retain out of her estate the expenses of her funeral though such estate was insufficient for creditors, and her will did not contain any charge of debts and funeral expenses. *McMyn, In re, Lightbown v. McMyn*, 33 Ch. D. 575; 55 L. J., Ch. 845; 55 L. T. 834; 35 W. R. 179—Chitty, J.

Liability for Maintenance of Wife—In Case of Divorce.]—See ante, cols. 901 *et seq.*

—On Desertion of Wife.]—See post, cols. 933, 934.

—In case of Separation Agreement.]—See *McGregor v. McGregor*, post, col. 916.

—Order obtained by Guardians.]—See POOR LAW (MAINTENANCE).

Liability for Necessaries—Wife living apart from Husband—Adultery—Connivance.]—In an action against a husband for necessities supplied to his wife it appeared that the wife had committed adultery with the connivance of her husband, and the husband subsequently turned her out of doors; that she had no means of support; and that the plaintiff supplied her with the necessities in question while she was living separate from her husband:—Held, that the husband was liable. *Wilson v. Glossop*, 20 Q. B. D. 354; 57 L. J., Q. B. 161; 58 L. T. 707; 36 W. R. 296; 52 J. P. 246—C. A.

Liability for Acts of Wife—Agency.]—Where a husband and wife were living together, and furniture was supplied for, and work done at, the house on the order of the wife, but the husband took part in making selections, and giving directions as to the execution of the orders:—Held, that the husband was liable to pay for the goods and work, although he had expressly prohibited her from pledging his credit, and they had agreed together that she should pay for the goods and work. *Jetley v. Hill*, 1 C. & E. 239—Pollock, B.

Torts committed by Wife after Marriage.]—The Married Women's Property Act, 1882, does not abolish the liability of a husband for his wife's wrongful acts, and the plaintiff may sue the husband and wife jointly or the wife alone for wrongs committed by her after the marriage. *Seroka v. Kattenburg*, 17 Q. B. D. 177; 55 L. J., Q. B. 375; 54 L. T. 649; 34 W. R. 543—D.

Wife's Breaches of Trust.]—A husband's liability for his wife's breaches of trust extends to breaches of trust arising from negligence, and is not confined to losses caused by her active misconduct. *Bahin v. Hughes*, 31 Ch. D. 390; 55 L. J., Ch. 472; 54 L. T. 188; 34 W. R. 311—C. A.

Money paid by Husband for Wife after Marriage.]—Before the coming into operation of the Married Women's Property Act, 1882, a husband in a court of equity might make his wife a defendant to a suit respecting her separate estate, and might obtain a decree against her for breach of any contract, whereby she had intended to bind the same, and that statute has not deprived a

husband of any right or remedy, to which, if it had not been passed, he would have been entitled as against his wife in respect of her separate estate: and therefore it is now competent to a husband to maintain an action against his wife, and to charge her separate estate for money lent by him to her after their marriage, and for money paid by him for her after their marriage at her request made before or after their marriage. *Butler v. Butler*, 16 Q. B. D. 374; 55 L. J., Q. B. 55; 54 L. T. 591; 34 W. R. 132—C. A.

Liability for Costs—Action by Executrix and Husband—Liquidation.—A married woman, before the Married Women's Property Act, 1882, brought an action as executrix, and her husband was joined as co-plaintiff. While the action stood for trial, the husband filed a petition for liquidation, and obtained his discharge. The action was subsequently dismissed with costs on default of appearance by the plaintiffs:—Held, that the husband was not exonerated by his discharge in the liquidation from his liability to have judgment given against him with costs, as the action was not rendered defective by his going into liquidation. *Vint v. Hudspeth*, 30 Ch. D. 24; 54 L. J., Ch. 844; 52 L. T. 744; 33 W. R. 738—C. A.

Custody of Children.—See INFANT.

VI. CONTRACTS BETWEEN HUSBAND AND WIFE.

Wife's Conveyance—Specific Performance of.—A married woman was entitled by an ante-nuptial settlement to a jointure rent-charge after her husband's death secured upon his real estates in Ireland. The wife having left him, the husband commenced a suit for restitution of conjugal rights; with a view to a compromise by an agreement for separation a document was drawn up and signed by the husband, which stipulated that the wife should release part of her jointure. The wife signed this document with a qualification that no further steps were to be taken in the matrimonial suit, but it was not stayed or dismissed. A deed was prepared to carry out the terms of the compromise and was executed by the husband, but the wife refused to execute it or to return to her husband, and the husband afterwards died:—Held, that the wife was not, when she signed the document, in all respects in the same position as a feme sole, and that even if any final agreement had been come to she would not have been bound by it, there having been no acknowledgment as required by 4 & 5 Will. 4, c. 92, ss. 68, 71; and that specific performance of the agreement to release her jointure could not be decreed against her. *Hunt v. Hunt* (4 D., F. & J. 221; and *Besant v. Wood* (12 Ch. D. 605), commented on by the Earl of Selborne, L. C. *Cahill v. Cahill*, 8 App. Cas. 420; 49 L. T. 605; 31 W. R. 861—H. L. (Ir.)

Power of Wife to contract without Intervention of Trustee.—A husband and wife having taken out cross-summonses against each other for assaults, entered into a verbal agreement with each other to withdraw the summonses and to live apart, the husband allowing the wife a

weekly sum for maintenance, and the wife indemnifying the husband against any debts she might contract. An action having been brought in the county court by the wife against her husband for six weeks' arrears of maintenance under the agreement:—Held, that the husband and wife had power to contract, without the intervention of a trustee, to live apart, in consideration of their agreeing not to take legal proceedings against one another, and that the action was maintainable. *McGregor v. McGregor*, 21 Q. B. D. 424; 57 L. J., Q. B. 591; 37 W. R. 45; 52 J. P. 772—C. A. Affirming 58 L. T. 227—D.

VII. GIFTS TO HUSBAND AND WIFE.

Unity of Person of Husband and Wife.—The rule of construction whereby, under a gift to a husband and wife and a third person, the husband and wife take only one moiety between them, has not been altered by the Married Women's Property Act, 1882. A testator by his will made in 1887, directed that a share of his residuary estate should be divided between his "sister M. B., D. B., her husband, and H. B., her step-daughter, in equal parts." M. B. and D. B. were married previously to the commencement of the Married Women's Property Act, 1882:—Held, that M. B. and D. B. each took one-fourth, and H. B. one-half of the share, the one-fourth of M. B. being her separate property according to the act. *Jupp, In re, Jupp v. Buckwell*, 39 Ch. D. 148; 57 L. J., Ch. 774; 59 L. T. 129; 36 W. R. 712—Kay, J.

A testatrix, by her will, dated in 1880, gave her residuary personal estate "to C. J. M., and J. H. and E. his wife," to and for their own use and benefit absolutely, and appointed C. J. M., and J. H. and E. H. his wife, her executors. The testatrix died in 1883, after the commencement of the Married Women's Property Act, 1882. J. H. and E. H. were married in 1864:—Held, that as the will was made before the Married Women's Property Act came into operation, it must be construed in accordance with the law at that time, and that the three residuary legatees were entitled to the personal estate as joint tenants, C. J. M. taking one moiety, and J. H. and E. H., his wife, taking the other moiety between them, J. H. in his own right, and his wife for her separate use. *March, In re, Mander v. Harris*, 27 Ch. D. 166; 54 L. J., Ch. 143; 51 L. T. 380; 32 W. R. 241—C. A.

How the court would have construed the gift if the will had been made after the Married Women's Property Act, 1882, came into operation, *quære*. *Ib.*

Ante-nuptial Parol Agreement.—By a parol ante-nuptial agreement in 1879 it was agreed that the intended wife should retain 1,400*l.* as her separate property. The money was paid into a bank in her maiden name, and for two years after the marriage she received the interest with her husband's acquiescence, and she afterwards drew out the principal. The money was claimed by the trustee in liquidation of the husband:—Held, that it was unnecessary to decide whether s. 4 of the Statute of Frauds, or the doctrine of part performance, applied to the case, because the transaction amounted to a gift by the hus-

band to the wife of the money, which thus became her separate property, and therefore the husband was a trustee for the wife, and his trustee in liquidation was not entitled to the money. *Whitehead, In re, Whitehead, Ex parte*, 14 Q. B. D. 419; 54 L. J., Q. B. 240; 52 L. T. 597; 33 W. R. 471; 49 J. P. 405—C. A.

Separate Estate—Receipt by Husband—Presumption of Gift.—A testator, who died in 1860, bequeathed a portion of the residue of his personal estate to his daughter, a married woman, for her separate use. Shares in certain companies were allotted to her in respect of this bequest, which shares were transferred by the executor of the will into the name of her husband. In 1862 a deed of release was given to the executor, which was executed both by the husband and the wife. The testator's daughter and her husband lived together on affectionate terms until 1884, when the husband died, having by his will bequeathed to his wife a legacy, and given her a life interest in all his property. During the whole of the time from 1860 to 1884 the husband received the dividends on the shares. He kept very careful books of account, from which it appeared that he did not pay the dividends to his wife, although he did pay to her the dividends of certain other property, which also belonged to her for her separate use. Before 1862 the shares were always referred to in the books as having originally belonged to the wife, but this mode of reference was discontinued after that date. The wife died in 1884, a few days after her husband, and the question was, whether the shares, which still remained in specie, formed part of her estate or of that of her husband:—Held, that the mere transfer of the shares into the name of the husband was not per se evidence of a gift thereof to him; that the burden lay upon those who represented him to show that the wife had given him the shares, which burden they had not discharged; and that, therefore, the shares must be treated as forming part of the wife's estate. *Curtis, In re, Hawes v. Curtis*, 52 L. T. 244—Kay, J.

By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband; with this difference, that by Scotch law she has the privilege of revoking the donation, even after her husband's death, and reclaiming the subject of her gift in so far as it had not been consumed. The same circumstances which are in England held to imply donations between husband and wife are sufficient to sustain a similar inference in Scotland. *Edward v. Cheyne*, 13 App. Cas. 385—H. L. (Sc.)

VIII. WIFE'S PROPERTY, RIGHTS AND LIABILITIES.

1. EQUITY TO A SETTLEMENT.

Debt of Husband to Testator—Wife's share in Residue—Deduction of Debt from Wife's share.—A testator bequeathed to his married daughter after the death of his wife, a share of the residue of his real and personal estate. The daughter's husband owed the testator 725*l.*, a sum equal to or in excess of her share of residue. There were six children of the mar-

riage. The daughter had about 70*l.* a year derived from an uncle, for her life, and remainder to her children, and her husband had no private means, and made only some 60*l.* a year by his business. The testator left six children him surviving. He died in 1877:—Held, the case not coming within the Married Women's Property Act, 1882, that although the executors had a right to set off the debt due from the husband against the share given to the wife, yet as the claim of the husband, if there had been no debt, would have been subject to the wife's equity to a settlement, which would therefore have been prior to the husband's claim, the wife's equity was also prior to the executors' right of retainer. *Knight v. Knight* (18 L. R., Eq. 487) distinguished. *Briant, In re, Poulter v. Shachel*, 39 Ch. D. 471; 57 L. J., Ch. 953; 59 L. T. 215; 36 W. R. 825—Kay, J.

Desertion—Sale of Leaseholds.—A husband entitled to leaseholds in right of his wife deserted her and their children, and for eight years contributed nothing towards her or their support, except the rents of the leaseholds. During the desertion the leaseholds were sold by the wife for 250*l.* to a purchaser, who expended the greater part of the proceeds upon the maintenance of the wife and children. In an action by the husband against the wife and the purchaser to set aside the sale and recover the leaseholds or the proceeds:—Held, that, under her equity to a settlement, the wife was entitled to have the entire proceeds of the sale secured to herself, and such proceeds having practically been expended for her benefit, the action must be dismissed with costs. *Bowall v. Bozall*, 27 Ch. D. 220; 53 L. J., Ch. 838; 51 L. T. 771; 32 W. R. 896—Kay, J.

Amount to be Settled—Misconduct of Husband.—A wife was entitled to about 1,500*l.* The husband had disregarded an order of the court for restitution of conjugal rights, and stated that he and his wife should not again live together:—Held, that the conduct of the husband amounted to aggravated misconduct, and that under all the circumstances of the case the whole fund was to be settled on the wife and children. *Reid v. Reid*, 33 Ch. D. 220; 55 L. J., Ch. 756; 55 L. T. 153; 34 W. R. 715—Stirling, J. See also *Fowle v. Draycott*, post, col. 936.

—Bankruptcy of Husband.—In an action by a married woman for her equity to a settlement, where the husband was an undischarged bankrupt, but was living with his wife, and contributed something out of his earnings to her support, the court directed two-thirds only of the wife's fund to be settled upon her. *Callow v. Callow*, 55 L. T. 154—Stirling, J. See *Beauprè's Trusts, In re*, post, col. 924.

Domicil—Change by Residence—Reverter to Domicil of Origin.—In 1855 a domiciled Manxman came to England and married an Englishwoman, and resided in England for twenty years. At the date of the marriage the wife was entitled to a vested reversionary interest in a legacy which fell into possession in 1885. In 1875 the husband and wife returned to the Isle of Man, where the husband carried on business till 1878, when he became insolvent, and executed

a deed of assignment of all his property, including his wife's interest in the legacy, for the benefit of his creditors. In 1880 the parties returned to England, where they resided till 1882, when the husband went to Mexico to seek employment. The doctrine of a wife's equity to a settlement is unknown to Manx law:—Held, that the Manx domicile of the husband which had been lost by the twenty years' residence in England, reverted on his return to the Isle of Man, that nothing happened afterwards to re-establish the English domicile, and that as the domicile was therefore Manx, the wife's equity to a settlement could not be asserted, *Marsland, In re*, 55 L. J., Ch. 581; 54 L. T. 635; 34 W. R. 540—Kay, J.

2. DOWER.

Interest in Land—Gift to Wife of Income of Proceeds of Land.]—A testator having entered into a contract for the sale of real estate to a purchaser, died before completion. By his will he devised all his real estate to trustees for sale, and of the proceeds to invest 1,000*l.* and pay the income thereof to his widow. He then gave various other legacies out of the proceeds, but made no disposition of the ultimate residue. After the testator's death it was found that no title could be made to a material part of the property comprised in the contract, and thereupon the trustees of the will rescinded the contract:—Held, that the gift to the widow of the income of part of the proceeds of the real estate was a gift to her of an "interest in land" within s. 9 of the Dower Act, 3 & 4 Will. 4, c. 105, and that, therefore, she was not entitled to dower out of any part of her husband's estate. *Thomas, In re, Thomas v. Howell*, 34 Ch. D. 166; 56 L. J., Ch. 9; 55 L. T. 629—Kay, J.

Marriage Settlement—Provision for intended Wife and Issue.]—In an ante-nuptial settlement any provision for the intended wife in the event of her surviving her husband, will bar her dower, if such intention be expressed or appear clearly from the construction of the deed. But provisions for the wife to her separate use for life, for the maintenance of herself and her children, in the event of the husband failing in his credit or becoming a bankrupt or insolvent, and inter alia a proviso that the trustees should, whenever they might think fit or expedient, that is to say—in the event of the husband becoming embarrassed in his circumstances, or there should arise some good and sufficient reason therefor, so as to render a sale consistent with, and in aid of, the trusts of the settlement, and provision for the wife and the issue of the marriage, realize out of the property of the husband a bond for 1,000*l.*, executed to them, and invest the proceeds for the wife to her separate use for life, and after her death for the issue of the marriage, provided that the amount of the bond should not be levied after the husband's death without the consent in writing of the wife:—Held, not a bar to the wife's right to dower. *O'Rourke v. O'Rourke*, 17 L. R., Ir. 153—M. R.

3. POLICIES OF INSURANCE.

For "Wife and Children"—Joint Tenancy.]

—A policy was taken out on the life of

the assured for the benefit of his wife and children:—Held, that his widow and children took as joint tenants. *Mellor's Policy Trusts, In re* (7 Ch. D. 200), explained; *Adam's Policy Trusts, In re* (23 Ch. D. 525), dissented from. *Seyton, In re, Seyton v. Satterthwaite*, 34 Ch. D. 511; 56 L. J., Ch. 775; 56 L. T. 479; 35 W. R. 373—North, J.

Appointment of Trustees—Petition.]—A petition (presented since the coming into operation of the Married Women's Property Act, 1882), for the appointment of trustees of the proceeds of a life policy effected by a husband, under the provisions of the Married Women's Property Act, 1870, for the benefit of his wife and children, ought to be entitled in the matter of the act of 1882. *Soutar's Policy Trust, In re*, 26 Ch. D. 236; 54 L. J., Ch. 256; 32 W. R. 701—Pearson, J.

— Direction to Exchange Policy for One fully Paid up.]—The defendant effected a policy on his life for the benefit of his wife and children under s. 10 of the Married Women's Property Act, 1870. He became bankrupt and mentally deranged, and was unable to pay the premiums. By the rules of the insurance society the policy could be exchanged for a fully paid-up policy of smaller value, and thus preserved from lapsing. The wife and only child of the defendant brought this action, claiming the appointment of a trustee of the policy, and that such trustee might be authorised to exchange the policy for one fully paid up:—Held, that the court under its general jurisdiction had power to appoint two trustees; and judgment was given to that effect, and otherwise as claimed. *Schultz v. Schultz*, 56 L. J., Ch. 356; 56 L. T. 231—Stirling, J.

Policy in Wife's Name—Voluntary Settlement of—Payment of Premiums.]—On 5th November, 1844, a policy of insurance for 2,000*l.* was effected upon the life and in the name of B. the wife of A. By a post-nuptial settlement dated 27th November, 1844, reciting that B. was desirous of making provision for her husband and children, and that A. had agreed to join in the deed for the purpose of assuring "all his interest, if any," in the policy, A. and B. assigned to C. and D. the policy and all sums payable thereunder upon trust to invest the same and pay the income to A. and his assigns during his life and after his decease to divide the trust funds equally among the children of A. and B. The settlement contained no power of revocation. A. predeceased his wife, having paid all premiums during his lifetime. Upon the death of B., the question arose whether the policy moneys were subject to the trusts declared by the settlement:—Held, that the policy was intended by the husband to be and was the separate property of the wife at the date of settlement, in which the husband concurred only for conformity and to bind such interest, if any, as he had; that the settlement was valid and that the policy moneys were bound by the trusts of the settlement. *Winn, In re, Reed v. Winn*, 57 L. T. 382—Kay, J.

For Benefit of Wife—Contingent Interest of Husband—Withdrawal.]—A policy of insurance on the life of a husband for the benefit of his

wife was, in 1876, effected with an insurance company which carried on business at New York, through their branch office in London. The application for the policy was made by him on behalf of his wife. The premiums were made payable in London. By the policy the company promised to pay the amount assured to the wife for her sole use, if living, and, if she were not living, to the children of the husband, or, if there should be no such children, to the executors or assigns of the husband, at the London office. The policy also provided that, on the completion of a period of ten years from its issue, provided it should not have been previously terminated by lapse or death, the legal owner should have the option of withdrawing the accumulated reserve and surplus appropriated by the company to the policy. The husband paid the premiums until July, 1883, when he filed a liquidation petition under the Bankruptcy Act, 1869. In 1884 he obtained his discharge. After 1883 the wife paid the premiums out of her separate estate. In 1886 the wife exercised the right of withdrawal, and the company paid 2,959*l.* in respect of the policy:—Held, that, even if the sum thus paid did not by virtue of the policy belong to the wife for her separate use, the husband's contingent interest in it at the time when he obtained his discharge was a mere possibility, and that, consequently, it did not pass to the trustee in the liquidation. *Dever, Ex parte, Suse, In re*, 18 Q. B. D. 660; 56 L. J., Q. B. 552—C. A.

4. SEPARATE ESTATE.

a. What is—Creation of.

Freeholds—Agreement signed by Husband only.—In order that the fee simple of an intended wife may be affected with a trust for her separate use by an agreement made between the intended husband and wife before marriage, the agreement must be in writing and signed by the wife as well as by the husband; if it is signed by the husband alone, it is, owing to the Statute of Frauds, s. 7, invalid as a declaration of trust for separate use as to the fee simple, a husband having in his wife's land only an estate for the joint lives of himself and his wife with a possible estate by the curtesy. *Dye v. Dye*, 13 Q. B. D. 147; 53 L. J., Q. B. 442; 51 L. T. 145; 33 W. R. 2—C. A.

Judicial Separation—Effect of—Property subsequently acquired.—A wife who has obtained a decree for judicial separation is to be considered as a feme sole with respect to such property only as she may acquire or which may come to or devolve upon her after the decree: s. 25 of the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), not applying to property to which the wife was entitled in possession at the date of the decree. *Cooke v. Fuller* (26 Beav. 99) distinguished. *Waite v. Morland*, 38 Ch. D. 135; 57 L. J., Ch. 655; 59 L. T. 185; 36 W. R. 484—C. A.

Wife Trading Separately from Husband—General Power of Appointment.—By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 5, "Every married woman carrying on a trade separately from her

husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole":—Held, that the expression "separate property" includes only that which would, if the woman was unmarried, be her "property," and does not therefore include a general power of appointment by deed or will of which she is the donee, but which she has not exercised, and a married woman who has traded separately from her husband and who has been adjudicated a bankrupt, cannot be compelled to execute a deed exercising such a power in favour of the trustee in the bankruptcy. *Gilchrist, Ex parte, or Armstrong, Ex parte, Armstrong, In re*, 17 Q. B. D. 521; 55 L. J., Q. B. 578; 55 L. T. 538; 34 W. R. 709; 51 J. P. 292; 3 M. B. R. 193—C. A.

—**Marriage before 1870—Earnings during Coverture.**—A lady, who was carrying on the business of a ladies' school, was married in 1862. A settlement was executed on the marriage, which did not in any way refer to or affect to deal with the business carried on by her or the goodwill thereof. After the marriage she continued to carry on the school. Her husband lived in the house, but he did not take any part in the business, nor assist in any manner in the tuition. The prospectuses, &c., of the school were in her name. Out of the earnings of the school the wife contributed to, if she did not substantially pay, the household expenses. Some of the earnings were invested by the husband in his own name, and another portion was invested in the purchase of the lease of the premises in which the school was carried on. The husband died in 1877. He did not in any way affect to deal with the school property by his will, and he had not ostensibly by any act of his treated it as his own property. Upon his death, the question arose between the executors of his will, under which his infant children were interested, and his widow, who survived him, as to who was entitled to the goodwill, property, and effects of the business:—Held, upon the evidence, that the business was carried on by the wife separately from her husband within the meaning of s. 1 of the Married Women's Property Act, 1870; that it made no difference that the marriage took place before the passing of that act, and that the goodwill, stock, and effects belonging to the business, and all investments out of the earnings of the business made since the passing of the act, were the property of the wife. *Dearmer, In re, James v. Dearmer*, 53 L. T. 905—Kay, J.

Settlement on First Marriage—Life Estate—General Power of Appointment—Re-marriage.

—By a settlement made in 1878, upon a former marriage of Mrs. P., a fund was settled in trust for her during her life, and during her said intended coverture, for her separate use without power of anticipation; and then upon trust, in the events which happened, for such persons as she should during coverture by deed or will appoint, and when not under coverture by deed or will appoint, and, in default of appointment, upon trust for her executors, administrators, and assigns. Mrs. P., having survived her former husband, married again after the passing of the Married Women's Property Act, 1882, without having exercised her power of appointment under the settlement:—Held, that the operation

of the Married Women's Property Act was not excluded by s. 19, and that the act applied so far as to add the incident of separate use to her interest under the settlement, and that she and her husband were entitled to have the fund transferred to them. *Onslow, In re, Plowden v. Gayford*, 39 Ch. D. 622; 57 L. J., Ch. 940; 59 L. T. 308; 36 W. R. 883—Stirling, J.

Possession of Husband as Trustee—Marriage Settlement made Abroad.—The rule that a husband is a trustee for his wife of her separate property when no other trustee has been appointed, applies to that which becomes her separate property by virtue of a marriage contract entered into in a foreign country. When, therefore, such property is in the possession of a husband at the commencement of his bankruptcy it does not pass to his trustee. *Sibeth, Ex parte, Sibeth, In re*, 14 Q. B. D. 417; 54 L. J., Q. B. 322; 33 W. R. 556—C. A.

Bequest—Words creating.—A bequest to a married woman of real and personal property "for her absolute use and benefit," is sufficient to create a separate estate. *Negus v. Jones*, 1 C. & E. 52—Williams, J.

—Restraint on Anticipation—Election.—In the case of a married woman, to whom an interest with a restraint on anticipation attached thereto is given by the same instrument as that which gives rise to a question of election, the doctrine of election does not apply, as the value of her interest in the property to be relinquished by way of compensation has, by the terms of the instrument, been made inalienable. *Wheatley, In re, Smith v. Spence*, 27 Ch. D. 606; 54 L. J., Ch. 201; 51 L. T. 681; 33 W. R. 275—Chitty, J.

—Restraint on Anticipation—Right to Capital.—A testator having a general power of appointment over a settled fund, appointed that a sum of 1,500*l.* should be raised and paid to his daughter, who was a married woman, absolutely, for her separate use, without power of anticipation; and appointed that one-fourth of the residue of the fund should be held upon trust for the same daughter absolutely for her separate use without power of anticipation:—Held, that the daughter was not entitled to payment of the capital of one-fourth of the residue. *Grey's Settlements, In re, Acason v. Greenwood*, 34 Ch. D. 712; 56 L. J., Ch. 511; 56 L. T. 350; 35 W. R. 560—C. A.

Devise of Freeholds—Restraint on Alienation.—A testator gave, devised, and bequeathed all his freeholds and leaseholds to two of his daughters equally between them as tenants in common to and for their several and respective sole and separate use and benefit absolutely, and stated that it was "his wish and request that they should not sell or dispose of any part of his said freehold or leasehold premises." In a subsequent part of his will, there was a bequest of a sum of stock to trustees in trust to pay the income to another daughter for her life, "for her own sole and separate and inalienable use and benefit, and without power of anticipation." The two daughters, one of them being married, contracted to sell some of the freehold property. On summations under the Vendor and Purchaser Act on

behalf of the purchaser:—Held, that the words of the devise, even if they stood alone, would have been insufficient to operate as a restraint on anticipation; that the cases as to precatory trusts did not apply, as there was no trust imposed in favour of some other person; that the subsequent bequest strengthened this construction; and that a good title was shown as to the moiety of the married woman. *Hutchings to Burt, In re*, 59 L. T. 490—C. A. Reversing 58 L. T. 6—Kay, J.

Marriage Before, Funds Accrued after 1882.]—Property to which at the time of the commencement of the Married Women's Property Act, 1882, a woman married before the act was entitled subject to a life estate, but not for her separate use:—Held, not to become her separate estate by falling into possession after the commencement of the act. *Reid v. Reid*, 31 Ch. D. 402; 55 L. J., Ch. 294; 54 L. T. 100; 34 W. R. 332—C. A.

If a woman married before the commencement of the Married Women's Property Act, 1882, has before the commencement of the act acquired a title, whether vested or contingent, and whether in reversion or remainder, to any property, such property is not made her separate estate by s. 5 of the act, though it falls into possession after the act. *Baynton v. Collins* (27 Ch. D. 604) overruled. *Id.*

Property to which a married woman was, at the commencement of the Married Women's Property Act, 1882, entitled for a vested interest in remainder, and which, on the 4th of October, 1884, became an interest in possession, is not property "her title to which has accrued after the commencement of the act" within the meaning of s. 5. *Tucker, In re, Emanuel v. Parfitt* (54 L. J., Ch. 874) and *Adames's Trust, In re* (54 L. J., Ch. 878) followed. *Baynton v. Collins* (27 Ch. D. 604) not followed. *Hobson, In re, Webster v. Richards*, 55 L. J., Ch. 300; 34 W. R. 195—Chitty, J.

N., a lady married in 1860, became entitled, as one of the next of kin of C., who died without children in 1885, to a share of a fund settled by a deed of 1830, in trust for C. for life, and after her death to her children, and in default of children, for such person or persons as should, on the failure of children, be the next of kin of C. under the Statute of Distributions:—Held, that N.'s title accrued before the Married Women's Property Act, 1882, and that she did not take a separate estate under s. 5 of that act, in her share, but that it went to the assignee in bankruptcy of her husband, subject to her equity to a settlement. *Beaupré's Trusts, In re*, 21 L. R., Ir. 397—C. A.

A married woman, married before the date when the Married Women's Property Act, 1882, came into operation, is entitled to receive as her separate property funds to which her title accrued in possession after that date, although it accrued in reversion or remainder before that date. *Baynton v. Collins*, 27 Ch. D. 604; 53 L. J., Ch. 1112; 51 L. T. 681; 33 W. R. 41—Chitty, J.

A testator, who died in 1875, devised his real estate to his wife for life, with remainder to his children. One daughter married in 1878, and the tenant for life died in 1884:—Held, that under the operation of s. 5 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75),

the married woman's share in the estate was her separate property, and could be disposed of by her without the concurrence of her husband. *Thompson and Curzon, In re*, 29 Ch. D. 177; 54 L. J., Ch. 610; 52 L. T. 498; 33 W. R. 688—Kay, J.

Property to which a married woman was, at the commencement of the Married Women's Property Act, 1882, entitled for a vested interest in remainder, and which afterwards became an interest in possession, is not property "her title to which has accrued after the commencement of the act" within the meaning of s. 5. *Trucker, In re, Emanuel v. Parfitt*, 54 L. J., Ch. 874; 52 L. T. 923; 33 W. R. 932—Pearson, J.

Section 5 of the Married Women's Property Act, 1882, applies only to property of a married woman her title to which accrues for the first time after the commencement of the act; it does not, therefore, include an interest to which she was contingently entitled before, but which falls into possession after the act. *Adames' Trusts, In re*, 54 L. J., Ch. 878; 53 L. T. 198; 33 W. R. 834—Kay, J.

Property to which a woman, married before the passing of the Married Women's Property Act, 1882, has acquired a contingent title before the act, does not become her separate property by its falling into possession after the act. *Tench's Trusts, In re*, 15 L. R., Ir. 406—V.-C.

Marriage and Accrual before 1882.—A woman, being executrix and residuary legatee, married in 1880. She had discharged all her duties qua executrix, save that she had not obtained payment of a sum of money which fell due to her testator's estate in September, 1879, for which sum she brought an action in 1883:—Held, that the wife's title qua legatee accrued before the Married Women's Property Act, 1882, came into operation, and that the husband was entitled to this money jure mariti. *Edwards v. Edwards*, 1 C. & E. 229—Mathew, J.

Protection Order—Cohabitation resumed.—*See Emery's Trust, In re*, post, col. 935.

Question as to Property—Enquiry by Registrar.—A wife who had obtained a decree for a judicial separation, claimed certain furniture as her separate property, but her husband denied that she had a title to it:—The court made an order under s. 17 of the Married Women's Property Act, 1882, directing the registrar to enquire whether the furniture formed part of the wife's separate estate. *Phillips v. Phillips*, 13 P. D. 220; 57 L. J., P. 76; 59 L. T. 183; 37 W. R. 224; 52 J. P. 407—Butt, J.

b. Liability of.

Property must exist at Time of making Contract.—The contract entered into by a married woman "to bind her separate property," referred to in s. 1, sub-s. 4, of the Married Women's Property Act, 1882, is a contract entered into at a time when she has existing separate property. If the married woman commits a breach of such a contract, and a judgment is recovered against her for the breach, the judgment can be enforced against any separate property which she then has. But s. 1, sub-s. 4, does not enable a married

woman who has no existing separate property to bind by a contract any separate property which she may possibly thereafter acquire. *Shakespeare, In re, Deakin v. Lakin*, 30 Ch. D. 169; 55 L. J., Ch. 44; 53 L. T. 145; 33 W. R. 744—Pearson, J.

—**Onus of Proof.**—S. 1, sub-s. 2, of the Married Women's Property Act, 1882, does not make a married woman capable of rendering herself liable in respect of her separate property on any contract unless she has some separate property at the time the contract is made. In an action against a married woman to recover the price of goods sold and delivered to her:—Held, that the onus was on the plaintiff to show that the defendant had separate property at the time she made the contract. *Palisier v. Gurney*, 19 Q. B. D. 519; 56 L. J., Q. B. 546; 35 W. R. 760; 51 J. P. 520—D.

Married Women's Property Act, 1882, s. 1, sub-s. 4, not Retrospective.—Sub-section 4 of section 1 of the Married Women's Property Act, 1882, which enacts that a married woman's contract with respect to her separate property shall bind not only the separate property to which she is entitled at the date of the contract, but all which she shall subsequently acquire, is not retrospective, and does not apply to a married woman's engagements made before the act. *Roper, In re, Roper v. Doncaster*, 39 Ch. D. 482; 58 L. J., Ch. 215; 59 L. T. 203; 36 W. R. 750—Kay, J.

Sub-s. 4 of s. 1 of the Married Women's Property Act, 1882, is not retrospective, and, therefore, in an action on a contract made by a married woman before the passing of that act, judgment cannot be ordered in such terms as to be available against separate property to which the defendant became entitled after the date of the contract. *Turnbull v. Forman*, 15 Q. B. D. 234; 54 L. J., Q. B. 489; 53 L. T. 128; 33 W. R. 768; 49 J. P. 708—C. A.

Separate Use not arising till after Contract.—By a post-nuptial settlement made in pursuance of ante-nuptial articles, certain policies of insurance on the life of the husband were assigned to trustees upon trust to receive the money and pay the income to the wife during her life for her separate use, independently of any future husband whom she might marry. There was no restraint on anticipation. During the life of her first husband the wife made promissory notes in favour of the plaintiff, and the plaintiff, the first husband being still alive, brought an action claiming a charge on the policies:—Held, that the trust for separate use did not arise till after the death of the husband, and that as the contracts of a married woman can only be enforced against property which formed part of her separate estate at the date of the contract, the action could not be maintained. *Gaffee, In re* (1 Mac. & G. 541), *Molynse's Estate, In re* (6 L. R., Eq. 411), and *Sturgis v. Corp* (13 Ves. 190), discussed. *King v. Lucas*, 23 Ch. D. 712; 53 L. J., Ch. 64; 49 L. T. 216; 31 W. R. 904—C. A.

Marriage during Pending Proceedings.—Where a woman married when proceedings were pending between her and others, which resulted

after her marriage in a statutory debt being created:—Held, that her separate property was chargeable with the payment of such debt. *London (Mayor) v. Brooke*, 1 C. & E. 169—Pollock, B.

Contract after 1882—Restraint on Anticipation.]—A married woman, having either no separate property, or only separate property subject to a restraint on anticipation, who institutes divorce proceedings after the passing of the Married Women's Property Act, 1882, cannot be deemed under the act to have entered into a contract, with respect to her separate property, for payment of the costs of her solicitor incurred in the divorce proceedings. *Harrison v. Harrison*, 13 P. D. 180; 58 L. J., P. 28; 60 L. T. 39; 36 W. R. 748—C. A.

Action brought before, Order of Reference by Consent after Act.]—S. 1, sub-sections 3 and 4, of the Married Women's Property Act, 1882, have not a retrospective operation so as to include contracts entered into by a married woman before the date of the commencement of the act. But an order made after the commencement of the act by consent in an action by a creditor against a married woman in respect of her contract before the act, by which order all questions under the contract were referred to an arbitrator, and the parties bound themselves to abide by, obey, perform, and keep the award, is an agreement by the married woman after the commencement of the act, within s. 1 (3), and therefore by s. 1 (4) any separate estate which she had at or after the date of such agreement is liable to pay the amount found by the award to be due from her under the contract. *Conolan v. Leyland*, 27 Ch. D. 632; 54 L. J., Ch. 123; 51 L. T. 895—Chitty, J.

Settlement made before 1882—Restraint on Anticipation.]—S. 19 of the Married Women's Property Act, 1882, so far as it affects the validity of a settlement or an agreement for a settlement as against the creditors of a married woman, is not retrospective. Therefore execution cannot issue against property settled before the commencement of the act to the separate use of a married woman without power of anticipation. *Smith v. Whitlock*, 55 L. J., Q. B. 286; 34 W. R. 414—D.

Post-nuptial Settlement before 1882—Contract during Coverture.]—By a post-nuptial settlement, made before the Married Women's Property Act, 1882, property devised by will to a married woman for her separate use without restraint against anticipation was limited to her for life for her separate use without power of anticipation, remainder to the husband for life, remainder to the children. The wife after the act and during coverture made a promissory note in favour of the plaintiffs, and after the death of the husband the plaintiffs obtained judgment upon the note against the widow and an order for the appointment of a receiver of the rents and profits of the property in settlement:—Held, that upon the true construction of the Act, ss. 1, 5, and 19, the property in settlement was not liable to satisfy the judgment, and that the order appointing the receiver must be discharged. *Beckett v. Tasker*, 19 Q. B. D. 7; 56 L. T. 636; 36 W. R. 158—D.

Undertaking as to Damages.]—Where an injunction is wrongly granted, an undertaking as to damages given to the plaintiff is equally enforceable whether the mistake was in point of law or in point of fact. In such a case a husband-defendant is not prohibited from enforcing an undertaking given by a wife-plaintiff by reason of the provision in the Married Women's Property Act, 1882, s. 12, debarring him from suing his wife in tort. A married woman who has given an undertaking as to damages since the Married Women's Property Act, 1882, will be dealt with on the same footing as that on which a married woman's next friend who had given such an undertaking would have been dealt with before the act. *Hunt v. Hunt*, 54 L. J., Ch. 289—Pearson, J.

Costs of Proceedings improperly Instituted—Restraint on Anticipation.]—A married woman who, under a will, was entitled to income for her separate use, with a restraint on anticipation, instituted (without a next friend) against the trustees proceedings in the course of which she took out a summons which was refused:—Held, that the restraint on anticipation did not prevent the court from giving the trustees liberty to retain their costs of the proceedings out of the married woman's income. *Andrews, In re, Edwards v. Dewar*, 30 Ch. D. 159; 54 L. J., Ch. 1049; 53 L. T. 422; 34 W. R. 62—Pearson, J. See next case.

A married woman by her next friend, having brought in 1882 an action for administration of a trust fund, to the income of which she was entitled for her separate use without power of anticipation, the court, on further consideration in 1884, held the action to have been unnecessary and improper, and the next friend was ordered to pay the defendants' costs. The defendants being unable to find the next friend, an order was made giving the trustees liberty to retain the costs out of the income of the trust fund already due and to become due to the married woman:—Held on appeal, that no such order could be made, for that the court has no jurisdiction to disregard the restraint on anticipation on the ground that it appeared to the court to be just to do so; and that no income which did not accrue due till after the action on which the claim against the separate estate depended, viz., the improper institution of the suit, could be attached to meet the costs. *Glanville, In re, Ellis v. Johnson*, 31 Ch. D. 532; 55 L. J., Ch. 325; 54 L. T. 411; 34 W. R. 309; 50 J. P. 662—C. A.

Whether, if the plaintiff had been suing under the Married Women's Property Act, 1882, without a next friend, the order could have been supported, *quære*. *Andrews, In re* (30 Ch. D. 159) observed upon. *Id.*

Simple Contract Debt—Analogy of Statute of Limitations.]—In 1875 a married woman borrowed money from her husband upon a parol agreement to repay him the amount with interest out of her separate estate. She died in 1884, without having paid anything in respect either of interest or principal, and without having given any acknowledgment in writing of her liability to repay the debt. After her death her husband claimed repayment:—Held, that the debt was barred by analogy to the Statute of Limitations. *Norton v. Turvill* (2 P. Wms. 144) explained. *Hastings (Lady), In re, Hallett v.*

Hastings, 35 Ch. D. 94; 56 L. J., Ch. 631; 57 L. T. 126; 35 W. R. 584; 52 J. P. 100—C. A.

General Power of Appointment by Will—Liability of appointed Property.—In cases not within the Married Women's Property Act, 1882, the exercise by the will of a married woman of a general power of appointment, whether the power be exercisable by deed or will, or by will only, does not make the property appointed liable to engagements entered into with her on the credit of her separate estate. *Roper, In re, Roper v. Doncaster*, 39 Ch. D. 482; 58 L. J., Ch. 215; 59 L. T. 203; 36 W. R. 750—Kay, J.

Restraint on Anticipation—Payment to Wife under Order reversed—Lien.—A female infant entitled under a will to a share of residuary personality contingently on her attaining twenty-one, married before—but came of age after—the commencement of the Married Women's Property Act, 1882. On her marriage a settlement of her property, not sanctioned under the Infants' Settlement Act, was made under which she took the first life estate with a restraint on anticipation. On her coming of age the fund was paid to her under an order of the court. The Court of Appeal reversed this order and declared her liable to refund, on the ground that the fund was subject to the settlement. She refunded part, but was unable to refund the remainder, which she had spent. After this, the executors of the will paid to the trustees of the settlement an arrear of income which they had in hand:—Held, that so much of this income as accrued between the married woman's attaining twenty-one, and the order declaring her liability to refund, must be retained in part satisfaction of her liability to refund. *Pike v. Fitzgibbon* (17 Ch. D. 454) distinguished. *Dixon, In re, Dixon v. Smith*, 35 Ch. D. 4; 56 L. J., Ch. 773; 57 L. T. 94; 35 W. R. 742—C. A.

Devised Real Estate—Liability of Devisee—Restraint on Anticipation.—The liability, under the Act 11 Geo. 4 & 1 Will. 4, c. 47, of a devisee of land, who alienates the land, to the unpaid debts of the testator, is such that, on the alienation, the debts become his own debts to the extent of the value of the land alienated. Consequently, when a woman to whom land had been devised settled it on her marriage, after the passing of the Married Women's Property Act, 1870, the first trust being for herself absolutely until the marriage, and, after its solemnization, on trust for herself for her life, without power of anticipation, with remainder on trusts for the issue of the marriage:—Held, that the testator's personal estate being insufficient to pay his debts, the life interest of the settlor was, notwithstanding the restraint on anticipation, liable to make good the deficiency, to the extent of the value of the devised land; her liability to satisfy the debts of the testator, which arose on her alienation of the land by the settlement, being a debt "contracted by her before marriage," within the meaning of s. 12 of the Married Women's Property Act, 1870. *Sanger v. Sanger* (11 L. R., Eq. 470) and *London and Provincial Bank v. Bogle* (7 Ch. D. 773) followed. *Hedgely, In re, Small v. Hedgely*, 34 Ch. D. 379; 56 L. J., Ch. 360; 56 L. T. 19; 35 W. R. 472—North, J.

c. Proceedings against.

Pleading—Statement of Claim—No Appearance entered.—Where a married woman is defendant in an action on a contract, and has made default in the delivery of a defence, the statement of claim must contain an allegation that the defendant has separate estate; otherwise the court will refuse to make an order against the defendant on the statement of claim under Ord. XXVII. r. 11, of the Rules of 1883. *Tetley v. Griffith*, 57 L. T. 673; 36 W. R. 96—Chitty, J.

Judgment under Ord. XIV—Evidence of Separate Estate.—In an action against husband and wife to recover a debt of the wife contracted before marriage, where the marriage has taken place after the coming into operation of the Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, but before the coming into operation of the Married Women's Property Act, 1882, judgment may be entered against the wife under Ord. XIV. r. 1, making the debt and costs payable out of her separate property, with a limitation as regards execution similar to that in the form settled in *Scott v. Morley* (20 Q. B. D. 120), without proof of the existence of separate estate at the date of the judgment. *Downe v. Fletcher*, 21 Q. B. D. 11; 59 L. T. 180; 36 W. R. 694; 52 J. P. 375—D.

Form of Judgment.—The proper form of judgment against a married woman under s. 1, sub-s. (2) of the Married Women's Property Act, 1882, settled by the court. *Scott v. Morley*, 20 Q. B. D. 120; 57 L. J., Q. B. 43; 57 L. T. 919; 36 W. R. 67; 52 J. P. 230; 4 M. B. R. 286—C. A.

When judgment was recovered against a married woman, an order was made, on the application of the plaintiff, that the judgment debtor should pay the amount due upon the judgment by instalments out of her separate estate not subject to restraint against anticipation; or which, being so subject, was nevertheless liable to execution under s. 19 of the Married Women's Property Act, 1882. *Johnstone v. Browne*, 18 L. R., Ir. 428—Ex. D.

When judgment is obtained against a married woman, execution is limited to such separate estate as she is not restrained from anticipating; unless such restraint exists under any settlement or agreement for a settlement of her own property, made or entered into by herself. *Bursill v. Tanner*, 13 Q. B. D. 691; 50 L. T. 589; 32 W. R. 827—D. See also *Gloucestershire Banking Company v. Phillips*, post, col. 943.

The plaintiff sued the defendant, a widow, as maker of a promissory note during the lifetime of her husband. The defendant pleaded that at the making of the note she was not entitled to separate property, and that she did not afterwards become possessed of or entitled to any property which she could charge, alien or dispose of; that the only separate estate she possessed or was entitled to at the date of the note, and afterwards during coverture, was separate estate subject to a restraint on anticipation; and that there were not, at the date of the alleged contract, or subsequently, arrears

thereof due :—Held, on demurrer, a valid defence to the action. The principle of *Pike v. Fitzgibbon* (17 Ch. D. 454) has not been altered by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). *Myles v. Burton*, 14 L. R., Ir. 258—C. P. D.

— **Execution Limited.**—Where, upon motion to enter final judgment against a married woman, she denied by affidavit having separate estate, save property settled on her marriage, with a restraint on anticipation, the court, in allowing judgment to be entered, limited execution to such separate property as she was not restrained from anticipating, unless such restraint existed under a settlement or agreement for a settlement of her own property made or entered into by herself. Form of Order. *Nicholls v. Morgan*, 16 L. R., Ir. 409—C. P. D. And see *Scott v. Morley*, supra.

Writ of Sequestration—Form.—The general form of a writ of sequestration against "the estate and effects" of a married woman without any express limitation therein to separate property of the wife not subject to a restraint on anticipation is correct; but the writ can only operate on her separate property which is not so subject. *Hyde v. Hyde*, 13 P. D. 166; 57 L. J., P. 89; 59 L. T. 529; 36 W. R. 708—C. A.

Inquiry as to Existence.—A charge given by a married woman upon her separate estate is sufficient evidence of the existence of separate estate to entitle a plaintiff, with whom she has contracted, to an inquiry. *London Alliance Discount Company v. Kerr*, 1 C. & E. 5—Cave, J.

Receiver—In what Cases—Judicature Act, 1873, s. 25, sub-s. 8.—M., a married woman, by her next friend, applied to tax the bill of costs of her solicitor, incurred in a suit relating to her separate estate. After the taxing-master's certificate had been filed, an order was made on the application of the solicitor, directing an inquiry of what M.'s separate estate consisted at the date of the filing of the certificate capable of being reached by the judgment and execution of the court, and appointing a person to receive it until the amount found due on taxation was paid.—Held, that this order was proper, and that it was not necessary to take separate proceedings by action to enforce the demand against the separate estate. *Peace and Waller, In re*, 24 Ch. D. 405; 49 L. T. 637; 31 W. R. 899—C. A.

— **Who Appointed—Prior Charges.**—In an action against a married woman alleged to be possessed of separate estate, no defence being delivered, the master, by his report, found that she was entitled to separate estate vested in trustees, and subject to certain charges. The report being confirmed, the plaintiff was appointed receiver, without security, of the residue of the income of the separate estate, after payment of the prior charges, the plaintiff undertaking to act without commission. *M'Garry v. White*, 16 L. R., Ir. 322—Q. B. D.

d. Removing Restraint on Anticipation.

Principles on which Courts act.—The power given by s. 39 of the Conveyancing Act, 1881, ought not to be used indiscriminately. *Jordan, In re, Kino v. Picard*, infra.

S. 39 of the Conveyancing Act, 1881, confers no general power of removing the restraint on anticipation, but only enables the court to make binding some particular disposition of her property by a married woman, notwithstanding a restraint on anticipation, if the court is of opinion that such disposition is beneficial to her. *Warren's Settlement, In re*, 52 L. J., Ch. 928; 49 L. T. 696—C. A.

Possibility of Issue.—Application by husband and wife and trustees of a settlement for the removal of the restraint on anticipation, for the purpose of rendering the capital of the trust fund—which stood limited upon the death of the survivor of husband and wife in trust for the children of the marriage—available for the benefit of the husband and wife, who were fifty-three and fifty years old respectively, there being no issue of the marriage, refused, chiefly on the ground that the court ought not to assume that there would be no children, although the parties had been married for twenty-eight years, and had never had any children, and there was medical evidence that it was almost, if not entirely, impossible that there could be any issue. *Id.*

Unauthorised Investment.—Trust funds, to which a married woman was absolutely entitled, but subject to a restraint on anticipation, were invested upon mortgages of leasehold property, one of which, not being authorised by the trusts of the settlement, the trustees proposed to call in. The court being satisfied that it would be for the benefit of the married woman, made an order, on her application, permitting the investment to continue unchanged. *Wright's Trusts, In re*, 15 L. R., Ir. 331—V.-C.

Payment off of Mortgage.—By a voluntary deed lands were settled on A., the settlor for life; remainder to B., a married woman, for life, with a clause against anticipation; remainder to C. (B.'s husband) for life; remainder as B. should appoint; A., B., and C., joined in a mortgage with a power of sale, to secure advances by a bank to them. The bank sold under their power for the full value. It appearing that there were no other means of paying off the mortgage, that the lands were in danger of eviction for non-payment of headrent, and that they were sold for full value, the court, on the application of B. and C., made an order for dispensing with the restraint on anticipation. *Seagrave's Trust, In re*, 17 L. R., Ir. 373—M. R.

Binding Life Interest — Forfeiture.—A married woman was, under the will of a testator, entitled to the income of a share of his residuary estate for her life for her separate use without power of anticipation. The will contained a proviso that the income to which any person should become entitled for life under the will should be forfeited in the event of such person charging, alienating, or assigning such income or any part thereof by any act of theirs, or by bankruptcy, or other act or operation of law.

And there was a gift over of the income in the event of forfeiture. She applied to the court, under s. 39 of the Conveyancing Act, 1881, that, notwithstanding the restraint on anticipation, she might be at liberty to bind her life interest under the will for the purpose of raising a loan :—Held, that the application must be refused as it might involve a forfeiture of her life interest. *Jordan, In re, Kimo v. Picard*, 55 L. J., Ch. 330 ; 54 L. T. 127 ; 34 W. R. 270—Pearson, J.

Tenants in Common—House Property.—Two married women were tenants in common in equal shares of property for their separate use without power of anticipation. The property consisted for the most part of houses of which desirable leases could not be granted because of the restraint on anticipation. A summons was accordingly taken out for an order under the Conveyancing Act, 1881, s. 39, enabling the married women to bind their interests in the property, and for a partition, and its resettlement in moieties upon the married women for their lives for their separate use without power of anticipation, with remainders for their husbands for their lives, and ultimate remainders for the issue of the marriages :—Held, that under the circumstances an order binding the interests of the married women would be for their benefit within s. 39. *Curvey, In re, Gibson v. Way*, 56 L. J., Ch. 389 ; 56 L. T. 80 ; 35 W. R. 326—Chitty, J.

To satisfy Wife's Creditors.—A wife living with her husband was entitled to an income of 1,700l. for her separate use without power of anticipation. Her husband was without any means and had been adjudged bankrupt. The wife had given acceptances to many of her husband's creditors, and was harassed with actions, and a county court order for attachment in event of non-payment had been made against her. She was also suffering in health from the anxiety produced by pecuniary embarrassment :—Held, that the case was one in which the court would, in the exercise of its discretion under s. 39 of the Conveyancing Act, 1881, make an order relieving part of the wife's income from the restraint on anticipation, in order that a sum might be raised to satisfy creditors. *C's Settlement, In re*, 56 L. J., Ch. 556 ; 56 L. T. 299—Chitty, J.

Application—Service on Trustees.—On an application by a married woman, under s. 39 of the Conveyancing Act, 1881, for liberty to bind her life interest by way of mortgage, notwithstanding that she is restrained from anticipation, it is not necessary to serve the trustees of the settlement. *Little, In re*, 36 Ch. D. 701 ; 56 L. J., Ch. 872 ; 57 L. T. 583—C. A.

5. MAINTENANCE BY HUSBAND.

Jurisdiction of Justices—"Desertion."—By the Married Women (Maintenance in case of Desertion) Act, 1886 (49 & 50 Vict. c. 52), s. 1, any married woman who has been "deserted" by her husband may summon him before justices, and the justices, "if satisfied that the husband, being able wholly or in part to maintain his wife and family, has wilfully neglected or refused so to do, and has deserted his wife,"

may order that he shall pay her a weekly sum for her support. Upon a summons by a married woman under the act, it appeared that disputes had arisen between her and her husband, and that they had lived apart under an agreement for separation, by which he undertook to pay her a weekly allowance so long as she should live chastely and should not molest him. He had ceased to make and refused to continue the weekly payments under the agreement. He charged his wife with adultery, but the justices found that the charge was not proved :—Held, that the refusal of the husband to pay his wife the weekly allowance and to carry out the agreement of separation was not sufficient evidence of "desertion" within the act to warrant the justices in making an order against him for her support. *Pape v. Pape*, 20 Q. B. D. 76 ; 57 L. J., M. C. 3 ; 58 L. T. 399 ; 36 W. R. 125 ; 52 J. P. 181—D.

Residence of Wife.—A married woman whose husband has deserted and refused to maintain her may obtain an order, under 49 & 50 Vict. c. 52, against him for her support from any magistrate or justices within whose jurisdiction she resides at the time of such refusal or desertion, whichever act is the latest. *Reg. v. Leresche*, 56 L. J., M. C. 135 ; 35 W. R. 805—D.

Where such an order did not contain the name of the place where the refusal to maintain took place, the court refused to make absolute a rule for a certiorari to bring up and quash the same, it being admitted that the wife's residence was within the jurisdiction. *Id.*

Order obtained by Guardians—Wife leaving Workhouse.—K., in 1877, deserted his wife, who went into the workhouse in 1881 ; the overseers obtained an order upon K. for maintenance. In 1886 the wife left the workhouse, and applied for an order of maintenance under 49 & 50 Vict. c. 52 :—Held, that the justices had jurisdiction, and that as the former order was revoked by the wife leaving the workhouse, and as K. had never made any bona fide offer to resume cohabitation, she was a deserted wife. *Kershaw v. Kershaw*, 51 J. P. 646—D.

Right of Re-hearing—Evidence of Adultery.—A wife applied to justices for an order of maintenance against her husband under 49 & 50 Vict. c. 52. He suggested adultery against her, but was not prepared to prove it. The justices offered to adjourn it, so as to give time to obtain evidence, but he declined. The justices made the order against the husband :—Held, that he could not afterwards insist on a rehearing on the ground that he had since obtained evidence of the wife's adultery. *Reg. v. Oldham JJ.*, 51 J. P. 647—D.

The power given to justices by s. 2 of the Married Women (Maintenance in case of Desertion) Act, 1886 (49 & 50 Vict. c. 52), to "rehear any such summons at the instance of the husband at any time" is, on the true construction of the act, confined to the cases mentioned in the 2nd proviso to the 1st section, in which proof is offered that the wife has since the making of the order been guilty of adultery. *Sephton v. Sephton*, 58 L. T. 281 ; 52 J. P. 356—D.

Under Separation Agreements.—*See ante*, cols. 910 *et seq.*

In Divorce Proceedings.—*See ante*, cols. 901 *et seq.*

6. OTHER PROPERTY.

Title Deeds—Trustee in Bankruptcy of Husband of Tenant for Life.—Where a wife is legal tenant for life of lands, not for her separate use, the trustee in bankruptcy of her husband has no absolute right to the possession of the title-deeds during the coverture, but the court has a discretion in the matter. *Rogers, Ex parte, Pyatt, In re*, 26 Ch. D. 31; 53 L. J., Ch. 936; 51 L. T. 177; 32 W. R. 737—C. A.

Protection Order—Cohabitation resumed—Reduction into Possession.—Where a wife, entitled to property which is reversionary, or which had not been reduced into possession by the husband, has obtained a protection order under 41 & 42 Vict. c. 19, s. 4, and has afterwards resumed cohabitation with her husband, on the property coming or being reduced into possession, the wife is entitled to it absolutely under 20 & 21 Vict. c. 85, s. 25, and 21 & 22 Vict. c. 108, s. 8. *Emery's Trust, In re*, 50 L. T. 197; 32 W. R. 357—Kay, J.

7. DEALINGS WITH PROPERTY.

a. Examination—Fines and Recoveries Act.

Object and Effect of Examination.—One of the essential purposes of the separate examination of a wife on a sale and conveyance of her real estate by herself and her husband under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), is to ascertain whether the purchase-money is to belong to her husband or not. Accordingly, when she has acknowledged the conveyance before the commissioners, and has, on being separately examined by them, refused any provision out of the purchase-money or otherwise, she must be treated as having given up to her husband all claim upon the purchase-money, and as having no further interest in it either at law or in equity. This is the case even if the purchase-money or any part of it is left outstanding in trustees by way of an indemnity fund against charges on the estate; as, for instance, in the case of part being vested in trustees by a deed of declaration of trust for the purpose of keeping down an annuity originally charged on the estate, and subject to which it is sold; consequently, in such a case, in the event of the wife surviving the husband, and the fund still remaining outstanding, she cannot, as against his estate, claim the fund as her chose in action not reduced into possession by the husband. The effect of a married woman's acknowledgment and separate examination under the Fines and Recoveries Act, discussed. *Tennent v. Welch*, 37 Ch. D. 622; 57 L. J., Ch. 481; 58 L. T. 368; 36 W. R. 389—Kay, J.

Woman Married after 1870.—The 8th section of the Married Women's Property Act, 1870, does not enable a woman married after the passing of the act to pass by an unacknowledged deed the fee simple of real estate descended upon her. Observations upon a dictum of Jessel, M.R., in *Voss*,

In re (13 Ch. D. 504, 505). *Johnson v. Johnson*, 35 Ch. D. 345; 56 L. J., Ch. 326; 56 L. T. 163; 35 W. R. 329—Stirling, J.

Non-concurrence of Husband—Husband's Interest in Rents.—An order in the usual form obtained under s. 91 of the Fines and Recoveries Act, 1833, by a married woman, empowering her to dispose of her real estate without the concurrence of her husband, does not deprive him of the common law rights which he acquired in the property by reason of the coverture. Where, therefore, under such an order, a married woman sold and conveyed all her estate and interest in real estate, her husband refusing to join:—Held, that the husband's common law right to the rents during the coverture remained unaffected by the wife's alienation, but that (she asserting her equity to a settlement) he was bound, whether his estate was legal or equitable, to provide for her out of the rents; and, under the circumstances, the whole of the rents were settled upon her. *Fowke v. Draycott*, 29 Ch. D. 996; 54 L. J., Ch. 977; 52 L. T. 890; 33 W. R. 701—North, J.

Specific Performance of Agreement.—*See Cahill v. Cahill*, *ante*, col. 915.

Trust for Sale—"Bare Trustee."—A testator devised his real estate to trustees for sale, who were married women, one of them having married before and the other after the Married Women's Property Act, 1882. Both of them also took beneficial interests in the proceeds of sale. Under the judgment in an action for the administration of the testator's estate, part of the real estate was sold by the trustees, the purchaser paying his purchase-money into court:—Held, that the married women were "bare trustees" within s. 6 of the Vendor and Purchaser Act, 1874, and that the conveyance to the purchaser did not require the concurrence of the husbands, or acknowledgment under the Fines and Recoveries Act. *Docwra, In re, Docwra v. Faith*, 29 Ch. D. 693; 54 L. J., Ch. 1121; 53 L. T. 288; 33 W. R. 574—V.-C. B.

Copyholds, Covenant to Surrender.—A covenant to surrender copyholds vested in husband and wife in right of the wife is inoperative to pass the wife's estate, though by deed acknowledged. *Green v. Paterson*, 32 Ch. D. 95; 56 L. J., Ch. 181; 54 L. T. 738; 34 W. R. 724—C. A.

Sale under Settled Estates Act.—Notwithstanding the provision of s. 50 of the Settled Estates Act, 1877, that, when a married woman consents to an application to the court under the act, she is to be examined apart from her husband as to her consent, such an examination is not now necessary in the case of a woman who has married since the commencement of the Married Women's Property Act, 1882. *Riddell v. Errington*, 26 Ch. D. 220; 54 L. J., Ch. 293; 50 L. T. 584; 32 W. R. 680—Pearson, J.

In the case of a woman married before the commencement of the Married Women's Property Act, 1882, s. 1 of the act applies only as to property acquired by her after the commencement of the act. Therefore, if such a woman is a petitioner, or a respondent to a petition, under the Settled Estates Act, 1877, relating to property

her interest in which was acquired before the commencement of the act of 1882, she must be examined separately, as provided by s. 50 of the act of 1877. *Harris's Settled Estates, In re*, 28 Ch. D. 171; 54 L. J., Ch. 208; 51 L. T. 855; 33 W. R. 393—Pearson, J.

On an application under the Settled Estates Act, 1877, for the sanction of the court to the purchase of certain land by the trustees of a settlement out of funds in court arising from sales of the settled hereditaments, the separate examination of a married woman, the tenant for life, was directed, notwithstanding s. 32 of the Settled Land Act, 1882. *Arabin's Trusts, In re*, 52 L. T. 728—Kay, J.

Payment of Fund out of Court.—A fund standing to the separate credit of a married woman, unless married after the Married Women's Property Act, 1870, will not be paid to her by the court, even on her separate receipt, without her separate examination. Secus, where the marriage was after the act, and the applicant takes under an intestacy. *Deignan v. Deignan*, 13 L. R., Ir. 278—V. C.

b. In other Cases.

Payment out of Dividends.—Form of order for payment of dividends to a married woman where the trust is for payment to her separate use with a restraint on anticipation and no gift over, discussed and stated. *Stewart v. Fletcher*, 38 Ch. D. 627; 57 L. J., Ch. 765; 36 W. R. 713—Chitty, J.

Absolute Gift—Restraint on Anticipation.—A testatrix, by her will dated in 1875, gave all her real and personal estate to trustees upon trust for sale and conversion, and, after payment of debts, to raise thereout 4,500*l.*, and invest the same and hold the investments upon trust for B. for life; and declared, after his death, the trustees should stand possessed of three several sums of 1,000*l.*, part of the 4,500*l.*, in favour of certain persons therein named; as to the remaining 1,500*l.*, in trust for and to pay the same to B. (a married woman) for her sole and separate use, and in the event of her death in the lifetime of the testatrix to divide the same amongst her children, and declared that the interest which any female might take under her will should be for her sole and separate use and without power to anticipate the same, and for which her receipt alone should be a sufficient discharge. The testatrix died in 1881; B. died in 1882:—Held, that B. was entitled to have the capital sum of 1,500*l.* paid to her, and to give a good discharge for the same. *Bown, In re, O'Halloran v. King*, 27 Ch. D. 411; 53 L. J., Ch. 881; 50 L. T. 796; 33 W. R. 58—C. A.

Where a fund subject to a particular estate is given absolutely to a married woman with a restraint on anticipation, the restraint will not in the absence of any other ground be confined to the continuance of that particular estate. *Bown, In re* (27 Ch. D. 411) distinguished. *Tippett and Newbould, In re*, 37 Ch. D. 444; 58 L. T. 754; 36 W. R. 597—C. A.

A testator directed surplus income of real and personal estate, after providing an annuity, to be accumulated during the life of his wife; after her death he gave the capital to his children; he

directed that the shares of his daughters should be for their separate use, without power of alienation or anticipation during the wife's life:—Held, that his married daughters, during the life of their mother, were entitled to receive only the income of invested income. *Spencer, In re, Thomas v. Spencer*, 30 Ch. D. 183; 55 L. J., Ch. 80; 34 W. R. 62—Pearson, J.

—Settled Realty—Mortgage of Income of.]
—By a settlement, dated in 1864, freehold property was conveyed to trustees upon trust to let the same, and pay the rents and annual proceeds to C. S. W., a married woman, during her life for her own sole and separate use, free from the debts, control, or engagements of her present or any future husband; and “the receipts of her . . . for the said rents and annual proceeds to be given after the same shall become due” to be “good and effectual discharges” to the trustees for the same; and from and after the decease of C. S. W. then upon trust to pay the rents and annual proceeds to the husband, in case he survived her, during his life, with ultimate trusts for sale and division amongst the children and issue of C. S. W. by her then present or any future husband, as should be living at the time of such division. In 1881, C. S. W. and her husband mortgaged the income of the settled property to secure a loan of 1,000*l.*, and in 1883 they further charged such income, together with other property, with the payment of 500*l.* Notices of the mortgage and further charge were duly given to the trustees of the settlement. C. S. W. did not receive any of the moneys secured thereby, but her husband received the same, and applied the whole in payment of his own debts. The question was whether the mortgage was a valid charge upon the income of the settled property, and who was entitled to be paid such income:—Held, that C. S. W. was restrained from anticipation and her receipt was the only discharge which the trustees could accept. *Baker v. Bradley* (7 De G., M. & G. 597) followed. *Smith, In re, Chapman v. Wood*, 51 L. T. 501—Kay, J.

Restraint on Anticipation—Mortgage—Marshalling.—C., a widow, was entitled to the income of one-third of a fund in court for her life for her separate use without power of anticipation, and was also entitled to the income of the remaining two-thirds of the fund for her life, but subject to certain deductions. She mortgaged all her interest in the fund, and some policies of assurance on her life to F., and an order was made for payment of the income of the mortgaged property to him. C. then married M.; and after her marriage she charged all her interest in the fund in favour of P. After this T. obtained a judgment against her, and the appointment of a receiver of her separate estate. The income received by F. was more than sufficient for payment of the interest on his mortgage and the premiums on the policies, and he did not desire to reduce his principal:—Held, that as between F. and the subsequent incumbrancers of the fund, there ought to be a marshalling of securities, and that F. ought to pay the interest on his mortgage and the premiums on the policies out of the income of the one-third with respect to which the restraint on anticipation existed, so as to leave the income of the remaining two-thirds to satisfy the subsequent

incumbrances. *Loder's Trusts, In re*, 56 L. J., Ch. 230; 55 L. T. 582; 35 W. R. 58—North, J.

Will—Future Separate Estate—Assent of Husband.]—The will of a married woman who had no personal estate belonging to her for her separate use at the date of the will, made without the assent of her husband, is effectual to dispose of personal estate to her separate use which she afterwards acquires and is entitled to at her death. *Charlemont (Earl) v. Spencer*, 11 L. R., Ir. 490—C. A.

—Renunciation of Marital Rights—Real Estate.]—Mere renunciation by an intended husband of his marital rights in his wife's real property is not sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee. And upon the death of the wife without issue during her husband's lifetime, her heir-at-law, and not her devisee, will be entitled to the land of which she is seised in fee simple. *Rippon v. Dawding* (Ambl. 565) commented on. *Dye v. Dye*, 13 Q. B. D. 147; 53 L. J., Q. B. 442; 51 L. T. 145; 33 W. R. 2—C. A.

—Property acquired after Coverture.]—S. 1, sub-s. 1, of the Married Women's Property Act, 1882, gives a married woman power to dispose by will only of property of which she is seised or possessed while she is under coverture. Consequently, notwithstanding s. 24 of the Wills Act, her will made during coverture is not, unless it is re-executed after she has become discover, effectual to dispose of property which she acquires after the coverture has come to an end. *Price, In re, Stafford v. Stafford*, or *Price v. Stafford*, 28 Ch. D. 709; 54 L. J., Ch. 509; 52 L. T. 430; 33 W. R. 20—Pearson, J.

Banking accounts were kept in the joint names of husband and wife, and investments in railway stock were made in their joint names. The wife survived her husband five days, having executed a will during coverture:—Held, that the balances of the joint accounts and the joint investments survived to the wife, but did not pass under her will. *Young, In re, Trye v. Sullivan*, 28 Ch. D. 705; 54 L. J., Ch. 1065; 52 L. T. 754; 33 W. R. 729—Pearson, J.

—Statute for promoting Erection of Churches—Married Women, without their Husbands, excepted.]—Under the statute 43 Geo. 3, c. 108, which contained a power to all persons having an interest in any lands or in any goods or chattels, to give by deed enrolled, or will executed, three months before death, lands not exceeding five acres, or goods and chattels not exceeding in value 500*l.*, for or towards the erecting of any church, with a proviso that the Act should not extend to any persons being within age, nor women covert without their husbands to make any such gift:—Held, that the proviso was not affected by the Married Women's Property Act, 1882, which by s. 1, sub-s. 1, gave power to married women to dispose by will of any real or personal property as her separate property in the same manner as if she were a feme sole. Consequently a gift by a married woman, by will executed three months before death, to the vicar and churchwardens of a church of a sum of 300*l.* to be applied by them in the erection of a new church, and to be paid

out of personal estate which was legally applicable for the purpose, was held to be invalid. *Smith's Estate, In re, Clements v. Ward*, 35 Ch. D. 589; 56 L. J., Ch. 726; 56 L. T. 860; 35 W. R. 514; 51 J. P. 692—Stirling, J.

—Appointment by Will—Conversion.]—There is a distinction between a will made by a married woman under a power and when disposing of property in her own right as a feme sole. The power must be looked at to see in what character the property was held when disposed of by the testator, and where by virtue of the power it has been converted into personalty, she is in fact disposing of personalty. *Gunn, In goods of*, 9 P. D. 242; 53 L. J., P. 107; 33 W. R. 169; 49 J. P. 72—Hannen, P.

Probate to Wills of Married Women.]—See WILL (PROBATE).

IX. ACTIONS AND PROCEEDINGS BY AND AGAINST MARRIED WOMEN.

Suing Alone—Tort committed before 1882.]—A married woman is entitled under the Married Women's Property Act, 1882, s. 1, sub-s. 2, to bring an action in respect of a tort committed upon her during coverture before the commencement of the act, without joining her husband as plaintiff. *Weldon v. Winslow*, 13 Q. B. D. 784; 53 L. J., Q. B. 528; 51 L. T. 643; 33 W. R. 219—C. A.

The Married Women's Property Act, 1882, does not enable a married woman to bring an action for an assault committed upon her during coverture before the passing of the act without joining her husband. *Weldon v. Riviere*, 53 L. J., Q. B. 448—D. But see preceding case.

—Tort when barred by Statute of Limitations.]—The right of a married woman whose husband is alive to bring an action in her own name, dates from the commencement of the Married Women's Property Act, 1882 (January 1, 1883). For that purpose she is a feme discover within the Statute of Limitations (21 Jac. 1, c. 16), and she may within the statutable limits from that date bring an action for a cause which accrued many years previously to that date while she was a married woman. *Weldon v. Neal*, 51 L. T. 289; 32 W. R. 828—D.

The effect of the Married Women's Property Act, 1882, is to make a married woman discover from the date of the passing of the act in respect of torts committed against her during coverture, and she is entitled to bring an action in respect of a tort committed during coverture and before 1882, which would otherwise be barred by 21 Jac. 1, c. 16, s. 3; for that statute begins to run only from the date of the passing of the act of 1882. *Loue v. Fox*, 15 Q. B. D. 667; 54 L. J., Q. B. 561; 53 L. T. 886; 34 W. R. 144; 50 J. P. 244—C. A.

—House Settled to Separate Use—Husband Claiming Right—Interim Injunction.]—On a marriage a leasehold house was settled upon the usual trusts for the wife for life, for her separate use, and the husband and wife continued to reside in the house. Differences arose between them, they ceased to cohabit, and the wife instituted proceedings for divorce or judicial separa-

tion. The husband claimed the right to go to and to use the house when and as he thought fit, not for the purpose of consorting with his wife, but for his own purposes. In an action by the wife against the trustees and her husband, claiming administration of the trusts of the settlement and an injunction to restrain the husband from entering the house:—Held, that, under the circumstances, the wife was entitled to an interim injunction. *Symonds v. Hallett*, 24 Ch. D. 346; 53 L. J., Ch. 60; 49 L. T. 380; 32 W. R. 103—C. A. And see next case.

— **House in Sole Occupation of Wife as her Separate Property—Trespass.**—A married woman in the sole occupation of a house, bought by her out of her own earnings, since the Married Women's Property Act, 1870, can now, after the Married Women's Property Act, 1882, sue alone, without her husband, in an action for trespass, a person who has entered such house against her will, though he did no injury to the house, and entered it with the authority of her husband, but for a purpose unconnected with the husband's desire to live with his wife:—*Quære*, if the husband has himself a right to enter such house. *Weldon v. De Bathe*, 14 Q. B. D. 339; 54 L. J., Q. B. 113; 53 L. T. 520; 33 W. R. 328—C. A.

— **For Arrears of Maintenance under Separation Agreement.**—See *Macgregor v. Macgregor*, ante, col. 916.

Liability for Tort after Marriage.—The plaintiff may sue the wife alone or the husband and wife jointly for wrongs committed by her after marriage. *Seroka v. Kattenburg*, 17 Q. B. D. 177; 55 L. J., Q. B. 375; 54 L. T. 649; 34 W. R. 542—D.

Liability for Money Lent by Husband after Marriage.—See *Butler v. Butler*, ante, col. 915.

Guardian ad litem of Infant—Next Friend.—Notwithstanding the Married Women's Property Act, 1882, a married woman is still incompetent to act as next friend or guardian ad litem. *Somersett (Duke), In re, Thynne v. St. Maur*, 34 Ch. D. 465; 56 L. J., Ch. 733; 56 L. T. 145; 35 W. R. 273—Chitty, J.

Criminal Proceedings—Wife against Husband—Defamation.—A wife could not before and cannot since the Married Women's Property Acts take criminal proceedings against her husband for defamatory libel. *Reg. v. London (Mayor)*, 16 Q. B. D. 772; 55 L. J., M. C. 118; 54 L. T. 761; 34 W. R. 544; 50 J. P. 614; 16 Cox, C. C. 81—D.

— **Husband and Wife—Coercion.**—Upon an indictment for highway robbery with violence D. and his wife were found guilty, the jury finding as to the wife that she had acted under the compulsion of her husband:—Held, that as to the wife the verdict amounted to one of not guilty. *Reg. v. Dykes*, 15 Cox, C. C. 771—Stephen, J.

— **Husband taking Wife's Money.**—It is no offence for a husband to take his wife's money while they are living together; sed aliter while they are living apart. *Lemon v. Simmons*, 57 L. J., Q. B. 260; 36 W. R. 351—D.

Next Friend—Liability for Costs.—A next friend, as long as he remains upon the record as next friend, must be taken to be carrying on the proceedings on behalf of the plaintiff, and is liable for the costs of an appeal, even though the notice of appeal did not purport to be given by him. *Glanville, In re, Ellis v. Johnson*, 31 Ch. D. 532; 55 L. J., Ch. 325; 54 L. T. 411; 34 W. R. 309; 50 J. P. 662—C. A.

— **Security for Costs.**—A married woman by her next friend took out an originating summons for an administration of a testator's estate, upon which an order was made without prejudice to any application by the defendants as to security for costs. The defendants applied, and, on the ground that the next friend was not a person of substance, an order was made staying proceedings till the plaintiff had given security for costs. The plaintiff appealed on the ground that a married woman could not be ordered to find security for costs:—Held, that, although a married woman suing alone cannot be ordered to find security for costs on the ground of poverty, security had rightly been ordered in the present case, since the next friend alone was liable for them, and that the plaintiff after obtaining a judgment by her next friend was too late to claim to sue alone. *Thompson, In re, Stevens v. Thompson*, 38 Ch. D. 317; 57 L. J., Ch. 748; 59 L. T. 427—C. A.

Security for Costs.—A married woman, suing alone, and having no separate estate, will not be ordered to give security for costs. *Isaac, In re, Jacob v. Isaac*, 30 Ch. D. 418; 54 L. J., Ch. 1136; 53 L. T. 478; 33 W. R. 845—C. A. And see preceding case.

Undertaking as to Damages—Injunction.—An application was made on behalf of a married woman for an injunction restraining the Bank of England, until further order, from permitting the transfer of a sum of New Three per Cent. Annuities, standing in the names of the executors of a testator, and to which the married woman claimed to be beneficially entitled. An injunction was granted for a fortnight on the usual undertaking of the married woman to be answerable in damages. The registrar refused to draw up the order on the sole undertaking of the married woman as to damages:—Held, that the sole undertaking of the married woman must be accepted. *Prynnne, In re*, 53 L. T. 465—Pearson, J. See also *Hunt v. Hunt*, ante, col. 928.

Affidavit of Documents—Husband and Wife.—A husband and wife sued as co-plaintiffs in respect of an alleged breach of trust by the trustees of their marriage settlement. The wife had a life estate for her separate use, and sued without a next friend. An order was made that the plaintiffs should file an affidavit stating "whether they or either of them" had in the possession or power "of them or either of them," any documents relating to the matters in question. They filed an affidavit admitting the possession of various documents, which they scheduled, and going on to say, "We have not now, and never had in our possession, custody, or power, or in the possession, custody or power of any other person or persons on our behalf, any deed, &c., other than and except the documents

set forth in the said schedule":—Held, that the plaintiffs must be ordered to file a further and better affidavit, for that an affidavit relating only to documents in the joint custody of the husband and wife did not comply with the order, and that the order was right in requiring them to answer as to documents in the possession of either of them. *Fendall v. O'Connell*, 29 Ch. D. 899; 54 L. J., Ch. 756; 52 L. T. 553; 33 W. R. 619—C. A.

Third Party—Judgment against—Refusing to state Defence.—[Judgment may be ordered, under Ord. XVI. r. 52, against a third party who has appeared after a third-party notice has been served on him, if the third party, on the hearing of an application for directions, declines to state any defence, and if the judge is not satisfied that there is any question proper to be tried. Such judgment may be ordered against a married woman as a feme sole declaring her separate estate liable, although the liability was incurred prior to the passing of the Married Women's Property Act, 1882. *Gloucestershire Banking Company v. Phillips*, 12 Q. B. D. 533; 53 L. J., Q. B. 493; 50 L. T. 360; 32 W. R. 522—D.]

Right of Proof against Husband's Estate.—[H. was married to his wife in 1864, and she subsequently became entitled to certain moneys under the wills of her father and grandfather. These moneys she lent to her husband for the purposes of his business, upon the terms that he would execute a settlement of the moneys upon her, which was done. Upon the bankruptcy of H. a proof was tendered upon the settlement and rejected:—Held, that the settlement was not invalidated by s. 3 of the Married Women's Property Act, 1882, since that section was not retrospective and could not affect previously existing rights. *Home, Ex parte, Home, In re*, 54 L. T. 301—Cave, J. And see BANKRUPTCY, IX., 3.]

Order of Committal—Jurisdiction—Debtors Act, 1869, s. 5.—[Under s. 5 of the Debtors Act, 1869, there is no power to commit to prison a married woman for her default in paying a sum for which judgment has been recovered against her by virtue of s. 1, sub-s. (2), of the Married Women's Property Act, 1882. *Scott v. Morley*, 20 Q. B. D. 120; 57 L. J., Q. B. 43; 57 L. T. 919; 36 W. R. 67; 52 J. P. 230; 4 M. B. R. 286—C. A.]

Judgment for a debt and costs was recovered against a married woman, execution being, by the terms of the judgment, limited to her separate property not subject to any restraint upon anticipation, unless by reason of the Married Women's Property Act, 1882, such property should be liable to execution notwithstanding such restraint. Upon an application for an order of committal against her under s. 5 of the Debtors Act, 1869, the only evidence of her ability to pay was that since the date of the judgment she had received sufficient income of separate property subject to a restraint upon anticipation:—Held, that no order could be made against her upon that evidence, because s. 5 did not apply to the judgment. *Draycott v. Darracott v. Harrison*, 17 Q. B. D. 147; 34 W. R. 546—D.]

Upon a judgment summons issued under s. 5 of the Debtors Act, 1869, against a married woman

who has only separate estate which she is restrained from anticipating, an order for payment cannot be made unless it is shown that, since the date of the judgment, she has received some of her separate income. If in the judgment execution is limited to separate estate which she is not restrained from anticipating, *quære*, whether s. 5 of the Debtors Act, 1869, applies at all. *Dillon v. Cunningham* (8 L. R., Ex. 23) distinguished. *Meager v. Pellew*, or *Meager, Ex parte, Pellew, In re*, 14 Q. B. D. 973; 53 L. T. 67; 33 W. R. 573—C. A.]

An order, under the Debtors Act, for payment by instalments will not be made against a married woman whose only separate estate is subject to restraint on anticipation, even though, since the date of the judgment against her, she has received income of the separate estate. *Morgan v. Pyre*, 20 L. R., Ir. 541—Q. B. D.]

Whether can be made Bankrupt.—[A married woman, possessed of separate estate, but not carrying on a trade separately from her husband, is not subjected to the operation of the bankruptcy laws, and cannot commit an act of bankruptcy under s. 4 of the Bankruptcy Act, 1883. *Coulson, Ex parte, Gardiner, In re*, 20 Q. B. D. 249; 57 L. J., Q. B. 149; 58 L. T. 119; 36 W. R. 142; 5 M. B. R. 1—D.]

Property in Bankruptcy.—[See BANKRUPTCY, VIII., 1, g.]

X. MARRIAGE SETTLEMENTS.

1. WHAT INCLUDED IN.

a. After-acquired Property.

Judicial Separation—Effect of, upon Covenantant.—[Where a marriage settlement contained a covenant to settle all property (except jewellery and money up to 200*l.*) which the wife, or her husband in her right, might acquire "during the intended coverture," and after a decree for judicial separation the wife became entitled to certain stocks:—Held, that by virtue of s. 25 of the Divorce Act, 1857, the stocks belonged to her as a feme sole, and that the covenant to settle "during the coverture" had become inoperative. *Darves v. Creyke*, 30 Ch. D. 500; 54 L. J., Ch. 1096; 53 L. T. 292; 33 W. R. 869—V.-C. B.]

Gift with Restraint on Anticipation.—[A restraint on anticipation is equivalent to a restraint on alienation, and accordingly the shares of married women in residuary real and personal estate given to them by will for their separate use without power of anticipation, are not bound by covenants for settlement of after-acquired property contained in their respective marriage settlements; and the capital of the personal estate is not payable to them on their separate receipt. *Currey, In re, Gibson v. Way*, 32 Ch. D. 361; 55 L. J., Ch. 906; 54 L. T. 665; 34 W. R. 541—Chitty, J.]

Gift for Separate Use.—[In a marriage settlement in which there were no recitals, the intended husband covenanted with the intended wife and the trustees that he would, at the request of the trustees or trustee for the time

being join with the wife in, or otherwise do, all such acts as might be required on his part in settling the after-acquired property of the wife. And it was thereby agreed and declared that, in the meantime until such settlement should be made, the property should be held upon the trusts upon which the same was thereby covenanted to be settled:—Held, that property to which the wife had become entitled during the marriage for her separate use was not bound by the covenant. *Macpherson's Estate, In re, Macpherson v. Macpherson*, 55 L. J., Ch. 922; 55 L. T. 346—Kay, J.

No Covenant by Wife—Recitals.]—A marriage settlement contained a recital of an agreement that all such personal estate above a certain value as should during the coverture be given or bequeathed to or otherwise vest in the wife should be settled, and that the husband should enter into the covenant in that behalf therein-after contained. The corresponding operative part of the deed was a covenant by the husband alone (without the usual words "It is hereby agreed") that he and his wife would settle such property, and that until such settlement the husband and wife should stand possessed of the same upon the trusts of the settlement. The wife as well as the husband executed this settlement, and during the coverture property was given to the wife for her separate use:—Held, that the operative words were sufficiently ambiguous to enable the court to look at the recitals, and that on the whole instrument the wife's after-acquired separate property was bound by the covenant. *De Ros' Trust, In re, Hardwicke v. Wilmot*, 31 Ch. D. 81; 55 L. J., Ch. 73; 53 L. T. 524; 34 W. R. 36—Kay, J.

Covenant of Wife as well as Husband—Reversionary Interest.]—By a marriage settlement it was agreed and declared by the parties thereto, and the husband covenanted with the trustees of the settlement that all such property as the wife should at the date of her marriage, or as she should become during coverture, seised, possessed of, or entitled to, should, so far as their respective rights, interests or powers over the same would allow, be conveyed and assigned to the trustees of the settlement. The wife was entitled at the date of her marriage to a vested reversionary interest. The reversion fell in after the death of the husband and wife:—Held, that the covenant was a covenant of the wife as well as by the husband, and that the reversionary interest was included therein. *D'Estampes, In re, D'Estampes v. Hankey*, 53 L. J., Ch. 1117; 51 L. T. 502; 32 W. R. 978—Kay, J.

Agreement of even Date.]—By an ante-nuptial settlement a lady and her intended husband, after reciting a settlement of even date, and that the parties had agreed to settle other property to which the lady "may be entitled," covenanted that, in case the lady "should be entitled to any property other than that in the settlement, the same should be settled upon similar trusts to those contained in the settlement:"—Held, that the agreement included after-acquired property of the lady. *Blockley, In re, Blockley v. Blockley*, 49 L. T. 805; 32 W. R. 385—Pearson, J.

Effect of Married Women's Property Act, 1882

—Property acquired since 1882.]—A testatrix, dying in 1883, bequeathed the residue of her personal estate to her daughter, a married woman, absolutely. The daughter, by her marriage settlement in 1862, covenanted to settle after-acquired property (except interests limited to her separate use), upon the trusts of the settlement:—Held, that s. 19 of the Married Women's Property Act, 1882, exempted the marriage settlement from the operation of s. 5, and that the fund representing the residuary personalty was payable to the trustees of the settlement. *Stonor's Trusts, In re*, 24 Ch. D. 195; 52 L. J., Ch. 776; 48 L. T. 963; 32 W. R. 413—Pearson, J.

By ante-nuptial settlement of 1873 the husband and wife covenanted to settle after-acquired property of the wife other than personal chattels, savings out of her separate income, or any moneys not exceeding in each case the value of 1,000l., "or any property belonging, or which may be given or bequeathed to or settled upon her for her separate use, all which excepted articles and property shall belong to the said (wife) and shall or may be used, enjoyed, and disposed of by her accordingly as if she were not under coverture." Under the will, made in 1884, of her father, who died in the same year, the wife became entitled to a share of personalty exceeding 1,000l., and not limited to her separate use:—Held, that having regard to s. 19 of the Married Women's Property Act, 1882—the effect of which is to limit the operation of s. 5 by preventing the provisions of marriage settlements from being interfered with or affected by withdrawing therefrom property, which independently of the act must have been brought into settlement—the share of the wife under her father's will had not been made separate estate so as to fall within the exception, but was bound by the covenant to settle after-acquired, other than separate, property. And, *semble*, per Cotton, L.J., that upon the construction of the covenant, independently of s. 19, the property in question was not within the exception. *Stonor's Trusts, In re* (24 Ch. D. 195) approved. *Whitaker, In re, Christian v. Whitaker*, 34 Ch. D. 227; 56 L. J., Ch. 251; 56 L. T. 34; 35 W. R. 217—C. A.

By a post-nuptial settlement made in 1847, it was agreed and declared by and between the husband, wife, and trustees, and the husband covenanted, that all property to which the wife, or her husband in her right, was then or should during the coverture become possessed of or entitled to, should be assured upon trust for the wife for life to her separate use without power of anticipation, and after her death upon trusts in favour of the husband and issue of the marriage. During the coverture, property of the wife was reduced into possession by the husband, and settled upon the trusts of the settlement. In 1883 the wife became entitled, as one of the next-of-kin of a deceased testator, to a share of undisposed-of personalty:—Held, first, that the operation of s. 5 of the Married Women's Property Act, 1882, conferring on women married before the 1st of January, 1883, the right to hold and dispose of as their separate property all real and personal property accruing after that date, was not displaced by s. 19 of the act, which saves "any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman;" but that s. 19 referred only to settlements made by and binding upon married

women; and, therefore, that the settlement, so far as it purported to be made by the wife, being void, the wife was entitled to the undisposed-of personality as her separate property. *Stonor's Trusts, In re* (24 Ch. D. 195) distinguished. Secondly, that the wife could be put to her election, notwithstanding that the compensating fund was subject to restraint on anticipation. *Queade's Trusts, In re*, 54 L. J., Ch. 786; 53 L. T. 74; 33 W. R. 816—Chitty, J.

The effect of s. 19 of the Married Women's Property Act, 1882, is so to modify the operation of s. 5, that the persons interested under a settlement of the property of a married woman are not by s. 5 deprived of any benefit to which they would have been entitled under the settlement in case s. 5 had not been enacted. *Hancock v. Hancock*, 38 Ch. D. 78; 57 L. J., Ch. 396; 58 L. T. 906; 36 W. R. 417—C. A.

An ante-nuptial settlement executed in 1870, contained a covenant by the husband with the trustees that he would settle, or concur with the wife in settling, any property which during the coverture should come to her or to him in her right. The settlement did not contain any such covenant by the wife, or any joint agreement or declaration to that effect. In 1883, on the death of the wife's mother, the wife became entitled under her will to a share of the mother's personal estate, which was not limited by the will to the separate use of the wife:—Held, that this share was, notwithstanding the Act of 1882, bound by the covenant in the settlement. *Queade's Trusts, In re* (supra), disapproved. *Id.*

Property acquired "by purchase"—Shares—Policy of Insurance.—A marriage settlement contained a covenant by the settlor to settle his estate and interest in any property or estate, real or personal, of or to which he should, at any time thereafter during marriage, become possessed or entitled by devise, bequest, purchase, or otherwise. He afterwards purchased some shares and effected some policies of insurance on his life:—Held, that the covenant in the settlement was in fact divisible, and that the shares and policies were "property," and property of or to which the settlor had "during the marriage become possessed or entitled by purchase" within the specific words of the covenant. Whether the covenant would have been capable of enforcement if it were in fact indivisible, or if, though divisible, the shares and policies had not come within one of the particular classes specified in it, *quære*. *Turcan, In re*, 40 Ch. D. 5; 58 L. J., Ch. 101; 59 L. T. 712; 37 W. R. 70—C. A.

Power of Appointment—Appointment to Self.—By a marriage settlement, made in 1878, it was agreed that if M., the intended wife, or her husband in her right, should at one and the same time, and from the same source, become entitled to any real or personal property of the value of 500*l.* or upwards, then and in every such case the husband and wife should cause the same to be vested in the trustees of the settlement, to be held by them upon the trusts of the property assigned by M. By his will, made in 1884, the father of M. bequeathed to the trustees of the will a sum of 4,000*l.* upon trust for such persons and purposes as M. should appoint in writing, and in default of or subject to any such appointment in trust for her sole and separate use, and

the testator declared it to be his intention that M. might be able, by exercising her power of appointment, to defeat the operation of the covenant contained in her marriage settlement for the settlement of her after-acquired property. The testator died in 1887. M. appointed that the sum of 4,000*l.* should be held in trust for her separate use by nine separate appointments, made on separate days, and each under 500*l.* in amount:—Held, that the sum of 4,000*l.* had been properly appointed by M., and was payable to her, and was not bound by her covenant to settle after-acquired property. *Gerard (Lord), In re, Oliphant v. Gerard*, 58 L. T. 800—North, J.

Exception of Property settled by Instrument under which it was derived.—A marriage settlement made in January, 1877, contained a covenant by the husband and wife that all property not thereinbefore settled to which the wife or the husband in her right then was or should during the intended coverture become beneficially entitled, except jewels, trinkets, &c., and except also any property which might be settled by the instrument under which it was derived, should be assured and transferred to or otherwise vested in the trustees upon certain trusts. Under an appointment made by an indenture dated 30th July, 1883, the wife had become entitled to a sum of 10,000*l.*, which by such indenture was declared should be for her sole and separate use, and should not be subject to any trust or agreement for settlement contained in any settlement executed upon or in contemplation of her marriage:—Held, that the 10,000*l.* was settled by the instrument under which it was derived, and was not within the covenant. *Kane v. Kane* (16 Ch. D. 207) followed. *Beren's Settlement Trusts, In re*, 59 L. T. 626—Chitty, J.

Absolute Gift of Personality—Separate Use attached only to Income.—On the 5th June, 1860, A. and B., in exercise of the power of appointment in favour of children contained in their marriage settlement, dated in 1830, appointed 3,500*l.* to their daughter M. (afterwards M. S.). By the marriage settlement of N. S. and M. S., dated the 6th June, 1860, M. S. assigned the 3,500*l.* to the trustees, upon trusts under which N. S. had the first life interest, and, in default of children, M. S. had a general testamentary power of appointment. There was also a covenant by N. S. and M. S. that if they, or either of them, should during the coverture become entitled to any real or personal property (except certain specified interests) the same should be forthwith assured to the trustees. On the 20th June, 1860, A. and B. appointed that a moiety of the residue unappointed of the trust funds under the settlement of 1830 should, after the decease of the survivor of them, go to M. S., during her coverture, for her sole and separate use, without power of anticipation, her receipt to be a sufficient discharge for the payment thereof. There was a proviso that if M. S. should die in the lifetime of N. S., leaving no children, the same moiety should go to the brother of M. S. absolutely, and that if M. S. should survive her husband, the same moiety should go to M. S. absolutely. M. S. died in 1887, leaving children, and having by her will appointed and bequeathed all her property to N. S., and ap-

pointed him sole executor. A. and B. had both pre-deceased M. S. :—Held, that the appointment by A. and B., of the 20th June, 1860, showed an intention to exclude N. S., and any interest which he would take if the fund was caught by his marriage settlement; that though the restraint on anticipation must be rejected (*Fry v. Capper*, Kay, 163), yet, taken together with the gift over in default of children and the receipt clause, it showed an intention that the separate use should apply only to the income accruing during the particular coverture, and that M. S. should have no power of disposition over the corpus. Held, also, that such a limitation was clearly good; and that, therefore, the fund having accrued during the coverture, the corpus was caught by the after-acquired property clause. *Shute v. Hogge*, 58 L. T. 546—Kay, J.

Chose in Action of Wife existing before, but falling into Possession after, Marriage.—By a marriage settlement 10,000*l.*, part of a share of residue to which the wife was entitled under her uncle's will, was settled upon trusts therein declared. The settlement contained a covenant by the husband and wife to settle all property exceeding 300*l.* which the husband and wife, or either of them in her right, should at any time or times subsequent to the solemnisation of the marriage and during the coverture become seised or possessed of or entitled to, either at law or in equity, under any gift, devise or bequest in her favour, or by descent, representation, or any other means whatsoever. Previously to the date of the settlement the wife, who was of full age, had executed a general release to the executors of her uncle's will in respect of all her claims against the estate. It subsequently appeared that the release had been executed under a mistake, common to all the parties to it, as to the amount of the share of residue, and that the wife was in fact entitled to a large additional sum. The release was set aside in proceedings instituted for that purpose :—Held, that the additional share of residue was an equitable chose in action, which until the release was set aside, could not have been recovered against the executors, and was therefore practically gone; that upon the setting aside of the release the chose in action revived and must be treated as having come into existence, or at least into possession at that date; and that therefore the additional sum was after-acquired property within the meaning of the covenant. The additional sum which had been recovered by reason of the setting aside of the release consisted in part of capital and in part of income :—Held, that the whole sum was bound by the covenant. But held, on appeal, that the setting aside of the release did not give the wife any new right, but merely removed a bar which prevented her enforcing an existing right to property, and that the additional sum was not subject to the settlement. *Garnett, In re, Robinson v. Gandy*, 33 Ch. D. 300; 55 L. J., Ch. 773; 55 L. T. 562—C. A. Reversing 34 W. R. 434—Kay, J.

Property to which Wife or Husband in her Right "shall become entitled."—In a settlement made before marriage there was an agreement to settle upon certain trusts all real and personal property to which the wife or the

husband "in her right at any time during her now intended coverture shall become entitled (except jewels and)" certain other articles "which it is hereby declared shall belong to" the wife "for her separate use." The trusts included a power of sale, the moneys arising from the sale to be held upon the trusts agreed and declared concerning such part of the personal estate of or to which the wife "now is or she or" the husband "in her right shall become possessed or entitled as aforesaid :"—Held, that on the true construction of the agreement, read in conjunction with the context, it included property to which the wife was entitled before marriage; and therefore that jewels given to the wife before marriage were within the exception, and belonged to the wife for her separate use. *Williams v. Mercier*, 10 App. Cas. 1; 54 L. J., Q. B. 148; 52 L. T. 662; 33 W. R. 373; 49 J. P. 484—H. L. (E.).

Settlement of Real Estate on "the like Trusts" with Personal Estate.—By a marriage settlement a sum of 360*l.* belonging to the wife was settled, after the deaths of husband and wife, and in default of appointment by the wife, upon the wife's next of kin "of her own blood and family in due course of distribution, the same as if she died a feme sole and intestate possessed thereof or entitled thereto." The settlement contained a clause providing that after-acquired real or personal property of the wife should be settled "upon and for the like trusts, intents, and purposes as were therein-before declared of and concerning the said principal sum of 360*l.* thereby assigned." The wife afterwards acquired real and personal property, and died without having exercised the power of appointment, and the husband also died :—Held, that the wife's personal estate passed to her next-of-kin according to the Statute of Distributions, the half-blood sharing equally with the whole blood; and that her real estate passed to her heir-at-law. *Brigg v. Brigg*, 54 L. J., Ch. 464; 52 L. T. 753; 33 W. R. 454—Pearson, J.

Annuities—Fitting in with Trusts of Settlement.—By an ante-nuptial settlement made in 1870 the intended husband and wife respectively covenanted with the trustees that all the estate, property, and effects, real or personal, of or to which the wife, or the husband in her right, should at any time during the coverture become seised, possessed, or entitled, should be assured and settled, as regarded personal estate, upon trust, as to such part thereof as should not consist of money or authorized investments, or of interests determinable on the death of the wife, upon trust to convert, and to invest the proceeds, and such part of the estate as should consist of money, upon such investments as therein mentioned, and during the joint lives of husband and wife pay "the interest, dividends, and annual proceeds thereof" to them in equal shares, the share of the wife to be for her separate use without power of anticipation. By a deed of the same date the wife's father covenanted with the trustees to pay to them an annuity of 500*l.* to be applied by them upon trusts corresponding with those of the income of the personal property mentioned in the covenant. In 1874 the wife's father bought up the husband's interest in this annuity, and assigned it to trustees for the wife's

separate use with no restraint on anticipation :—Held, that the covenant to settle included life annuities given to the wife, that the share assigned by the wife's father in the annuity of 500*l.* was bound by the covenant, and that, during the joint lives of the husband and wife, three-fourths of the annuity belonged to the wife for her separate use with a restraint on anticipation, and the remaining fourth to the trustee of the husband, who had become bankrupt, and that persons to whom the wife had mortgaged the interest assigned in 1874 took nothing. *Scholfeld v. Spooner*, 26 Ch. D. 94; 53 L. J., Ch. 777; 51 L. T. 138; 32 W. R. 910—C. A.

Intention of Donor.—Where a covenant has been entered into for settlement of the future property of a married woman, and a gift is afterwards made to her of such a nature as to come within the terms of the covenant, no expression of the intention of the donor that it shall not be settled will exclude it from the operation of the covenant. *Mainwaring's Settlement, In re* (2 L. R., Eq. 487), observed upon. *Id.*

Real Property of which Wife "should become seised or possessed of or entitled to"—Estate Tail in Possession.—A marriage settlement contained an agreement and declaration by the parties that, if the wife then was, or if, during the coverture, she, or the husband in her right, should become seised or possessed of or entitled to any real or personal property (of a specified value) for any estate or interest whatsoever, in possession, reversion, remainder, or expectancy, then and in every such case the husband and wife, and all necessary parties, should, as soon as circumstances would admit, convey, assign, and assure the said real and personal property to, or otherwise cause the same to be vested in, the trustees of the settlement, upon the trusts thereof :—Held, that an estate tail in possession to which the wife became entitled during the coverture was not bound by this agreement, and that she could not be compelled either to execute a disentailing deed, and to convey the estate in fee thus acquired by her to the trustees, or to execute a conveyance of the property to the trustees, so that they could by inrolling the deed acquire an estate in fee simple. Held, further, that the agreement extended only to the wife's estate or interest in the property acquired by her, and that it was impossible that she could convey an estate tail to the trustees. *Hilbers v. Parkinson*, 25 Ch. D. 200; 53 L. J., Ch. 194; 49 L. T. 502; 32 W. R. 315—Pearson, J.

b. In Other Cases.

Consumable Articles—Life Interest, with Power of Disposing by Will.—By a deed of ante-nuptial settlement, the intended husband covenanted with the intended wife that "he will have no claim or demand to that part of the lands of B. now in her possession, nor any stock thereon, nor to the crops thereof during her life, nor to the furniture of said house; but she is to have claim and control over the stock and furniture during her natural life, and that she can dispose of the farm and lands of B., together with the furniture of the said house thereon, together with the crops growing on the said premises at the time of her death, and the

house and furniture, either by deed or will, to such person or persons as she may think fit." The wife was seised of the lands of B. for a freehold estate, and after marriage she farmed these lands, and purchased farming stock out of the profits. She died in her husband's lifetime, having made a will, by which she devised and bequeathed to P. "the said lands and all the stock that may be thereon, and all the household furniture in the dwelling-house on the said lands":—Held, upon the true construction of the settlement, that the wife had power to dispose by will of the stock on the lands of B. at the time of her death. *Purcell v. Sheehy*, 16 L. R., Ir. 439—C. P. D.

Covenant to Settle—"Equal Child's Share"—Advancement to other Children.—A., by settlement on the marriage of his son B., covenanted to settle an equal child's share for B., rateably and in proportion to the several children of him the said A., of all the property, real and personal, he should be possessed of. A., in his lifetime, made advances to some of his children. By his will, A. directed a valuation to be made of his estate, that all his debts, funeral and testamentary expenses should be paid, and that the clear amount of the residue of his real and personal estate should be ascertained, and the testator gave such an amount as would be equivalent to one-seventh of the real and personal estate when so ascertained, to the trustees of the settlement, in satisfaction of the covenant. After several other bequests, he directed that, subject as aforesaid, his trustees should be possessed of all his residuary real and personal estate, in trust for such of his children, save B., as should survive him, in equal shares. A. died, leaving B. and six other children him surviving :—Held, that the one equal seventh share, to which B. was entitled, meant one-seventh of the property of which the testator died actually seised and possessed, and without taking into account the advancements which he had made to others of his children. *Stephens v. Stephens*, 19 L. R., Ir. 190—V. C.

Renewal of Lease—Trust—Repayment of Premium.—A husband made a voluntary settlement of leaseholds for the benefit of his wife, and afterwards, without disclosing the settlement, obtained a renewal in his own name, but with the intention of giving his wife the benefit of the renewal lease :—Held, that the renewal lease was held by the husband as constructive trustee for his wife, and that the trust arising by operation of law, it was within the exception of s. 7 of the Statute of Frauds, so as to make the absence of writing immaterial. Held, also, that as the husband's intention was to benefit his wife, she was not bound to repay to her husband's estate the premium paid by him for the renewal. *Lulham, In re, Brinton v. Lulham*, 53 L. T. 9; 33 W. R. 788—C. A. Affirming 53 L. J., Ch. 928—Kay, J.

2. CONSTRUCTION.

a. In General.

Validity—Trust for Accumulation—Thellusson Act.—The prescribed periods mentioned in the Thellusson Act beyond which accumulations of income must not extend are not

cumulative—that is to say, when one of them has been applied and exhausted, recourse cannot be had to another in order to extend the period of accumulation. *Jagger v. Jagger*, 25 Ch. D. 729; 53 L. J., Ch. 201; 49 L. T. 667; 32 W. R. 204—Kay, J.

By a post-nuptial settlement, a husband gave his personal estate to trustees upon trust in the first place to appropriate so much as should be necessary for his own personal maintenance, and subject thereto, during the joint lives of himself and his wife and the life of the survivor, to apply the whole or any part of the annual income for the support of the wife and children, and to accumulate the surplus (if any) so that the accumulations should follow the destination of the principal, with liberty to resort to the accumulations of previous years and apply the same to the support of the wife and children, and upon the death of the survivor of the husband and wife upon trust for the children as therein mentioned:—Held, that the only one of the four terms mentioned in the *Thellusson Act* which applied to the trust for accumulation, was the first, namely—the life of the grantor—and that the trust was therefore void as from the date of his death. *Id.*

Provision for Children of prior Marriage—Irrevocability.—The general rule of law is that the courts will not enforce a marriage settlement in favour of stranger volunteers who are not parties to the contract, on the ground that they are not within the consideration of the marriage. But when the persons who are within the consideration of the marriage take only on terms which admit to a participation with them, others who would not otherwise be within the consideration, then not the matrimonial consideration, but the consideration of the mutual contract, extend to and comprehend them. *Mackie v. Herbertson*, 9 App. Cas. 303—H. L. (Sc.).

Where in an ante-nuptial contract of marriage, the intention of the owner of the property, a widow with children, was to make the children of the prior marriage and those procreated of the second marriage a single class, the members of which class were to take equally among them, subject to a power of apportionment, it is inconsistent with this intention to hold that some of the children take vested interests, as they come into existence, and that others take nothing except subject to a testamentary power; and in such a case the vested interest of the children of the earlier marriage is not contingent on there being children of the second marriage, for the effect and operation of the deed must be determined at the time it was executed. A widow possessed of certain heritable and movable property, who had children alive by her first husband, by deed, before her second marriage, to which her husband was a party, conveyed her property to trustees for behoof of herself "in liferent for her liferent alimentary use of the annual proceeds thereof alienably and seclusive of the *ius mariti* of" her husband, "and not affectable by his or her debts or deeds or by the diligence of their creditors, and for behoof of the children procreated or to be procreated of" her body, "in such proportions, and on such terms and conditions as she might appoint by a writing under her hand, which failing, equally among them share and share alike," &c., "in fee." The trustees entered into possession, and

applied the income for the behoof of the wife. She died without issue by the second marriage, leaving testamentary deeds by which she cut down one of the children's interest to a sum much less than he would have taken under an equal division of her estate. He raised this action for declarator of his right to an equal share of her estate; and the sole question now for decision was whether the marriage contract was revocable:—Held, that the provision of the marriage contract in favour of the children of the prior marriage was irrevocable. *Id.*

Power to raise Money of Use of Wife—Repeated Exercise of Power.—Under a power to the trustees of a marriage settlement upon the request of the wife, notwithstanding coverture, to raise out of the trust funds any sum not exceeding 1,000*l.*, and to pay the same to her for her separate use, her receipt to be a sufficient discharge. The trustees advanced 310*l.* 9*s.* 6*d.* to the wife:—Held, that the trustees had power to raise and pay to the wife the difference between the sum already advanced and 1,000*l.* *Krantzke v. Robinson*, 11 L. R., Ir. 500—M. R.

Life Annuity—Arrears—Deficiency of Income—Charge on Corpus.—By marriage settlement, dated the 29th January, 1821, two sums of 3,000*l.* and 1,000*l.* (Irish currency), were vested in trustees in trust to pay the income to the husband for life, and, after his death, in case the wife survived, to pay to her out of the income an annuity of 200*l.* (Irish currency) for her life; and after the death of the husband, subject to the said annuity, in trust for the issue of the marriage. At the date of the settlement, the trust bonds were represented by two bonds for 3,000*l.* and 1,000*l.*, bearing interest at 6*l.* per cent., given respectively by the husband and the wife's father. They were paid off shortly after the marriage, and the 4,000*l.* was invested in government stock, which produced annually 112*l.* 13*s.* 6*d.* only. The husband died in 1871, and the wife died in 1883, leaving one daughter issue of the marriage:—Held, that the executor of the wife was entitled to be paid out of the corpus of the trust fund a sum of money amounting to the difference between 112*l.* 13*s.* 6*d.* and 200*l.* (Irish currency) annually during the eleven and a-half years that the wife survived her husband. *Pepper's Trusts, In re*, 13 L. R., Ir. 108—V.-C.

Ultimate Limitation to Next-of-kin of Wife—Time for ascertaining Persons entitled.—In a marriage settlement, which gave successive life interests to the wife and husband, the ultimate limitation of personal property, in the event of the husband surviving the wife, was in trust for the person or persons who, under the statutes for the distribution of the estates of intestates would, on the decease of the wife, have been entitled thereto in case she had survived the husband, and had then died possessed thereof and intestate. The wife predeceased the husband:—Held, that the class of persons to take under the limitation ought to be ascertained as at the date of the death of the wife, and not as at the date of the death of the husband. *Bradley, In re, Brown v. Cottrell*, 58 L. T. 631—Stirling, J.

Ultimate Trust for Next-of-kin—"Unmarried."—The primary and usual meaning of the word "unmarried," in the absence of any con-

text showing a different meaning, is "without ever having been married." *Blundell v. De Fulbe*, 57 L. J., Ch. 576; 58 L. T. 621—North, J.

By a marriage settlement property belonging to the wife was settled in the events which happened, subject to the life interests of the husband and wife, in trust "for such person or persons as, under or by virtue of the statute for the distribution of intestates' effects, would at the time of the decease of the wife have been entitled to her personal estate as her next-of-kin in case she had died intestate and unmarried":—Held, that in the absence of anything in the settlement showing a contrary intention, the word "unmarried" must be construed to mean "without ever having been married." *Ib.*

By a marriage settlement funds were vested in trustees, for the intended wife and husband successively, for their lives, and after their deaths for the children of the marriage, as the husband and wife during their joint lives, or the survivor, should appoint; and in default of appointment, for the children equally, or for one child if only one, the shares to vest in sons at twenty-one and in daughters at twenty-one or marriage; on failure of issue who should acquire a vested share, as the wife should, notwithstanding her coverture, by deed or will appoint; and in default of such appointment, and so far as the same should not extend, then as the husband should by deed or will appoint; and in default of appointment by him, for such person or persons as, under the statutes for the distribution of the effects of intestates, would have become entitled thereto at the decease of the wife, if she had died possessed thereof intestate and without having been married, with a power to the trustees after the death of the husband, or during his life with his consent, to advance one-half of the respective shares of the sons towards placing them out in any business, employment, or advancement in the world. There were two children of the marriage, who died infants. The wife survived the husband, married again, and had by her second marriage one son (the plaintiff), and died intestate, without making any appointment of the fund, leaving the second husband (her administrator) surviving:—Held, that the next-of-kin of the wife, excluding the plaintiff, were entitled to the funds. *Hardman v. Maffett*, 13 L. R., Ir. 499—M. R.

"Eldest Son"—Portions for Younger Children—Younger becoming the Elder Son—Estates sold.]—By a marriage settlement an estate was settled on the wife and husband successively for life, with remainder to trustees for a term of 600 years, and subject thereto to the first and other sons in tail. Other estates were settled free from the portions term, but subject to prior charges, which entirely absorbed them. The trusts of the term were if there should be any child or children of the husband and wife, other than or besides an eldest or only son, who by virtue of the limitations should for the time being be entitled to the hereditaments and premises to raise for the portions of such child or children, other than or besides such eldest or only son, 5,000*l.*, to be vested in such of them as the husband and wife, or the survivor, should appoint, and in default of appointment equally. There were three children of the marriage, two sons and a daughter. In 1841 the estate was sold under a paramount title, and produced a sum of

about 2,400*l.* In 1842 the eldest son died an infant. In 1882 the surviving tenant for life died, and the portions became payable. There had been no appointment. The younger son, who had become the elder, and had attained twenty-one, claimed to take a share with his sister of the 2,400*l.*:—Held, that the effect of the settlement was to give 5,000*l.* to the sister as a first charge on the estate, and the rest of the estate to the brother, and whether the value of the residue were more or less than the portion, or, as in this case, nothing at all, the brother had no right to claim any share in the prior charge. *Reid v. Hoare*, 26 Ch. D. 363; 53 L. J., Ch. 486; 50 L. T. 257; 32 W. R. 609—Kay, J.

Money Fund for Younger Children—Portions—Trust of Term to secure.]—By settlement executed on the marriage of F. with H., a sum of 1,000*l.*, the fortune of the wife H., and 923*l.* 1*s.* 6*d.*, the property of the husband, were vested in trustees in trust for F. for life, and after his decease in case he survived his wife (which event happened) in trust to pay and assign said funds among his children other than and besides an eldest or only son, as he should appoint, and in default of appointment then upon the trust declared concerning the trust fund secured by the term of five hundred years for the benefit of F.'s younger children therein-after mentioned; but if there were no such child or children as those for whom said trust fund was to be provided then in trust for F.'s father. By the same settlement certain lands were conveyed to the use of F. for life, remainder subject to a trust term of five hundred years to the use of his first and other sons in tail male; remainder to the daughters, as tenants in common in tail with remainders over. The trusts of the term of five hundred years were declared to be, that if there should be any child or children of the said F. other than and besides an eldest or only son who by virtue of the limitations before mentioned, should for the time being, be entitled to the lands, then that the trustees should raise for such child or children other than or besides an eldest or only son, as aforesaid, the sums mentioned, 6,000*l.* if one such child, 8,000*l.* if two, and 10,000*l.* if three or more. There are two other clauses as to the vesting of these portions, which contained the words "other than or besides an eldest or only son so for the time being entitled as aforesaid," and an advancement clause which contained the words "other than and except an eldest or only son for the time being entitled as aforesaid." There was issue of the marriage two daughters only, both of whom died in F.'s lifetime, leaving children who became entitled on F.'s death to the settled lands:—Held, first that the clauses in the settlement dealing with the money fund must be read as providing for children other than and besides an eldest or only son. Secondly, that there not being any son of the marriage the daughters did not come within the description of "a child or children other than and besides an eldest or only son," and that consequently the money fund of 1,923*l.* 1*s.* 6*d.* passed to F.'s father under the ultimate trust. *Fleming's Trusts, In re*, 15 L. R., Ir. 363—V.-C.

Portions—Vesting—Satisfaction.]—A sum of 2,000*l.* secured by the bond of J. M., the father

of the intended wife, was, by a marriage settlement in 1849, vested in trustees upon trust for her separate use for life, and after her decease "in trust for the other or others of the issue of the said intended marriage whether a son or sons, or daughter or daughters, or more remote descendant or descendants, if more than one, in such shares, &c., as the wife should appoint; but so, nevertheless, that no share in the said trust funds shall be absolutely vested in any child or any issue by any such appointment until he being a male shall attain the age of one and twenty years, or until she being a daughter shall attain that age or marry; and in default of appointment in trust for all and every the children or child of the marriage who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, to be divided between and among them, if more than one, in equal shares; and if there should be one such child the whole in trust for such one child: Provided, however, that if any child or children of the said intended marriage shall die in the lifetime of the said G. H. (the husband) and M. M. (the wife) or the survivor of them leaving issue, such issue shall stand and be in the place of his or their parent or parents, and shall be entitled to such share of the said trust moneys as the parent or parents would have been entitled to in case of surviving the said G. H. and M. M. and attaining twenty-one years." The deed contained provisions for maintenance and advancement. M. M. (the wife) died leaving her husband and several children surviving her, one of whom a daughter (A. H.) attained twenty-one and married in 1873 after the mother's death:—Held, that the portion secured by the settlement of 1849 vested in the children of the marriage of G. H. and M. M. at twenty-one or marriage. *Martin v. Dale*, 15 L. R., Ir. 345—M. R.

Vested Interest — "Payable" meaning "Vested"—Shares "to be Paid" at Twenty-one—Gift over on Death before Share "Payable."

—By a marriage settlement lands were conveyed upon trust for husband and wife successively for life, and after the death of the survivor "to levy out of the said lands and premises . . . the sum of 3,000*l.* . . . to be divided among all the children of the said intended marriage, save and except such child and children as under the limitations aforesaid shall succeed to the enjoyment of the lands and premises hereby conveyed . . . in equal shares and proportions as tenants in common and not as joint tenants, the share of such child or children as shall be a son or sons to be paid to him or them upon his or their respectively arriving at the full age of twenty-one years, and the share or shares of such of them as shall be daughters to be paid upon their respectively arriving at their full age of twenty-one years, or day or days of marriage, whichever shall first happen: Provided always that such marriage during minority shall be had by and with the consent and approbation of" the parents: "or the survivor of them: with interest for the same by way of maintenance at the rate of 6*l.* by the hundred to be computed from the day of the death of the survivor of" the parents "with benefit of survivorship to the survivors or survivor of such children if any of such children shall die, before his, her, or their share or shares

shall become payable, unmarried, and without leaving issue as aforesaid, it being the true intent and meaning of these presents that none of the children of the said intended marriage, who under the limitations herein contained shall become entitled to an estate in possession in any part of the lands and premises hereby conveyed . . . shall be entitled to any part of" the said sum. A son attained twenty-one and died in the lifetime of his father:—Held, that there being no words indicating a clear intention to make the vesting of children's shares contingent on their surviving both parents, the rule laid down in *Emperor v. Rolfe* (1 Ves. sen. 208) applied, and the son took a vested interest in his share on attaining twenty-one. *Wakefield v. Moffet*, 10 App. Cas. 422; 55 L. J., Ch. 4; 53 L. T. 169—H. L. (Ir.).

Power of Appointment—Recitals in Will.]—

By articles under seal, dated 25th October, 1830, executed on the marriage of J. R. M. and E. C. M., and not containing any hotchpot clause, two bonds for 1,500*l.* and 3,000*l.* respectively, and two policies of insurance for 1,000*l.* each, were assigned to trustees upon trust, after the death of the husband and wife, for the children of the marriage as J. R. M. should appoint, and in default of any appointment in trust for the children equally. The parties to the marriage articles covenanted to execute a settlement in pursuance thereof. There was issue of the marriage, six children. In 1856, by settlement on the marriage of M. T., one of the daughters, J. R. M., assigned to the trustees of that settlement one of the policies for 1,000*l.*, the proceeds of which were on the death of J. R. M., in 1862, paid to the trustees of the settlement. In 1860, on the marriage of M. S., another daughter, a settlement was executed to which J. R. M. was a party, reciting an agreement by J. R. M. to give to that daughter 1,000*l.*, payable upon the death of J. R. M. and E. C. M.; and J. R. M. executed to the trustees of the settlement his bond for 1,000*l.* In 1862, S., a third daughter, married, when a sum of 1,000*l.*, secured by the joint bond of J. R. M. and his father, was put in settlement. In 1864, on the marriage of a fourth daughter, E., a settlement was executed, to which E. C. M. was a party, reciting the articles of 1830, and that J. R. M. had died, leaving 3,500*l.* of the 6,500*l.* comprised in these articles unappointed; and E. C. M., in exercise of the power, appointed 1,250*l.* to E., which she assigned to her trustees. In 1865, one of the sons married, and by marriage settlement, dated the 17th of January, 1865, reciting the articles of 1830, and that 2,250*l.* remained unappointed, E. C. M. appointed 1,000*l.* to him on the 5th of March, 1873; E. C. M. by will reciting that she had a disposing power over 1,500*l.*, exclusive of the sums settled on her son and her three firstly married daughters, viz., M. T., M. S. and S., bequeathed 500*l.* out of her own personal estate and out of the 1,500*l.* to trustees for her grandson J. (son of M. T.), and the residue of the 1,500*l.* to trustees for her grandson J. (son of M. T.), and the residue of the 1,500*l.* to trustees for her daughter M. T. for life, remainder to her children. By a codicil to her will E. C. M. left one-half of the residue of the 1,500*l.* to M. T. for life, remainder to her children, and the other half to M. S. for life, remainder to her children:—Held, that the settlements on the marriage of the

daughters, M. S. and S., were not good appointments, and were not validated by the recitals in E. C. M.'s will; that the will and codicil were good appointments to M. T. and M. S. for life as to half of the residue to each, but void as to their children. *Miller v. Gulsom*, 13 L. R., Ir. 408—V.-C.

— **“Issue.”**—By a marriage settlement certain funds were assigned to trustees, upon trust (after the death of the husband and wife) for the issue of the marriage as the wife should by deed or will appoint; and, for want of such appointment, upon trust for the issue of the marriage, if more than one, in equal shares, the sons at twenty-one and the daughters at twenty-one or marriage; and in case there should be but one child issue of the marriage, or, if more than one, and all but one should die without having become entitled, then in trust for such only or surviving child at the time thereinbefore limited or appointed; and, in case there should not be any issue of the intended marriage, upon certain trusts therein mentioned. The wife by will appointed part of the trust fund to the five children of her late son W. A.:—Held, that the word “issue” in the power of appointment must be construed in its strictly technical meaning, and that therefore the appointment was valid. *Warren's Trusts, In re*, 26 Ch. D. 208; 53 L. J., Ch. 787; 50 L. T. 454; 32 W. R. 641—Pearson, J.

There is no absolute rule that, because the word “issue” is used in one or more clauses of a settlement as meaning “children” only, it must receive the same construction in every other clause. *Ib.*

— **Objects of Power**—“Issue then in being” — **Vesting of Estate, Time of.**—By a settlement made on his marriage, the settlor granted freehold lands to trustees upon trust for himself for life and after his death to convey the lands and pay the rents and profits “unto or for the benefit of all and every or any one or more child or children, or any grandchild or grandchildren or other issue then in being of the said intended marriage” for such estate or interest and in such shares and subject to such conditions as the settlor should by deed or will appoint. There was issue of the marriage several children who all attained twenty-one. The settlor appointed a portion of the lands to his eldest son, then of age, his heirs and assigns, and joined with him in mortgaging this portion. The son having died in his father's lifetime:—Held, that upon the true construction of the settlement the words “then in being” governed only the words “grandchild or grandchildren or other issue,” and not the words “child or children;” that the appointment was therefore valid, and that the fee passed under the mortgage. *Leader v. Duffey*, 13 App. Cas. 294; 58 L. J., P. C. 13; 59 L. T. 9—H. L. (Ir.).

— **Power to A. and B. Jointly and to Survivor**—**Revocation of Joint Appointment by Survivor.**—By a marriage settlement a sum of stock was settled upon trust (after the decease of the husband and wife) for the children of the marriage as the husband and wife should by deed, with or without power of revocation, jointly appoint; and in default of such appointment, and so far as any such appointment should not extend, then as the survivor should by deed or

will appoint. The husband and wife by deed appointed the fund amongst their children in certain shares. The deed reserved a power of revocation to the husband and wife or the survivor. The wife died, and the husband by deed revoked the former appointment, and irrevocably appointed the fund amongst the children in shares differing from those given by the original appointment:—Held, that it was competent to the husband and wife to reserve a power to the survivor of them to revoke the joint appointment, and that therefore the deed of revocation and new appointment executed by the husband was valid. *Dixon v. Pyner*, 55 L. J., Ch. 566; 54 L. T. 748; 34 W. R. 528—Kay, J.

— **Exercise by Will**—**Lapse—Covenant for further Assurance—Estoppel.**—By a marriage settlement, dated in 1863, after reciting that B., the wife, was “seised of or otherwise well entitled to” the freeholds therein described (subject to the life estate of J. C. P.), and that she was entitled to leaseholds and other personal estate, the freeholds were conveyed to trustees (subject to the life estate of J. C. P.), and the leasehold and personal estate were assigned to them upon trust as to 10,000*l.* for B. for life, and afterwards for A. (the husband) for life, and subject thereto, as to all the realty and personalty as B. should appoint, and in default in trust for B. for life, and if she should predecease her husband, in trust as to the realty for her heirs, and as to her personalty for her next of kin as if she had died unmarried. The settlement contained the usual covenant for further assurance. At the date of the settlement it was believed that B. was entitled to the entirety of the freeholds and leaseholds, subject to the life estate of J. C. P., whereas she was entitled only to thirteen-sixteenths thereof, and J. C. P. was then, and to the time of his death, entitled to three-sixteenths. J. C. P. died in 1866, having by his will given his property to B. B. made her will in 1880, and in exercise of the powers in the settlement, and of every other power, gave all the freeholds and leaseholds to W. W. P. and T. H. P. equally, and the rest of the personal estate to trustees to divide between J. B. P., W. W. P. and T. H. P. B. made a codicil in 1880, revoking the gift of any moneys accumulated from the settled property, and giving the same to her husband. T. H. P. died in B.'s lifetime without issue:—Held, that B. had made the personal estate, which was included in the residuary gift, part of her own assets, and that so far as it lapsed it passed to her next of kin, as though at her death it had belonged to her absolutely. Held, also, that the person claiming under the appointment had, as regards the three-sixteenths of the freeholds, the right to insist upon that claim, either on the ground that the recital in the settlement amounted to an estoppel, or that he had an equity to enforce the covenant for further assurance; that B. had made the property part of her estate, and that so far as it lapsed it devolved upon her heirs-at-law. *Horton, In re, Horton v. Perks*, 51 L. T. 420—Kay, J.

b. Election.

Settlement on Marriage of Female Infant—Restraint on Anticipation—Covenant to settle After-acquired Property.—The doctrine of election is founded on the presumption of a general intention that every part of an instru-

ment shall take effect, and the presumption of such general intention may be rebutted by an inconsistent particular intention apparent in the instrument. Therefore, where a marriage settlement settled a fund for the separate use of the wife for life with restraint on anticipation, and contained a covenant by the wife (then an infant) to settle future property:—Held, that the wife could not be compelled to elect between after-acquired property and her interest in the settled fund, but was entitled to retain both. *Vardon's Trust, In re*, 31 Ch. D. 275; 55 L. J., Ch. 259; 53 L. T. 895; 34 W. R. 185—C. A. See also *Wheatley, In re*, ante, col. 923, and *Queade's Trusts, In re*, ante, col. 947.

c. Forfeiture Clauses.

Effect of words "commit, permit, or suffer."—Under the terms of a marriage settlement the rents and profits of lands were payable to M. for life, or until he should be adjudged a bankrupt "or should commit, or knowingly permit, or suffer to be committed, any act whereby his interest in all or any of the said several lands, or any part thereof, might become the property of a third party for any time or term whatsoever," or that the lands, or any part of them, should be taken in execution, or any proceedings taken to sell same, by any person or persons whatsoever. A judgment was obtained against M., a writ of fi. fa. issued, and some cows were seized by the sheriff but returned, the debt having been paid:—Held, that under the words "commit, or knowingly permit, or suffer to be committed, any act whereby his interest might become the property of a third party," no forfeiture of M.'s interest in the lands had occurred. *Ryan, In re*, 19 L. R., Ir. 24—Bk.

Charging order—"Assigns."—By a marriage settlement the annual income of the trust fund was given to the husband "and his assigns" for his life or until he should make, or attempt to make, any assignment of the income or any part thereof, or to charge or incur, or attempt to charge or incur the same; the settlement contained limitations over. The husband mortgaged his life interest, and charging orders, in respect of certain judgments, had been made against his life interest. It was contended that the effect of the addition of the word "assigns" was that the husband's life interest was absolute, and the forfeiture clause void:—Held, that the construction contended for was too wide; that the charging orders were not within the clause; that effect could be given to the clause against alienation and at the same time to the word "assigns," and further that the charging orders were valid against the income up to the date of the mortgage, but that the mortgage operated so as to work a forfeiture of the life interest. *Kelly's Settlement, In re, West v. Turner*, 59 L. T. 494—Chitty, J.

Effect of Bankruptcy.—See BANKRUPTCY, XVII.

3. ENFORCING COVENANTS.

Covenant to Settle After-acquired Property—Volunteer Claiming Benefit—Defective Execu-

tion of Power.—The maxim that equity looks upon that as done which ought to be done, applies only (in cases depending on contract) in favour of persons who are entitled to enforce the contract, and cannot be invoked by volunteers. By a marriage settlement executed in 1853, certain personal estate was assigned to trustees upon trust in case the husband should die in the lifetime of the wife, and there should be no children of the marriage, to stand possessed thereof for the wife, her executors, administrators, and assigns. The settlement contained a covenant by the husband and wife that any real estate to which the wife should become entitled, whether in possession, reversion, remainder, or expectancy, or over which she should have an absolute power, should be assured to the trustees to be held by them upon the same trusts as the above-mentioned personal estate, or as near thereto as the nature of the property would admit of, and until so assured should be subject to the trusts and enjoyed accordingly. By a deed executed in 1873, certain lands called the Stonehouse property were conveyed to trustees for the wife during the joint lives with restraint on anticipation, remainder to her for life, remainder as she should by deed or will appoint, and in default of appointment to the husband in fee. By a codicil to her will made in her husband's lifetime the wife devised the Stonehouse property to two persons. The husband died in May, 1882, and the wife in the month of June following. She never republished her will or codicils. There were no children of the marriage, and the Stonehouse property was never assured to the trustees on the trusts of the marriage settlement. In an action to administer the real and personal estate of the wife:—Held, that the covenant to assure after-acquired property could not be enforced or treated as operative in favour of the heir-at-law, that the declaration of trust annexed to it could not be regarded in his favour as a defective execution of a power which the court would cure, and that the codicil being a good execution of the power of appointment contained in the deed of 1873, the two devisees therein-mentioned were entitled to the Stonehouse property. *Anstis, In re, Chetwynd v. Morgan*, 31 Ch. D. 596; 54 L. T. 742; 34 W. R. 483—C. A.

Post-nuptial—Voluntary as to Children.—Where a post-nuptial settlement has been executed by a husband and wife in consideration of an exchange of interests between them, such a settlement, though for value as between themselves, is voluntary as regards the children of the marriage, and specific performance of a covenant to surrender copyholds cannot be enforced by them. *Green v. Paterson*, 32 Ch. D. 95; 56 L. J., Ch. 181; 54 L. T. 738; 34 W. R. 724—C. A.

4. RECTIFICATION AND CANCELLATION.

Rectification—Agency of Wife's Father.—A father living on affectionate terms with his daughter is the proper person to recommend and advise her, and her natural agent in matters relating to the preparation and provisions of her marriage settlement, and there is no occasion for any independent legal advice beyond that of the family solicitor who is preparing the settlement. If, however, the father is taking under the

settlement a benefit from the daughter, she ought to be separately advised. *Smith v. Niffe* (20 L. R. Eq. 666) disapproved. *Wollaston v. Tribe* (9 L. R., Eq. 44) doubted. *Tucker v. Bennett*, 38 Ch. D. 1; 57 L. J., Ch. 507; 58 L. T. 650—C. A.

The court will not apply to the consideration of provisions in favour of volunteers contained in a contract founded on marriage, the principles on which it would act in considering provisions contained in a voluntary settlement. *Id.* Per Cotton, L.J.

Cancellation—Inchoate Marriage Settlement.]

—In contemplation of marriage, an intended wife and her father executed the engrossment of a settlement of, inter alia, funds to be provided by the father, and the present and after-acquired property of the intended wife. The engrossment was given into the custody of the solicitors of the intended husband; it was not executed by him or the trustees. The engagement was broken off by agreement. After the lapse of three and a half years the court declared the engrossment void as a settlement, and directed it to be given up. *Bond v. Walford*, 32 Ch. D. 238; 55 L. J., Ch. 667; 54 L. T. 672—Pearson, J.

By a settlement executed in 1877, in consideration of a then intended marriage, it was declared that a sum of stock, the property of the intended wife, which had been transferred by her to two trustees, should be held by them on trust for the benefit of the intended wife, the intended husband, and the issue of the intended marriage. The marriage was not solemnized, but the parties cohabited without marriage, and three children were born. In 1883 an action was brought by the father and mother against the trustees of the settlement, to obtain a transfer of the fund to the mother:—Held, that the contract to marry had been absolutely put an end to, and that the court could order the stock to be transferred to the lady. *Essey v. Couland*, 26 Ch. D. 191; 53 L. J., Ch. 661; 51 L. T. 60; 32 W. R. 518—Pearson, J.

Rescission—Fraud before Marriage.]—[In an action to set aside a marriage settlement, the plaintiff alleged, as the ground of his action, that previous to the execution of the settlement made upon the marriage between himself and I. S., the latter stated to him that her first husband had been divorced from her, at her suit, by reason of his cruelty and adultery, and that she had not herself been guilty of adultery; that such statements were made to induce him to execute the settlement and contract the marriage; that in reliance on the representations, he executed the settlement and married I. S.; that he subsequently discovered that the representations were false to the knowledge of I. S., and that she herself had been divorced from her husband at his suit and by reason of her adultery:—Held, on motion by the defendant, that the plaintiff's statement of claim must be struck out under Ord. XXV. r. 4, as disclosing no reasonable ground of action. *Johnston v. Johnston*, 52 L. T. 76; 33 W. R. 239—C. A. Affirming 53 L. J., Ch. 1014—Pearson, J.

ILLEGALITY.

Of Contracts.]—See CONTRACT, III., 3.

Of Companies—Non-registration.]—See COMPANY, I., 3, a.

IMPRISONMENT.

Of Debtors.]—See DEBTORS ACT.

Of Criminals.]—See PRISONS—CRIMINAL LAW.

False Imprisonment.]—See MALICIOUS PROSECUTION.

INCLOSURE.

See COMMONS.

INCOME TAX.

See REVENUE.

INCUMBENT.

See ECCLESIASTICAL LAW.

INDEMNITY.

See PRINCIPAL AND SURETY.

INDIA.

Bombay Civil Fund—Mode of Trial.]—On an application to the Court of Appeal under the Bombay Civil Fund Act, 1882, to prescribe the manner of trial of a question alleged by the applicant to arise between him and the Secretary of State for India as to the liability of the fund, the court will not enter into any inquiry as to the nature of the applicant's claim. Form of directions as to the manner in which the question shall be tried. *Bombay Civil Fund Act, In re*, 1882, *Pringle, Ex parte*, 39 Ch. D. 300; 60 L. T. 81—C. A.

INDICTMENT.

See CRIMINAL LAW.

INDUSTRIAL SCHOOLS.

See SCHOOL.

INDUSTRIAL SOCIETY.

Mortgage by Member of Property and "Other Moneys"—Defalcations.—H., a member of the defendant society, mortgaged to the society certain property to secure principal money payable by certain instalments, with interest and subscriptions, and "other moneys becoming due from the mortgagor to the defendant society." H. was also secretary of the society, and in that capacity had received and misapplied moneys belonging to the society. He had conveyed the equity of redemption in the mortgaged property to the plaintiff, who claimed to redeem on payment of the mortgage debt, with interest, subscriptions, fines, and other payments due from H. as member. The society claimed in addition to this the amount which H. had embezzled, contending that it came within the words "other moneys":—Held, that the words applied to debts ejusdem generis with what had been mentioned before, and that the sums which H. had embezzled were not ejusdem generis with the mortgage debt, interest, and subscriptions, but were due from H. on a totally different contract, and the society could not insist upon the plaintiff paying such sums before redeeming the property. *Bailes v. Sunderland Equitable Industrial Society*, 55 L. T. 808; 51 J. P. 310—Stirling, J.

INFANT.

I. CONTRACTS, 966.

II. MARRIAGE SETTLEMENTS, 967.

III. PROPERTY, 969.

IV. MAINTENANCE, 971.

V. GUARDIANS, 975.

VI. WARD OF COURT, 976.

VII. CUSTODY, 977.

VIII. RELIGIOUS EDUCATION, 980.

IX. ACTIONS AND PROCEEDINGS BY AND AGAINST, 980.

X. LEGITIMACY OF.—See HUSBAND AND WIFE, I., 4.

XI. ADVANCEMENT OF.—See ADVANCEMENT.

I. CONTRACTS.

Necessaries—Evidence.—Where an infant is sued for the price of goods supplied to him on credit, he may, for the purpose of showing that they were not necessaries, give evidence that, when the order was given, he was already sufficiently supplied with goods of a similar description, and it is immaterial whether the plaintiff did or did not know of the existing supply. *Ryder v. Wombwell* (3 L. R., Ex. 90) dissented from. *Baines or Barnes v. Toye*, 13 Q. B. D. 410; 53 L. J., Q. B. 567; 51 L. T. 292; 33 W. R. 15; 48 J. P. 664—D.

Where an infant is sued for the price of goods sold to him on credit, he may, for the purpose of showing that they were not necessaries, give evidence to show that at the time of the sale he was sufficiently provided with goods of the kind supplied. *Ryder v. Wombwell* (3 L. R., Ex. 90) dissented from. *Barnes v. Toye* (13 Q. B. D. 410), approved. *Johnstone v. Marks*, 19 Q. B. D. 509; 57 L. J., Q. B. 6; 35 W. R. 806—D.

For Benefit of Infant—Injunction to restrain Breach.—An infant contracted with a dairyman to enter his employment at a salary of 1*l.* a week, and agreed that he would not serve for his own benefit any of his employer's customers during the time he remained in such employment, or for two years afterwards, and that two weeks' notice to leave was to be given on either side:—Held, that this contract was beneficial to the infant, and could be enforced by injunction against him, and that s. 1 of the Infants' Relief Act, 1874, does not apply to such a contract. *Fellows v. Wood*, 59 L. T. 513; 52 J. P. 822—D.

Apprenticeship Deed.—An infant was apprenticed by a deed containing a provision that the master should not be liable to pay wages to the apprentice so long as his business should be interrupted or impeded by or in consequence of any turn-out, and that the apprentice might during any such turn-out employ himself in any other manner or with any other person for his own benefit:—Held, that, this provision not being for the benefit of the infant, the apprenticeship deed could not be enforced against the infant under the Employers and Workmen Act, 1875, ss. 5, 6. *Meakin v. Morris*, 12 Q. B. D. 352; 53 L. J., M. C. 72; 32 W. R. 661; 48 J. P. 344—D.

Promise of Marriage—Ratification—Fresh Promise.—The plaintiff and defendant, who were both under age, became engaged to be married in April, 1886. In September, 1886, the defendant came of age. In October, 1886, the plaintiff's father made an assignment of his property to his creditors, and immediately afterwards informed the defendant of the fact, and told him if he wished to be released from his

engagement he could. The defendant then refused to be released, and said he was quite willing to marry the plaintiff, and asked her whether she thought they were old enough; to which the plaintiff replied they had better wait awhile. The defendant subsequently broke off the engagement, and refused to marry the plaintiff:—Held, that there was evidence to go to the jury that there had been a new promise to marry made by the defendant after he came of age. *Holmes v. Brierley*, 36 W. R. 795—C. A. Reversing 59 L. T. 70; 52 J. P. 711—D.

II. MARRIAGE SETTLEMENTS.

Confirmation—Joint Tenancy—Severance—Caterorum Grant.—Where on the marriage of a female infant her interest as one of several joint-tenants in a reversionary property is settled, the settlement requires no confirmation, but, though voidable, is valid and effectual until avoided, and operates to sever the joint-tenancy. *Smith v. Lucas* (18 Ch. D. 531) considered. *Burnaby v. Equitable Reversionary Interest Society*, 28 Ch. D. 416; 54 L. J., Ch. 466; 52 L. T. 350; 33 W. R. 639—Pearson, J.

In such a case the lady, in exercise of a power of appointment given her by the settlement, appointed by her will all the property over which she had any power of appointment or disposition to her husband absolutely, and appointed him her executor:—Held, that the husband could make a good title to the wife's interest in the reversionary property without obtaining any *caterorum* grant. Held also, that the husband's title derived as above was sufficiently clear to be forced upon a purchaser.—*Ib.*

Post-nuptial—Jurisdiction of Court to Order—Infants' Settlement Act, 1855.—The court has jurisdiction in a case where a female infant has married under the age of seventeen, after she has attained that age, to direct a proper settlement of her property to be executed. *Phillips, In re*, 34 Ch. D. 467; 56 L. J., Ch. 337; 56 L. T. 144; 35 W. R. 284—Chitty, J.

The Infants' Settlement Act, 1855 (18 & 19 Vict. c. 43) removed the disability of infancy only, leaving unaffected the disability of coverture. In 1862 an infant ward of court married without the sanction of the court. An inquiry as to her fortune having been shortly afterwards directed by the court, a post-nuptial settlement was executed by her in 1863, with the approval of the Vice-Chancellor, whereby she settled her property, a reversionary interest in personality under a will, upon trusts for herself for life, with the remainder for the children of the marriage. The testator having died before Malins' Act (20 & 21 Vict. c. 57) came into force, that act had no application. There was issue of the marriage. During coverture the wife recognized the settlement by various acts, and after a dissolution of the marriage had been decreed on her petition, she successfully petitioned the Probate, Divorce and Admiralty Division to vary the terms of the settlement. The reversionary interest having fallen into possession after the dissolution of the marriage:—Held, that neither the sanction of the court nor the effect of that act could make the settlement of the wife's reversionary interest in personality binding upon

her; that no acts of acquiescence and confirmation could have that effect unless they amounted (which these acts did not) to an actual disposition by her of the property (while discoverte) to the trustees of the settlement, and that she was entitled to a transfer of the property. *Seaton v. Seaton*, 13 App. Cas. 61; 57 L. J., Ch. 661; 58 L. T. 565; 36 W. R. 865—H. L. (E.).

A post-nuptial settlement of an infant's property may be made with the sanction of the court under the Infants' Settlement Act, 1855. *Sampson and Wall, In re*, or *Wall, In re*, 25 Ch. D. 482; 53 L. J., Ch. 457; 50 L. T. 435; 32 W. R. 617—C. A.

Trustees—Form of Settlement.—S. having married a ward of court, in contempt of court, was committed to prison, and a settlement was prepared by the order of the court of the wife's property, giving S. no interest in the property, and containing a power of appointment by will to the wife in default of children in favour of any one except her husband. The wife objected to the trustees named in the proposed settlement on personal grounds, and objected also to the power of appointment in default of children excluding her husband, and refused to execute the settlement:—Held, that it was desirable that trustees of the settlement should be persons with whom the parties interested could hold friendly intercourse, and that as the proposed trustees were personally distasteful to the wife, it was desirable to substitute other trustees for them. That as to the power of appointment by will by the wife in default of children, it would be conducive to the happiness of the husband and wife during their married life that the wife should not be debarred in default of children from appointing anything to her husband, and the settlement was therefore directed to be altered in those respects. *Ib.*

Disentailing Assurance—Female Infant—Omitted Property—Mistake.—A public body took, under compulsory powers, certain freeholds at A. to a moiety of which (together with much other property) a female infant ward of court was entitled as one of two tenants in common in tail, and they paid the purchase-moneys into court. Afterwards, and while the ward was still an infant, proposals for a settlement upon her marriage were carried in on her behalf under the Infants' Settlement Act, 1855, in which it was stated that she was entitled as tenant in common in tail to certain specified properties, and that it was proposed to bar the entail in the lady's share in such properties, and to vest the whole of such share, except 13,000*l.*, in trustees to be held upon certain trusts. Amongst the properties so specified were included by inadvertence the freeholds at A. A settlement founded on these proposals was sanctioned by the court, and was carried out in 1884 by a disentailing deed, and a deed of declaration of trust, both of which were approved by the court. The freehold property at A. was included in the parcels to the disentailing deed, but no mention of the fund in court arising from the purchase-money of this property was made, either in the proposals or in the deeds; and the disentailing deed contained no covenant for further assurances, or for the settlement of other or after-acquired property. The marriage took place,

and afterwards, in 1885, the lady attained twenty-one, disentailed the fund in court, and claimed it as being her absolute property under the Married Women's Property Act, and unaffected by her marriage settlement. In an action by the trustees of the marriage settlement to establish their title to the funds in court:—Held, that the disentailing deed of 1884 was not effectual to bar the estate tail of the lady in the fund in court; and that although in the absence of any contract binding the lady to settle the freeholds at A., the settlement could not be rectified, yet inasmuch as both the marriage and the settlement were sanctioned by the court upon the faith of a representation made on behalf of the lady that she was entitled in tail to a moiety of the property, the purchase-money of which was represented by the fund in court, she was bound in equity to make good such representation, notwithstanding her infancy at the time it was made; and that having disentailed the fund in court, and thus become the only person, besides the plaintiffs, who could claim any interest in it, she was precluded from setting up any title to the fund in court adverse to that of the plaintiffs as trustees of the settlement, and that one moiety of such fund ought to be transferred to and held by them upon the trusts of the settlement. *Mills v. Fox*, 37 Ch. D. 153; 57 L. J. Ch. 56; 57 L. T. 792; 36 W. R. 219—Stirling, J.

Costs—Payment out of Corpus.]—The costs of a settlement of the property of a female ward of court, made upon her marriage with the sanction of the court, were ordered to be paid out of the corpus of the settled property. *Anonymous* (4 Russ. 473) followed. *De Staepoole v. De Staepoole*, 37 Ch. D. 139; 57 L. J., Ch. 463; 58 L. T. 382; 36 W. R. 320—North, J.

III. PROPERTY.

Surrender of Lease.]—The provisions of the Act 11 Geo. 4 & 1 Will. 4, c. 65, for the surrender of a lease to which an infant is entitled, apply to a lease to which an infant is only beneficially entitled, the legal estate being vested in a trustee for him. *Griffiths, In re*, 29 Ch. D. 248; 54 L. J., Ch. 742; 53 L. T. 262; 33 W. R. 728—Pearson, J.

Payment out of Court—Attainment of Age according to Law of Domicil.]—Funds in court in this country, placed to the separate credit of an infant domiciled abroad, were paid out to her on attaining her full age, according to the law of her then and native domicil, although she had not come of age according to English law. *Donohoe v. Donohoe*, 19 L. R., Ir. 349—V.-C.

Small Sum.]—Small sums of money representing shares of infants in a fund in court may be directed to be paid out by the Paymaster-General into the Post-office Savings Bank to accounts in the names of the infants. *Elliot v. Elliott*, 54 L. J., Ch. 1142—Chitty, J.

Stock in Name of Infant—Vesting in Guardian—Trustee Acts.]—Stock to which an infant was absolutely entitled under a will was standing in her own name alone. The will contained

no direction for maintenance, but the stock constituted the only property of the infant, who was domiciled in Scotland, and a Scotch court had ordered that advances should be made out of the capital of her property for the purpose of maintenance:—Held, following the principle of *Gardner v. Cowles* (3 Ch. D. 304), that the court could make an order under s. 3 of the Trustee Extension Act, 1852, vesting in the guardian of the infant the right to transfer the stock and receive the dividends. *Findlay, In re*, 55 L. J., Ch. 395—North, J.

Equitable Mortgage by a Testator—Power to Mortgage Estate.]—By will dated the 12th October, 1881, W. K. devised to W. K. G. certain freehold property of considerable value. The title-deeds of portion of the property had been deposited by W. K. with the National Bank, by way of equitable mortgage, to secure a debt due to them; W. K. died in October, 1881, and the National Bank having subsequently brought an action in the Chancery Division for recovery of their debt by sale and a receiver, the court, on the application of W. K. G. (who was a minor, and appeared by his guardian), gave him liberty, under the 1 Wm. 4, c. 47, and 2 & 3 Vict. c. 60, to raise and pay the amount of the equitable mortgage by a mortgage of the devised lands. *National Bank v. Gourley*, 17 L. R., Ir. 357—V.-C.

Right of Father to charge on Contingent Interest.]—The court refused to declare that sums advanced by a father for the benefit of his infant son were a charge on property to which the son would become entitled only in the event of his attaining twenty-one. *Tanner, In re*, 53 L. J., Ch. 1108; 51 L. T. 507—Kay, J.

Semble, the court has no jurisdiction to make such a charge, and the only proper form of order in such a case is that in *Arbuckle, In re*, (14 W. R. 435). *Id.*

Bailiff for Infants—Possession as Guardian by Nurture—Liability to Account.]—The owner of a public-house and cottages devised them to his widow during her life or widowhood, with remainder to his four infant children. His widow married again, but continued to reside in and manage the public-house; and she received the rents of the cottages and maintained the children. One of the children was still an infant married, but she and her husband for some months resided in the public-house. They then left it, and had not since received anything from the estate of the testator. She and her husband brought an action against her mother for one-fourth of the rents and profits:—Held, that after her second marriage the mother was in possession as bailiff for her infant children, and not as guardian by nurture, or by leave of her children, or as a trespasser, and was therefore a trustee and liable to account; that though on the daughter's marriage the right to receive the rents passed to her husband, this did not change the character of the mother's possession, and that it was not changed when the daughter came of age:—Held, therefore, that the mother was liable to account to the daughter and her husband for the rents and profits. *Wall v. Stanwick*, 34 Ch. D. 763; 56 L. J., Ch. 501; 56 L. T. 309; 35 W. R. 701—Kekewich, J.

— **Tenants in Common—Receipt of Rents by Father.**—A father was entitled in fee to an undivided moiety of gavelkind land, the other moiety of which belonged to his wife in fee. She died in May, 1870, leaving two sons, Samuel and John. John was then an infant. He attained twenty-one in 1877, and died in May, 1884. On the mother's death her moiety descended to her two sons in equal shares, as her co-heirs by the custom of gavelkind, but the father was by that custom entitled to a moiety of the rents of her moiety so long as he remained a widower. On the mother's death he entered into the receipt of the whole of the rents of her moiety, and continued in possession, without accounting to his sons or acknowledging their title in writing, for more than twelve years. On the death of John in 1884, his interest descended to his brother Samuel as heir of the mother. In February, 1884, the father had married a second wife, and in November, 1884, he died:—Held, that, as to that one-eighth of the property to which John became entitled in possession on the death of his mother, the father must be taken to have entered into receipt of the rents as bailiff for his infant son, and that, consequently, the title of John was not barred by s. 12 of the act 3 & 4 Will. 4, c. 27, and that his brother Samuel was entitled to that one-eighth. But held, that, as to Samuel's own one-eighth the same presumption did not arise, and that, there being no evidence that the father had received the rents as agent for Samuel, or had before the expiration of the statutory period acknowledged his title in writing, or accounted to him for the rents, the title to that one-eighth was barred by the statute. Consequently, Samuel was entitled to three-eighths of the whole property and the remaining five-eighths passed under the father's will. *Hobbs, In re, Hobbs v. Wade*, 36 Ch. D. 553; 57 L. J., Ch. 184; 58 L. T. 9; 36 W. R. 445—North, J.

IV. MAINTENANCE.

Conveyancing Act—Contingent Legacy.—Trustees cannot, under section 43 of the Conveyancing Act, 1881, apply the income of an infant's contingent legacy for the benefit of the infant, unless the income will go along with the capital of the legacy if and when such capital vests. *Judkin's Trusts, In re*, 25 Ch. D. 743; 53 L. J., Ch. 496; 50 L. T. 200; 32 W. R. 407—Kay, J.

S. 43 of the Conveyancing and Law of Property Act, 1881, empowering trustees to apply towards the maintenance of an infant the income of property held in trust for him contingently on his attaining the age of twenty-one years, does not authorise the allowance of maintenance where, apart from the act, the infant, on attaining twenty-one would only be entitled to the legacy without interest. *Dickson, In re, Hill v. Grant*, 29 Ch. D. 331; 54 L. J., Ch. 510; 52 L. T. 707; 33 W. R. 511—O. A.

— **"Contrary Intention."**—A testator gave a fund to trustees, on trust for all the children of A. equally, who being sons should attain twenty-one, or being daughters should attain twenty-one, or marry, with benefit of survivorship amongst them, and he directed his trustees to accumulate the income of the shares of the children, and to pay the same to them as and when their presumptive shares should become

payable under the previous trust:—Held, that the will did not express a "contrary intention" within the meaning of s. 43 of the Conveyancing Act, 1881, and that, the children being infants and unmarried, the trustees might at their discretion apply the income of the trust fund in or towards the maintenance and education of the infants. *Thatcher's Trusts, In re*, 26 Ch. D. 426; 53 L. J., Ch. 1050; 32 W. R. 679—Pearson, J.

Dividends—Payment to Father.—Accrued and future dividends of the fortune of three minors were ordered to be paid to their father, he undertaking to apply the dividends to their maintenance, clothing, and education; and the court being satisfied that under the special circumstances of the case such order would be for the benefit of the minors. *Birch's Trustees, In re*, 15 L. R., Ir. 380—M. R.

— **Money invested in Name of Infant—Accumulations.**—On the 7th of June, 1880, A. K., an infant, became absolutely entitled under the will of S. H. to a sum of consols standing in the name of J. K., one of the trustees of the will, deceased, and A. K.'s own name, being part of a trust fund under that will. This was a petition to obtain a vesting or other order for the purpose of dealing with the dividends on the consols. No guardian of A. K. was appointed by the will or otherwise. A. K. was born on the 6th March, 1879. On the 21st April, 1888, at the suggestion of the judge, it was ordered that the proper officer of the Bank of England do, during the minority of the said infant petitioner A. K., invest the dividends now due and hereafter to accrue due on the consols. On the 10th May, 1888, the bank wrote refusing to act on the order. The court now made an order directing the dividends to be paid to the present trustees of the will of S. H., for the benefit of the infant. *Kemp, In re*, 59 L. T. 209; 36 W. R. 729—Kay, J.

Power of Trustees—Unlimited Duration.—A testator by his will, after giving certain annuities to his daughters and a granddaughter, directed his trustees to accumulate the surplus income after providing for these annuities until the death of all his daughters, when the period of distribution was fixed; and, after other provisions, the will contained a power of maintenance which was unlimited in duration of time, and expressed to be exercisable during the lifetime of the daughters. Superadded to the power of maintenance was another trust for accumulation of surplus income not applied in maintenance. Upon an application to the court by the trustees for directions whether the income of the testator's estate was applicable for the maintenance and education of the testator's grandchildren:—Held, that the power of maintenance was unlimited; that there was not sufficient evidence upon the face of the will of an intention to cut down the terms of the power of maintenance, which operated as well during the continuance as after the expiration of the trust for accumulation; and that the grandchildren were therefore entitled to have the income of the testator's estate applied towards their maintenance and education. *Smeed, In re, Archer v. Prall*, 54 L. T. 929—Chitty, J.

Discretion of Trustees—Ability of Father to Maintain.—J. B. M. having absolute power to

dispose of property, devised it to her husband J. M. for life, in trust that he should "apply the same, or as much thereof as he should from time to time think proper, for or towards the maintenance and education, or otherwise, for the benefit of my son D. M., and shall and do invest the unapplied income, &c., in such stocks, &c., as the said J. M. in his absolute and uncontrolled discretion shall think fit, with power to him at any time, and from time to time, to use and apply all or any part of such accumulated income for the benefit of my said son, or to pay the same over to him as the said J. M. may from time to time think proper:" and after the death of J. M., she devised the property, and all accumulations which should not have been applied or paid over in trust for his son D. M. absolutely; and if he should die in the lifetime of his father J. M., to J. M. absolutely. After the testatrix's death, J. M. received the rents and maintained his son in a manner suitable to his rank until his own death. Independently of the testatrix's property he was during his life of ability to maintain his son, J. M. having died, his administratrix in an action brought by D. M. claimed credit for a considerable sum for the maintenance and education, &c., of the minor by J. M. during several years. It was sought, on behalf of the plaintiff, to have this credit disallowed on the ground that the father, having been of sufficient ability to maintain and educate his child, was not entitled to apply any of the trust funds for that purpose:—Held, that J. M. was under the testatrix's will entitled (notwithstanding his own ability) to apply so much of the income of the trust funds as he should from time to time think proper for and towards the maintenance and education, or otherwise for the benefit, of his son D. M. *Malcomson v. Malcomson*, 17 L. R., Ir. 69—C. A.

— **Jurisdiction of Court to Control.**—A female infant was entitled contingently on her attaining twenty-one or marrying, to a fund of which her deceased mother had been tenant for life. The trustees had power to "apply all or any part" of the income (about 538*l.* a year) for her maintenance and education. On a summons in the matter of the infant, Bacon, V.-C., held that he had jurisdiction to control the discretion of the trustees as to the quantum to be allowed, and made an order on them to pay 400*l.* a year to the father for her maintenance and education. The trustees appealed, and in answer to an inquiry by the court, stated their intention to allow 250*l.* to the father for her maintenance and education:—Held, that the order of the Vice-Chancellor was irregular, and must be discharged, the court having no jurisdiction on a summons in the matter of an infant to make any order for payment by trustees or other persons. *Lofthouse, In re*, 29 Ch. D. 921; 54 L. J., Ch. 1087; 53 L. T. 174; 33 W. R. 668—C. A.

Whether the court could control the discretion of the trustees as to the amount to be allowed for maintenance and education, so long as such discretion was honestly exercised, *quære*. *Ib.*

— **Child assigning Interest.**—A testator directed his trustees, after the death of his wife, to apply the income of his estate "in and towards the maintenance, education, and advancement of my children in such manner as

they shall deem most expedient until the youngest of my said children attains the age of twenty-one years," and on the happening of that event he directed them to divide his estate equally among all his children then living. The testator left four children, two of whom at the death of the widow in 1884 were of age, and the youngest was in his seventh year. After the decease of the widow the trustees paid each of the adult children one-fourth of the income, and applied the other two-fourths for the benefit of the minors equally till 1886, when J. S. C. the eldest son, made an absolute assignment for value of all his interest under the testator's will to H. The trustees declining to pay one-fourth of the income to H. he took out a summons to have the construction of the will determined:—Held, that no child of the testator was entitled, prior to the attainment of twenty-one by the youngest of the testator's children, to the payment of any part of the income, and that the trustees were entitled to apply the income for the maintenance, education, or advancement of the children, including J. S. C., in their absolute discretion; that H. was entitled to no interest in the income except such moneys or property, if any, as might be paid or delivered or appropriated for payment or delivery by the trustees to J. S. C., and that the trustees could not pay or deliver to J. S. C. money or goods forming part of the income or purchased out of the income, for that such moneys and goods so paid or delivered, or appropriated to be paid or delivered, would pass by the assignment. *Coleman, In re, Henry v. Strong*, 39 Ch. D. 443; 58 L. J., Ch. 226; 60 L. T. 127—C. A.

Charge on Infant's Real Estate.—Two infants were entitled to successive estates tail in remainder after the life estate of their father, which life estate had been sold under his bankruptcy. There being no income applicable to the maintenance of the infants, an application was made on their behalf that a yearly sum might be allowed for that purpose, and borrowed on the security of a mortgage or charge on the real estate to which they were entitled as above. The amount for which the charge was to be given included the premiums on the insurance requisite for the protection of the lender:—Held, that an order sanctioning the scheme could not be made, and that the principle of *Howarth, In re* (8 L. R., Ch. 415) would not support it, for that, although judgment might be recovered against the infants for necessities supplied to them, it could not be recovered for premiums on the policies, and, moreover, judgment could not be recovered against one infant for necessities supplied to the other, and a judgment would not charge the estates of the infants, inasmuch as those estates were so circumstanced that they could not be delivered in execution. *Hamilton, In re*, 31 Ch. D. 291; 55 L. J., Ch. 282; 53 L. T. 840; 34 W. R. 203—C. A.

Five infants were entitled to successive estates tail in real estate after the death of their grandmother, who was tenant for life. There being no income applicable for the maintenance of the infants, an application was made in an action on their behalf, that a sum of money for past maintenance, and certain annual sums for future maintenance, should be raised on the security of a charge on the estate; the tenant for life

being willing to release her life estate in a portion of the property so as to give the first tenant in tail an estate in possession, and to join in the necessary deeds :—Held, that such an order could not be made. *Howarth, In re* (8 L. R. Ch. 415) distinguished and doubted. *Cadman v. Cadman*, 33 Ch. D. 397; 55 L. J., Ch. 833; 55 L. T. 569; 35 W. R. 1—C. A.

One Guardian allowed to receive Money—Voucher of Items of Expenditure.—H. and C. were trustees and executors of a will, and guardians of the testator's daughters. The daughters during their infancy were maintained by C., and H. allowed him to receive the income for that purpose. After they attained majority judgment was given for administration of the testator's estate, in which the usual accounts of the personal estate were directed, and an inquiry how and by whom each of the daughters was maintained during infancy, and what was proper to be allowed and to whom out of the income of her share for her maintenance and education. A dispute having arisen in taking the accounts and inquiry, H. applied for a declaration that the receipts by C. of the income of the shares of the daughters for maintenance were a good discharge to H., and that H. was not to be called upon to produce vouchers in respect of the particular manner in which the income was applied. Kay, J., made an order expressing the opinion of the court that the accounts of the trustees should be taken as directed by the judgment as between guardian and ward, and ordering H. to pay the costs of the application :—Held, on appeal, that H., as trustee, was not discharged by mere evidence of payment of the income to C., his co-guardian, but that under the inquiry, H. was not bound to vouch the items of expenditure; and if it was shown that C. had properly maintained and educated the children, the sum proper for that purpose would be allowed against the balance found due on the account, without vouching the details of the application. *Evans, In re, Welch v. Channell*, 26 Ch. D. 58; 53 L. J., Ch. 709; 51 L. T. 175; 32 W. R. 736—C. A.

Jurisdiction of Court to Order, out of Accumulations.—See post, WILL, V. k. v.

V. GUARDIANS.

Appointment of—Jurisdiction—British Subject born Abroad.—If an infant be born abroad whose paternal grandfather was a natural-born British subject, the court has jurisdiction to appoint a guardian of such infant, although the infant is resident abroad, and has no property in this country. A Frenchwoman, who was the mother of such an infant, and entitled by the law of France to the status of natural guardian of the infant, though not a person who would have been appointed guardian if she and the infant had been domiciled in England, had brought proceedings in the French courts for the appointment of guardians, which proceedings had been directed to stand over until it should be ascertained what course the English courts would adopt :—Held, by Kay, J., that this was a case in which the English court should exercise its jurisdiction; and a guardian of the infant was appointed accordingly :—Held by the Court of Appeal, that under the circumstances

the decision of the court below was right. *Willoughby, In re*, 30 Ch. D. 324; 54 L. J., Ch. 1122; 53 L. T. 926; 33 W. R. 850—C. A.

Statutory Guardian resident out of the Jurisdiction.—Where the mother of infants, whose father died intestate, was permanently resident in England, the court, with her consent, made an order, under the 49 & 50 Vict. c. 27, s. 6, substituting a paternal uncle of the infants as their guardian. Form of procedure in such cases. *Lemons, In re*, 19 L. R., Ir. 575—L. C. See also *Callaghan, In re*, infra.

Religion of Children—Indication of Father's Intention.—W., a Roman Catholic, shortly before his marriage in 1876, with Miss D., a Protestant, wrote to the priest of his parish, applying for a dispensation, and promising to have the children (if any) brought up as Roman Catholics. About the same time he also wrote three letters to Miss D.'s mother, stating that he had no objection to the children being baptized by a Protestant clergyman, but that circumstances might arise compelling him to have them baptized Roman Catholics, which, however, would in no way bind him to have them brought up in that faith; that the matter presented no difficulty except baptism; that the future did not depend on any ceremony, but on his own will or honour; and that as to guardianship, on no consideration would he "permit anyone to step between [his intended wife] and her children," but "would by will leave her sole and undivided authority." The dispensation for the marriage was obtained from the Roman Catholic bishop, but W. did not avail himself of it, and his marriage with Miss D. was celebrated by a Protestant clergyman only. A child, C., was born in 1878, which was, with W.'s sanction, baptized as a Roman Catholic. W. having died intestate in 1879, his widow (C.'s mother), in 1883, presented a petition as next friend, praying to have C. made a ward of court and herself appointed guardian :—Held, that upon the whole, the facts afforded a sufficient indication of W.'s intention that his children should, after his death, be committed to the guardianship of their mother, and an order simply to that effect was made with respect to C. *Walsh, In re*, 13 L. R., Ir. 269—L. C. See also *Scanlan, In re*, post, col. 980.

Administration with Will annexed granted to.—See WILL (LETTERS OF ADMINISTRATION).

Guardian ad litem.—See infra, IX.

VI. WARD OF COURT.

Who is—Payment into Court—Alien Infant Resident Abroad.—A legacy had been paid into court to which, on the death of the tenant for life, two female infants, who were French subjects by birth, and resident in France, became absolutely entitled. They were both married, and, by the French law, under the settlements made on their respective marriages, their husbands were absolutely entitled to receive their shares of the fund. One of the infants had since attained twenty-one :—Held, that the infants, not being subjects of, or domiciled, or resident in England, the court had a discretion as to whether or not they should

be treated as wards of court, and that the money might therefore be paid out to the husbands. *Brown v. Collins*, 25 Ch. D. 56; 53 L. J., Ch. 368; 49 L. T. 329—Kay, J.

Whether, in any case, the mere fact that there is a fund in court to a share in which an infant is entitled, makes the infant a ward of court, quære. *De Pereda v. De Mancha* (19 Ch. D. 451) doubted on this point. *Id.*

Leave to take Ward out of the Jurisdiction.]—

A resident in Jamaica died leaving two children, who were born there, and resided there with their mother till 1875, when the elder, a daughter, was sent to England to be educated. The mother came to England in 1876 to place her son at school, and returned to Jamaica in 1878. In 1880 she came to England to see her children and had remained there, the daughter, upon leaving school, living with her. With the above exceptions, the mother had always lived in Jamaica, and regarded it as her home. She now wished to return thither permanently, and to take with her the daughter aged twenty years and three months, the son, who was apprenticed to an engineer, remaining in England. The children were wards of court, and the mother had been appointed by the court sole guardian:—Held, that leave may be given to take a ward out of the jurisdiction without a case of necessity being shown, the court having only to be satisfied that the step is for the benefit of the ward, and that there is sufficient security that future orders will be obeyed. Leave was accordingly given upon a relative resident in England being appointed guardian along with the mother. *Callaghan, In re, Elliott v. Lambert*, 28 Ch. D. 186; 54 L. J., Ch. 292; 52 L. T. 7; 33 W. R. 157—C. A.

VII. CUSTODY.

Age of Nurture—Lunatic Mother—Removal Order.]—

The court will, in the exercise of its discretion, and under exceptional circumstances, such as the dangerous lunacy and improbable recovery of the mother, order the removal of a child within the age of nurture from her care, notwithstanding the rule established by *Reg. v. Birmingham* (5 Q. B. 210), that a child within the age of nurture cannot be separated from its mother by order of removal even with her consent. *Reg. v. Barnet Union*, 57 L. J., M. C. 39; 58 L. T. 947; 52 J. P. 611—D.

Right of Mother—Breach of Marital Duty by Father—Tender Years.]—

In determining whether the custody of an infant child ought to be given to or retained by the mother, the court will take into consideration three matters—the paternal right, the marital duty, and the interest of the child. For this purpose the marital duty includes, not only the duty which the husband and wife owe to each other, but the responsibility of each of them towards their children so to live that the children shall have the benefit of the joint care and affection of both father and mother. In a case where a father had committed a breach of the marital duty as thus defined:—Held, for this among other reasons, that the mother, in whose custody two children of the marriage of tender years were, ought to retain the custody until further order. *Elderton, In*

re, 25 Ch. D. 220; 53 L. J., Ch. 258; 50 L. T. 26; 32 W. R. 227; 48 J. P. 341—Pearson, J.

In the exercise of its discretion under 36 & 37 Vict. c. 12, s. 1, and s. 25, sub-s. 10, of the Judicature Act, 1873 (36 & 37 Vict. c. 66), the court will look at all the surrounding circumstances before they will accede to the application of the father of a female child of tender years to remove her from the custody of the mother and other relations whose conduct with regard to the child is unimpeached, and place her under his control. A mariner who had no fixed home, and who had already married a woman who left him and went to America more than seven years before and (as he said) died there, went through the ceremony of marriage with another woman at a registry-office at Portsmouth. Shortly after her marriage, the second wife, being informed by a stranger that she had received a letter from the first wife, after the ceremony at the registry-office, quitted her supposed husband, and went to reside with her parents at Southampton, where she gave birth to a female child. She afterwards took proceedings against her husband for bigamy; but, for want of proof that the first wife was living at the time of the second marriage, these became abortive. The child having reached the age of nine, the father (without showing any efforts to ascertain whether his first wife was living or not) applied to a judge at chambers for a habeas corpus to obtain its custody. The judge refused the application. The father appealed. The court,—not being satisfied that the second was a valid marriage, or that the father was in a position properly to maintain and educate the child:—Held, that the judge had wisely exercised his discretion, and dismissed the appeal, and also that the failure of the prosecution for bigamy was not entitled to any weight upon a motion of this kind. *Brown, In re*, or *Rowe, In re, Rowe v. Smith*, 13 Q. B. D. 614; 51 L. T. 793; 33 W. R. 79—D.

Infant above Sixteen—Free Access to Mother restricted—Jurisdiction.]—

A father has a legal right to control and direct the education and bringing up of his children until they attain the age of twenty-one years, even although they are wards of court, and the court will not interfere with him in the exercise of his paternal authority, except (1) where by his gross moral turpitude he forfeits his rights, or (2) where he has by his conduct abdicated his paternal authority, or (3) where he seeks to remove his children, being wards of court, out of the jurisdiction without the consent of the court. *Agar-Elis, In re, Agar-Elis v. Lascelles*, 24 Ch. D. 317; 53 L. J., Ch. 10; 50 L. T. 161; 32 W. R. 1—C. A.

A father put restrictions on the intercourse between his daughter, in her seventeenth year, who was a ward of court, and her mother, on the plea that he believed the mother would alienate the daughter's affections from him. The court refused to interfere. *Id.*

Mixed Marriage—Christian and Mahom-

medan.]—S., an Englishwoman, had married, according to the Mahomedan ritual, N., a Hindoo Mahomedan, he being already married. The children of this marriage had been recognized by N. as his children and his heirs according to Mahomedan law. By an agreement between S. and N. the children were

brought up as Mahomedans, and S. and N. having separated, they went with their father to India, and remained there until the father's death, four years afterwards. By his will, N. appointed certain persons guardians of the children. S. now moved that an order might be made giving her the custody of her children, as she admitted that her union with N. was not a marriage, and therefore contended that, as her children were illegitimate, she had the right to the custody of them:—Held, that S. had no absolute right to the custody, and the court would consider what was best for the interests of the children, and having regard to the nature of their birth, the religion in which they had been educated, and the mode of life which had been adopted for them, it was best for them to remain in the custody of the guardians whom the father had appointed. *Ullee, In re*, 54 L. T. 286—C. A.

Refusal of Wife to Live with Husband.]—A wife left her husband's home without any reasonable cause, taking with her their only child. The court, on the petition of the husband, ordered the wife forthwith to deliver the child into the hands of the petitioner, with liberty to either party to apply in chambers as to access to the child. *Constable v. Constable*, 34 W. R. 649—North, J.

Separation Deed—Religious Education—Authority—Infants' Custody Act, 1873.]—The words "custody or control," in s. 2 of the Infants' Custody Act, 1873, comprise all the rights which a father has over his children, including that of directing their religious education. A motion was made by the mother of a female infant eight years of age, for the exclusive control of the education (religious and otherwise) of the infant and that the father's access might be limited to thirteen weeks of the year during the child's holidays. The father, who was a Roman Catholic, was married to the mother, a Protestant, in 1878. In July, 1881, a separation deed was executed, containing a declaration that the wife should have the absolute custody and control of the infant until the deed should be mutually put an end to and revoked by the parties, without any interference of or by the husband. The father had not seen the child for three years and a half, and no reason for his not doing so was alleged. An order had been made in an action to administer the trusts of the separation deed, the mother undertaking not to bring up the child in any manner at variance with the Roman Catholic faith. The father was without means to maintain the child:—Held, that it was for the benefit of the infant to give effect to the agreement in the separation deed; and that it should be enforced accordingly. *Condon v. Vollum*, 57 L. T. 154—Chitty, J.

Guardianship of Infants Act—Misconduct of Father—No Limit as to Age.]—Where a mother applied by petition to the court for the custody of her boy, aged ten years, on the ground of the misconduct of the father:—Held, that under s. 5 of the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), the court had jurisdiction to make such order as it might think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the

parents, and to the wishes as well of the mother as of the father. The court has jurisdiction to order the delivery of the infant to the custody of its mother, without fixing any limit of age. *Witten, In re*, 57 L. T. 336—Kay, J.

In a suit by the wife for divorce on the ground of adultery coupled with cruelty, which was of an aggravated character, the court, after pronouncing a decree nisi, made an order under s. 7 of the Guardianship of Infants Act, 1886, declaring the respondent, who did not appear to oppose the application, to be an unfit person to have the custody of the children. *Skinner v. Skinner*, 13 P. D. 90; 57 L. J., P. 104; 58 L. T. 923; 36 W. R. 912; 52 J. P. 406—Hannen, P.

Under Separation Deed.]—See ante, col. 913.

After Decree in Divorce Proceedings.]—See ante, cols. 903, 904.

VIII. RELIGIOUS EDUCATION.

Guardianship of Infants Act, 1886.]—The Guardianship of Infants Act, 1886, does not affect the right of the father to determine the religion in which his children shall be brought up after his death. *Seanlan, In re*, 40 Ch. D. 200; 57 L. J., Ch. 718; 59 L. T. 599; 36 W. R. 842—Stirling, J.

Abandonment of Right by Father—Guardian.]—The children of a Protestant father and Roman Catholic mother, aged respectively ten, nine, and three years, were with the assent of the father educated as Roman Catholics for three years, and his two elder children were admitted to communion according to the rites of that faith. At the end of that period, the father, being then dependent for support upon the Protestant clergy of his parish, caused his children to be educated as Protestants, and expressed a wish that they should thenceforth be brought up in that religion. He died in the following year in the lifetime of the mother, without appointing a guardian:—Held, that the father had not by his conduct abandoned the right to have his children brought up in his own religion; and, under the circumstances of the case, that a member of the Church of England ought to be appointed a guardian to act jointly with the mother. *Id.* See also *Walsh, In re*, ante, col. 976.

Mother out of Jurisdiction.]—Infants interested in real estate in England, whose father was dead, were living in charge of their mother, who was resident out of their jurisdiction, and was one of their testamentary guardians. At the instance of their other two guardians an order was made declaring in what faith they ought to be educated. *Montagu, In re, Montagu v. Festing*, 28 Ch. D. 82; 54 L. J., Ch. 397; 33 W. R. 322—Pearson, J.

Effect of Separation Deed.]—See *Condon v. Vollum*, supra.

IX. ACTIONS AND PROCEEDINGS BY AND AGAINST.

Guardian ad litem.]—See next case and *Lowndes, In re*, post, col. 983.

Next Friend—Married Woman.—[S. 1, sub-s. 2, of the Married Women's Property Act, 1882, does not abolish the rule that a married woman is incapable of filling the office of next friend, or guardian ad litem. *Somerset (Duke), In re, Thynne v. St. Maur*, 34 Ch. D. 465; 56 L. J., Ch. 733; 56 L. T. 145; 35 W. R. 273—Chitty, J.

— **Removal of.**—Doubts having arisen as to the proper custody of an infant, a suit was commenced in her name for the administration of her father's estate. A next friend was appointed, who was a friend of the defendants, the executors and trustees of the will, and guardians of the infant, and accepted the office at their request, and on an indemnity from their father. The solicitors on the record for the plaintiff were the solicitors of the executors. On an application in the name of the infant by M., the husband of her paternal aunt, as next friend pro hac vice, to remove the next friend and substitute M. :—Held, that although nothing was alleged against the character, circumstances, or conduct of the next friend, his connexion with the executors made him an improper person to act as next friend, and that he ought to be removed and M. substituted. *Burgess, In re, Burgess v. Bottomley*, 25 Ch. D. 243; 50 L. T. 168; 32 W. R. 511—C. A.

On an application by the next friend of an infant plaintiff for the removal of a receiver in the action, the court refused the application, but expressed dissatisfaction with the general conduct of the next friend, and ordered that the official solicitor should be named as the next friend of the infant in all future proceedings, and that the next friend should deliver up all documents to him. On appeal, this order was discharged, on the ground that although the court had, on a proper application, jurisdiction to remove a next friend, such a course ought not to be taken without giving the next friend an opportunity of explaining his conduct. *Corsealis, In re, Lawton v. Elwes*, 50 L. T. 703; 32 W. R. 965—C. A.

A father authorised a stranger to act as next friend to his infant children; he died, having by will appointed his wife, their mother, guardian of his children :—Held, that the mother had the right to remove the next friend and be substituted in his place. *Hutchinson v. Norwood*, 31 Ch. D. 237; 55 L. J., Ch. 375; 54 L. T. 15; 34 W. R. 214—Pearson, J.

— **Affidavit of Documents by.**—[The court refused either to order the next friend of an infant plaintiff to make an affidavit as to documents, or stay the action till he made such affidavit. *Dyke v. Stephens*, 30 Ch. D. 189; 55 L. J., Ch. 41; 53 L. T. 561; 33 W. R. 932—Pearson, J.

— **Costs—Solicitor and Client—Reversion.**—[When the costs of infant plaintiffs suing by their next friend are directed to be paid out of a fund in court to which the infants are entitled in reversion, party and party costs only will be immediately paid; the next friend having liberty to apply for the difference between those costs and costs as between solicitor and client when the fund comes into possession.

Damant v. Hennell, 33 Ch. D. 224; 55 L. T. 182; 34 W. R. 774—Stirling, J.

Personal Liability of Solicitor for Costs of Infant Defendant.—[Where a writ of summons is served on an infant, and an appearance entered for him by a solicitor without knowledge of his infancy and bona fide, and costs are subsequently incurred by the plaintiff in proceedings in the action, which became abortive by reason of the defendant's infancy :—Held, that although the appearance and defence will be set aside as irregular, the solicitor entering the appearance is not personally liable for the costs thereby occasioned by the plaintiff. *Wade v. Keefe*, 22 L. R., Ir., 154—Q. B. D.

Change of Parties by Birth.—[See PRACTICE (PARTIES).

Motion for Judgment—Default of Pleading—Infant Defendants.—[On a motion for judgment in default of pleading by the plaintiffs in a partition action, some of the defendants being infants :—Held, that it was not necessary that any affidavit should be made verifying the statements in the statement of claim. *Ripley v. Sawyer*, 31 Ch. D. 494; 55 L. J., Ch. 407; 54 L. T. 294; 34 W. R. 270—Pearson, J.

The defence of two infant defendants in an ejectment action was withdrawn under an order of court. The other defendants having made admissions, judgment was moved for, supported by an affidavit proving the statement of claim :—Held, that the correct course where infants are parties, and their defence is withdrawn and judgment is moved for, is to prove the statement of claim by affidavit. *Gardner v. Tapling*, 33 W. R. 473—North, J.

Where there are minor defendants who do not file any defence, the proper course is to move for judgment against such defendants under Ord. XXXIX. r. 1, grounding the motion upon affidavits verifying the statement of claim. *Wallis v. Wallis*, 13 L. R., Ir. 258—V.-C.

Foreclosure—Parties—Settlement.—[By a post-nuptial settlement, lands of which the wife, before the marriage, had been seised in fee, were settled, subject to successive life estates for husband and wife, upon the children of the marriage, reserving to the husband and wife power of revocation, and power to charge the lands with 1,000*l*. The husband and wife executed a second settlement, conveying the lands in trust for the wife for her separate use during their joint lives, and, subject thereto, and to an annuity for the survivor, in trust for the children of the marriage. Afterwards both husband and wife purported to mortgage the lands in fee. In a suit for foreclosure and sale, instituted by the mortgagee against the husband and wife and the trustee of the second settlement, an order was made declaring the mortgage well charged on the lands, and directing a sale. The children were at the date of the order infants, and were not named as respondents in the petition or represented by the guardians in the matter :—Held, that the order was not binding on the children. Some of the children sold their shares, and conveyed them to the purchasers subject to the mortgage :—Held, that the mortgage was not thereby converted into a valid charge on the

shares conveyed. *Bell's Estate, In re*, 11 L. R., Ir. 512—Land Judges.

— **Day to show Cause.**—In an action by an equitable mortgagee, without any memorandum of deposit of title-deeds, against the widow and infant heir-at-law of the mortgagor for foreclosure:—Held, on motion for judgment, the defendants not having appeared, that the infant heir must be ordered to convey the estate when he attained the age of twenty-one years, and that he must have a day to show cause in the usual way. *Price v. Carver* (3 My. & Cr. 157) followed. *Mellor v. Porter*, 25 Ch. D. 158; 53 L. J., Ch. 178; 50 L. T. 49; 32 W. R. 271—Kay, J.

Judgment for foreclosure was made absolute against an infant without giving time to show cause, the mortgagee offering to pay the infant's costs as between solicitor and client, and the guardian of an infant being of opinion that it was for the benefit of the infant that the order should be made, and there being evidence that the mortgage debt greatly exceeded the value of the property. *Younge v. Cocker*, 32 W. R. 359—Chitty, J.

Bringing Infants before Bankruptcy Court—Avoidance of Settlement.—When it is desired to bring an infant before the court, the proper course is to apply for the appointment of a guardian ad litem. Where on an appeal from a county court, the divisional court in bankruptcy directs such appeal to stand over in order that certain persons, some of whom are infants, may be made parties, it would appear that an application for the appointment for a guardian ad litem should be made to the county court. *Trustee, Ex parte, Lowndes, In re*, 3 M. B. R. 216—Cave, J.

Administration Action—Staying Proceedings—Infant Defendant.—Where some of the defendants in an administration action offered to satisfy the whole of the plaintiff's claim and the costs of the action, the court refused to stay the proceedings unless the rights of an infant defendant interested in the suit were also provided for. *Clegg v. Clegg*, 17 L. R., Ir. 118—V.-C.

Partition—Sale out of Court.—Where some of the parties beneficially interested are not sui juris, and the trustees have no power of sale under their trust deed, there is no jurisdiction under the Partition Act, 1868, s. 8, to order a sale out of court. *Strugnell v. Strugnell*, 27 Ch. D. 258; 53 L. J., Ch. 1167; 51 L. T. 512; 33 W. R. 30—Chitty, J.

Order against Infant Trustee to Account.—In an action against trustees of a settlement, asking (inter alia) that each should furnish and vouch their accounts of the trust declared thereby, one of the trustees (R.) had only recently attained twenty-one. Bacon, V.-C., directed that in taking the account, the same was, as regards R., to be limited to any moneys and properties received by him since he attained twenty-one. On appeal, the court, without then determining the liability of such infant trustee, held that the proper form of decree was to order the account against the adult trustee in the usual form, directing an inquiry whether all or any and what parts of the trust property had come to the hands of R., and what had been his

dealings and transactions in respect of the same, and as to the dates of, and circumstances attending, such receipts, dealings, and transactions. *Garnes, In re, Garnes v. Applin*, 31 Ch. D. 147; 55 L. J., Ch. 303; 54 L. T. 141; 34 W. R. 127—C. A.

INFERIOR COURT.

See COURT.

INFORMATION.

Who may Present—Attorney-General for Duchy of Lancaster.—It is not competent to the Attorney-General of the Duchy of Lancaster to exhibit an information in the High Court of Justice, and the court will order an information exhibited by him to be taken off the file on the application of the defendant even after answer put in by him. *Attorney-General (Duchy of Lancaster) v. Devonshire (Duke)*, 14 Q. B. D. 195; 54 L. J., Q. B. 271; 33 W. R. 367—D.

Appeal to Court of Appeal—“Criminal Matter”—Parliamentary Oaths Act, 1866.—Upon the trial of an information at the suit of the Attorney-General against a member of the House of Commons for voting without having taken the oath of allegiance within the meaning of the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Act, 1868, judgment was given for the Crown, and the Divisional Court refused to grant a rule for a new trial, on the ground of misdirection and misreception of evidence. On application by the defendant to the Court of Appeal:—Held, that the Court of Appeal had power to hear the application and to grant a new trial in such a case.—By Brett, M.R., and Lindley, L.J., Cotton, L.J., doubting, an information at the suit of the Attorney-General to recover penalties under s. 5 of the Parliamentary Oaths Act, 1866, from a member of Parliament for voting without having taken the oath of allegiance required by that statute, as amended by the Promissory Oaths Act, 1868, is not a “criminal cause or matter” within the meaning of the Supreme Court of Judicature Act, s. 47, and an appeal may be brought from any order or judgment therein of the High Court to the Court of Appeal:—By Brett, M.R., on the ground that the information is in its nature a civil proceeding, and, therefore, that an appeal lies under the Supreme Court of Judicature Act, 1873, s. 19:—By Lindley, L.J., on the ground that even although the information may be to some extent of a criminal nature, nevertheless before the passing of the Supreme Court of Judicature Acts, 1873, 1875, an appeal would have lain under the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), ss. 81, 84, 35, from a decision of the Court of Exchequer to the Court of Exchequer Chamber, and that the Supreme Court of Judicature Acts, 1873, 1875, do not take away any right of appeal existing before the passing

of those statutes.—*Semble*, by Brett, M.R., that even if the information could be regarded as a criminal proceeding, nevertheless an appeal would lie, for by the Supreme Court of Judicature Act, 1873, s. 47, the right of appeal is taken away only in the case of indictments, of criminal informations for indictable misdemeanors filed in the Queen's Bench Division, and of criminal proceedings before justices. *Attorney-General v. Bradlaugh*, 14 Q. B. D. 667; 54 L. J., Q. B. 205; 52 L. T. 589; 33 W. R. 673—C. A.

— **Notice of Motion—Not Ex parte.**—An appeal lies to the Court of Appeal from any order or judgment made or given by the Queen's Bench Division either during, or afterwards with respect to, a trial at bar of a civil proceeding, and whether or not the appeal is brought from a decision upon a motion for a new trial on the ground of misdirection or wrongful reception of evidence; but the appeal must be brought on by notice of motion, an ex parte application for a rule nisi to the Court of Appeal being irregular. *Id.*

INJUNCTION.

1. *General Principles.*
2. *In Particular Cases.*

1. GENERAL PRINCIPLES.

Injunction or Damages—Principles on which Courts act.—The principles upon which the courts act in deciding whether or not to award damages in lieu of an injunction under Lord Cairns' Act, in cases of injury to property, are as follows:—If the defendant, in the injury he is inflicting, is doing an act which will render the property of the plaintiff absolutely useless to him unless it is stopped, then, inasmuch as the only compensation which could be given to the plaintiff would be to compel the defendant absolutely to purchase the property, the court will not, in the exercise of the discretion given to it by the act, withhold an injunction. Where, however, the injury is less serious, and the court considers that the property may still remain the property of the plaintiff, and be still substantially as useful as it was before the defendant's acts, and that the injury, therefore, is of such a nature as can be compensated by money without taking away the property from the plaintiff, the court has and will exercise a discretion to award damages in place of an injunction. *Holland v. Worley*, 26 Ch. D. 578; 54 L. J., Ch. 268; 50 L. T. 526; 32 W. R. 749; 49 J. P. 7—Pearson, J.

— **Lord Cairns' Act—Repeal.**—The court has power under Lord Cairns' Act to refuse an injunction, although no case is established for granting damages in substitution for the injunction, and in such a case may dismiss an action to enforce a covenant with costs. *Sayers v. Collyer*, *infra*.

Although Lord Cairns' Act (21 & 22 Vict. c. 27) is repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 3, under sect. 5 the jurisdiction conferred

thereby is still in force—Per Baggallay, L. J. *Id.*

Mandatory—Discretion.—Upon a motion for an interlocutory injunction to restrain an interference with light and air, the defendant gave an undertaking to pull down any building thereafter erected or proceeded with, and to abide by any order as to damages; whereupon the court made no order upon the motion. The defendant subsequently completed his buildings. At the trial of the action, when a mandatory injunction was asked for, it was proved that the defendant's buildings obstructed the plaintiff's ancient lights:—Held, that it was a proper case for the court to grant a mandatory injunction, and not to award damages in lieu thereof, under the discretion given by Lord Cairns' Act. *Greenwood v. Hornsey*, 33 Ch. 471; 55 L. J., Ch. 917; 55 L. T. 135; 35 W. R. 163—V.-C. B.

Interlocutory — Irreparable Damage.—To warrant the court in granting an interim or interlocutory injunction to restrain persons from pursuing an objectionable course of conduct, those who complain must at least show that they have sustained or will sustain "irreparable damage"—i.e., damage for which they cannot obtain adequate compensation without the special interference of the court. *Mogul Steamship Company v. Macgregor*, 15 Q. B. D. 476; 54 L. J., 540; 53 L. T. 268; 49 J. P. 646; 5 Asp. M. C. 467; 15 Cox, C. C. 740—D.

— **Balance of Convenience.**—On a motion for an interim injunction, the court, holding that the plaintiffs had shown an intention to preserve and not to abandon their ancient lights, and that there was a fair question of right to be tried at the hearing, and considering that the balance of convenience was in favour of granting an injunction rather than allowing the defendants to complete their building with an undertaking to pull it down if required to do so, granted an injunction till the hearing. *Newson v. Pender*, 27 Ch. D. 43; 52 L. T. 9; 33 W. R. 243—C. A.

Remedy Barred by Acquiescence.—A building estate was laid out in lots, which were sold by the owners of the estate to different purchasers, each of whom covenanted with the vendors and with the purchasers of the other lots entitled to the benefit of the covenant not to build a shop on his land, or to use his house as a shop or to carry on any trade therein. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot, who was using his house as a beer-shop with an "off" licence to restrain him from breaking his covenant and for damages. The plaintiff had known for three years before the action was commenced that the defendant was using his house as a beer-shop, and had himself bought beer at the shop. There was evidence that some of the houses built on other lots had been for some time used as shops notwithstanding the covenant, and that some of the houses near the plaintiff's house were occupied, not each by a single tenant, but by two families at weekly rents:—Held, that the change in the character of the neighbourhood was not in itself a ground for refusing relief to the plaintiff, as the change was not caused by his conduct; but

that the plaintiff had lost the right to enforce his covenant either by injunction or damages through his acquiescence in the proceedings of the defendant. *Duke of Bedford v. Trustees of the British Museum* (2 My. & K. 552), explained. *Sayers v. Collyer*, 28 Ch. D. 103; 54 L. J., Ch. 1; 51 L. T. 723; 33 W. R. 91; 49 J. P. 244—C. A.

Per Fry, L. J.:—An amount of acquiescence on the part of the plaintiff which would not be sufficient to bar his action, may be sufficient to induce the court to give damages instead of an injunction. *Ib.*

— **Delay.**—A delay of fourteen months by a plaintiff in taking steps to prevent the continuance of a breach of a restrictive covenant will not amount to such acquiescence as to disentitle him to an injunction. *Northumberland (Duke) v. Bowman*, 56 L. T. 773—Kekewich, J.

— **Public Convenience—Breach of Statutory Contract.**—In an action brought to obtain a mandatory injunction to compel the defendants to pull down a goods station and cattle shed which they had erected 140 yards from Bala station, in the face of sub-sect. 6 of sect. 6 of an act which provided, “that at that station there should be no goods or cattle station;” the plaintiff had not objected to the buildings till they were nearly completed, owing to his being abroad at the time, and ignorant of their erection until his return. The defendants contended that the buildings in question had not been erected “at” the station, as they were 140 yards off; that, if they had been, it was for the public convenience they should be there, and that the plaintiff was precluded by his acquiescence from now obtaining a mandatory injunction to remove:—Held, that by sub-sect. 6 the defendants had made a statutory contract not to do what the court was of opinion they had done, so that the question of public convenience did not apply, and that the acquiescence of the plaintiff was not such as would preclude him from obtaining the injunction, but that the court would grant one, compelling the defendants to remove the buildings as prayed. *Price v. Bala and Festiniog Railway*, 50 L. T. 787—Chitty, J.

Proof of Damage—Building Land—Covenant to erect Houses of certain Value.—A plaintiff bought certain plots on a building estate subject to certain restrictions; the defendant subsequently bought other plots with a restriction as to the value of the house to be erected, but he proposed to build houses of less value:—Held, that the plaintiff in such a case is not obliged to prove damage in order to obtain an injunction. *Collins v. Castle*, 36 Ch. D. 243; 57 L. J., Ch. 76; 57 L. T. 764; 36 W. R. 300—Kekewich, J.

Motion to Discharge for Misrepresentation.—A motion to discharge an ex parte injunction on the ground of its having been obtained by misrepresentation is proper, though the injunction is about to expire. *Wimbledon Local Board v. Croydon Sanitary Authority*, 32 Ch. D. 421—North, J.

Undertaking as to Damages—Injunction wrongly granted.—Where a plaintiff obtains an interlocutory injunction, upon giving an under-

taking in damages, the defendant is entitled to the benefit of the undertaking even though it should afterwards be decided that the injunction was wrongly granted, owing to the mistake of the court itself. Dictum of Jessel, M.R., in *Smith v. Day* (21 Ch. D. 421), disapproved. *Griffith v. Blake*, 27 Ch. D. 474; 53 L. J., Ch. 965; 51 L. T. 274; 32 W. R. 833—C. A.

Where an injunction is wrongly granted, an undertaking as to damages given by the plaintiff is equally enforceable whether the mistake was in point of law or in point of fact. In such a case the court has no discretion to refuse an inquiry as to damages unless the damages alleged would be too remote if the defendant were suing in respect of them upon a breach of contract. *Hunt v. Hunt*, 54 L. J., Ch. 289—Pearson, J.

— **What Losses.**—An army surgeon, living apart from his wife, was under orders to sail for Egypt, and proposed to take some of his children with him. The wife obtained an injunction to restrain him from so doing, the judge considering that he would be acting in contravention of the separation deed between them. The Court of Appeal took a different view of the effect of the separation deed and dissolved the injunction. The husband applied for an inquiry as to damages occasioned to him by the injunction, in enforcement of an undertaking as to damages given by the wife, alleging loss of free passages to Egypt for the children, loss of pay, and expenses caused by his stay in London:—Held, that the inquiry must be granted. *Ib.*

— **Where Plaintiff is a Married Woman.**—An application was made on behalf of a married woman for an injunction restraining the Bank of England, until further order, from permitting the transfer of a sum of New Three per Cent. Annuities, standing in the names of the executors of a testator, and to which the married woman claimed to be beneficially entitled. An injunction was granted for a fortnight on the usual undertaking of the married woman to be answerable in damages. The registrar refused to draw up the order on the sole undertaking of the married woman as to damages:—Held, that the sole undertaking of the married woman must be accepted. *Prynné, In re*, 53 L. T. 465—Pearson, J.

Breach of Injunction—Service of Order—Notice—Committal for Contempt.—It is not the rule on applications for committal for contempt by disregarding an order of the court, that the court will only commit where, there having been time to draw up, enter, and serve the order, such order has been actually served on the offending party. On the contrary, even where the order is ten or eleven months old, and has never been so served, the party disregarding it will be committed if it appears that he really knew of its existence and purport, and wilfully disobeyed it. *United Telephone Company v. Dale*, 25 Ch. D. 778; 53 L. J., Ch. 295; 50 L. T. 85; 32 W. R. 428—Pearson, J.

An attachment may be issued for breach of an injunction, although no writ of injunction has been actually issued, when the defendant, after being served with the decree or order for injunction has disobeyed it. *Mining Company of Ireland v. Delany*, 21 L. R., Ir. 8—V. C.

Injunction with Costs—Interim Injunction.]

—An order made on notice and continuing an injunction with costs will, in the absence of special directions to the contrary, include the costs of an interim injunction previously obtained on an ex parte application. *Blakey v. Hall*, 56 L. J., Ch. 568; 56 L. T. 400; 35 W. R. 592—Chitty, J.

Taxation of Costs on Higher Scale.]—See COSTS, VI. 1, c. i.

2. IN PARTICULAR CASES.**Breach of Statutory Provision—No Proof of Actual Damage necessary.]**

—Where an act of parliament contains a provision for the special protection or benefit of an individual, he may enforce his rights thereunder by an action, without either joining the Attorney-General as a party or showing that he has sustained any particular damage. The Plymouth, Devonport, and District Tramways Act, 1882, authorised the making of tramways in the adjoining boroughs of P. and D., and provided that the defendant company should not, without the consent of the corporations of P. and D., use for public traffic any of the tramways mentioned in the act until the whole system was completed, and if either corporation should at any time complain to the Board of Trade that the company were not carrying out this provision, the board might direct an inquiry in the manner prescribed by the act, and the company was to abide by every order made consequent on such inquiry by the board. The company had opened and worked a tramway in P. without the requisite consent, and the corporation of D. moved for an interim injunction to restrain the company from working the section opened until the whole system in both boroughs was complete:—Held, that the injunction could be granted, as there was nothing in the section of the private act to take the case out of the jurisdiction under the Judicature Act, 1873, to grant an injunction, and that the plaintiffs were entitled to complain of the breach of the conditions imposed by the private act, without showing that they had thereby sustained any actual damage. *Devonport (Mayor) v. Plymouth and Devonport Tramways Company*, 52 L. T. 161; 49 J. P. 405—C. A. See *Price v. Bala and Festiniog Railway*, ante, col. 987.

Water Company withholding Water—Dispute as to Annual Value.]

—Although the statutory remedy provided by s. 68 of the Waterworks Clauses Act, 1847, for the settlement by two justices of disputes as to the annual value of a tenement supplied with water, and the special remedy by penalties given by s. 43 against a company for withholding water, have not ousted the general jurisdiction to restrain the company by injunction from cutting off the supply of water pending proceedings for settling a dispute as to value, such injunction will not be granted on the application of an owner or occupier who will not undertake to commence proceedings with due speed before the justices under s. 68. *Hayward v. East London Waterworks Company*, 28 Ch. D. 188; 54 L. J., Ch. 523; 52 L. T. 175—Chitty, J.

Exercise of Legal Power not Restrained if done bonâ fide.]—Defendants were lessees of

mines with liberty, on giving notice, to make such railways over the surface as they should think necessary or convenient for carrying away the minerals. The plaintiffs, being lessees of other mines under the same lessor, took from him a lease of two closes of the same surface lands over which the defendants' power extended, in order to make a railroad for their minerals. The defendants thereupon gave notice that they required part of the surface lands for continuing a siding they already had communicating with a neighbouring railway, and proceeded to construct a siding on the same two closes which had been leased to the plaintiffs and (as required by their lease) to fence in the land, the effect being to exclude the plaintiffs from access across the closes to the railway. The plaintiffs brought an action to restrain the obstruction, alleging that the defendants' further lines were unnecessary, and that the defendants were exercising their power mala fide and unreasonably:—Held, by analogy to the principle governing cases of purchase under compulsory powers, that, as the defendants were exercising a legal power, the onus of proving mala fides was on the plaintiffs, and that even if further accommodation was not at present necessary, the defendants were entitled to look forward to the time when it might become so. *James v. Lovel*, 56 L. T. 739; 35 W. R. 626—Kekewich, J.

Agreement to serve as Manager in Business.]

—Where in breach of an agreement by the defendant to serve the plaintiff for fourteen years as manager of his business (which agreement contained no express negative covenants), the defendant left the plaintiff, and started a similar business a few doors off:—Held, that the court had power to grant an injunction, but that the power was discretionary, and the case was not one for its exercise. *Jackson v. Astley*, 1 C. & E. 181—Pollock, B. See also cases sub tit. CONTRACT, III. 3, g.

To Evicted Tenant to Remove Timber.]

—Injunction granted ordering defendant to remove logs of timber left by him on premises of which he had agreed to give up possession at the end of his lease, and from which he was evicted by a writ of possession. *Guinness v. Fitzsimons*, 13 L. R., Ir. 71—M. R.

Farming Agreement—Agreement to keep Farm Properly Stocked.]

—An injunction will not be granted to restrain a threatened breach by a tenant of a stipulation in a farming agreement requiring him to keep on the farm a proper and sufficient stock of sheep, horses, and cattle. *Phipps v. Jackson*, 56 L. J., Ch. 550; 33 W. R. 378—Stirling, J.

Stage Carriage—Use of Manager's name.]

The plaintiff, as manager of an omnibus company, became, under the provisions of the statutes and rules for the regulation of metropolitan stage-carriages, the licensee of their vehicles. Having ceased to be such manager:—Held, that he was entitled to an injunction to restrain the company from continuing to use his name upon the number plates affixed to their carriages. *Hodges v. London Tramways Omnibus Company*, 12 Q. B. D. 105; 50 L. T. 262; 32 W. R. 616—D.

Assuming Business Name—Damnum absque injuria.—The short address "Street, London," was used for many years in sending telegrams from abroad to Street & Co., of Cornhill. A bank adopted by arrangement with the Post-office the phrase "Street, London," as a cypher address for telegrams from abroad to themselves:—Held, that the court had no jurisdiction to grant an injunction restraining the bank from using such address, as there was no attempt to interfere with trade, no legal injury done, but simply a matter of inconvenience. *Street v. Union Bank of Spain and England*, 30 Ch. D. 156; 55 L. J., Ch. 31; 53 L. T. 262; 33 W. R. 901—Pearson, J.

Public Lecture—Notes taken by Shorthand Writer—Publication in Shorthand Characters.—Where a lecture is delivered to an audience admitted by ticket without payment, there is an implied contract on their part not to publish such lecture for purposes of profit. *Nicols v. Pitman*, 26 Ch. D. 374; 53 L. J., Ch. 552; 50 L. T. 254; 32 W. R. 631—Kay, J.

The plaintiff delivered a lecture at a working men's college to an audience who were admitted gratuitously by tickets issued by the committee of the college. The plaintiff had committed the lecture to writing, but delivered it from memory. The defendant, a shorthand writer, attended the lecture, took it down nearly verbatim, and subsequently published his notes in shorthand characters in a periodical brought out and sold by him for the instruction of learners for the art of shorthand writing:—Held, that the plaintiff was entitled to an injunction to restrain the defendant from so publishing the lecture. *Ib.* See also *Caird v. Sime*, 12 App. Cas. 326; 57 L. J., P. C. 2; 57 L. T. 634; 36 W. R. 199—H. L. (Sc.).

Letters Addressed to Agent at Principal's Office—Compelling Agent to rescind Order to Post-Office.—B. was employed to manage one of L.'s branch offices for the sale of machines, and resided on the premises. He was dismissed by L., and on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at L.'s branch office. He admitted that among the letters so forwarded to him were two which related to L.'s business, and that he did not hand them to L., but returned them to the senders. L. brought an action to restrain B. from giving notice to the post-office to forward to B.'s residence letters addressed to him at L.'s office, and also asking that he might be ordered to withdraw the notice already given to the post-office:—Held, that the defendant had no right to give a notice to the post-office, the effect of which would be to hand over to him letters of which it was probable that the greater part related only to L.'s business; and that the case was one in which a mandatory injunction compelling the defendant to withdraw his notice could properly be made, the plaintiff being put under an undertaking only to open the letters at certain specified times, with liberty for the defendant to be present at the opening. *Hermann Loog v. Bean*, 26 Ch. D. 506; 53 L. J., Ch. 1128; 51 L. T. 442; 32 W. R. 994; 48 J. F., 708—C. A.

Marine Insurance—Unseaworthiness of Ship—Action on Policy.—In an action by underwriters for an injunction to restrain policy-

holders from taking any proceedings with reference to a policy of insurance, on the ground that the underwriters had an admittedly good defence to any action that might be brought on such policy:—Held, that an injunction ought not to be granted. *Brooking v. Maudslay*, 38 Ch. D. 636; 57 L. J., Ch. 1001; 58 L. T. 852; 36 W. R. 664; 6 Asp. M. C. 296—Stirling, J.

To Prevent Person from Permitting Nuisance beyond his Control.—I think it would be wrong to enjoin a company or an individual from permitting that to be done which is really beyond his control—not beyond his control in this sense, that there is a vis major or an act of God paramount—but beyond his control in the sense that he cannot by any precaution or by any works with reasonable certainty prevent that happening which all contemplate as likely to happen. *Evans v. Manchester, Sheffield, and Lincolnshire Railway*, 36 Ch. D. 639; 57 L. J., Ch. 159; 57 L. T. 198; 36 W. R. 331—Per Kekewich, J.

Publication of Slander or Libel.—See DEFAMATION.

Breach of Covenants in Leases.—See LANDLORD AND TENANT.

Infringement of Copyright.—See COPYRIGHT.

Threats of Infringement of Patent.—See PATENT.

Imitation of Goods.—See TRADE.

Disturbance of Market.—See MARKET.

Apprehended Injury.—See NUISANCE.

Nuisances.—See NUISANCE.

Corporation changing name of Streets.—See HEALTH.

Conspiracy to molest in Trade.—See TRADE.

User of Trade Mark or Trade Name.—See TRADE.

Publication of Letters.—See LETTERS.

To Prohibit Meetings of Shareholders.—See COMPANY.

Restraining Proceedings on Winding-up of Companies.—See COMPANY.

Restraining Railway from Running Trains while Purchase-Money Unpaid.—See RAILWAY.

INJURY.

See NEGLIGENCE.

INLAND REVENUE.*See* REVENUE.**INNKEEPER.**

Liability for Negligence—Person of Guest.]—The general duty of an innkeeper to take proper care for the safety of his guests does not extend to every room in his house at all hours of night or day, but must be limited to those places into which guests may be reasonably supposed to be likely to go, in a reasonable belief that they are entitled or invited to do so. *Walker v. Midland Railway*, 55 L. T. 489; 51 J. P. 116—H. L. (E.)

Property of Guest—Temporary Refreshment.]—The plaintiff arrived at Carlisle with the intention of spending the night at the defendant's hotel, which adjoined the railway station. He delivered his luggage to one of the porters of the hotel, but, after reading a telegram which was waiting for him, decided not to spend the night at Carlisle, and went into the coffee-room to order some refreshments. He was not able to obtain in the coffee-room exactly what he required, and went into the station refreshment-room, which was under the same management as the hotel, and connected with it by a covered passage. Shortly afterwards he went out, telling the porter to lock up his luggage, and it was locked up in a room near the refreshment-room. On his return he found that part of it was missing:—Held, that at the time of the loss of the plaintiff's goods there was no evidence of the relation of landlord and guest between him and the defendants, so as to make them responsible. *Strauss v. County Hotel and Wine Company*, 12 Q. B. D. 27; 53 L. J., Q. B. 25; 49 L. T. 601; 32 W. R. 170; 48 J. P. 69—D.

Licences.]—See INTOXICATING LIQUORS.

INNUENDO.*See* DEFAMATION.**INQUEST.***See* CORONER.**INQUISITION.**

To assess Compensation for Taking Lands.]—
See LANDS CLAUSES ACT.

Coroners.]—See CORONER.

Of Lunacy.]—See LUNATIC.

INSANITY.*See* LUNATIC.**INSOLVENCY.***See* BANKRUPTCY.**INSPECTION.**

Of Documents.]—See DISCOVERY.

Of Property.]—See PRACTICE.

INSURANCE.**I. LIFE AND ACCIDENT.**

1. *The Contract—Conditions*, 994.
2. *Assignment of Policies*, 998.
3. *Premiums*, 999.
4. *Interest of Assured*, 1001.
5. *Evidence, &c., of Death*, 1003.
6. *Life Insurance Companies*, 1003.

II. FIRE, 1005.**III. MARINE.**

1. *Interest of Assured*, 1009.
2. *Duration of Risk*, 1010.
3. *Nature of Risk*, 1012.
4. *Concealment of Facts*, 1013.
5. *Warranties*, 1014.
6. *Losses*, 1016.
7. *Actions on Policy*, 1018.
8. *Mutual Insurance Associations*, 1019.

I. LIFE AND ACCIDENT.**1. THE CONTRACT—CONDITIONS.**

Form of Proposal—"Residence."]—In a form of proposal to an assurance office for a policy of life insurance, the residence of the proposer was stated to be "191, Great Ancots-street, Manchester." The proposer was at the time temporarily staying at the address given,

K K

and really resided in Ireland, whither he returned three months afterwards. The proposer agreed that, if anything contrary to the truth were stated in the proposal, the policy to be granted in pursuance thereof should be absolutely void:—Held, in an action on a policy issued in accordance with the proposal, that the declaration of the assured as to residence was not, according to the true construction of the word in the form of proposal, untrue so as to render the policy void. *Grogan v. London and Manchester Industrial Assurance Co.*, 53 L. T. 761; 50 J. P. 134—D.

Proposal and Acceptance—Material Alteration of Risk before Tender of Premium.]—A proposal was made to an insurance company for an insurance on the life of the proposer, who made, on a form issued by the company, statements as to his state of health and other matters, and a declaration that the statements were true, and were to be taken as the basis of the contract. The proposal was accepted at a specified premium, but upon the terms that no insurance should take effect till the premium was paid. Before tender of the premium there was a material alteration in the state of the health of the proposer, and the company refused to accept the premium or to issue a policy:—Held, that the nature of the risk having been altered at the time of the tender of the premium, there was no contract binding the company to issue a policy. *Canning v. Farquhar*, 16 Q. B. D. 727; 55 L. J., Q. B. 225; 54 L. T. 350; 34 W. R. 423—C. A.

Quære, whether, if there had been no alteration in the risk, the company would have been legally entitled to refuse to accept the premium, and to issue a policy. *Id.*

Express Warranty of Truth of Answers — "Strictly Temperate."]—A. applied to an insurance office to effect a policy on his life. He received a printed form of proposal containing questions. Among these was the following: Question 7 (a). Are you temperate in your habits? (b) and have you always been strictly so? A. answered, (a) "Temperate;" (b) "Yes." Subjoined to the printed questions was a declaration, which A. signed, to the effect that the foregoing statements were true, and that the assured agreed that this declaration should be the basis of the contract, and that if any untrue averment, &c. was made the policy was to be absolutely void, and all moneys received as premium forfeited. The policy recited the above declaration as the basis of the contract. After A.'s decease the insurance company refused payment of the policy on the ground that the above-mentioned answer was false in fact. In an action on the policy:—Held, that the declaration of A., taken in connexion with the policy, constituted an express warranty that the answer to Question 7 was true in fact; and as the evidence clearly proved that A.'s averment as to his temperance was untrue, the policy was absolutely null and void. *Thomson v. Weems*, 9 App. Cas. 671—H. L. (Sc.).

Reference to Foreign Law—Effect of.]—A reference to foreign law in an English contract does not incorporate the foreign law, but merely affects the interpretation of the contract. *Dever, Ex parte, Suse, In re*, 18 Q. B. D. 660; 56 L. J., Q. B. 552—C. A.

Conditions Precedent binding on Representative.]—A policy of assurance against injury and death by accident after reciting that A., therein-after called the assured, was desirous of effecting an assurance, witnessed that the insurers accepted the risk, subject nevertheless to the several provisions thereafter contained, and to the conditions and stipulations indorsed thereon which were to be conditions precedent to the right of the assured to sue or recover thereunder:—Held, that the conditions were conditions precedent to the right not only of the assured but of his legal personal representatives, to recover thereunder. *Cawley v. National Employers' Assurance Association*, 1 C. & E. 597—A. L. Smith, J.

Conditions—Death accelerated by Disease or Infirmary.]—One of the conditions provided that no claim should be made under the policy in respect of any injury, unless the same should be occasioned directly or solely by external or material causes visibly operating upon the person of the assured, whereof proof satisfactory to the insurers should be furnished, and that the policy did not insure against death, &c., accelerated or promoted by any disease or bodily infirmity, or any natural cause arising within the system of the assured, whether accelerated by accident or not. A. met with an accident, upon which death ensued, but death would not have ensued had he not at the time of the accident been suffering from gall-stones:—Held, that the insurers were not liable. *Id.*

— "Within the United Kingdom."—A policy of insurance covered death caused by accident happening within the United Kingdom. The assured was accidentally drowned in Jersey. In an action on the policy:—Held, that the accident happened within the United Kingdom. *Stonham v. Ocean, Railway, and General Accident Insurance Company*, 19 Q. B. D. 237; 57 L. T. 236; 35 W. R. 716; 51 J. P. 422—D.

— Notice of Accident within Seven Days—Omission to give.]—A policy was made subject to a condition that in case of fatal accident notice thereof must be given to the insurers within seven days. It was impossible to give notice within the seven days:—Held, that notice was not a condition precedent to the right to recover. *Id.*

— Notice of Death—Medical Report—Instantaneous Death.]—A policy of insurance against accident was made subject to the condition inter alia that in the event of any accident to the assured he, or his representatives, should give notice thereof in writing to the company within ten days after its occurrence, stating the number of the policy, nature and date of the injuries, place where, and manner in which they were received, extent of disablement, and name, address, and occupation of the person injured, and also within fourteen days of the accident, forward to the head office a written report from the assured's medical attendant, who should be a duly qualified and registered medical practitioner, of the facts of the case, and nature and extent of the injuries received and the condition, provided, that unless it were complied with, as to time and otherwise (time being of the essence of the contract) no person should be entitled to

claim under the contract :—Held, that the omission to give notice of death within the prescribed time, even when death was instantaneously caused by an accident, was an answer to a claim made upon the policy. *Gamble v. Accident Assurance Co.* (Ir. R., 4 C. L. 204) followed. *Patton v. Employers' Liability Assurance Co.*, 20 L. R., Ir. 93—C. P. D.

Held, also, that it was not necessary that the notice should be given by the legal personal representatives of the assured, but might be effectually given by any person appointed by the assured for the purpose, or (per Murphy, J.) by any person acting on behalf of the persons interested in the policy. *Id.*

Held, also, that any excuse for not forwarding the medical report as, e. g., that there was no one in medical attendance on the assured, should be specially pleaded and proved, when the company rely on the condition. *Id.*

— **Against Assignment.**—See *Turcan, In re, infra.*

— **Suicide Clause—Assignment.**—See *City Bank v. Sovereign Life Assurance Co.*, post, col. 999.

Railway Passengers' Assurance Company—Arbitration—Stay of Proceedings.—Sects. 3 and 16 of the Railway Passengers' Assurance Company's Act, 1864, provide that questions of differences arising shall, if either the company or the persons claiming require it, be referred to arbitration. By s. 33, where an action has been commenced, the court or a judge, "upon being satisfied that no sufficient reason exists why the matters cannot and ought not to be referred to arbitration, and that the company were at the time of the bringing of the action or suit, and still are, ready and willing to concur in all acts necessary and proper for causing the matters to be decided by arbitration, may make an order staying all proceedings in the action." A claim was made against the company, which they disputed, but they did not give notice before the commencement of the action that they required to have the question referred to arbitration. After an action had been commenced the company took out a summons to stay all proceedings in the action :—Held, that as the company had not given notice before the commencement of the action that they required to have the question referred to arbitration, ss. 3 and 16 did not apply, and that, under the circumstances of the case, the court were not satisfied that no sufficient reason existed why the matters could not or ought not to be referred to arbitration, or that the company were at the beginning of the action ready and willing to concur in all acts necessary and proper for causing the matters to be decided by arbitration, and therefore no order ought to be made under s. 33. *For v. Railway Passengers' Assurance Company*, 52 L. T. 672—C. A.

Benefit Society—Death of Member intestate—Payment of Death Allowance by Committee—Right of Administrator to recover from Payee.—The deceased, a member of an unregistered friendly society, had, upon making his application for admission to the society, signed a declaration agreeing to be bound by the rules of the society, and authorizing the deduction from his wages of the sum specified in the rules for

securing to himself, or to his representatives in case of his death, the benefits of the society. The rule relating to the payment of death allowances empowered and authorized the committee to pay the allowance to such person or persons as in their discretion they might think fit; and it further provided that the allowance should be paid to certain specified relatives in such proportions as the committee should determine, unless otherwise bequeathed by will, when it was to be paid to the person to whom it had been bequeathed; that, where there were no surviving relatives and no special bequest, only the funeral expenses should be defrayed by the society, and that where the allowance had been once paid neither the committee nor the society should be liable to any further claim in respect of it. Upon the death of the member intestate the society paid the amount of the death allowance to the defendant, his sister. The plaintiff, as administrator of the deceased, having brought an action against the defendant to recover the money so paid to her :—Held, that the rule constituted the contract between the member and the society as to the payment of the money; that the death allowance was not the property of the member during his life, and in the absence of a bequest by will was not assets for the payment of his debts, and that therefore the plaintiff could not recover. *Ashby v. Costin*, 21 Q. B. D. 401; 57 L. J., Q. B. 491; 59 L. T. 224; 37 W. R. 140; 53 J. P. 69—D.

2. ASSIGNMENT OF POLICIES.

Condition against Assignment — Beneficial Interest.—A policy was subject to a condition that it should "not be assignable in any case whatever," and there was a separate proviso that the insurance company should not be bound to recognize any equitable dealings with the policy :—Held, that the effect of the condition against assignment was merely to make the policy which was subject to it non-assignable at law as it would have been prior to the Policies of Assurance Act, 1867, and did not prevent a policy-holder dealing with the beneficial interest in it (e. g., by a declaration of trust), or a court of equity from enforcing such a transaction. *Turcan, In re*, 40 Ch. D. 5; 58 L. J., Ch. 101; 59 L. T. 712; 37 W. R. 70—C. A.

Assignment of Policy Abroad — Lex Loci.—The plaintiff sued the trustees of an English life assurance company as assignee from her husband of a policy of life insurance granted by the company. The assignment to the plaintiff was made in Cape Colony, the assignor being then domiciled in that colony, where he remained till his death. By the law of Cape Colony, such an assignment was void by reason of the alleged assignee being the wife of the assignor :—Held, that the law of Cape Colony applied to the assignment of the policy, and therefore that the defendants were entitled to judgment. *Lee v. Addy*, 17 Q. B. D. 309; 55 L. T. 297; 34 W. R. 653—D.

Notice to Company — Effect of.—The provisions of 30 & 31 Vict. c. 144, s. 3, to the effect that on the assignment of a policy of insurance a prescribed notice shall be given, and the date on which such notice shall be received shall regulate the priority of all claims under

the assignment, relate only to the liabilities of the insurance office to the assignees, and not to the rights inter se of persons claiming to be interested in the policy moneys. *Newman v. Newman*, 28 Ch. D. 674; 54 L. J., Ch. 598; 52 L. T. 422; 33 W. R. 505—North, J.

Assignee for Value—Suicide Clause—Collateral Security—Marshalling of Securities.—[A policy of assurance contained a condition that, if the assured should die by his own hand the policy should become void, and all moneys paid in respect thereof should be forfeited to the company. But in case the beneficial interest in the policy had been vested in any other person for a valuable and pecuniary consideration, the policy should remain valid to the extent of the interest of such person, subject to a specified notice in writing having been given of the transaction transferring the interest. The assured deposited the policy with the plaintiffs to secure a debt owing from his firm and further advances, the deposit being accompanied by a memorandum stating that the policy was deposited by way of equitable mortgage as collateral security. The required notice was given to the assurance company, and S. subsequently committed suicide, the plaintiffs holding at the time of his death other securities for the debt besides the policy:—Held, that the suicide clause was undistinguishable from that which was under decision in *Solicitors' and General Life Assurance Company v. Lamb* (10 L. T. 160, 702), and that the plaintiffs were entitled to be paid out of the policy moneys the amount of the debt due to them at the date of the death of S. Held, further, that notwithstanding that the estate of the assured might thereby be benefited, the assurance company were not entitled to have the debt paid, either primarily or rateably, out of the other securities held by the plaintiffs. *City Bank v. Sovereign Life Assurance Company*, 50 L. T. 565; 32 W. R. 658—Pearson, J.

3. PREMIUMS.

Payment by Person not sole Beneficial Owner—Lien—Salvage.—E. mortgaged a policy of life assurance to F., and afterwards filed a petition for liquidation. Resolutions of the creditors were passed, under which E.'s friends were to pay 2s. in the pound on the unsecured debts, and the trustee was to assign to a nominee of the friends all E.'s property except the equities of redemption in the securities held by secured creditors. The terms of these resolutions were carried out, and E. obtained his discharge. Shortly after this, in 1883, E. agreed with D., who professed to be F.'s agent, for the purchase of F.'s interest in the policy, but no such purchase was ever carried out. Shortly after this agreement D. informed E. that none of the incumbrancers would pay the premium for that year, and E. paid it on the faith, as he deposited, of his interest under the agreement. There was no evidence that D. had any authority to enter into any agreement on behalf of F., or that F. had any knowledge of the contract, or of the payment by E. F.'s representative, Mrs. F., brought an action to enforce her security, and the policy was sold for much less than the amount of the mortgage debt:—Held, that E. was entitled to be repaid out of the proceeds of

sale the premiums for 1883 which he had paid, and that the residue must be paid to Mrs. F. But held, on appeal, that E.'s payment of a premium in his character of owner of the equity of redemption could not give him a lien in priority to the mortgage debt; that E.'s belief that he had a valid contract for purchase, when he had not, could not give him any advantage as regarded the premium, there being nothing to show that F. knew of the alleged contract or of the payment of the premium; that, in the state of the evidence no request from F. to pay the premium could be inferred, and no equity could be held to have arisen against F. on the ground of acquiescence or lying by; and that the fact that the policy had been preserved by E.'s payment did not give him a right to have the premium repaid nor give him a lien on the policy for it; and that therefore, the whole proceeds of sale must be paid to Mrs. F. without deducting the premium. *Semble*, the maritime doctrine of salvage has no application to the payment of premiums on a policy. *West v. Reid* (2 Hare, 249); *Burridge v. Row* (1 Y. & C. Ch. 183); *Shearman v. British Empire Mutual Life Assurance Company* (14 L. R., Eq. 4); *Gill v. Downing* (17 L. R., Eq. 316); and *Aylwin v. Witty* (30 L. J., Ch. 860), considered. *Falcke v. Scottish Imperial Insurance Company*, 34 Ch. D. 234; 56 L. J., Ch. 707; 56 L. T. 220; 35 W. R. 143—C. A.

Under the provisions of a private estate act the trustee of a term of years in certain settled estates of which W. had been tenant for life, was bound to apply the rents of the estates, first, in the payment from time to time of the interest upon certain incumbrances existing before the passing of the act, and subject thereto in the payment from time to time of the interest on sums to be raised by W. by mortgages created under the powers conferred by the act, and of the premiums on policies of life assurance, constituting the collateral security for the repayment of those sums, the equity of redemption being reserved to W. The rents having become insufficient, the trustee, in order to save one of the policies from lapsing, paid a premium out of his own moneys. He did this without any request from the mortgagee or from the owner of the equity of redemption of the policy. The life insured having dropped, and the proceeds of the policy having been received by the mortgagee:—Held, that the trustee was not entitled to any lien on the proceeds in respect of the premiums which he had paid, he not being a trustee of the policy. *Winchelsea (Earl) Policy Trusts, In re*, 39 Ch. D. 168; 58 L. J., Ch. 20; 59 L. T. 167; 37 W. R. 77—North, J.

Right to Repayment—Purchase of Reversion set aside.—[The purchaser of a contingent reversionary interest insured the life of the vendor and paid premiums for some years. The sale was subsequently set aside as an unconscionable bargain:—Held, that the purchaser was not entitled to repayment of the premiums. *Fry v. Lane*, 40 Ch. D. 812; 58 L. J., Ch. 113; 60 L. T. 12; 37 W. R. 135—Kay, J.

Commission—Mortgagor and Mortgagee.—[The plaintiff mortgaged her life interest in a fund to the defendants, it being part of the agreement that a policy should be effected on her life, and the premiums be secured on the

mortgaged property. In an action for redemption the chief clerk found that 173*l.* 19*s.* 1*d.*, "premiums paid on policies," was due from the plaintiff to the defendants. *L.*, a solicitor and agent to all the parties, paid the premiums to the insurance offices, receiving from them 5 per cent. commission. On summons to vary the chief clerk's certificate by the amount of the commission, on the ground that the "premiums paid on policies" only amounted to 165*l.* 5*s.* :—Held, that after the premiums had been paid to the insurance offices, the mortgagor had no interest in them. The insurance offices received the premiums, and paid the commission out of them to their own agent. *Leete v. Wallace*, 58 L. T. 577—*Kay, J.*

Covenant to Pay—Bankruptcy—Proof—Value.—Where, in an arrangement matter, a creditor held policies of insurance which the arranging debtor had covenanted to keep up :—Held, that the value of the creditor's interest in the covenant was the sum which the insurance company would accept as a present payment, by way of commutation of the annual premiums, to keep the policies subsisting. *Bank of Ireland, Ex parte, S., In re*, 17 L. R., Ir. 507—*Bk.*

Return of—Wagering Policy.—*See next case.*

4. INTEREST OF ASSURED.

Wagering Policies—Return of Premiums.—*J. H.* effected with the defendant company two policies of insurance on the life of his father, *J. H.*, in which he had no insurable interest. According to the policies the premiums were to be paid weekly. *J. H.*, the son, continued to make these weekly payments for some years. *J. H.*, the father, had at first no knowledge of the insurances effected on his life; but when he became aware of them he objected to their being continued, and gave notice to that effect to the company. *J. H.*, the son, then gave notice to the defendants that the policies were at an end, and claimed the return of the amount of the premiums. The defendants refused to pay, and *J. H.*, the son, brought his action for their recovery, and the county court judge gave judgment for the plaintiff :—Held, that under the circumstances of the case the policies were wagering policies, and consequently the premiums paid in respect of them could not be recovered. *Howard v. Refuge Friendly Society*, 54 L. T. 644—*D.*

Benefit of Wife and Children—Appointment of Trustees.—A petition (presented since the coming into operation of the Married Women's Property Act, 1882), for the appointment of trustees of the proceeds of a life policy effected by a husband, under the provisions of the Married Women's Property Act, 1870, for the benefit of his wife and children, ought to be entitled in the matter of the act of 1882. *Soutar's Policy Trust, In re*, 26 Ch. D. 236; 54 L. J., Ch. 256; 32 W. R. 701—*Pearson, J.*

—**Appointment of Trustees—Direction to Trustee to exchange Policy.**—The defendant effected a policy on his life for the benefit of his wife and children under s. 10 of the Married Women's Property Act, 1870. He became bankrupt and mentally deranged, and was

unable to pay the premiums. By the rules of the insurance society the policy could be exchanged for a fully paid-up policy of smaller value, and thus preserved from lapsing. The wife and only child of the defendant brought this action, claiming the appointment of a trustee of the policy, and that such trustee might be authorised to exchange the policy for one fully paid up :—Held, that the court under its general jurisdiction had power to appoint two trustees; and judgment was given to that effect, and otherwise as claimed. *Schultze v. Schultze*, 56 L. J., Ch. 356; 56 L. T. 231—*Stirling, J.*

—**Joint Tenancy.**—A married man insured his life under a policy which, after reciting that he was desirous of assuring his life under the provisions of the Married Women's Property Act, 1870, for the benefit of his wife and children, stated that his wife and children, and failing them, his heirs, administrators, or assigns, would be entitled after his death to the policy money :—Held, that the wife and children took the policy money as joint tenants. *Adam's Policy Trusts, In re* (23 Ch. D. 525), not followed. *Seyton, In re, Seyton v. Satterthwaite*, 34 Ch. D. 511; 56 L. J., Ch. 775; 56 L. T. 479; 5 W. R. 373—*North, J.*

Policy in Wife's Name—Voluntary Settlement of—Payment of Premiums.—On 5th November, 1844, a policy of insurance for 2,000*l.* was effected upon the life and in the name of *B.*, the wife of *A.* By a post-nuptial settlement dated 27th November, 1844, reciting that *B.* was desirous of making provision for her husband and children, and that *A.* had agreed to join in the deed for the purpose of assuring "all his interest, if any," in the policy, *A.* and *B.* assigned to *C.* and *D.* the policy and all sums payable thereunder upon trust to invest the same and pay the income to *A.* and his assigns during his life and after his decease to divide the trust funds equally among the children of *A.* and *B.* The settlement contained no power of revocation. *A.* predeceased his wife, having paid all premiums during his lifetime. Upon the death of *B.*, the question arose whether the policy moneys were subject to the trusts declared by the settlement :—Held, that the policy was intended by the husband to be and was the separate property of the wife at the date of settlement, in which the husband concurred only for conformity and to bind such interest, if any, as he had; that the settlement was valid and that the policy moneys were bound by the trusts of the settlement. *Winn, In re, Reed v. Winn*, 57 L. T. 382—*Kay, J.*

Contingent Interest—Possibility—Interest for Benefit of Wife.—A policy of insurance on the life of a husband for the benefit of his wife was, in 1876, effected with an insurance company which carried on business at New York, through their branch office in London. The application for the policy was made by him on behalf of his wife. The premiums were made payable in London. By the policy the company promised to pay the amount assured to the wife for her sole use, if living, and, if she were not living, to the children of the husband, or, if there should be no such children, to the executors or assigns of the husband, at the London office. The policy also provided that, on the completion of a period of ten years from its issue, provided

it should not have been previously terminated by lapse or death, the legal owner should have the option of withdrawing the accumulated reserve and surplus appropriated by the company to the policy. The husband paid the premiums until July, 1883, when he filed a liquidation petition under the Bankruptcy Act, 1869. In 1884 he obtained his discharge. After 1883 the wife paid the premiums out of her separate estate. In 1866 the wife exercised the right of withdrawal, and the company paid 2,959*l.* in respect of the policy:—Held, that, even if the sum thus paid did not by virtue of the policy belong to the wife for her separate use, the husband's contingent interest in it at the time when he obtained his discharge was a mere possibility, and that, consequently, it did not pass to the trustee in the liquidation. *Dever, Ex parte, Susse, In re*, 18 Q. B. D. 660; 56 L. J., Q. B. 552—C. A.

5. EVIDENCE, ETC., OF DEATH.

Evidence of Death—Cestui que vie.—Money was payable to a tenant pur autre vie under a policy, after proof, to the satisfaction of directors, of the cestui que vie. An order was made under 6 Anne, c. 72, that the cestui que vie ought to be deemed and taken to be dead under the statute, and the remainderman entered:—Held, that the directors might reasonably require further evidence of the death of the cestui que vie. *Doyle v. City of Glasgow Life Assurance Company*, 53 L. J., Ch. 627; 50 L. T. 323; 32 W. R. 476; 48 J. P. 374—North, J.

Presumption of Death.]—See EVIDENCE, II.

— **Notice to Insurance Company.**—Where the estate of a person whose death the court were asked to presume consisted in part of a policy of assurance on his life, the court ordered that notice of the application should be given to the insurance company. *Barber, In Goods of*, 11 P. D. 78; 56 L. T. 894; 35 W. R. 80—Butt, J.

6. LIFE INSURANCE COMPANIES.

Income Tax—"Profits and Gains"—Bonuses to Participating Policy-holders.—A life insurance company issued "participating policies," according to the terms of which any surplus which existed at the end of each quinquennial period in the hands of the company, after payment of policies falling due during such period, and provision for outstanding liabilities, was dealt with as follows: two-thirds of the surplus went to the policy-holders, who received payment thereof either by way of bonus or abatement of premiums; the remaining third of the surplus went to the company, who bore the whole expenses of the business, the portion remaining after payment of expenses constituting the only profit available for division:—Held (by Lords Blackburn and Fitzgerald, Lord Bramwell diss.), that the two-thirds returned to the policy-holders were "annual profits or gains" and assessable to income tax. *Last v. London Assurance Corporation*, 10 App. Cas. 438; 55 L. J., Q. B. 92; 53 L. T. 634; 34 W. R. 233; 50 J. P. 116—H. L. (E.).

Where a life insurance company carrying on business in New York and Great Britain issued participating policies as well as non-participating policies in Great Britain to members

of the company, and remitted the net amount received to New York:—Held, that the premium income derived from participating as well as non-participating policies was a "profit or gain" liable to be assessed to income tax. *Last v. London Assurance Corporation* (10 App. Cas. 438) followed. *Styles v. New York Life Insurance Company*, 51 J. P. 487—D.

— **"Profits and Gains"—Interest arising from Investments.**—The amount of interest arising from investments made by an insurance company for the purpose of carrying on their business on which income tax had been deducted at its source amounted to more than the profits of the company for the year of assessment, but the company had during the year received interest from investments on which income tax had not been deducted at its source:—Held, that under s. 102 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), and sched. D. of s. 2 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), the company were liable to pay income tax on the interest from which income tax had not been deducted at its source. *Last v. London Assurance Corporation* (10 App. Cas. 438) considered. *Clerical, Medical, and General Life Assurance Society v. Carter*, 21 Q. B. D. 339; 57 L. J., Q. B. 614; 59 L. T. 827; 37 W. R. 124—D. Affirmed 22 Q. B. D. 444; 58 L. J., Q. B. 224; 37 W. R. 346; 53 J. P. 276—C. A.

Deposit of Fund in Court—Payment out.—Where a petition is presented under the Life Assurance Companies Acts, 1870, 1871, and 1872, for payment out of Court to the company of the statutory deposit of 20,000*l.*, the petition must contain a statement of rule 6 of the Board of Trade Rules, 1872, which provides for payment out of the deposit money so soon as it is proved to the satisfaction of the court that the life assurance fund of the company, in respect of which the deposit was made, amounts to the sum of 40,000*l.* *Le Phenix, In re*, 58 L. T. 512—Chitty, J.

Deed of Settlement—Power to alter—Sale of Business.—The deed of settlement of an unincorporated life assurance company contained no provision for the sale or transfer of its business. But it provided that the proprietors might alter, amend or repeal the laws, regulations and provisions of the company. Resolutions were passed with due formalities to take power to sell and transfer the business:—Held, that a sale and transfer of the business was *intra vires*. *Argus Life Assurance Company, In re*, 39 Ch. D. 571; 58 L. J., Ch. 166; 59 L. T. 689; 37 W. R. 215—North, J.

Transfer of Business—Confirmation by Court—Time for sending Notice.—When a petition is presented by a life assurance company under the Life Assurance Companies Act, 1870, for the confirmation of a conditional agreement to transfer its business to another company, s. 14 of the act will have been sufficiently complied with if all the notices (required by that section to be given to each policy-holder of the transferred company) are given before the hearing (though some of them may have been given after the presentation) of the petition. *Briton Life Association, In re*, 56 L. J., Ch. 988; 35 W. R. 803—North, J.

Winding up—Scheme for Reduction of Contracts.]—On a petition for winding up an insolvent life assurance company, it was suggested that there should be an order for the reduction of the amount of the contracts of the company under s. 22 of the Life Assurance Companies Act, 1870, instead of a winding-up order. The matter was referred to chambers, so that steps might be taken, by holding meetings or otherwise, to ascertain what course ought to be adopted, and the petition directed to stand over generally for the meetings to be held, the meetings of the policy-holders and shareholders to be separate. *Briton Medical and General Life Assurance Company, In re*, 54 L. T. 14—Kay, J.

II. FIRE.

Payment of Premium—Risk when Commencing.]—In a policy of fire insurance, in the absence of a provision that the policy is not to attach until payment of the premium, such a provision will not be implied. *Kelly v. London and Staffordshire Fire Insurance Company*, 1 C. & E. 47—Mathew, J.

— Agent to Receive.]—A policy contained the following clause:—"It is part of this contract that any person other than the assured who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." A broker who effected the insurance for the assured, and received the premium, had frequently effected other insurances with the company, deducting his commission from the premiums and handing over the balance:—Held, that he was the agent of the company to receive the premium. *Id.*

Specific Appropriation.]—Where the plaintiffs being agents for an insurance office remitted to it 100% "for premiums," and it appeared that the 100% was to the knowledge of the office in excess of what they owed as agents, and that the terms on which certain lapsed policies should be renewed by the office for their benefit had been ascertained by consent:—Held, that although there was not in the office any specific appropriation of any part of the 100% to the payment of the premiums on the lapsed policies, yet that it must be taken to have been received on account thereof, and that from the date of receipt there was a good contract for the renewal of the old insurance. *Kirkpatrick v. South Australian Insurance Co.*, 11 App. Cas. 177—P. C.

Option to Reinstate or Replace Property Damaged or Destroyed.]—A condition in a policy of insurance against fire that, "the company may, if it think fit, reinstate or replace property damaged or destroyed instead of paying the amount of the loss or damage," entitles the company to exercise an option, and in the event of the property insured being wholly destroyed, to reinstate it by other property which is equivalent to that which has been destroyed; or in the event of the property insured being damaged but not destroyed, to reinstate it—that is, to

repair and put it, not in the exact place, but in the same state in which it was before the fire occurred, instead of paying the amount of the loss or damage. *Anderson v. Commercial Union Assurance Co.*, 55 L. J., Q. B. 146; 34 W. R. 189—C. A.

Latent Ambiguity in Policy — Evidence — Question for Jury.]—In an action upon a policy of fire insurance, if the evidence discloses a latent ambiguity in the policy so that it becomes necessary to go into the consideration of other documents, and to resort to parol evidence to solve that ambiguity, it ceases to be merely a question for the court on the construction of the instrument, and raises a question of fact which must be determined by the jury. *Hordern v. Commercial Union Assurance Company*, 56 L. J., P. C. 78; 56 L. T. 240—P. C.

Condition Precedent—Proviso against Suing before Arbitration.]—In an action on a fire policy the defendant pleaded that the policy was made subject to a condition that, if any difference should arise in the adjustment of a loss, the amount to be paid should be submitted to arbitration, and the insured should not be entitled to commence or maintain any action upon the policy until the amount of the loss should have been referred and determined as therein provided, and then only for the amount so determined; that a difference had arisen, and the amount had not been referred or determined:—Held, that the determination of the amount by arbitration was a condition precedent to the right to recover on the policy, and the defence was an answer to the action. *Collins v. Locke* (4 App. Cas. 674) distinguished. *Viney v. Biggins v. Norwich Union*, 20 Q. B. D. 172; 57 L. J., Q. B. 82; 58 L. T. 26; 36 W. R. 479—D.

Average Condition—Sub-tenant Insuring—Covenant to Repair—Laches.]—A. being owner of a house granted a lease to G., containing a covenant by the tenant to repair, but not a covenant to insure. A. insured the premises with the defendant company in the sum of 1,000l., and G. also insured them with another company in the sum of 1,000l. A.'s policy was subject, amongst others, to the usual average condition, viz., that if at the time of any loss or damage by fire happening to the insured property, there should be any other subsisting insurance, whether effected by the insured or any other person "covering the same property," the defendant company should not be liable to pay or contribute more than its rateable proportion of such loss or damage. The premises being destroyed by fire, G. was paid upon his policy 625l., but did not apply the same in reinstating the premises, and subsequently became bankrupt. In an action by A. on the policy effected with the defendants, they relied in their defence on the following points—(1), upon the condition as exempting them from liability save as to 62l., which they admitted to be due as their apportionment of the loss; (2), on A.'s neglect and laches in not compelling G. to repair the premises, as disentitling A. to recover from the defendants more than the said sum of 62l.:—Held, that neither defence could be sustained. "Property" in such a condition means the estate of the insurer in the premises, not the actual

building. *Andrews v. Patriotic Assurance Co.*, 18 L. R., 1r. 355—Ex. D.

Condition—Loss occasioned by "Incendiarism"
—Fire spreading from adjoining Premises.]—Goods in a house were insured against fire by a policy containing a condition "that it did not cover any loss or damage occasioned by, or in consequence of, incendiarism." While the policy was subsisting, adjoining premises were set on fire by an incendiary, for whose act the policyholder was admittedly not responsible; and the fire having spread to the house containing the insured goods, they were destroyed:—Held, that the word "incendiarism" in the policy included any act of incendiarism wherever committed which directly caused the loss; that in the absence of evidence pointing to any other cause, the act of the incendiary must be assumed to be the direct cause of the loss, and that therefore the insurance company was not liable. *Walker v. London and Provincial Insurance Company*, 22 L. R., 1r. 572—Ex. D.

Claim by postponed Bondholder—Payment to prior Bondholders by other Insurers of sufficient Sum to reinstate—Rent of Mortgaged Premises.]—The pursuers having a heritable security by bond on certain premises insured them against fire in the defender's office for 900l. Prior securities had been given by the owner upon the same premises to other creditors, and those creditors had insured in other offices. The premises having been in part destroyed by fire, the prior incumbancers recovered from and were paid by the offices in which they were insured an amount sufficient for the re-instatement of the premises, and for the payment of the rent during the period of re-instatement, but the premises were not in fact re-instated. It appeared that immediately before the date of the fire the value of the premises was sufficient to cover the prior bonds and that of the pursuers, but in consequence of the fire the value of the premises was so reduced that they were not sufficient to meet the balance remaining due to the prior creditors, and the pursuers' bond was left entirely uncovered:—Held, that the pursuers were entitled, notwithstanding the amount paid to the other creditors, to recover to the full extent of their loss, but that the pursuers were not entitled to recover anything in respect of the loss of rent of the premises after they had been damaged by fire. *Westminster Fire Office v. Glasgow Provident Investment Society*, 13 App. Cas. 699; 59 L. T. 641—H. L. (Sc.).

Semble, that 14 Geo. 3, c. 78, s. 83, relating to the application of insurance money on houses destroyed by fire, does not extend to Scotland. *Ib.*, per the Earl of Selborne and Lord Watson.

Assignment of Policy—Validity.]—A trader insured his stock in trade and other effects. These were destroyed by fire. He assigned the policies to trustees on trust to pay and divide the monies received thereunder among all his creditors rateably, and to pay the balance, if any, to himself:—Held, that the assignment was not void under 13 Eliz. c. 5, at the suit of a creditor whose debt was under 50l. *Green v. Brand*, 1 C. & E. 410—Lopes, J.

"Policy"—What is.]—Any contract of insur-

ance comes within the word "policy," and there is no statutory or formal document necessary to make a contract of insurance. If a contract of insurance is created by any binding means, that is a "policy" to all intents and purposes. *Norwich Equitable Fire Assurance Society, In re*, 57 L. T. 541—Kay, J.

Guarantee Business and Treaty Business—Ultra Vires—Company in Liquidation.]—A fire insurance society being an unincorporated association, had powers of giving to, or taking from other offices policies by way of guarantee for the purpose of dividing the risk of insurance, and also under their powers entered into treaties with other companies appointing them their agents in foreign lands, and agreeing to accept and enter upon the risk of one-eighth of every fire insurance policy of such companies in force at the date of the treaty, or effected or renewed after that date, and agreed to be on all risks simultaneously with the other companies, the other companies agreeing to pay a proportion of the premiums, 20 per cent. commission to be allowed on such premiums to the agent for the expenses of conducting the agency. The fire insurance society having gone into liquidation, the chief clerk allowed the claim of another company for sums due to them in respect of guarantee and treaty business. On summons by the liquidator to vary the certificate:—Held, that guarantee business was insurance business contemplated by the deed of settlement, and within the powers of the society; that the treaty agreements did not constitute an amalgamation between the contracting companies, nor a partnership either inter se or as regarded third persons, but were agreements of agency: the society having had the benefit of these agreements, the burden of proof was upon them to show that the agreements were invalid; that the treaty business was insurance business, being guarantee business carried on with a very unlimited faith in the agent; it was a re-insurance contract more wide and less prudent than an ordinary contract of re-insurance, but was within the powers of the society, and that the directors had by acquiescence ratified the acts of the manager of the agency department. *Ib.*

—Limitation of Liability—Constructive Notice.]—In consequence of a decision that the N. society (now in course of being wound up) had not been acting ultra vires in entering into "treaty" agreements, and that the R. company were entitled to prove for their claim in respect of a transaction of that nature, the official liquidator of the N. society applied by summons for an order that no call should be made in respect of such claim upon any of the contributories of the N. society who had paid up the full amount of their shares, nor upon any of such contributories beyond the amount unpaid of their shares:—Held, that on the face of the contracts no limitation of liability was expressed, neither could it be inferred by intendment of law; and that the doctrine of constructive notice could not be extended to cover such a case as the present:—Held, also, that the shareholders in the N. society were liable for the full amount of the claim; and that not only was the capital stock of the N. society liable for those sums, but

that the liability was one which, until those sums were paid, must be without limit. *Norwich Equitable Fire Assurance Society, In re*, 58 L. T. 35—Kay, J.

III. MARINE.

1. INTEREST OF ASSURED.

Duty of the Court.—It is the duty of the Court always to lean in favour of an insurable interest, if possible, for it seems to me that after underwriters have received the premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection, and one which has no real merit, certainly not as between the assured and the insurer. *Stock v. Inglis*, 12 Q. B. D. 564; 53 L. J., Q. B. 356; 51 L. T. 449—Per Brett, M. R.

Goods at Purchasers' Risk—Sale of Goods "f. o. b."—D. sold to B. 200 tons of German sugar. "f. o. b. Hamburg; payment by cash in London in exchange for bill of lading;" the price to be variable according to the percentage of saccharine matter, which was not to exceed or fall short of certain limits. B. resold to the respondent the same quantity at an increased price, but otherwise upon similar terms. D. also sold to the respondent 200 tons upon similar terms. To fulfil these contracts 390 tons (being ten tons short) were shipped in bags on one vessel at Hamburg for Bristol, no bags being set apart for one contract more than the other. Each bag was marked with its percentage of saccharine matter, and bills of lading with marks corresponding to the bags were sent to D. to be retained till payment in accordance with the contracts. The respondent was insured in floating policies "upon any kind of goods and merchandises" between Hamburg and Bristol, and duly declared in respect of this cargo. The ship sailed from Hamburg for Bristol and was lost. After receiving news of the loss, D. allocated 2,000 bags, or 200 tons, to B.'s contract, and 1,900 bags, or 190 tons, to the other contract. In an action upon the policies:—Held, that the sales being "f. o. b. Hamburg" the sugar was at the respondent's risk after shipment; that he had an insurable interest in it, and that the underwriters were liable. *Inglis v. Stock*, 10 App. Cas. 263; 54 L. J., Q. B. 582; 52 L. T. 821; 33 W. R. 877; 5 Asp. M. C. 422—H. L. (K.)

Re-insurers—Extent of Interest.—*See Urielli v. Boston Marine Insurance Company*, post, col. 1017.

Mortgagees — Insurance against Absolute Total Loss—Payment off.—The mortgagees of a ship agreed with the mortgagors to effect an insurance on the ship at the mortgagors' expense, the policy to be held by them as part of their security. After the ship had sailed, the mortgagees effected an insurance against absolute total loss only. On the voyage the ship was driven ashore in a gale, and having become a constructive total loss, notice of abandonment was given by the mortgagees to the underwriters. The mortgagors immediately gave notice that they would look to the mortgagees as if they were their underwriters for a full insurance, and recovered from

them the full value of the ship. The ship remained for two months exposed to the perils of the sea, when she became a complete wreck, and was then sold without prejudice to the rights of the parties. After the sale, but before this action, the mortgage was paid off:—Held, in an action by the mortgagees against the underwriters claiming for an absolute total loss, that the mortgagees, though their mortgage had been paid off, had an insurable interest in the ship, the mortgagors having ceded to them their rights under the policy when they were paid the full value of the ship. *Levy v. Merchants Marine Insurance Company*, 52 L. T. 263; 1 C. & E. 474; 5 Asp. M. C. 407—Mathew, J.

Purchasers of Goods also Charterers.—Where the charterers of a vessel were also the purchasers of a cargo of wheat to be shipped on board, and the master of the vessel from time to time received delivery from the vendors:—Held, that such delivery from time to time was a delivery to the purchasers, that it vested in them a right of possession and property, and that, consequently, they had an insurable interest in such wheat as had been so delivered. *Anderson v. Morice* (1 App. Cas. 713), distinguished; *Owendale v. Wetherell* (9 B. & C. 387), approved. *Colonial Insurance Company of New Zealand v. Adelaide Marine Insurance Company*, 12 App. Cas. 128; 56 L. J., P. C. 19; 56 L. T. 173; 35 W. R. 636; 6 Asp. M. C. 94—P. C.

Advances on Ship—"Full interest admitted."

—A policy insuring cash advances on a ship is within 19 Geo. 2, c. 37, s. 1. Such a policy containing the term "full interest admitted" is avoided by that statute. *Smith v. Reynolds* (1 H. & N. 221); and *De Mattos v. North* (3 L. R., Ex. 185), followed. *Berridge v. Man On Insurance Company*, 18 Q. B. D. 346; 56 L. J., Q. B. 223; 56 L. T. 375; 35 W. R. 343; 6 Asp. M. C. 104—C. A.

2. DURATION OF RISK.

"Whilst in Port"—Fairway of Navigable Channel.—A ship insured for a voyage to any port of discharge in the United Kingdom, "and whilst in port during thirty days after arrival," arrived at Greenock, discharged her cargo, and was placed in a dock for repairs. Within thirty days after her arrival she left the dock in ballast for the port of Glasgow, in tow of a steam-tug, to proceed on a new voyage, and had reached the fairway of the channel of the Clyde, her stern being about 500 feet distant from the harbour works, when she was capsized by a sudden gust of wind, and sustained damage:—Held, that the ship at the time of the accident was not "in port" within the meaning of the policy, and that the underwriters were not liable. *"Garston" Sailing Ship Company v. Hickie* (15 Q. B. D. 580) discussed. *Hunter v. Northern Marine Insurance Company*, 13 App. Cas. 717—H. L. (Sc.)

"At and from Port."—Where the plaintiffs proposed to insure a wheat cargo "at and from" port, and the defendants, "in accordance with your written request," granted an insurance

"from" port :—Held, that there was a complete contract to insure "at and from" port. *Colonial Insurance Company of New Zealand v. Adelaide Marine Insurance Company*, supra.

Commencement of Risk—Shipment of Portion.]

—Where a contract of insurance related to wheat cargo then on board or to be shipped in the "D. of S.":—Held, that the risk commenced as soon as any portion thereof was on board. *Id.*

Risk of Craft till Goods landed—Transshipment from Lighters into export Vessel.]—A

policy of insurance on goods which includes "all risk of craft until the goods are discharged and safely landed" does not cover the risk to the goods while waiting on lighters at the port of delivery for transshipment into an export vessel. *Houlder v. Merchants Marine Insurance Company*, 17 Q. B. D. 354; 55 L. J., Q. B. 420; 55 L. T. 244; 34 W. R. 673; 6 Asp. M. C. 12—C. A.

Pumps engaged "at the Wreck."]—A policy of insurance was effected on salvage pumps insured "from the 30th of December, 1882, to the 12th of January, 1883, . . . whilst engaged in salvage operations at the wreck of the C.," "including all risk whilst being conveyed from B. to and on board the wreck." It was shewn that the C. was floated by means of the pumps which were brought from B., and placed on board her, and that she was kept afloat by the pumps, and that she partly steamed and partly was towed by another vessel for a distance of nearly forty miles, until she had almost reached B., the nearest port of safety, when she sank in deep water, with the salvage pumps on board, on the 4th of January, 1883 :—Held, that the loss was not covered by the policy. *Difiori v. Adams*, 53 L. J., Q. B. 437; 1 C. & E. 228—Cave, J.

Time Policy—Chartered Freight.]—The plaintiffs were the owners of a vessel which they chartered on certain terms as regards payment of freight for six months from the 21st of March, 1881, with the option to the charterers of extending the time for a period of three or six months. A clause in the charter-party provided that in the event of loss of time by collision, whereby the vessel was rendered incapable of proceeding for more than forty-eight hours, payment of hire was to cease until such time as she was again in an efficient state to resume her voyage. On the 4th of April, 1881, the plaintiffs insured against loss of freight with the defendant "at and from and for and during the space of six calendar months from the 15th of April to the 14th of October, 1881," the defendant to pay only loss of hire which might arise under the clause in the charter-party "for accidents occurring between the 15th of April and the 15th of October." On the 27th of June, 1881, the vessel, while on a voyage, struck something soft with her bottom, but was able to proceed on her voyage, and it was not until the 18th of November, when she arrived at Liverpool, that it was discovered that she required considerable repairs, owing to damage admittedly caused by the accident in June. The charterers, who had exercised their option of continuing the charter

until the 21st of December, thereupon gave notice to the plaintiffs discontinuing the hire until the vessel was in a fit state to resume employment, which she never was until the end of December :—Held, that as the policy was a time policy, the loss insured against must happen during the period covered by the policy; and that the defendant's liability being confined to loss of chartered freight between the 15th of April and the 15th of October, could not be extended so as to include loss of hire which only occurred after the expiration of that time. *Hough v. Head*, 55 L. J., Q. B. 43; 53 L. T. 809; 34 W. R. 160; 5 Asp. M. C. 505—C. A.

3. NATURE OF RISK.

"Perils of the seas and all other Perils," &c.—Donkey-engine, Injury to.]—A steamer was insured by a time policy in the ordinary form on the ship and her machinery, including the donkey-engine. For the purposes of navigation the donkey-engine was being used in pumping water into the main boilers, when owing to a valve being closed which ought to have been kept open water was forced into and split open the air-chamber of the donkey-pump. The closing of the valve was either accidental or due to the negligence of an engineer and was not due to ordinary wear and tear :—Held, that whether the injury occurred through negligence or accidentally without negligence, it was not covered by the policy, such a loss not falling under the words "perils of the seas," &c., nor under the general words "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the subject-matter of insurance." *West India and Panama Telegraph Company v. Home and Colonial Marine Insurance Company* (6 Q. B. D. 51), disapproved. *Thames and Mersey Marine Insurance Company v. Hamilton*, 12 App. Cas. 484; 56 L. J., Q. B. 626; 57 L. T. 695; 36 W. R. 337; 6 Asp. M. C. 200—H. L. (E.)

"Improper Navigation of Ship"—Negligence—Damage to Cargo—Insufficiently-closed Port.]

—By the articles of a mutual assurance association the members agreed to indemnify each other against losses, damages, and expenses arising from or occasioned by any loss or damage of or to any goods or merchandize caused by "improper navigation of the ship carrying the goods," for which any such member might be liable. A cargo of wheat was shipped on board a vessel belonging to the plaintiffs, who were members of the association. During the loading of the cargo an opening or port in the side of the vessel was by the negligence of persons employed by the plaintiffs insufficiently secured, so that during the voyage water leaked in and damaged the wheat in the lower hold, and the plaintiffs became liable to pay and paid compensation to the owners of the cargo. The leak did not hinder or impede the navigation of the vessel in the course of her voyage :—Held, that this was a damage arising from "improper navigation of the ship," within the articles of association, for which the plaintiffs were entitled to recover. *Carmichael v. Liverpool Sailing Ship Owners' Association*, 19 Q. B. D. 242; 56 L. J., Q. B. 428; 57 L. T. 550; 35 W. R. 793; 6 Asp. M. C. 184—C. A.

4. CONCEALMENT OF FACTS.

Craft Risk—Employment of Lightermen with Restricted Liability—Notice.—On policies of marine insurance on goods, which included risks on crafts and lighters, underwriters to the knowledge of the plaintiffs charged a higher rate of premium where the insurance was with no recourse against lightermen (which meant where the lightering was done on the terms that the liability of the lightermen was to be less than that of common carriers, namely, for negligence only), than they charged where there was such recourse, and the liability of the lightermen was to be that of common carriers. The plaintiffs effected with the defendant, a Lloyd's underwriter, a policy of marine insurance on goods which included risk on craft and lighters, and was not with no recourse against lightermen. At the time of effecting such policy the plaintiffs had an arrangement with one H., by which he was to do all the plaintiffs' lightering on the terms that he was only to be liable for negligence.—Held, that if the plaintiffs intended that the goods so insured should be landed under such arrangement with H., it was a fact which a prudent and experienced underwriter would take into consideration in estimating the premium, and that therefore a jury would be justified in finding that the non-communication of it to the defendant was the concealment of a material fact which vitiated the policy. A mere disclosure of the existence of such arrangement to the defendants' solicitor is not notice of it to the defendant. *Tate v. Hyslop*, 15 Q. B. D. 368; 54 L. J., Q. B. 592; 53 L. T. 581; 5 Asp. M. C. 487—C. A.

Name of Ship uncertain—Usage at Lloyd's.]

—Where an assured expects, but is not certain, that goods will come by a particular ship, the name of such ship is not a material fact, the non-disclosure of which prevents the policy from attaching; nor in such a case is there any usage of underwriters at Lloyd's compelling the assured to disclose it. *Knight v. Cotesworth*, 1 C. & E. 48—Mathew, J.

Concealment by Agent through whom Policy not effected.—The plaintiffs instructed a broker to re-insure an overdue ship. Whilst acting for the plaintiffs the broker received information material to the risk, but did not communicate it to them, and the plaintiffs effected a re-insurance for 800*l.* through the broker's London agents. Afterwards the plaintiffs effected a re-insurance for 700*l.*, lost or not lost, through another broker. The ship had in fact been lost some days before the plaintiffs tried to re-insure, but neither the plaintiffs nor the last-named broker knew it, and both he and the plaintiffs acted throughout in good faith.—Held, that the knowledge of the first broker was not the knowledge of the plaintiffs, and that the plaintiffs were entitled to recover upon the policy for 700*l.* *Fitzherbert v. Mather* (1 T. R. 12), *Gladstone v. King* (1 M. & S. 35), *Stribley v. Imperial Marine Insurance Company* (1 Q. B. D. 507), and *Proudfoot v. Montefiore* (2 L. R., Q. B. 511), commented on. *Blackburn v. Vigors*, 12 App. Cas. 531; 57 L. J., Q. B. 114; 57 L. T. 730; 36 W. R. 449; 6 Asp. M. C. 216—H. L. (E.).

The plaintiffs, underwriters in Glasgow, employed there a firm of insurance brokers to re-

insure a ship which was overdue. The brokers received information tending to show that the ship, as was the fact, was lost. Without communicating this information to the plaintiffs they telegraphed in the plaintiffs' name to their own London agents, stating the rate of insurance premium which the plaintiffs were prepared to pay. Communications followed between the plaintiffs and the London agents, and the London agents, through a firm of London insurance brokers, effected a policy of re-insurance at a higher rate of premium, which policy was underwritten by the defendant.—Held, that the policy was void on the ground of concealment of material facts by the agents of the assured. *Blackburn v. Vigors* (supra) considered. *Blackburn v. Haslam*, 21 Q. B. D. 144; 57 L. J., Q. B. 479; 59 L. T. 407; 36 W. R. 855—D.

5. WARRANTIES.

Time Policy—Negative Words—Custom of Merchants.—A time policy of marine insurance on A.'s ship, from the 29th of May, 1878, to the 28th of May, 1879, contained the words "warranted no St. Lawrence between the 1st of October and the 1st of April." The vessel was lost on the voyage home. The underwriters refused A.'s claim for a total loss on the ground of breach of warranty, inasmuch as the vessel had navigated in the Gulf of St. Lawrence during the prescribed period. A. contended that the above words referred exclusively to the River St. Lawrence. Admittedly no general custom of merchants could be proved; but the facts established that the great river which discharges the waters of the North American lakes, and the gulf into which it flows, both bear the name of "St. Lawrence"; that the navigation of both, though of the gulf in a less degree than of the river, was within the prohibited period dangerous.—Held, that the evidence disclosed no ambiguity or uncertainty sufficient to prevent the application of the ordinary rules of construction; and according to those rules the whole St. Lawrence navigation, both gulf and river, is within the fair and natural meaning of these negative words, and therefore prohibited during the months in question. *Birrell v. Dryer*, 9 App. Cas. 345; 51 L. T. 130; 5 Asp. M. C. 267—H. L. (Sc.).

Free from Capture and Seizure—Barratry.—In a time policy of marine insurance on ship the ordinary perils insured against (including "barratry of the master") were enumerated, and the ship was warranted "free from capture and seizure, and the consequences of any attempts thereat." In consequence of the barratrous act of the master in smuggling, the ship was seized by Spanish revenue officers, and proceedings were taken to procure her condemnation and confiscation. In an action on the policy to recover expenses incurred by the owner in obtaining her release.—Held, that the loss must be imputed to "capture and seizure," and not to the barratry of the master, and that the underwriter was not liable. *Cory v. Burr*, 8 App. Cas. 393; 52 L. J., Q. B. 657; 49 L. T. 78; 31 W. R. 894; 5 Asp. M. C. 109—H. L. (E.).

"Free from Average under 3 per cent. unless general."—**Time Policy—Losses on separate Voyages.**—In a valued time-policy of marine

insurance the ship and freight were warranted free from average under 3 per cent., unless general, or the ship be stranded, sunk, or burned. The ship made several voyages during the period insured, and incurred particular average losses. Such losses on any one voyage did not amount to 3 per cent., but the total of all the losses on all the voyages exceeded 3 per cent. In an action by the assured on the policy:—Held, that the plaintiffs were not entitled to recover, for although the separate losses on each voyage could be added together, yet the losses occurring on distinct and separate voyages could not be added together so as to bring the amount of the losses up to 3 per cent. *Stewart v. Merchant Marine Insurance Company*, 16 Q. B. D. 619; 55 L. J., Q. B. 81; 53 L. T. 892; 34 W. R. 208; 5 Asp. M. C. 506—C. A.

— **General Average and Particular Average not to be added together.**—Under a policy of insurance covering all losses not recoverable under a policy of insurance containing the clause “warranted free from average under three per cent., unless general, or the ship is stranded, sunk, or burnt,” the insured are entitled to recover where the particular average loss is less than three per cent., although if added to the general average loss it would be more than three per cent., if the ship be not stranded, sunk, or burnt. *Price v. “A 1” Ships’ Small Damage Insurance Company*, 57 L. J., Q. B. 459—Cave, J. Affirmed 22 Q. B. D. 580; 58 L. J., Q. B. 269; 37 W. R. 566—C. A.

— **Particular Average Loss, Mode of ascertaining.**—A time policy on ship contained the warranty “free from average under 3 per cent.” During a voyage covered by the policy the ship sustained (without its being discovered) a fracture of her stern-post owing to perils of the sea, being a particular average loss within the policy. The voyage having been completed and the cargo delivered, the ship was put into dry dock for the purpose only of being cleaned, scraped, and painted, being in such a state that no prudent owner would have put to sea again without having her cleaned and scraped. When the ship was put into dry dock the injury was for the first time discovered, and the necessary repairs were then effected, and the ship was discharged from dry dock on the eighth day, repaired, cleaned, scraped, and painted. Had she required nothing but cleaning, scraping, and painting, she might have been discharged on the evening of the third day. The repairs alone, without cleaning, &c., would have taken the whole eight days. If the whole or half of the dock dues for the first three days ought to be charged against the underwriters in account, there was a particular average loss exceeding 3 per cent. If the cost of the repairs plus the dock charges for the last five days were alone to be charged against the underwriters, there was not a particular average loss of 3 per cent. If the dock charges for the first three days ought to be attributed partly to the repairs and partly to the cleaning, &c., then (so far as the apportionment was a question of fact) it was to be taken that one-half of those charges should be attributed to each purpose:—Held, that although a contract of marine insurance is a contract of indemnity, and though the result would be that the shipowners would be relieved

of part of the dock charges which they would otherwise have had to pay themselves, they were entitled to have the dock charges for the first three days apportioned between the repairs on the one hand and the cleaning, &c., on the other; that the apportionment should be one-half to each purpose, and that there had therefore been a particular average loss exceeding 3 per cent. *Marine Insurance Company v. China Trans-Pacific Steamship Company*, 11 App. Cas. 573; 56 L. J., Q. B. 100; 55 L. T. 491; 35 W. R. 169; 6 Asp. M. C. 68—H. L. (E.).

6. LOSSES.

Warranties.—See supra.

General Average—Expenses of re-shipping Cargo.—A ship on a voyage having sprung a dangerous leak, the captain, acting justifiably for the safety of the whole adventure, put into a port of refuge to repair. In port the cargo was reasonably, and with a view to the common safety of ship, cargo, and freight, landed in order to repair the ship. The ship was repaired, the cargo reloaded, and the voyage completed:—Held, that the cargo-owners were not chargeable with a general average contribution in respect of the expenses of reshipping the cargo. *Atwood v. Sellar* (4 Q. B. D. 342; 5 Q. B. D. 286) discussed. *Seendsen v. Wallace*, 10 App. Cas. 404; 54 L. J., Q. B. 497; 52 L. T. 901; 34 W. R. 369; 5 Asp. M. C. 453—H. L. (E.).

Actual Total Loss—Sale of Ship by Court—Proceeds less than Salvage—Derelict.—To constitute a total loss within the meaning of a policy of marine insurance it is not necessary that a ship should be actually annihilated or destroyed. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by sale under decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated. *Cossmann v. West*, 13 App. Cas. 160; 57 L. J., P. C. 17; 58 L. T. 122; 6 Asp. M. C. 233—P. C.

Where a ship had been deserted by her master and crew, having been previously placed by them in a sinking condition, but had been subsequently taken possession of by salvors, towed into port, and there sold together with the cargo, by order of the Admiralty Court, for less than the actual cost of the salvage services—Held, in actions upon policies on the ship and freight respectively, that, assuming the possession by salvors of a derelict vessel to be only a constructive total loss, the subsequent sale constituted an actual total loss of both ship and cargo. *Id.*

— **Constructive—Continuous Perils.**—The mortgagees of a ship agreed with the mortgagors to effect an insurance on the ship at the mortgagors’ expense, the policy to be held by them as part of their security. After the ship had sailed, the mortgagees effected an insurance against absolute total loss only. On the voyage the ship was driven ashore in a gale, and having become a constructive total loss, notice of abandonment was given by the mortgagees to the underwriters.

The mortgagors immediately gave notice that they would look to the mortgagees as if they were their underwriters for a full insurance, and recovered from them the full value of the ship. The ship remained for two months exposed to the perils of the sea, when she became a complete wreck, and was then sold without prejudice to the rights of the parties. After the sale, but before this action, the mortgage was paid off:—Held, in an action by the mortgagees against the underwriters claiming for an absolute total loss, that as the ship when sold had become an absolute total loss from perils which were continuous, the plaintiffs were entitled to recover. *Levy v. Merchants Marine Insurance Company*, 52 L. T. 263; 1 C. & E. 474; 5 Asp. M. C. 407—Mathew, J.

Constructive Total Loss—Notice of Abandonment—Reinsurance.—Upon a constructive total loss happening to the ship insured, notice of abandonment need not be given to the underwriters of a policy of reinsurance. The owners of a ship insured her for twelve months in an ordinary Lloyd's policy, which contained a suing and labouring clause. The underwriters of the Lloyd's policy reinsured themselves with a French company which reinsured itself with the defendants. The policy underwritten for the French company by the defendants was for 1,000*l.*; bound them to pay the sum that might be paid on the original policy; was to cover the risk of total loss only, and contained a suing and labouring clause. Whilst the policy was in force, the ship went ashore and was much damaged. Her owners gave notice of abandonment to the underwriters of the Lloyd's policy, but notice of abandonment was not given to the defendants; the underwriters of the ship ultimately settled with her owners at 88 per cent. They expended more than 5,000*l.* in floating the ship, and sold her to a builder who repaired her at a cost of 9,000*l.*, and resold her for 11,200*l.* The cost of floating the ship (after deducting the price paid by the shipbuilders) being added to the 88 per cent. represented a loss of 112 per cent. In an action by the French company as reinsurers against the defendants:—Held, that a constructive total loss had occurred, and that as the defendants had bound themselves to pay as might be paid on the original policy, they were liable to the extent of 1,000*l.*; but that they could not be held liable for more, as the underwriters of the Lloyd's policy were not the "factors, servants, or assigns" of the plaintiffs within the meaning of the suing and labouring clause, and that the defendants were not liable, at least by virtue of that clause, for any part of the expenses incurred in floating the ship. *Uzielli v. Boston Marine Insurance Company*, 15 Q. B. D. 11; 54 L. J., Q. B. 142; 52 L. T. 787; 33 W. R. 293; 5 Asp. M. C. 405—C. A.

Owner altering Obsolete Ship at less Cost instead of Reinstating.—A ship, insured on a time policy, had above her main deck a saloon deck for passengers. During the time covered by the policy the saloon deck was destroyed by fire. At the time of the fire the ship was engaged in carrying cargo, being obsolete as a passenger ship and useless for passenger traffic. After the expiration of the policy the ship was converted into a cargo-carrying ship, and the saloon deck for passengers was not reinstated. The cost of

converting the ship was less than the cost of the reinstatement of the saloon deck would have been. The ship, after the alteration, was as valuable for sale or use as she was before the accident. In an action by the shipowners against the underwriters, to recover the cost of reinstatement of the saloon deck:—Held, that as the shipowners were not entitled to recover more than they had lost, they were not entitled to recover the cost of reinstatement, but only the actual cost of converting the ship. *Bristol Steam Navigation Company v. Indemnity Mutual Marine Insurance Company*, 57 L. T. 101; 6 Asp. M. C. 173—D.

Freight—Salvage—Duty of Shipowner.—A shipowner shipped goods of his own on his own ship for a particular voyage from Sunderland to Valparaiso, and effected a policy of insurance on "freight." The ship was run into and damaged at the port of loading with the goods on board after the policy had attached, whereby the cargo was so damaged that it had to be unloaded, and the particular adventure was frustrated. The ship was detained in port some six weeks, and all expenses of repairs and demurrage were paid by the owners of the colliding ship. When again in a sea-going condition she was offered a similar cargo to the same port by the owners of the colliding ship; this the shipowner refused, and sailed with another cargo elsewhere:—Held, that the shipowner could recover nothing on the policy, inasmuch as the salvage was, or might have been, equivalent to the freight insured. *Gayner v. Sunderland Joint Stock Premium Association*, 1 C. & E. 293—Day, J.

Separate Policies on Ship and Freight—Payment for Total Loss on Ship—Right of Underwriters on Ship to Damages recovered by Assured for Unearned Freight.—The defendants effected a policy of insurance on their ship for 1,000*l.* with the plaintiffs; but insured the freight with other underwriters. The ship, while proceeding to her port of loading under a charter-party, was run into and damaged by another ship. The defendants abandoned her to the plaintiffs, who settled with them as for a total loss. The defendants afterwards recovered in the Admiralty Division, against the owner of the other ship, damages in respect of the loss of the ship, and also of the freight which had not been earned:—Held, that the plaintiffs were not entitled to recover the damages recovered in respect of the loss of freight, such damages being in the nature of salvage on freight; for freight which has not been earned is not an incident of the ownership of the ship, and does not therefore pass to the underwriters, who have paid as for a total loss on the ship. *Sea Insurance Company v. Hadden or Hodden*, 13 Q. B. D. 706; 53 L. J., Q. B. 252; 50 L. T. 657; 32 W. R. 841; 5 Asp. M. C. 230—C. A.

7. ACTIONS ON POLICY.

Third Parties—Claim for Indemnity—Underwriters—Suing and Labouring Clause.—The defendant insured his ship under a policy containing the usual suing and labouring clause. In an action to recover for work alleged to have been done and expenses incurred by the plaintiffs for the defendant, at his request, in respect of attempting to save the ship during the continu-

ance of the policy :—Held, that the defendant was not entitled to bring in the underwriters as third parties under Ord. XVI. r. 48, because they did not, by the suing and labouring clause, contract to indemnify the defendant in respect of any contract made by him with the plaintiffs. *Johnston v. Salvage Association*, 19 Q. B. D. 458; 57 L. T. 218; 36 W. R. 56; 6 Asp. M. C. 167—C. A.

Action by Underwriters to restrain Holders from Proceeding on Policy.]—If a policy is liable to be completely avoided, as on the ground of fraud or misrepresentation, a Court of Equity has jurisdiction to direct its delivery up and cancellation, but it has no jurisdiction to direct the cancellation of a policy to any claim on which there is a good legal defence, or to declare that there is no liability upon it. If there is danger of the evidence for the defence being lost, the remedy is, not an action for cancellation, but an action to perpetuate testimony. *Brooking v. Maudslay*, 38 Ch. D. 636; 57 L. J., Ch. 1001; 58 L. T. 852; 36 W. R. 664; 6 Asp. M. C. 296—Stirling, J.

8. MUTUAL INSURANCE ASSOCIATIONS.

Limited by Guarantee—Limitation of Liability—Members having Twofold Liability.]—A mutual marine insurance association was incorporated, under the Companies Act, 1862, as an association limited by guarantee. The memorandum of association declared that every member undertook to contribute to the assets of the association, in the event of its being wound up, a sum not exceeding 5*l.* for the payment of the debts and liabilities of the association, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of contributories amongst themselves. The defendant entered his ship to be insured in the association, and by the rules of the association he, by so doing, also became an insurer of the ships of other members of the association who entered their ships in the same class. While the defendant continued to be a member the association was wound up. In an action brought, pursuant to the rules of the association, to recover from the defendant a sum of 35*l.* as contribution towards losses incurred by other members insured in the same class as that in which he had entered his ship, the defendant contended that his liability was limited by the memorandum of association to a sum of 5*l.* :—Held, that the limit of 5*l.* only applied to the liabilities incurred by the defendant as a member of the association to the association, and that his liability as an insurer towards the other members of the association who entered their ships in the association was not limited to that amount. *Lion Mutual Marine Insurance Association v. Tucker*, 12 Q. B. D. 176; 53 L. J., Q. B. 185; 49 L. T. 764; 32 W. R. 546—C. A.

Action for Contributions—Managing Owner—Principal and Agent.]—The managing and part owner of a steamship became a member of a mutual insurance association, and took out a policy on behalf of himself and his co-owners in respect of the ship. By the articles of association every person was deemed to be a member "who in his own name, or in his name as agent, insures any ship in pursuance of the regulations of the company," and they also provided that the funds

required for the payment of claims should "be raised by contributions from all the members." By the policy it was agreed between the assured and the company, "that without prejudice to the rights and remedies of the company against the said person or persons effecting this insurance, as a member or members of the company, in respect of this insurance, the assured shall pay to the company, in lieu of premiums, all the sums and contributions which the company are entitled to call upon the said person or persons effecting this insurance, as a member or members of the company, to pay to the company in respect of this insurance according to the articles of association of the company, and that the provisions contained in the said articles of association shall be deemed and considered part of this policy, and shall, so far as regards this insurance, be as binding upon the assured as upon the said person or persons effecting this insurance." Certain contributions having, in accordance with the articles of association, become payable by the managing owner in respect of the ship, and the managing owner being bankrupt, the association sued the other owners to recover the contributions :—Held, that, under the terms of the policy, they were liable, although the policy was effected by the managing owner alone. *Ocean Iron Steamship Insurance Association v. Leslie*, 22 Q. B. D. 722; 57 L. T. 722; 6 Asp. M. C. 226—Mathew, J.

Principal and Agent—Undisclosed Principal not Member of Association.]—T., the manager and part owner of a ship, became a member of a mutual insurance association, and took out a policy with such association in respect of the ship. The articles of association gave power to the committee, in order to provide funds for the business of the association, from time to time to direct sums to be paid by the members rateably. By the policy, which was made by the association under their seal, the association agreed with T. that the members thereof should according to the articles of association pay and make good losses and damages to the ship occasioned by the risks insured against, subject to a proviso that the association should be liable only to the extent of so much of the funds as they were able to recover from the members liable for the same, and which were applicable for the purpose of paying claims under the policy. Certain contributions to the funds of the association having, in accordance with the articles, become payable by T. in respect of the ship, and T. being bankrupt, the association sued N., another part owner of the ship, for such contributions as an undisclosed principal of T. :—Held, that the effect of the articles of association and the policy being that the liability for such contributions was imposed on members only, and N. not being a member of the association, he could not be sued for such contributions as an undisclosed principal of T. *United Kingdom Mutual Steamship Assurance Association v. Nevill*, 19 Q. B. D. 110; 56 L. J., Q. B. 522; 35 W. R. 746—C. A.

Ships Insured without Stamped Policy—Estoppel.]—Where a member of a mutual insurance company, afterwards converted into a limited company, has vessels on its books as insured, and pays calls, and otherwise acts as if he were a member of the company, he is, in any action brought against him by the limited com-

pany for calls on losses, estopped from denying his liability, and from setting up either any irregularity in the transfer from the one company to the other, or that the losses were paid without any stamped policies being entered into in contravention of 30 Vict. c. 23, s. 7. *Barrow Mutual Ship Insurance Company v. Ashburner*, 54 L. J., Q. B. 377; 54 L. T. 58; 5 Asp. M. C. 527—C. A.

Annual Policies—Forfeiture for non-payment of Contribution—Set-off of Contribution against Loss.—By the rules of a marine insurance association the members insured each other's ships from noon of Feb. 20 in any year, or from the date of entry of a vessel, until noon of Feb. 20 in the succeeding year; and the managers were empowered to levy contributions of one-fourth part of the estimated annual premium quarterly in each year, such premiums of insurance to form a fund for the payment of claims, and if any member should refuse to pay his contributions thereto, his ship should cease to be insured, and he should thenceforth forfeit all claims in respect of any loss. On the 5th April, 1881, a loss, incurred in the year 1880-1 upon a ship belonging to the plaintiff, and insured in the association, was fixed by an average adjuster at 180*l*. A call of 41*l*. 10*s*., made on the plaintiff on the 5th May, 1881, for the second quarter of 1881-2, was by mutual consent set off against the loss. On the 13th May, 1881, the association paid the plaintiff 100*l*. on further account of the loss. On the 23rd June, 1881, a call was made on the plaintiff of 52*l*. 16*s*. 8*d*., and on the 5th July, 1881, another call of 31*l*. 4*s*. The plaintiff having tendered the balance due from him, the association refused to accept it, and during the pendency of an action to recover the full amount of the two calls one of the plaintiff's ships insured in the association was wholly lost:—Held, on case stated, that the plaintiff's ship did not cease to be insured, and that he had not forfeited his claim in respect of the loss. *Williams v. British Marine Mutual Insurance Association*, 57 L. T. 27—D.

INTEREST.

On Legacies.—See EXECUTOR AND ADMINISTRATOR, III., 3, a.

On Costs.—See COSTS.

Judgment Debt.—The effect of s. 17 of 1 & 2 Vict. c. 110, is that interest at the rate of four per cent. is a debt necessarily attached to every judgment debt, and recoverable at law as a debt; and the judgment creditor is not confined to the remedy by execution mentioned in the section. Therefore, where, in the case of a deceased insolvent debtor who became insolvent before 1869, a sum of money subsequently came to the hands of the assignee, out of which the principal of all the debts entered in the debtor's schedule was paid, it was held that the judgment debts were not satisfied within the meaning of s. 92 (since repealed) of that Act until interest was paid, and the assignee was ordered to pay interest before handing over any surplus to the repre-

sentatives of the insolvent. *Lewis, Ex parte, Clagett, In re*, 36 W. R. 653—C. A.

County Court.—A county court judgment debt does not carry interest under 1 & 2 Vict. c. 110, s. 17. *Reg. v. Essex County Court Judge*, 18 Q. B. D. 704; 56 L. J., Q. B. 315; 57 L. T. 643; 35 W. R. 511; 51 J. P. 549—C. A.

Payment over of Money by Agent to Principal.—A person who has received money as agent is bound not only to account for the same, but also to pay it over to his principal when requested so to do; and, in an action for money had and received, is chargeable with interest on the amount so received from the date of the refusal to pay it over. *Pearse v. Green* (1 Jac. & W. 135), followed. *Harsant v. Blaine*, 56 L. J., Q. B. 511—C. A.

Payment of, when an Acknowledgment of Debt.—See LIMITATIONS, STATUTE OF.

Solicitor and Client—Fiduciary Relation.—The plaintiff had mortgaged her life interest in certain leasehold property to various persons. In the year 1880, the defendant, who was then acting as her solicitor, in order to release her from embarrassment, bought up several of the incumbrances with his own money, and took a transfer of them to himself:—Held, in an action for redemption brought by the plaintiff against the defendant, that the defendant must be allowed interest at the rate of five per cent. on the moneys he had actually advanced. *Macled v. Jones*, 53 L. J., Ch. 534; 50 L. T. 358; 32 W. R. 660—Pearson, J.

Disbursements and Costs—Demand from Client.—By General Ord. VII. under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 5, the interest which a solicitor is entitled to recover under the order on the amount due on business transacted by him is not to commence till the amount due is ascertained, either by agreement or taxation—and it is provided that a solicitor may charge interest at 4 per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client. A solicitor delivered his bill to a client without claiming interest. The bill was taxed, and the client paid the amount allowed on taxation. On such amount being paid the solicitor claimed interest thereon at 4 per cent. from one month from the date of the delivery of the bill:—Held, that the solicitor was entitled to such interest. *Blair v. Corder*, 19 Q. B. D. 516; 56 L. J., Q. B. 642; 36 W. R. 109—D.

Mortgage—Payment off—Interest in Lieu of Notice—Payment out of Fund in Court—Delay in Completion of Order.—One of the beneficiaries under a will mortgaged her interest in the testator's estate. She gave the mortgagees six months' notice to pay off the mortgage on the 1st of July, 1885, and on the 20th of May, 1885, an order was made in an action to administer the estate, on the application of the beneficiaries and in the presence of the mortgagees, which directed (inter alia) payment to the mortgagees, out of funds in court standing to the credit of the mortgagor, of the mortgage debt, with interest up to the 1st of July, 1885. Owing to delay in the completion of the order the payment could not be made on the 1st of

July, and on the 2nd of July the mortgagees took out a summons, claiming six months' additional interest in lieu of a fresh six months' notice to pay off the mortgage. On the 20th of July the order was completed, and on the 21st of July the mortgagees took the sum mentioned in the order out of court:—Held, that the mortgagees were only entitled to additional interest from the 1st to the 21st of July, on the ground that, by accepting the order, they assented to payment out of the fund in court subject to all the contingencies to which the completion of the order might be subject. *Moss, In re, Levy v. Sewill*, 31 Ch. D. 90; 55 L. J., Ch. 87; 54 L. T. 49; 34 W. R. 59—Pearson, J.

— **Covenant to pay Principal and Interest—Judgment—Merger.**—A mortgage deed contained a covenant by the mortgagor for payment of the principal sum on the expiration of six months next after a specified day, together with interest at 5 per cent. per annum. There was a further covenant that if the principal should remain unpaid after the expiration of the six months, the mortgagor would pay interest at the same rate on the amount unpaid. After the expiration of the six months the mortgagee recovered judgment against the mortgagor on the covenant for the principal sum and interest in arrear:—Held, that the covenant being merged in the judgment, the mortgagee was, as from the date of the judgment, entitled only to interest on the judgment debt at the rate of 4 per cent., and was not entitled under the covenant to interest at the rate of 5 per cent. on the principal sum. *Popple v. Sylvestre* (22 Ch. D. 98) distinguished. *Fewings, Ex parte, Sneyd, In re*, 25 Ch. D. 338; 53 L. J., Ch. 545; 50 L. T. 109; 32 W. R. 352—C. A.

— **Unpaid Purchase Money—Lands Clauses Act.**—In the case of a compulsory purchase under the Lands Clauses Act, 1845, interest is payable to the vendor by the purchaser from the time when possession might have been taken, it appearing that a good title could be shown. And the land being subject to mortgage, interest is payable by the vendor to the mortgagee in lieu of notice. *Spencer-Bell to the London and South Western Railway*, 33 W. R. 771—Chitty, J.

— **On Foreclosure.**—See MORTGAGE (FORECLOSURE).

On Damages—Admiralty Division.—In an action in the Admiralty Division, which could not, prior to the Judicature Acts, have been tried in the Admiralty Court, the defendant made no objection to the jurisdiction, and interest was, according to the practice in the Admiralty registry, allowed on the assessed damages from the time when the plaintiffs' claim arose. In another action transferred by consent, after verdict for the plaintiff, to the Admiralty Division for the assessment of the damages by the registrar and merchants, the same practice was followed in regard to the interest:—Held, that interest on the damages was properly awarded by the registrar on the ground that the parties, in both cases, having proceeded on the understanding that the Admiralty practice should

apply, had impliedly consented to abide by such practice. *The Gertrude, The Baron Aberdare*, 13 P. D. 105; 59 L. T. 251; 36 W. R. 616; 6 Asp. M. C. 315—C. A.

INTERLOCUTORY PROCEEDINGS.

See PRACTICE.

INTERNATIONAL LAW.

I. FOREIGN GOVERNMENTS AND AMBASSADORS, 1024.

II. ALIENS—NATURALIZATION, 1025.

III. DOMICIL, 1026.

IV. JURISDICTION OF ENGLISH COURTS, 1031.

V. CONTRACTS, 1034.

VI. FOREIGN JUDGMENTS, 1038.

I. FOREIGN GOVERNMENTS AND AMBASSADORS.

Recognition of de facto Government—Rebel State—De jure Government.—Where the revolutionary or de facto government of a country has been recognised by the government of a foreign state, a subject of such foreign state may safely contract with that de facto government; and if, by subsequent revolution, the previously existing government of the country is restored, the restored government is bound by international law to treat any such contract as valid, and in a litigation with the foreigner, party to the contract, must adopt the contract, merely taking such rights as the de facto government might have had under it:—Semble, that even in the case of a contract by a foreigner with a rebel state which has not been internationally recognised, property acquired under it cannot be recovered from him in violation of the contract. *Republic of Peru v. Dreyfus*, 38 Ch. D. 348; 57 L. J., Ch. 536; 58 L. T. 433; 36 W. R. 492—Kay, J.

Immunities of Ambassador—Attaché—Liability for Rates.—An attaché to an ambassador in this country of a foreign state is not liable for rates assessed on his private residence. *Parkinson v. Potter*, 16 Q. B. D. 152; 55 L. J., Q. B. 153; 53 L. T. 818; 34 W. R. 215; 50 J. P. 470—D.

Semble, if there is evidence that a certain person is treated at the embassy of a foreign nation in England as a member of the legation, and is employed from time to time by the ambassadors of that nation, it is not for the court to measure the quantum of the services either required from or rendered by him. *Id.*

II. ALIENS—NATURALISATION.

Aliens—Electoral Status of Persons Born in Hanover before the Queen's Accession.]—At a parliamentary election in 1885 the following persons voted:—(1) Persons born in the kingdom of Hanover before 1837 and not naturalised; (2) persons born in that kingdom since 1837 of parents born there before that date and not naturalised; (3) a person born in Prussia since 1837 of parents born in Hanover in 1802 and not naturalised:—Held, that such persons are aliens in the contemplation of the law relating to parliamentary elections, and as such disentitled to vote though upon the register. *Isaacson v. Durant*, 17 Q. B. D. 54; 55 L. J., Q. B. 331; 54 L. T. 684; 34 W. R. 547—D.

Qualified Naturalisation—Infants—Guardian—Jurisdiction.]—In 1861 B., a Frenchman, came to England, and in 1871 obtained from the British Home Office a certificate of naturalisation, declaring that he was thereby naturalised as a British subject, and that upon taking the oath of allegiance he should in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations to which a natural-born British subject was entitled or subject in the United Kingdom, with this qualification, "that he shall not, when within the limits of the foreign State of which he was a subject previously to his obtaining his certificate of naturalisation, be deemed to be a British subject unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect." In 1870 B. married an Englishwoman. Two children were born in Paris, and their births registered at the British Embassy. In 1886 B. died at Neuilly, having by will made in French form given the residue of his property to his two children. Half the property was in France and half in England. In June, 1887, B.'s widow died. On summons by an English half-brother of the children for the appointment of himself as guardian:—Held, that the certificate was not a certificate of naturalisation absolutely to all intents and purposes, but that the naturalisation was qualified, and did not deprive B. of his status as a French subject:—Held, that, as B. was at the time of his death a French subject, and his children were French subjects, the English court had no jurisdiction. *Bourgoise, In re*, 41 Ch. D. 310; 58 L. T. 431; 37 W. R. 563—Kay, J. See *S.C.* in C. A., 41 Ch. D. 310; 60 L. T. 553; 37 W. R. 563.

British Subject Naturalised in Foreign Country.]—A testator who was by birth a British subject, and was the father of the plaintiff, went to reside in Switzerland, and in the year 1842 acquired the "Landrecht" or "Indigenat" in the canton of Zurich, without being required to renounce his English nationality, which in the then state of English law he could not have effectually done; and he thereby became of Swiss nationality. With the sanction of the cantonal authorities he could have relinquished this "Landrecht" or "Indigenat," but he never effectually did so, although he afterwards left Switzerland and went to reside in France, where he died with a French domicile in the year 1878:—Held, that the 6th section of the Naturalisation Act, 1870, applied to the

testator; that at the time of his death he was a Swiss, and not a British subject; and that, having regard to the French law, under which the Swiss tribunals were the proper forum, the courts of Zurich had jurisdiction to decide upon the right of succession to his personal estate:—Held, also, that notwithstanding an attempted disposition by the testator of the whole of his personal estate in favour of a stranger, the plaintiff was, in accordance with a judgment of the courts of Zurich, entitled as the testator's only child to nine-tenths of such estate as his compulsory portion. *Trufort, In re, Trafford v. Blanc*, 36 Ch. D. 600; 57 L. J., Ch. 135; 57 L. T. 674; 36 W. R. 163—Stirling, J.

III. DOMICIL.

General Principles.]—A change of domicile must be a residence sine animo revertendi. A temporary residence for the purposes of health, travel, or business, does not change the domicile. Also (1) every presumption is to be made in favour of the original domicile; (2) no change can occur without an actual residence in a new place; and (3) no new domicile can be obtained without a clear intention of abandoning the old. *Lauderdale Peerage, The*, 10 App. Cas. 692—H. L. (Sc.)

English Subjects visiting Colonies.]—When English settlers go out to a province conquered by the English, they carry with them, so far as may be applicable to their purpose, all the immunities and privileges of the law of England as the law of England was at that time. *Ib.*—Per Blackburn, Lord.

Not arising from Society or Locality—Anglo-Egyptian.]—There is no such thing as domicile arising from society and not from connexion with a locality; consequently, as Cairo is not a British possession governed by English law, a testator's permanent abode therein under British protection does not attract to him an English or Anglo-Egyptian domicile. *Tootal's Trusts, In re* (23 Ch. D. 532) approved. *Abd-El-Messih v. Farra*, 13 App. Cas. 431; 57 L. J., P. C. 88; 59 L. T. 106—P. C.

Presumption as to—Officer—Anglo-Indian.]—The mere fact that a person bears an English name, and is an officer in the British army, does not raise any presumption that his domicile is English as distinguished from Scotch or Irish. The cases relating to Anglo-Indian domicile commented on and explained. *Cunningham, Ex parte, Mitchell, In re*, 13 Q. B. D. 418; 53 L. J., Ch. 1067; 51 L. T. 447; 33 W. R. 22; 1 M. B. R. 137—C. A.

What Evidence Admissible.]—Evidence of subsequent as well as of prior acts is admissible for the purpose of ascertaining a person's domicile at a given period. *Grove, In re, Vaucher v. Solicitor to the Treasury*, 40 Ch. D. 216; 58 L. J., Ch. 57; 59 L. T. 587; 37 W. R. 1—C. A.

Evidence of Abandonment—Terms of Foreign Law in Will.]—A Scotchman came to live in England and acquired an English domicile. He afterwards went for ten years to France, and

returned to England where he soon after died. He left an unsigned will of personal estate made in 1827, which was drawn by a Scotch lawyer, and contained several technical words of Scotch law. The will was admitted to probate by the English court. Semble, that the testator died domiciled in England, his residence in France not being sufficient evidence of his intention to abandon his English domicil. Semble, also, that the use of some technical Scotch words in the will, did not furnish sufficient indication of the intention of the testator to induce the court to construe it according to Scotch law. *Bradford v. Young*, 29 Ch. D. 617; 53 L. T. 407; 33 W. R. 860—C. A. Affirming in part 54 L. J., Ch. 96—Pearson, J.

Residence—Will in English Form—Intention.—A testator was born in Scotland in 1832 of Scotch parents; he came to London in 1848, and in 1855 he went to Calcutta, and became first a clerk, and then a partner in the firm of Jardine, Skinner, & Co. In 1877 he retired from business, returned to England, and subsequently became a member of the Indian Council. He first took a house at Southampton for sixteen months, and lived there with his wife and family. In 1878 he took a five years' lease of a house at Surbiton, and lived there until 1883, when he took a lease of a house in London for seven, fourteen, or twenty-one years, with an option of purchase at the end of two years, which option he did not exercise. He lived there until 1887, when he died. He made his will in Calcutta in English form, leaving his property, which consisted entirely of personalty in England, to his wife for life, with remainder to his four children equally. He had no property in Scotland. On originating summons :—Held, that there was no indication of intention upon the part of the testator upon his return from India to go back to Scotland, or to treat himself as a Scotchman. If he had intended to remain a Scotchman, he would have made his will in Scotch form; because a man's personal property in any locality was governed by his domicil. The fact that he set up his place of residence in successive houses in England with his wife and family, showed an intention of permanently residing in England, and was sufficient to fix him with an English domicile. *Bullen-Smith, In re, Berners v. Bullen-Smith*, 58 L. T. 578—Kay, J.

Abandonment of Domicil of Choice—Change of Intention—Revival of Domicil of Origin.—In order to lose the domicil of choice and revive the domicil of origin it is not sufficient for the person to form the intention of leaving the domicil of choice, but he must actually leave it with the intention of leaving it permanently. *Marrett, In re, Chalmers v. Wingfield*, 36 Ch. D. 400; 57 L. T. 896; 36 W. R. 344—C. A.

In 1855 a domiciled Manxman came to England and married an Englishwoman, and resided in England for twenty years. At the date of the marriage the wife was entitled to a vested reversionary interest in a legacy which fell into possession in 1885. In 1875 the husband and wife returned to the Isle of Man, where the husband carried on business till 1878, when he became insolvent, and executed a deed of assignment of all his property, including his wife's interest in the legacy, for the benefit of his creditors. In 1880 the parties returned to England, where

they resided till 1882, when the husband went to Mexico to seek employment. The doctrine of a wife's equity to a settlement is unknown to Manx law :—Held, that the Manx domicil of the husband, which had been lost by the twenty years' residence in England, reverted on his return to the Isle of Man, that nothing happened afterwards to re-establish the English domicil, and that as the domicil was therefore Manx, the wife's equity to a settlement could not be asserted. *Marsland, In re*, 55 L. J., Ch. 581; 54 L. T. 635; 34 W. R. 540—Kay, J.

Military Service of Crown—Effect of, on Domicil.—The rule that a British subject does not, by entering into and remaining in the military service of the Crown, abandon the domicil which he had when he entered into the service, applies to an acquired domicil as well as to a domicil of origin. An infant, whose father was then living in Jersey, where he had acquired a domicil in place of his English domicil of origin, obtained a commission in the British army in 1854 and joined his regiment in England. He served with the regiment in different parts of the world, and ultimately, in 1863, he died in Canada, where he then was with the regiment. He had in the meantime paid occasional visits to Jersey while on leave :—Held, that he retained his Jersey domicil at the time of his death. *Macreight, In re, Paston v. Macreight*, 30 Ch. D. 165; 55 L. J., Ch. 28; 53 L. T. 146; 33 W. R. 838—Pearson, J.

P. was born in Scotland in 1792, of Scotch parents. In 1810 he obtained a commission in the army, and immediately proceeded with his regiment on foreign service, and served abroad till 1860, when he retired from the army. From 1860 till his death he resided in lodgings, hotels, and boarding-houses in various places in England, dying in 1882, intestate and a bachelor, in a private hotel in London, leaving no real estate in England, and no property whatsoever in Scotland. From the year 1810 till his death he never revisited Scotland, and for the last twenty-two years of his life never left the territorial limits of England :—Held, that the domicil of the intestate at his death was Scotch. *Patience, In re, Patience v. Main*, 29 Ch. D. 976; 54 L. J., Ch. 897; 52 L. T. 687; 33 W. R. 501—Chitty, J.

Englishwoman Marrying Foreigner Abroad—Acquisition of new Domicil—Abandonment of Domicil of Origin.—In 1839 N., a domiciled Englishwoman, being then an infant, married in France a Frenchman. Previously to the marriage she entered into a notarial contract dealing with her property according to French law. There were children of the marriage. In 1845 she separated from her husband and went with her children to reside in Jersey. In 1849 an act of separation of property between the husband and wife was made by the Royal Courts of Jersey. In 1853 N., believing her husband to be dead, went through the ceremony of marriage with B., and accompanied him and her children to New South Wales, where she lived until her death in 1879. Her husband did not in fact die until 1877. In 1878 she made a will, by which she left all her property to B. :—Held, that by going to New South Wales N. had acquired a new domicil there, inasmuch as there were present both the elements necessary for such acquisition—namely, the factum and the animus

manendi; but that, even if not so, it must be taken that she had abandoned her French domicil and that her English domicil of origin had revived:—Held also, following *Sottomayor v. De Barros* (3 P. D. 5), that the validity of the notarial contract must be decided according to the law of her domicil of origin, and consequently, she being an infant, that such contract was invalid:—Held, therefore, that there was nothing to prevent her making a will, or to disentitle B. to take under it as against the children of the French marriage. *Cooke's Trusts, In re*, 56 L. J., Ch. 637; 56 L. T. 737; 35 W. R. 608—Stirling, J.

The testatrix, whose domicil of origin was English, married a German subject, and resided in Germany until his death, which happened after the 12th May, 1870. After the death of her husband, she executed in Germany a will, which was valid according to the requirements of the English law, but not according to the requirements of the law of Germany:—Held, that the will was not entitled to probate in England. *Blowam v. Favre*, 9 P. D. 130; 53 L. J., P. 26; 50 L. T. 766; 32 W. R. 673—C. A.

The petitioner being a domiciled Englishwoman, in 1872 went through a form of marriage with an American citizen. She cohabited with him until February, 1879, in the United States, and in April, 1879, the Supreme Court of Columbia pronounced a decree dissolving the marriage on the ground of the husband's incapacity. She then returned to this country, and in 1886 presented a petition to this court praying for a declaration of nullity of marriage:—Held, that as the marriage was voidable and not void the petitioner had acquired an American domicil, that the American court had jurisdiction to dissolve the marriage, and that there being no longer a marriage in existence, this court had no jurisdiction. *Turner v. Thompson, or T. v. T.*, 13 P. D. 37; 57 L. J., P. 40; 58 L. T. 387; 36 W. R. 702; 52 J. P. 151—Hannen, P.

Husband of English Domicil living Abroad—Wife in England.]

—In proceedings for divorce it appeared that the petitioner had been born in France of French parents. When he was ten years old his parents settled in England, and the father subsequently obtained letters of naturalisation as a British subject. The petitioner when eighteen years of age went to Canada, where he took up the business of farming, bought a farm, served in the Canadian volunteers, and discharged the duties of a citizen of Canada. In 1878 he married the respondent, who was a Canadian, and in 1883 he brought her with their children to this country, where he resided for some years with his father. He had occasion to return several times to Canada, as he alleged, to look after his farm, and from 1884 was only seven months in this country. The respondent remained in England until the date of the alleged adultery, when she visited France:—Held, that the petitioner had not lost his English domicil—that the matrimonial home was in England, and that the Court had therefore jurisdiction over the proceedings. *D'Etchevoyen v. D'Etchevoyen*, 13 P. D. 132; 57 L. J., P. 104; 37 W. R. 64—Hannen, P.

Presumption of Jurisdiction of Foreign Court—Validity of Second Marriage.]—A. and B., both having an Irish domicil, were lawfully

married in Ireland, and resided in Ireland for a year after their marriage. They subsequently went to an English colony, where the husband was engaged in various pursuits, abandoned all idea of returning home, and visited England only for short periods and for temporary purposes. In the fifth year of cohabitation B. committed adultery with S., whose domicil was English, and in a suit instituted by A. in the colonial court, in which all parties were represented, a decree was pronounced dissolving the marriage. B. and S. shortly afterwards returned to England, where they went through the form of a marriage according to law:—Held, first, that it must be taken that A. was domiciled in the colony and that the divorce was valid; secondly, that the marriage between B. and S. was valid, for although the law prevailing in the colony prohibited the re-marriage of a guilty party as long as the innocent party remained unmarried, yet as the colonial divorce operated to annul the existing marriage and to restore the parties to the position of unmarried persons, they were free to remove from the jurisdiction and to contract a fresh marriage according to the laws of this country. *Scott v. Attorney-General*, 11 P. D. 128; 55 L. J., P. 57; 56 L. T. 924; 50 J. P. 824—Hannen, P.

S., an Austrian subject by birth and parentage, and a Roman Catholic by religion, contracted a valid marriage in Berlin with a lady of the same domicil as himself, but described in the marriage certificate as of the Evangelical religion. This marriage, which, by the law of Austria, was absolutely indissoluble, was subsequently dissolved in Berlin by mutual consent, on a petition presented by the wife. S. subsequently married in England an English Protestant lady, his first wife being still alive. The second wife petitioned this court for a decree of nullity, on the ground that the Berlin divorce did not effectually dissolve the first marriage of S., which, she alleged, was therefore still subsisting and binding:—Held, that the Berlin divorce was good; and, consequently, that the second marriage was good also. *Ingham v. Sachs*, 56 L. T. 920—Butt, J.

Illegitimate Child—Domicil of Origin or of Choice.]

—The illegitimate son of a Portuguese woman was sent to Scotland when a child, and remained under the control of his father's relations there, being sent to school in Scotland, and for a short time in Germany. At the age of eighteen he obtained an appointment in the English Customs Department, and went to Yarmouth, and afterwards to London, where he remained in the same employment till he was twenty-eight, when he returned to Scotland in ill-health, and soon afterwards became lunatic, in which state he remained until his death. While living in London he paid some visits to Scotland, where he retained apartments, in which he left his books, &c. According to Scotch law an infant can choose his own domicil at the age of fourteen:—Held, on the evidence, that his domicil was not Scotch. Semble, that his domicil was English. *Urquhart v. Butterfield*, 37 Ch. D. 357; 57 L. J., Ch. 521; 58 L. T. 750—C. A.

—Subsequent Marriage—Validity at Domicil of Birth.]—T., a German by birth, came to England in 1734, and remained there, carrying on business, till 1779. Soon after coming to

England he lived with P. as his wife, and by her had three children, born in 1744, 1745, and 1747. In 1749 he married W., and by her had one child, G. W. died in 1752, and in 1755 he married P., and by her had four more children. In 1774 he presented a petition to the council of Geneva, which he described as "his native country," seeking to establish the legitimacy in Geneva of his three children by P. born before marriage, by reason of his subsequent marriage with her, and the council made an order accordingly. T. died in 1779 in England, having by his will made in English form, described himself as of Tottenham, in Middlesex, and being possessed of leasehold property in London. A daughter of G. had died intestate a domiciled Englishwoman, and it became necessary to ascertain who were her next-of-kin, and the question was, whether the children of T. by P. born before marriage were legitimate or not:—Held, that T. had in 1744 acquired an English domicile, and the legitimacy of his children by P. must be determined according to the law of the place where their parents were domiciled at their birth, i.e., England, and that those born before marriage were, therefore, not legitimate. *Grove, In re, Vaucher v. Solicitor to the Treasury*, 40 Ch. D. 216; 58 L. J., Ch. 57; 59 L. T. 587; 37 W. R. 1—C. A.

Turkish Domicil—British Protected Subject.]

—The testator, a member of the Chaldean Catholic community, having a Turkish domicil of origin, fixed his permanent residence in Cairo, where he acquired the status of a protected British subject:—Held, that he died domiciled in the dominions of the Porte, and that the consular court at Constantinople, being bound by ss. 5 and 6 of the order in council of 1873 to follow the same principles which would have been observed by an English court of probate, was right in holding that the law of Turkey governing the succession to a member of the Chaldean Catholic community domiciled in Turkey should be followed in considering the power of testacy of the deceased and in distributing his effects. *Abd-El-Messih v. Farra*, 13 App. Cas. 431; 57 L. J., P. C. 88; 59 L. T. 106—P. C.

IV. JURISDICTION OF ENGLISH COURTS.

Foreign or English Domicil.]—*See supra*, II. and III.

Administration Action—Scotch Assets of Testator domiciled in Scotland.]—An action was brought in England by an infant beneficiary to administer the estate of a testator domiciled in Scotland. The bulk of the estate was in Scotland, and four out of six trustees and executors were domiciled there. The will was proved both in Scotland and England. The trustees all appeared to the writ, without protest, and at their suggestion an inquiry was directed whether the action was for the plaintiff's benefit, which resulted in a decision that it was. At the trial (the English assets having been meanwhile transferred to Scotland) the trustees objected to the jurisdiction of the court. No proceedings had been taken to administer the estate in the Scotch court:—Held, first, that the court had jurisdiction to order an administration:—secondly, that,

under the circumstances of the case, it had no discretion in the matter, but was bound to make the order, though the action might be stayed before or after decree if it appeared that proceedings were pending in a Scotch court equally beneficial to the plaintiff. *Dicta* of Lord Westbury in *Enokin v. Wylie* (10 H. L. Cas. 1) disapproved. *Ewing v. Orr-Ewing*, 9 App. Cas. 34; 53 L. J., Ch. 435; 50 L. T. 401; 32 W. R. 573—H. L. (E.).

—Estate of domiciled Scotch Testator—Trust Funds partly in Scotland partly in England.]

—A resident and domiciled Scotchman died leaving a trust disposition and settlement appointing six trustees: three were resident in Scotland, one, being a Scotch member of Parliament, resided in Scotland when Parliament was not sitting, and the other two were resident in England. The truster had a very large amount of personalty in Scotland as well as heritable estate; and a trifling amount of personal estate only in England. The trustees proved the trust deed in Scotland, and were confirmed as executors. They then had the Scotch probate sealed in accordance with 21 & 22 Vict. c. 66, s. 12, and thus became the personal representatives in England. They removed all but a small portion of the personalty in England into Scotland. A person resident in England, who was entitled to a share of a large legacy, and also to a share of the residue, brought an action in England to administer the estate. The trustees were served and entered an appearance. The plaintiff, an infant, in the English action moved for judgment for administration of the whole estate, and on the 29th November, 1882, the Court of Appeal granted the order. The trustees lodged an appeal to this House. In June, 1883, the trustees carried certain accounts into chambers in the English action. On the 5th July, 1883, four of the residuary legatees commenced this action in Scotland against the trustees for, inter alia, declarator that the trustees were bound to administer the estate in Scotland, subject to the Scotch law, and under the authority and jurisdiction of the Scottish courts alone; and that they were not entitled to place the estate under the control of the English court or any other foreign tribunal furth of Scotland, and for interdict; or, alternatively, to the conclusion for interdict for the removal of the trustees, for sequestration of the estate, the appointment of a judicial factor, and for interdict until the estate should be vested in the judicial factor. On the 30th November, 1883, this House affirmed the order of the Court of Appeal. On the 29th February, 1884, the Court of Session granted an interlocutor finding in terms of the declaratory conclusions of the summons: sequestrating the estate, appointing a judicial factor and interdicting the trustees from removing any title-deeds, &c., from Scotland, or accounting to anyone otherwise than the judicial factor. On appeal taken by order of the Court of Chancery in England:—Held, that the decerniture in terms of the declaratory conclusions of the summons, which in effect affirms the exclusive competency of the Scottish jurisdiction, was not supported by statute or authority; and, therefore, that part of the principal interlocutor and that part of the interdict relating to accounting must be reversed; but the remaining portion of the principal interlocutor and the others ap-

pealed from must be affirmed, because the Scotch courts had (1) full jurisdiction to sequestrate the estate in Scotland—the persons of the trustees and the trust property being there—and to appoint a judicial factor; and (2) because in the circumstances and on the undertaking given as to the infant plaintiff becoming a party to the Scotch administration, a *prima facie* case of convenience in favour of a judicial administration in Scotland had been made out. Dicta of Lord Cottenham, in *Preston v. Melville* (2 Rob. App. 107), explained, and of Lord Westbury, in *Enohin v. Wylie* (10 H. L. C. 13), dissented from. *Ewing v. Orr-Ewing*, 10 App. Cas. 453; 53 L. T. 826—H. L. (Sc.).

— **Liability for Waste under Implied Contract.—Tort—Actio Personalis moritur cum Persona.**—The possessor of Austrian entailed estates died domiciled in, and leaving property in, England. By the law of Austria the possessor is under an obligation to hand over the property to the successor in as good a state as when he received it, and is liable for deterioration, whether voluntary or permissive, unless it occurs without any fault of his, and he is entitled to compensation for improvements made by him. The successor brought a creditor's action in England against the English executrix, in which it was admitted by the parties that there was some deterioration, and also that some improvements had been made. The court below made a decree for administration with liberty to the plaintiff to take proceedings in the courts of the countries in which the estates were situate, to establish the amount of his claim:—Held, on appeal, that the objection that the plaintiff's claim was for a tort analogous to waste, and therefore, according to English law, died with the person, and could not be enforced in an English court, was not sustainable, for that the deteriorations were not to be regarded as torts, but as breaches of an obligation in the nature of an implied contract; but that the accounts in an administration suit ought not to be directed till it was ascertained that a sum was due to the plaintiff. *Batthyany v. Walford*, 36 Ch. D. 269; 56 L. J., Ch. 881; 57 L. T. 206; 35 W. R. 814—C. A.

— **Testator domiciled in Jersey—Persons interested under Will in this Country.**—A testator died, domiciled in Jersey, leaving a widow and two infant children. By his will he gave the whole of his personal property, subject to a certain annuity to his wife, to his children. He died possessed of 13,000*l.* of English Consols, and also of certain property in Jersey. The principal part of the latter consisted of a share in the property of a certain partnership, which had since his death become insolvent. His widow and two others were his executrix and executors. A gentleman resident in Jersey was shortly after the testator's death appointed "tuteur" of the infant children in accordance with the law of Jersey. The widow married again, and with the two children came to reside in England. An action was commenced in the Chancery Division by the infant children for administration of the testator's real and personal estate, and for the appointment of guardians. Leave was given for the service of the writ out of the jurisdiction on the "tuteur" and executors in Jersey; but after service, and before appear-

ance, they moved to discharge the order, on the ground that the proceedings were wrongly instituted in this country:—Held, that inasmuch as the plaintiffs were resident in England, and the bulk of the property was in England, there was no reason why the action should not be brought there. *Lane, In re, Lane v. Robin*, 55 L. T. 149—Pearson, J.

— **Deceased Domiciled Abroad—Foreign Creditors.**—In the administration in England of the English assets of a foreigner who died domiciled abroad, no priority is given to English creditors over foreign creditors, but all take *pari passu*. *Klaebe, In re, Kannreuther v. Geiselbrecht*, 28 Ch. D. 175; 54 L. J., Ch. 297; 52 L. T. 19; 33 W. R. 391—Pearson, J.

— **Distribution of Property—Decision of Foreign Tribunal.**—Although the parties claiming to be entitled to the estate of a deceased person may not be found to resort to the tribunals of the country in which he was domiciled, and although the courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and may in such a case be bound to ascertain as best they can who according to the law of the domicile are entitled to the estate, yet where the title has been adjudicated upon by the courts of the domicile, such adjudication is binding upon and must be followed by the courts of this country, *Enohin v. Wylie* (10 H. L. C. 1), *Ewing v. Orr-Ewing* (10 App. Cas. 453), *Dogliani v. Crispin* (1 L. R., H. L. 301); even if the judgment of the foreign court has by the default of the party complaining of the judgment proceeded on a mistake as to the English law, *Castrique v. Imrie* (4 L. R., H. L. 414), *Godard v. Gray* (6 L. R., Q. B. 139), or the whole of the facts were not before the foreign tribunal (*De Cosse Brissac v. Rathbone*, 6 H. & N. 301); for the courts of this country do not sit to hear appeals from foreign tribunals, and if the decision of the foreign tribunal is wrong, recourse must be had to the mode of appeal provided in the foreign country (*Bank of Australasia v. Nias*, 16 Q. B. 717). *Trufoort, In re, Trafford v. Blanc*, 36 Ch. D. 600; 57 L. J., Ch. 135; 57 L. T. 674; 36 W. R. 163—Stirling, J.

Payment out of Court—Attainment of Age according to Law of Domicil.—Funds in court in this country, placed to the separate credit of an infant domiciled abroad, were paid out to her on attaining her full age, according to the law of her then and native domicile, although she had not come of age according to English law. *Donohoe v. Donohoe*, 19 L. R., Ir. 349—V. C.

Winding up—Foreign Company.—See COMPANY, XI. 1.

— **Restraining Creditors and Actions abroad.**—See COMPANY, XI. 4.

Restraining Actions abroad when Action pending here.—See PRACTICE (STAYING PROCEEDINGS).

V. CONTRACTS.

Reference to Foreign Law.—A reference to foreign law in any English contract does not incorporate the foreign law, but merely affects

the interpretation of the contract. *Dever, Ex parte, Suse, In re*, 18 Q. B. D. 660; 56 L. J., Q. B. 552—C. A.

Marriage Settlement—English Husband and Scotch Wife—Scotch Form—Lex loci.—In 1849 an Englishman domiciled in England married a Scotch lady in Scotland. Previously to the marriage the parties executed a "contract of marriage" in the Scotch form. The intended husband thereby bound himself, his heirs, executors, and successors, to pay to the intended wife, in case she should survive him, an annuity of 200*l.*, and further to pay 3,000*l.* to the children of the marriage after his death. After the marriage the parties resided in England. In 1870 the husband died there, having by his will, dated in 1863, but which did not in any way refer to the marriage contract, given his residuary estate to trustees upon trust to pay the income thereof to his wife for life, with remainder as to the capital to his children equally at twenty-one. The wife died in England in 1886, having made a will appointing executors. During her widowhood she never received the annuity under the contract, but enjoyed the income of her husband's residuary estate. There were two children of the marriage, both of whom survived their father, but predeceased their mother, having attained twenty-one. The husband's estate being insufficient to satisfy both the arrears of the widow's annuity and the 3,000*l.* payable to the children, the question was raised, by originating summons, whether the contract was to be construed according to Scotch law (under which the provision of an annuity to the wife on marriage imports a *ius crediti* in her favour, entitling her to rank *pari passu* with her husband's other creditors, the children having only a *spes successionis*), or according to the English law:—Held, that the intention of the parties on entering into the contract must be considered; that the fact that it was entered into in the Scotch form led to the inference that it was to be construed not according to the law of England, but according to the law of Scotland; and that the case was governed by *Guepratte v. Young* (4 De G. & Sm. 217), and that, therefore, as the husband's assets were not more than enough to satisfy the paramount claim of the wife's representatives to the arrears of her annuity, the claim of the children in the division of the assets failed. *Barnard, In re, Barnard v. White*, 56 L. T. 9—Kay, J.

—Englishwoman with Foreign Husband.—By a settlement made in 1881, upon the marriage of an English lady with a Spaniard, certain real estate in England, the property of the lady, was, with the approbation of the intended husband, "given in consideration of the renunciation that day executed by her of any rights which she would otherwise have acquired by marriage in her husband's property according to the law of Spain," conveyed to a trustee to such uses as she should, notwithstanding coverture, by deed appoint. And it was thereby declared that the settlement was to be construed according to the law of England. By an indenture dated the 23rd of February, 1882, the wife, with the consent of her husband, appointed the real estate to a trustee in fee, upon trust to sell and to stand possessed of the proceeds of sale in trust for such persons as "she should at any time thereafter by any

writing appoint"; and, in default of appointment, in trust for her separate use. The wife died in June, 1882, without children, having, by her will, made immediately after her marriage, given four-fifths of her real and personal estate, in case she should leave no children, to her husband absolutely. According to the law of Spain, as she had died without children, two-thirds of her property belonged to her parents:—Held, that the deed of February, 1882, must be construed according to English law. *Hernando, In re, Hernando v. Sawtell*, 27 Ch. D. 284; 53 L. J., Ch. 865; 51 L. T. 117; 33 W. R. 252—Peerson, J.

—Infant domiciled abroad.—The appellant, the widow of a domiciled Scotchman, brought an action in the Court of Session, for the reduction of an ante-nuptial contract, by which in consideration of a provision made by her husband she purported to discharge her legal rights of *terce* and *jus relicte*. The contract was executed in Ireland by the appellant, who was then an infant domiciled in Ireland, but it was contemplated that she and her husband should reside, and they actually resided, during their married life in Scotland. The grounds upon which the appellant sought to obtain reduction of the contract were, that being an infant she was incapable of contracting by the law of Ireland, and minority and lesion according to the law of Scotland:—Held, that the capacity of the appellant to bind herself by the marriage contract must be determined by the law of her domicile (i.e., the Irish or English law), and that under such law she could not as an infant incur an obligation which was not shown to be for her benefit, and that she was therefore at liberty to avoid the contract and claim her legal rights as a Scotch widow. *Cooper v. Cooper*, 13 App. Cas. 88; 59 L. T. 1—H. L. (Sc.). See also, *Cooke's Trusts, In re*, ante, col. 1029.

Marriage in uncivilized Country between domiciled Englishman and Woman of barbarous Tribe—Native Customs.—A union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England, unless it is formed on the same basis as marriages throughout Christendom, and be in its essence the voluntary union for life of one man and one woman to the exclusion of all others. *Bethell, In re, Bethell v. Hildyard*, 38 Ch. D. 220; 57 L. J., Ch. 487; 58 L. T. 674; 36 W. R. 503—Stirling, J.

C. B., an Englishman, in 1878 went to South Africa, and while there married T., a woman of a semi-barbarous tribe, according to the native customs. No religious form or ceremony was gone through, and, beyond the taking of the woman, the native ceremony consisted simply in the bridegroom slaughtering an ox and sending the head to the bride's parents. By the custom of the tribe polygamy was practised, but C. B. never had more than the one wife, whom he took to his house, and he continued to live with her alone until 1884, when he was killed while fighting with the Boers. Ten days after his death T. gave birth to a female child. C. B. kept up communication with various members of his family in England, but never mentioned

his marriage, and by a testamentary document he made some provisions out of his property in South Africa for T., and any child which she might have by him. Under the will of his father he was entitled to real estate in England for life, with remainder to his children, with remainder over in default of issue:—Held, that the union between C. B. and T. was not a valid marriage according to the law of England. *Ib.*

Bill of Exchange—Foreign Endorsement.—Bills of exchange were drawn in France by a domiciled Frenchman in the French language, in English form, on an English company, who duly accepted them. The drawer indorsed the bills and sent them to an Englishman in England:—Held, that the acceptor could not dispute the negotiability of the bills by reason of the indorsements being invalid according to French law. *Marseilles Extension Railway and Land Company, Smallpage and Brandon, In re*, 30 Ch. D. 598; 55 L. J., Ch. 116—Pearson J.

Assignment of Policy of Assurance — Lex Loci.—The plaintiff sued the trustees of an English life assurance company as assignee from her husband of a policy of life assurance granted by the company. The assignment to the plaintiff was made in Cape Colony, the assignor being then domiciled in that colony, where he remained until death. By the law of Cape Colony such an assignment was void, because the assignee was the wife of the assignor:—Held, that the law of Cape Colony applied to the assignment of the policy, and that the defendants were entitled to judgment. *Lee v. Abdy*, 17 Q. B. D. 309; 55 L. T. 297; 34 W. R. 653—D.

Contract of Affreightment—Law of the Flag—Lex loci—Charter-party.—A claim was made by an American citizen in the winding-up of a British steamship company for damages for loss of his cattle arising through the negligence of the master and crew. The ship in which the cattle were carried was a British ship trading between Boston and Liverpool. The charter-party contained express stipulations exempting the company from liability caused by the negligence of the master and crew. The cattle were shipped at Boston, and bills of lading were given there, in conformity with the contract. The ship stranded on the coast of North Wales, owing, as was admitted, to the negligence of the master and crew. According to the law of the State of Massachusetts, as at present ascertained, the stipulations exempting the owners from liability through negligent navigation were void; but according to English law such stipulations were good, and were usually inserted in English bills of lading. The question was whether the law of the flag (that is to say, the personal law of the shipowner) or the *lex loci contractus* should govern the contract of affreightment:—Held, on the authority of *Lloyd v. Guibert*, (1 L. R., Q. B. 115), that the stipulations were valid, first on the general ground that the contract was governed by the law of the flag; and, secondly, on the particular ground that from the special provisions of the contract itself it appeared that the parties were contracting with a view to the law of England. *Missouri Steamship Company, Monroe's Claim, In re*, 58 L. T. 377; 6 Asp. M. 264—Chitty, J. Affirmed, 37 W. R. 696—C. A.

Made in England between Merchants residing there, for Delivery in London of Goods shipped Abroad by Foreign Company—Vis major.—The defendants, a London firm, contracted in London to sell to the plaintiffs, merchants in London, 20,000 tons of Algerian esparto, to be shipped by a French company at an Algerian port, at certain prices, according to specified qualities, on board vessels to be provided by the plaintiffs in London, and to be paid for by the plaintiffs in London by cash on or before arrival of the ship or ships at her or their port of destination, less interest at 5 per cent. per annum for the unexpired portion of three months from date of bill of lading, for the full amount of the invoice based on shipping weight. The defendants caused to be delivered, and were paid for, 9,000 tons of esparto, but failed to deliver the remaining 11,000 tons. In an action for this breach of contract:—Held, that the contract was an English contract and to be construed and dealt with according to the law of this country; and consequently, that it was no answer to say that by the French law (which prevailed at the port of shipment) the defendants were excused from performing their contract if prevented from so doing by "force majeure," viz., the prohibition by the constituted authorities of the export of esparto from Algeria, by reason of an insurrection and consequent hostilities in that country. *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. 589; 53 L. J., Q. B. 156; 50 L. T. 194; 32 W. R. 761—C. A.

Certificates negotiated in England—Foreign Securities.—In an action to determine whether a bank were entitled to certain certificates of American securities:—Held, that as the question whether the bank was to be deemed rightfully in possession of the certificates turned upon transactions in England it was to be decided by English and not by American law, though the consequences of being rightfully in possession of them depended on American law. *Williams v. Colonial Bank*, 38 Ch. L. 388; 57 L. J. Ch., 826; 59 L. T. 643; 36 W. R. 625—C. A.

VI. FOREIGN JUDGMENTS.

Action on—Ord. XIV.—An action upon a foreign judgment is an action for debt arising out of a contract within the meaning of Ord. III. r. 6, in which leave may be given to the plaintiff under Ord. XIV. to sign final judgment for the amount claimed. *Hodson v. Bawter* (28 L. J., Q. B. 61) followed. *Grant v. Easton*, 13 Q. B. D. 302; 53 L. J., Q. B. 68; 49 L. T. 645; 32 W. R. 239—C. A.

Two kinds in Spain—Judgment not final.—According to the law of Spain a person in whose favour documents of a certain class have been executed can commence "executive" proceedings in which the defendant can only plead defences not disputing the original right of action, and the plaintiff, if successful, obtains a "remate" judgment, which is an order for execution to issue for a sum of money and costs. A "remate" judgment does not preclude either party from taking "plenary" or "ordinary" proceedings as to the same subject-matter, and in such ordinary proceedings all defences are open, and neither party can set up the "remate" judgment as a

res judicata, or even as giving him a *prima facie* case, and the rights of the parties are not affected by it. The plaintiff can, however, on giving security, enforce the "remate" judgment though plenary proceedings are pending:—Held, that a "remate" judgment, as it did not, according to the law of Spain, decide the rights of the parties, was not a final and conclusive judgment which could be sued upon in this country, and did not enable the plaintiff to maintain a suit here for administration of the estate of the defendant in the executive proceedings who had since died. *Henderson, In re, Nouvion v. Freeman*, 37 Ch. D. 244; 57 L. J., Ch. 367; 58 L. T. 242—C. A.

On what Grounds impeached in English Courts.—A foreign judgment cannot, as between the same parties, be impeached in this country on the ground that it proceeded on a mistake of law. A foreign judgment binds, notwithstanding the discovery of fresh evidence, for the courts of this country will not either re-hear cases tried by, or hear appeals from foreign tribunals; and if the judgment of a foreign court is erroneous, the regular mode provided by every system of jurisprudence, of procuring it to be examined and reversed, ought to be followed. *Trufort, In re, Trafford v. Blanc*, 36 Ch. D. 600; 57 L. J., Ch. 135; 57 L. T. 674; 36 W. R. 163—Stirling, J.

Defendant's Appearance to Protect Property from Seizure.—It is no answer to an action upon the judgment of a foreign court that at the time of the proceedings in the foreign court the defendant was not resident or domiciled or under allegiance in the foreign country, and appeared in the foreign court as defendant merely to protect his property from seizure in case judgment by default should be given against him in the foreign court. *Voinet v. Barrett*, 55 L. J., Q. B. 39; 34 W. R. 161—C. A.

Only Evidence of Debt.—A foreign judgment is only evidence of a debt. *Hawkesford v. Giffard*, 12 App. Cas. 122; 56 L. J., P. C. 10; 56 L. T. 32—P. C.

INTERPLEADER.

1. *In what Cases.*
2. *Practice.*
3. *Appeal.*

1. IN WHAT CASES.

Sheriff—Money paid without Levy.—Where the sheriff seized goods under a *fi. fa.*, and a person other than the person against whom the process issued claimed the goods and paid out the sheriff under protest:—Held, that the money so paid to the sheriff under protest was the proceeds of goods taken in execution within the meaning of Ord. LVII. r. 1 (b.), and that therefore the sheriff was entitled to interplead in respect thereof. *Smith v. Critchfield*, 14 Q. B. D. 873; 54 L. J., Q. B. 366; 54 L. T. 122; 33 W. R. 920—C. A.

Stakeholder—Part only of a single Claim—Staying Proceedings.—A debtor against whom an action has been brought, and who has had notice of assignment of the debt, may interplead as to part only of the claim, and may dispute the residue. His application for relief may either be made in the action under Ord. LVII. rr. 1, 4, or by a separate proceeding under s. 25, sub-s. 6, of the Judicature Act, 1873. If an interpleader order be made on a separate proceeding under s. 25, sub-s. 6, of the Judicature Act, 1873, the judge making the order has no power to stay the proceedings in an action already commenced against the debtor. *Reading v. London School Board*, 16 Q. B. D. 686; 54 L. T. 678; 34 W. R. 609—D.

—Indemnity to—Objection by Claimant indemnifying to Issue.—The objection that a stakeholder has, by merely taking an indemnity from one of two rival claimants to property in his hands, disentitled himself to relief under the Interpleader Acts because he has identified himself with and must be taken to "collude" with the claimant who gave the indemnity, cannot be raised by that claimant himself, and the decisions in *Tucker v. Morris* (1 Cr. & M. 73), and *Belcher v. Smith* (9 Bing. 82), do not apply. *Thompson v. Wright*, 13 Q. B. D. 632; 54 L. J., Q. B. 32; 51 L. T. 634; 33 W. R. 96—D.

Liverpool Court of Passage—Jurisdiction.—The rules of the Court of Passage do not give that court the jurisdiction in interpleader contained in Ord. LVII. r. 8, of the rules of the Supreme Court, 1883, and that even if rules had been framed to that effect they could not give such a jurisdiction, as they would be in that respect *ultra vires*. The power to decide summarily without consent questions in interpleader is not a "rule of law" within the meaning of s. 91 of the Judicature Act, 1873. *Speers v. Daggers*, 1 C. & E. 503—Wills, J.

—Protection of Officers.—Officers of the court are not protected in the case of process executed under an interpleader order made without jurisdiction, though good on the face of it, if such order was obtained on their own application. The relief or remedy, the power to grant which is conferred on superior courts by s. 89 of the Judicature Acts, 1873, only refers to the relief and remedies to be administered in the action, and as the result of the action, and not to an incidental and extraneous proceeding arising out of the levy of execution, such as interpleader. *Ib.*

2. PRACTICE.

Service of Summons out of the Jurisdiction.]

—Where the plaintiffs sued for goods in the possession of the defendant, and it appeared that a foreigner residing out of the jurisdiction claimed the right to the same goods, and would probably sue the defendant in respect of them, the court gave the defendant leave to serve an interpleader summons out of the jurisdiction upon the foreigner. The effect of service out of the jurisdiction in such a case is to give the foreigner notice of the proceedings within the jurisdiction, so that he may appear and prosecute his claim, or, if he does not appear, so that

any future claim prosecuted by him against the defendant in respect of the subject-matter of the action within the jurisdiction may be barred. *Credits Gerundense v. Van Weede*, 12 Q. B. D. 171; 53 L. J., Q. B. 142; 32 W. R. 414; 48 J. P. 184—D.

Summons—Particulars of Claim.]—Where, upon an interpleader summons by the sheriff, a claimant alleges that he is entitled, under a bill of sale, or otherwise by way of security for a debt, to the goods seized in execution, and an order is made for the sale of the goods and the satisfaction of the claim out of the proceeds of the sale, the claimant is not entitled to demand from the sheriff any sum not included in the particulars of claim on which the order was made. *Hockey v. Evans*, 18 Q. B. D. 390; 56 L. J., Q. B. 253; 56 L. T. 179; 35 W. R. 265—C. A.

Goods taken in Execution—Right of Third Party.]—On an interpleader issue with regard to goods taken in execution, where the evidence shows that the claimant had not any interest in nor the possession of the goods at the time of seizure, but they belonged to a third person, the execution creditor is entitled to succeed. On an interpleader issue between the execution creditor and a claimant the facts were as follows:—The claimant, having let the goods afterwards taken in execution, for hire, became bankrupt. He did not inform the trustee in bankruptcy that he owned these goods, and the hirer of the goods, being unaware of the bankruptcy, continued to pay the claimant money for the hire of them. The goods, while in the possession of the hirer, were taken in execution under a judgment against him:—Held, that upon the above facts, assuming the execution debtor to be estopped from denying that the goods were the claimant's, such estoppel did not bind the execution creditor, and the claimant had no title to the goods as against the execution creditor, who was therefore entitled to judgment on the issue. *Richards v. Jenkins*, 18 Q. B. D. 451; 56 L. J., Q. B. 293; 56 L. T. 591; 35 W. R. 255—C. A.

Onus of Proof—Issue between Trustee for Creditors and Execution Creditor—Irrevocability of Deed.]—When a debtor has made an assignment of his property to a trustee for the benefit of his creditors generally, and when the trustee sets up this deed of assignment against an execution creditor, the onus of proving that the deed is irrevocable and binding, as against such execution creditor, lies on the trustee; that is, the trustee has to prove that the deed has gone beyond the stage of being revocable, by showing that it has been communicated to a creditor, and assented to, or at least not dissented from, by him. The burden of giving such affirmative evidence lies on the person setting up the deed against the execution creditor. *Adnitt v. Hands*, 57 L. T. 370—D.

Sale by Sheriff—Bankruptcy of Execution Debtor—Right to Proceeds.]—See BANKRUPTCY, XI., 1.

Receiver and Manager instead of Sale.]—An interpleader issue being ordered to try the right to goods seized in execution, the court or a judge may, under the Judicature Act, 1873, s. 25, sub-s. 8, and Ord. LVII. r. 15, order that, instead of a sale by the sheriff, a receiver and

manager of the property be appointed. *Howell v. Dawson*, 13 Q. B. D. 67—D.

Withdrawal of Sheriff by Consent—Goods in Custodiâ legis.]—Where, after the making of an interpleader order, the sheriff, with the consent of the execution creditor and the claimant, temporarily withdrew from possession:—Held, that the goods were no longer in custodiâ legis, and that the landlord was entitled to distrain upon them, although he knew that the interpleader proceedings were pending. *Cropper v. Warner*, 1 C. & E. 152—Williams, J.

Order rescinded—Liability of Sheriff.]—Where an interpleader order provided that no action should be brought against the sheriff, and the order was subsequently rescinded, owing to the default of the execution creditor to return the issue:—Held, that the claimant had no cause of action against the sheriff for the original seizure. *Martin v. Tritton*, 1 C. & E. 226—Lopes, J.

Protection of Sheriff against Action for Trespass.]—Where the sheriff in the execution of a fi. fa. enters the premises of a person other than the execution debtor, and there seizes goods, believing erroneously that such goods belong to the execution debtor, the sheriff may, upon interpleader proceedings, be protected against an action for trespass to the land as well as against an action for seizure of the goods, if no substantial grievance has been done to the person whose premises are wrongfully entered. *Hollier v. Laurie* (3 C. B. 334) discussed and *Winter v. Bartholomew* (11 Ex. 704) approved. *Smith v. Critchfield*, 14 Q. B. D. 873; 54 L. J., Q. B. 366; 33 W. R. 920—C. A. See also *Speers v. Daggers*, supra.

Security for Costs.]—The rules in regard to security for costs on interpleader issues follow the analogy of the rules on the same subject in actions, and no special jurisdiction to require security for costs in interpleader is given by Ord. LVII. r. 15. *Rhodes v. Dawson*, 16 Q. B. D. 548; 55 L. J., Q. B. 134; 34 W. R. 240—C. A.

In an interpleader issue directed upon an application by a sheriff, who has received a notice of a claim to goods seized by him under a writ of fieri facias in execution of a judgment, both the plaintiff and the defendant in the issue are really in the position of the plaintiffs in an ordinary action, and, therefore, the defendant in the interpleader issue may be ordered to give security for costs in any case in which a plaintiff may be so ordered, and the rule, that a defendant cannot be compelled to give security for costs, does not apply. *Tomlinson v. Land and Finance Corporation*, 14 Q. B. D. 539; 53 L. J., Q. B. 561—C. A.

Costs—Form of Order—Sheriff.]—Where an interpleader has been directed on the application of the sheriff, and the claim of the third party fails, the strict form of order, upon which the sheriff is entitled to insist, is to direct the execution creditor to pay the sheriff's charges of the interpleader, with a remedy over to the execution creditor against the third party, though it is a

common form of order simply to order the third party to pay them to the sheriff. *Smith v. Darlow*, 26 Ch. D. 606; 53 L. J., Ch. 696; 50 L. T. 571; 32 W. R. 665—C. A.

— **Power of Master to award in Action.**—Under the Rules of 1883, Ord. LIV. r. 12 (i), limiting the power of the master to award costs other than those of any proceedings before him or specially authorised—the master in making an order barring the claimant upon an interpleader summons under Ord. LVII., when the applicant is a defendant, has no power under rule 15 to make it a term of the order that the plaintiff shall pay the costs of the defendant in the original action, apart from those in the interpleader proceedings, and an order to this effect is, notwithstanding 36 & 37 Vict. c. 66, s. 49, subject to appeal. *Hanson v. Maddox*, 12 Q. B. D. 100; 53 L. J., Q. B. 67; 50 L. T. 123; 32 W. R. 183—D.

— **Deduction of, by Shareholder.**—A stakeholder interpleading, who acts with good faith, is entitled, although not a defendant in an action, to deduct from the fund in dispute the costs occasioned by the interpleader proceedings. *Clench v. Dooley*, 56 L. T. 122—D.

— **Sheriff's Charges for Levy and Sale—Successful Party.**—A successful claimant on an interpleader issue is entitled as against an unsuccessful execution creditor to the amount of the sheriff's charges incurred in the matter of a levy and sale. *Seavie v. Matthews* (W. N. 1883, p. 176) approved. *Goodman v. Blake*, 19 Q. B. D. 77; 56 L. J., Q. B. 441; 57 L. T. 494; 35 W. R. 812—D.

3. APPEAL.

Proceedings transferred to County Court—Jurisdiction of Court of Appeal.—Interpleader proceedings were transferred under the Judicature Act, 1884, s. 17, from the Queen's Bench Division to a county court. On appeal from the judgment of the county court the Queen's Bench Division affirmed that judgment but gave leave to appeal to the Court of Appeal:—Held, that the Court of Appeal had jurisdiction under the Judicature Act, 1873, s. 45, to hear the appeal, that jurisdiction not having been taken away by the Appellate Jurisdiction Act, 1876, s. 20. *Crush v. Turner* (3 Ex. D. 303) approved. *Thomas v. Kelly*, 13 App. Cas. 506; 58 L. J., Q. B. 66; 60 L. T. 114; 37 W. R. 353—H. L. (E.)

County Court—Amount not exceeding £20.—An appeal does not lie, even by leave of the judge, from the decision of a county court in proceedings in interpleader, where neither the money claimed, nor the value of the goods and chattels claimed, or of the proceeds thereof, exceeds 20*l*. *Collis v. Lewis*, 20 Q. B. D. 202; 57 L. J., Q. B. 167; 57 L. T. 716; 36 W. R. 472—D.

— **Value of Goods Claimed, or of proceeds thereof, over £20.**—Where in an interpleader proceeding in a county court the claimant deposits the amount of the value of the goods

claimed as fixed by appraisal under s. 72 of the County Courts Act, 1856, he cannot, if the amount so deposited be less than 20*l*., claim to appeal under s. 68 of the act on the ground that the value of the goods was over 20*l*., and that a less amount was deposited because it was sufficient to satisfy the execution creditor's judgment. *White v. Milne*, 58 L. T. 225—D.

Summary Decision—Appeal by Sheriff.—The 23 & 24 Vict. c. 126, s. 17, makes a summary decision under the act final and conclusive "against the parties," but this does not apply to the sheriff; therefore a sheriff can appeal from an order made in a summary way. *Smith v. Darlow*, 26 Ch. D. 605; 53 L. J., Ch. 696; 50 L. T. 571; 32 W. R. 665—C. A.

— **Master to Judge.**—Where a master summarily decides an interpleader matter under Order LVII. r. 8, and gives leave to appeal, a judge at chambers has jurisdiction to entertain such appeal by virtue of the provisions of Ord. LVII. r. 11. *Webb v. Shaw*, 16 Q. B. D. 658; 55 L. J., Q. B. 249; 54 L. T. 216; 34 W. R. 415—D.

Upon the true construction of Ord. LIV. rr. 12 and 21, and Ord. LVII. rr. 8 and 11, an appeal lies from a summary decision of a master in an interpleader proceeding to a judge at chambers. *Clench v. Dooley*, 56 L. T. 122—D. See also *Bryant v. Reading*, *infra*.

— **Judge at Chambers to Divisional Court.**—A summary decision under Ord. LVII. r. 8, by a judge at chambers, on an interpleader summons, is final and conclusive, and no appeal lies from such decision, and there is no power to give leave to appeal. *Lyon v. Morris*, 19 Q. B. D. 139; 56 L. J., Q. B. 378; 57 L. T. 324; 35 W. R. 707—C. A.

— **At Chambers—From Divisional Court to Court of Appeal.**—By the combined operation of the Common Law Procedure Act, 1860, s. 17, and of the Appellate Jurisdiction Act, 1876, s. 20, no appeal lies to the Court of Appeal from a decision of the Queen's Bench Division upon an appeal from the summary decision at chambers of an interpleader summons, and r. 11 of the Rules of the Supreme Court, 1883, Ord. LVII., does not confer any power to give leave to appeal. *Waterhouse v. Gilbert*, 15 Q. B. D. 569; 54 L. J., Q. B. 440; 52 L. T. 784—C. A.

On an interpleader summons at chambers the master decided, at the request of one of the parties, and having regard to the value of the subject-matter in dispute, to dispose of the claims in a summary manner, and he adjourned the summons for the production of evidence. The claimant objected that it was a case for an issue, and appealed to a judge at chambers, who dismissed the appeal on the ground that the decision of the master was final. An appeal from the judge at chambers to the divisional court was dismissed. On appeal to the Court of Appeal:—Held, that the decision of the master was a summary decision within Ord. LVII. r. 8, and that therefore *Waterhouse v. Gilbert* (15 Q. B. D. 569) applied, and the Court of Appeal could not entertain the appeal. Quære, whether under Ord. LIV. r. 21, all decisions of a master, including a decision in a summary way in interpleader, are not the subject of appeal to a judge at chambers. *Bryant v. Reading*, 17 Q. B. D.

128; 55 L. J., Q. B. 253; 54 L. T. 524; 34 W. R. 496—C. A. S. C., 54 L. T. 300—D.

From Divisional Court—"Final Order"—Time.—The judgment of a divisional court affirming the judgment of the county court in an interpleader issue transferred to the county court under s. 17 of the Judicature Act, 1884, is a "final order" within Ord. LVIII. r. 3. *Hughes v. Little*, 18 Q. B. D. 32; 56 L. J., Q. B. 96; 55 L. T. 476; 35 W. R. 36—C. A.

From Judgment of Judge on Trial of Issue—To what Court.—Where it is sought to impeach the judgment of a judge on the trial of an interpleader issue with respect only to the finding of the facts or the ruling of the law, and not with respect to the final disposal of the whole matter of the interpleader proceedings, an appeal will lie from such judgment under s. 19 of the Judicature Act, 1873, as it will from any other judgment or order of a judge. *Dawson v. Fox*, or *Fox v. Smith*, 14 Q. B. D. 377; 54 L. J., Q. B. 299; 33 W. R. 514—C. A.

When an interpleader issue has been tried by a judge and jury, and upon the finding of the jury the judge has, under Ord. LVII. r. 13, pronounced judgment disposing of the whole matter of the interpleader proceedings, but has given leave to appeal, a party to the issue who is dissatisfied with both the finding of the jury and the judgment of the judge, may appeal under Ord. XL. r. 5, to a Divisional Court of the Queen's Bench Division, and under the Supreme Court of Judicature Act, 1873, s. 19, from that court to the Court of Appeal.—Semble, that *Burstall v. Bryant* (12 Q. B. D. 103) was wrongly decided. *Robinson v. Tucker*, 14 Q. B. D. 371; 53 L. J., Q. B. 317; 50 L. T. 380; 32 W. R. 697—C. A.

The appeal from a judgment of the court or a judge in any action or any issue ordered to be tried or stated in an interpleader proceeding, or from the decision of the court or a judge in a summary way in an interpleader proceeding, lies direct to the Court of Appeal, and in no case to the divisional court; and it is immaterial whether the judge whose judgment is appealed against gives or refuses special leave to appeal. *Burstall v. Bryant*, 12 Q. B. D. 103; 49 L. T. 712; 32 W. R. 495; 48 J. P. 119—D.

INTERROGATORIES.

See DISCOVERY.

INTESTACY.

Descent of Estate.—See ESTATE.

Distribution of Personal property.—See EXECUTOR AND ADMINISTRATOR (ASSETS).

Application for Appointment of New Trustee.—See TRUST AND TRUSTEE.

INTOXICATING LIQUORS.

1. *Excise Licences and Offences*, 1046.
2. *Granting of Licences by Justices*, 1047.
3. *Renewals*, 1049.
4. *Transfers*, 1052.
5. *Offences against Licence*, 1053.
6. *Covenants respecting Licensed Houses—Licences*, 1057.

1. EXCISE LICENCES AND OFFENCES.

Licence—Right to—Place of Public Entertainment—Music Hall.—The proprietors of a music hall, having duly obtained a music and dancing licence, applied as being the proprietors of a place of public entertainment licensed by justices of the peace, to the Commissioners of Inland Revenue for an excise licence to sell by retail, beer, spirits, and wine on the premises under s. 7 of 5 & 6 Will. 4, c. 39:—Held, that the commissioners had properly refused to grant an excise licence until a licence of justices had first been obtained under the Licensing Act of 1872; that s. 7 of 5 & 6 Will. 4, c. 39, had been repealed by the later act (35 & 36 Vict. c. 94), except so far as the rights of proprietors of theatres were concerned; and that a music hall was not a theatre. *Reg. v. Inland Revenue Commissioners, Empire Theatre, In re*, 21 Q. B. D. 569; 57 L. J., M. C. 92; 59 L. T. 378; 36 W. R. 696; 52 J. P. 390—D.

—Retailing "Sweets"—Sale of "Best Sherry, British."—A., who held a licence for retailing "sweets and made wines," but had no licence for the sale of foreign wines, on being asked for a bottle of best sherry, sold a bottle of liquor labelled "Best Sherry, British." He was thereupon charged with selling foreign wine without a licence:—Held, that the justices, in dismissing the information against him on the ground that the liquor was not sold as being foreign wine, were wrong, and that the case must be remitted to them. Sherry is the name of a foreign wine, therefore, under 23 Vict. c. 27, s. 21, liquor labelled "Best Sherry, British," must, as against the seller, be deemed to be foreign wine. *Richards v. Banks*, 58 L. T. 634; 52 J. P. 23—D.

—Retail Dealer—Wine and Spirit Merchant's Traveller.—A traveller for a fully-licensed firm of wine and spirit merchants at B. occupied an office and premises at C., where he resided, and where amongst other places he solicited and obtained orders which he forwarded to his employers at B., who delivered the goods so ordered direct to the purchaser. The firm neither rented nor occupied any premises at all at C., nor did they store goods upon their traveller's premises. Upon an information being exhibited by an inland revenue officer against the traveller under the above acts, charging him with taking an order for spirits at his office at C., without having in force a proper licence authorising him so to do:—Held, that he was a bonâ fide traveller taking orders for his employers who were duly licensed to sell spirits, &c., and therefore not liable to take out a licence. *Stuchbery v. Spencer*, 55 L. J., M. C. 141; 51 J. P. 181—D.

— **Beer Licence—Botanic Beer.**—The appellant sold a liquor called "botanic beer," without having a retail licence for the sale of beer. It contained sugar, herbs, and water, but no hops or malt, and had 6 per cent. of proof spirit:—Held, that such a liquor was "beer" within the meaning of s. 4 of 48 & 49 Vict. c. 51, and that the appellant was rightly convicted. *Howorth v. Menno*, 56 L. T. 316; 51 J. P. 7—D.

Dilution of Beer by Publican—Mixing Beers of different Strengths.—By s. 8, sub-s. 2, of the Customs and Inland Revenue Act, 1885, "a dealer in or retailer of beer shall not adulterate or dilute beer, or add anything thereto, except finings for the purpose of clarification." The appellant, a publican, had in his cellar a cask of beer supplied by a firm of brewers, and also a quantity of small beer of much less strength. He drew off a certain quantity from the cask of stronger beer, and filled it up with small beer, adding some finings for clarification; the result, as tested by the quantity of proof spirit in the two kinds of beer, was that the mixture was about 15 per cent. weaker than the beer which was in the cask as it came from the brewers. No water or any other matter or thing (except the finings) was added to the beer. On appeal against a conviction for "diluting" beer under the above section:—Held, that the mixing of the two kinds of beer amounted to a dilution of the stronger beer, and that the appellant was properly convicted. *Crofts v. Taylor*, 19 Q. B. D. 524; 56 L. J., M. C. 137; 57 L. T. 310; 36 W. R. 47; 51 J. P. 532, 789; 16 Cox, C. C. 294—D.

2. GRANTING OF LICENCES BY JUSTICES.

Persons Qualified — Publican's Licence — Confectioner.—A confectioner who has held a wine licence for consumption on the premises, and who supplies luncheons, is sufficiently within the description of persons entitled to apply for and hold a publican's licence within 9 Geo. 4, c. 61, s. 1, being a person about to keep an inn, alehouse, or victualling-house. *Reg. v. Surrey JJ.*, 52 J. P. 423—D.

Jurisdiction—Division of County—Island in British Channel.—H. had a house in an island in the British Channel, and had for thirty-eight years, without having a justices' or excise licence, sold intoxicating liquors to all visitors there, no other house being in the island. He was summoned for selling without a licence:—Held, that the island was part of the county to which it was nearest, and that the licensing justices of any division of the county had jurisdiction to grant the ordinary licences to sell intoxicating liquors there. *Wright v. Harris*, 49 J. P. 628—D.

Retail Wine Licence—House Licensed before 1869 for Beer—Discretion.—By the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 19—where on May 1, 1869, a licence is in force with respect to a house for the sale therein of beer, cider, or wine to be consumed on the premises, the justices are not to be entitled to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises

in respect of such house except upon one or more of four grounds specified.—Upon an application to licensing justices under the above section for a certificate for a licence to sell wine to be consumed on the premises, it appeared that on May 1, 1869, a licence was in force with respect to the house for the sale of beer to be consumed on the premises:—Held, that, upon the true construction of s. 19, the discretion of the justices in refusing the application was unlimited, for the existence of a licence with regard to the sale of beer did not confer any privilege upon an application for a certificate in respect of the sale of either wine or cider. *Reg. v. King*, 20 Q. B. D. 430; 57 L. J., M. C. 20; 58 L. T. 607; 36 W. R. 600; 52 J. P. 164—C. A.

— **"Keeping Shop for Sale of Goods other than Foreign Wine."**—Semble, that a person who has a spirit-dealer's retail licence to sell spirits in bottles, and who has a wholesale beer-dealer's licence authorising the sale of casks of ale of four and a half gallons, sufficiently fulfils the description of "a person who keeps a shop for the sale of goods and commodities other than foreign wine," and therefore is entitled to a certificate of justices authorising the sale of wine by retail pursuant to 23 Vict. c. 27, s. 3. *Reg. v. Bishop*, 50 J. P. 167—D.

Agreement for Sale subject to transfer to Purchaser—New Licence or Transfer.—R. & Co. had for several years carried on the business of family grocers, tea, wine, and spirit merchants, in certain premises in S.-street, in the city of Dublin, and one of the firm had been each year duly licensed as a publican, to sell beer, wine, and spirits for consumption upon the premises, but had never carried on business as publican. At the October sessions of 1883, their publican's licence had been duly renewed by H., one of their firm. In September, 1884, R. & Co. entered into an agreement with M. to sell to him the premises, and it was therein provided that M. should pay a deposit of 800*l.* pending completion of the purchase, and making out title, &c.; and they also entered into a collateral agreement with M. that he should forthwith take all necessary steps to obtain, at the ensuing October Licensing Sessions, a transfer of the licence attached to the premises, and that, if M. obtained such transfer, the purchase should be completed on or before the 29th November, 1884, but that if such transfer was refused M. should be at liberty to rescind the contract, and be repaid his deposit. On the 2nd October, 1884, by an indorsement on the licence, H. purported to assign all his interest therein to M. No ad interim transfer of the licence to M. had been obtained. M. having applied to the recorder at the October Licensing Sessions of 1884 for a certificate enabling him to obtain a publican's licence, and such application having been opposed on the ground of the number of previously licensed houses in the neighbourhood:—Held, that the case was distinguishable from *Reg. v. Recorder of Dublin* (Ir. R. 11 C. L. 412); that M.'s application was in substance as well as in form an application for a new licence, and that therefore the court, in dealing with it, was entitled to take into consideration the number of existing licensed houses in the neighbourhood. *Reg. v. Dublin (Recorder)*, 16 L. R., Ir. 424—C. A.

Insertion of Condition in Licence—Sunday Closing.—The condition under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 49, requiring the licensed premises therein mentioned to be closed during the whole of Sunday, can only be inserted in a new licence if the applicant for it himself applies to the licensing justices to insert such condition. *Reg. v. Kirkdale JJ.*, 18 Q. B. D. 248; 56 L. J., M. C. 24; 51 J. P. 214—D.

“Special Occasion”—Exemption from Closing—Discretion.—It is for the justices (being the local authority under the Licensing Act, 1872) to determine what is a “special occasion” in their own district, on which a licence exempting a licensed victualler from the provisions of the above statute relating to the closing of his premises, may be granted. *Devine v. Keeling*, 34 W. R. 718; 50 J. P. 551—D.

Provisional Licence—Final Order—Equal Number of Justices.—Licensing justices agreed to grant a provisional licence for a railway refreshment room according to plans shown, though they directed change of site, which the applicant agreed to, but there was never any further assent of justices to any other site. At the application for the final order the eight justices were equally divided, and no adjournment was granted. A rule nisi for a mandamus being granted, the justices then met again, and agreed by a majority to make a final order:—Held, that the rule for the mandamus might be made absolute, but without costs, and not to be drawn up except on further application. *Reg. v. Cox*, 48 J. P. 440—D.

New Licence or Renewal.—*See Reg. v. Market Bosworth JJ.*, post, col. 1051.

3. RENEWALS.

Majority of Justices.—The granting of a renewal certificate by justices presiding at licensing sessions must be the act of the majority of the court, and a minority or two or more of such justices is not competent to grant and sign the said certificate when the remaining justices form a majority, and object to the grant being made. In such cases the majority should make an order of refusal, and not merely record their dissent. *Reg. v. O’Connell*, 20 L. R., Ir. 625—Q. B. D.

Objection by Justices—No Notice—No Evidence on Oath.—It is not competent for justices to refuse to grant the renewal of a licence on account of an objection originated by themselves, unless they have first given notice of objection and taken evidence in accordance with the provisions contained in the Licensing Act, 1872, s. 42, sub-ss. 2, 3. *Gascoyne v. Risley*, 36 W. R. 605—D.

Power to Adjourn.—By s. 42 of the Licensing Act, 1872, justices at the general annual licensing meeting shall not entertain any objection to the renewal of a licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal has been served upon the holder of the licence in the prescribed manner: “Provided that the justices may, notwithstanding

that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given.”—Held, that an objection to the renewal of a licence made privately to justices before they came into court at the general annual licensing meeting was not a good “objection made” within the meaning of the proviso to s. 42, and that, therefore, the justices had no power to adjourn the case. *Reg. v. Merthyr Tydvil JJ.*, 14 Q. B. D. 584; 54 L. J., M. C. 78; 49 J. P. 213—D.

Long-closing of Premises.—G. obtained a transfer of a licence in 1885 but never opened the premises owing to a pending negotiation with another tenant which ultimately fell through. In August, 1885, G. obtained a renewal on his promise to open the premises, but he did not re-open until 23rd August, 1886, when the negotiation ended. G. had some days previously been served with notice of objection, and on 26th August the justices refused the renewal on the ground that the re-opening was not *bonâ fide*. On appeal to Quarter Sessions this decision was affirmed:—Held, that the objection was relevant, and having been competently entertained and decided, the High Court would not interfere with the decision. *Griffiths v. Lancashire JJ.*, 35 W. R. 732; 51 J. P. 453—D.

“On” Beer Licence—Valuation of House.—Where an indoor beer licence which had been renewed since 1869, was refused to be renewed by the licensing justices on the ground that though the house was of sufficient annual value when the application was heard at the adjourned annual meeting, yet it had not been so on 25th August, the date of the original general annual meeting, the value having been increased during the interval:—Held, that the justices had exceeded their jurisdiction, and a rule for a mandamus was made absolute. *Reg. v. Montagu*, 49 J. P. 55—D.

Grounds of Refusal.—J., the holder of an “on” beer licence, was convicted in November, 1885, of allowing prostitutes to remain on his premises. He received notice of opposition to the renewal of his licence on that ground and gave up possession. T. became tenant on 16th September, 1886, and gave notice that he would apply for a renewal. At the general annual licensing meeting on 24th September, 1886, the justices refused the renewal either to T. or to J. without stating any grounds. The Quarter Sessions confirmed the decision:—Held, that the justices must state the ground of their refusal. *Tranter v. Lancashire JJ.*, 51 J. P. 454—D.

The licensing justices at the general meeting on hearing the report of the superintendent of police that the applicant for the renewal of an indoor beer licence had been convicted of permitting drunkenness on the premises, told him to come again at the adjournment day. Notice to attend was given; but no specific objection was stated. After hearing the superintendent on oath prove the conviction, and afterwards calling him into their private room, the justices refused the renewal, but gave no reason for their decision:—Held, that the justices had not

heard and determined the case according to the statute, and a mandamus to hear the application was directed. *Reg. v. Redditch JJ.*, 50 J. P. 246—D.

Discretion of Justices.—The discretion of the justices as to granting or refusing a licence by way of renewal under the Licensing Act, 1828 (9 Geo. 4, c. 61), and the Licensing Acts, 1872 and 1874, is absolute, provided it be exercised judicially, and the situation of the house as regards police supervision and the requirements of the neighbourhood are matters which the justices have a right to consider in deciding whether to grant or refuse a licence by way of renewal under these Acts. *Reg. or Sharpe v. Wakefield*, 22 Q. B. D. 239; 58 L. J., M. C. 57; 60 L. T. 130; 37 W. R. 187; 53 J. P. 20—C. A.

Six-day Licence—Application for Seven-day Licence.—Where a licence was originally granted subject to the condition under s. 49 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), requiring the licensed premises to be closed during the whole of Sunday, it can only be renewed subject to that condition, and cannot be renewed as an ordinary seven-day licence. *Reg. v. Crewkerne JJ. or Sparks*, 21 Q. B. D. 85; 57 L. J., M. C. 127; 60 L. T. 84; 36 W. R. 629; 52 J. P. 372—C. A.

T., a publican, held a six-day licence, which had existed as a six-day licence for three years only, a former holder thereof having held the ordinary licence for many years before that date. T. applied for a renewal without the six-day condition being inserted:—Held, that the justices were not bound to renew such licence as a seven-day licence. *Reg. v. Liverpool JJ.*, 52 J. P. 376—D.

New or Renewal Licence—Effluxion of Current Licence after Refusal of Renewal—Application by new Tenant.—At an adjourned general annual licensing meeting in 1885, the renewal of a public-house licence was refused to P. P. did not appeal to the Quarter Sessions, and his current licence expired on the 10th of October following. He closed the premises as a public-house, and continued to occupy them as his private residence until Midsummer, 1886, when he left and C. became tenant. At the general annual licensing meeting in 1886, C. applied for a licence, but the justices, considering his application to be one for the grant of a new licence, in their discretion refused it, on the ground that there were already a sufficient number of licensed houses in the district. Upon an application by C. for a rule for a mandamus to be directed to the justices:—Held, that C.'s application was not an application for a "new" licence, but one for the "renewal" of a licence. The justices accordingly could not refuse it upon the ground they did, and they ought to hold an adjournment to hear and determine the application. *Reg. v. Market Bosworth JJ.*, 56 L. J., M. C. 96; 57 L. T. 56; 35 W. R. 734; 51 J. P. 438—D.

Neglecting to apply for subsequent Renewal—Mandamus.—At a general licensing meeting in 1884, the justices refused to renew M.'s licence for an inn. The house was shut up, then sold in January to J., who in July, 1885, obtained a mandamus to hear the application.

The justices in obedience to the rule reheard the case in January, 1886, and granted the renewal for the year ending October, 1886, but refused to renew the licence for the then current year ending October, 1886, as no application had been made at the general meeting in September, 1885:—Held, that though the justices had no power to renew the licence for 1886, yet the court would give them power by making absolute a second rule for a mandamus to hear the application. *Reg. v. Mishin Higher JJ.*, 50 J. P. 247—D.

Appeal to Quarter Sessions—Mortgagor and Mortgagee.—The tenant and occupier of a house licensed for the sale of beer on the premises, in 1876 assigned all his interest in the premises for the residue of his term of years, and the benefit of the licence, to the appellants by way of first mortgage to secure the repayment of moneys advanced by them; and by the mortgage deed irrevocably constituted the appellants his attorneys, in his name, and as his act and deed, to do all acts necessary to procure a transfer of the licence. In 1883, the moneys secured by the mortgage being still unpaid, the occupier sent a written application for a renewal of his licence to the justices at their annual licensing meeting, and they adjourned the hearing of the application. At the adjourned hearing the appellants applied, as mortgagees, and under their power of attorney, for a renewal of the licence to the occupier, who appeared, but stated that he did not wish for a renewal. No objection was made to the renewal on any of the grounds specified in 32 & 33 Vict. c. 27, which act applied to the occupier's licence. The justices refused the application, and the appellants appealed to quarter sessions in their own names as mortgagees, and also as attorneys of the occupier, and in his name, and for and on his behalf. At the hearing the occupier again appeared, and stated that he did not wish the licence to be renewed, and the quarter sessions thereupon affirmed the order of the licensing justices:—Held, first, that the appellants were persons aggrieved, within 9 Geo. 4, c. 61, s. 27, by the refusal of the licensing justices to renew the occupier's licence, and were therefore entitled to appeal to quarter sessions; secondly, that upon the facts stated the licensing justices and the court of quarter sessions were bound to grant the application of the appellants for a renewal of the licence to the occupier. *Garrett v. Middlesex JJ.*, or *Reg. v. Garrett*, 12 Q. B. D. 620; 53 L. J., M. C. 81; 32 W. R. 646; 48 J. P. 357—D.

4. TRANSFER.

Transfer or New Licence.—See *Reg. v. Dublin (Recorder)*, ante, col. 1048.

Beerhouse Licence existing before 1869—Discretion.—A licence existing on 1st May, 1869, for the sale of beer to be consumed on the premises, was forfeited by the conviction of the holder under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 15, for permitting the premises to be used as a brothel:—Held, that the licence was not "in force" within the meaning of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 19, and that the licensing justices at special sessions had a general discretion to refuse appli-

cations by the landlord and a new tenant of the premises for a transfer of the licence, and were not limited to the four grounds of refusal specified in s. 8. *Reg. v. West Riding JJ.*, 21 Q. B. D. 258; 57 L. J., M. C. 103; 36 W. R. 855; 52 J. P. 455—D.

— **Power of Adjournment.**—The Wine and Beerhouse Act (1869) Amendment Act, 1870 (33 & 34 Vict. c. 29), s. 4, sub-s. 4—which enacts that it shall be in the discretion of the justices to whom an application for a transfer of a licence is made either to allow or refuse the application, or to adjourn the consideration thereof—is intended only to affect the procedure as to adjournment at sessions for the transfer of licences. Therefore, on an application to justices at special sessions for a transfer of a licence to sell beer to be consumed on or off premises in respect of which such a licence was in force on the 1st of May, 1869, and has since been renewed from time to time, the discretion of the justices is limited, as it is on an application at the general licensing meeting for a grant by way of renewal of the licence, and the application for the transfer can only be refused on one or more of the four grounds specified in the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), ss. 8, 19. *Simonds v. Blackheath JJ.*, 17 Q. B. D. 765; 55 L. J., M. C. 166; 35 W. R. 167; 50 J. P. 742—D.

Discretion of Justices — Refusal of.—C. having a lease of a licensed house at M. till 1879, began in 1875 to build a new house of his own at L., for which he obtained a licence and allowed the licence at M. to drop. A new tenant entered the premises at M. in 1879, and applied from then until 1883 for a new licence, which was always refused; he then applied for a transfer of the licence at M. which had expired in 1877.—Held, that the justices had a discretion to refuse the transfer, and could not be compelled by mandamus to hear the application. *Minnett, Ex parte*, 51 J. P. 84—D.

Tenant giving up Possession — Application by Landlord—Appeal to Quarter Sessions.—K., the licensed tenant of a public-house, abandoned possession in December, and the house was shut up. At the next general annual licensing meeting in September K. did not apply for a renewal, but the landlord asked for a renewal either in K.'s name or his own, which the justices refused. A new tenant, P., entered a few days after the adjourned annual licensing meeting, and applied at the next transfer sessions in October for a transfer of the licence, which was refused. P. then appealed to quarter sessions in January, when the refusal was confirmed. P. then applied in June for an order for a mandamus to the general annual licensing meeting to rehear his application.—Held, that P. was precluded from asking for a mandamus because of his appeal to quarter sessions, and that his application was for a mandamus to the wrong justices. *Reg. v. Newcastle-upon-Tyne JJ.*, 51 J. P. 244—C. A.

5. OFFENCES AGAINST LICENCE.

Suffering Gaming on Licensed Premises—Knowledge of Servant.—Where gaming had

taken place upon licensed premises to the knowledge of a servant of the licensed person employed on the premises, but there was no evidence to show any connivance or wilful blindness on the part of the licensed person, and it did not appear that the servant was in charge of the premises:—Held, that the justices were right in refusing to convict the licensed person of suffering gaming on the premises under the Licensing Act, 1872, s. 17. *Mullins v. Collins* (9 L. R., Q. B. 292) discussed. *Somerset v. Hart*, 12 Q. B. D. 360; 53 L. J., M. C. 77; 48 J. P. 327—D.

Where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person who was in charge of the premises, but without any knowledge or connivance on the part of the licensed person:—Held, that the licensed person had suffered gaming to be carried on on the premises within the meaning of s. 17 of the Licensing Act, 1872, and was rightly convicted. *Somerset v. Hart* (12 Q. B. D. 360) distinguished. *Bond v. Evans*, 21 Q. B. D. 249; 57 L. J., M. C. 105; 59 L. T. 411; 36 W. R. 767; 52 J. P. 612—D.

Permitting Drunkenness on Premises—Sale of Liquor to Drunken Person.—A publican was convicted by justices of selling intoxicating liquor to a drunken person, though at the hearing it had been proved that the liquor had been ordered and paid for by the sober companion of such drunken person:—Held, that the conviction was right and must be affirmed. *Seatchard v. Johnson*, 57 L. J., M. C. 41; 52 J. P. 389—D.

— **Knowledge of Condition of Customer.**—The Licensing Act, 1872, s. 13, makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person. A publican sold intoxicating liquor to a drunken person who had given no indication of intoxication, and without being aware that the person so served was drunk:—Held, that the prohibition was absolute, and that knowledge of the condition of the person served with liquor was not necessary to constitute the offence. *Cundy v. Le Cocq*, 13 Q. B. D. 207; 53 L. J., M. C. 125; 51 L. T. 265; 32 W. R. 769; 48 J. P. 599—D.

Selling without Licence—Unauthorised Sale by Club Steward—Liability of Trustees.—The appellants, who were trustees and members of the managing committee of a club, were convicted under the Licensing Acts for selling liquor without a proper licence to persons not members of the club. It appeared that the liquor was sold in the club premises by the steward of the club, who in selling it acted contrary to the orders of the appellants, and without their knowledge or assent. The money which he received for the liquor was paid by him to the account of the club:—Held, that the conviction was wrong, for the appellants were not, under the circumstances, responsible for the act of the steward. *Newman v. Jones*, 17 Q. B. D. 132; 55 L. J., M. C. 113; 55 L. T. 327; 50 J. P. 373—D.

— **Pretended Club — Manager the Proprietor.**—E. was summoned under 35 & 36

Vict. c. 94, s. 4, for selling liquors without a licence. Over the door a signboard was painted "The C. Working Men's Club." The interior was fitted up like a public-house, and E. professed to be manager, and ordered everything on the credit of the club, but could not tell who were members, nor how the accounts were kept, and neither committee nor secretary had any means of checking him:—Held, that there was evidence to justify the justices in holding that it was only a pretended club, and that E. was the real proprietor. *Evans v. Hemingway*, 52 J. P. 134—D.

Keeping open Billiard Table after Closing of Premises—Beerhouse.—A beerhouse keeper who has obtained a licence to keep a billiard table, and allows billiards to be played after the closing hour for the beerhouse, is not liable to the penalty in 8 & 9 Vict. c. 103, s. 13, which applies only to victuallers licensed under 9 Geo. 4, c. 61. *Bent v. Lister*, 52 J. P. 389—D.

Sale after closing of Premises—Lodger.—By the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 9, "Any person who during the time at which premises for the sale of intoxicating liquors are directed to be closed . . . sells . . . any intoxicating liquor . . . or allows any intoxicating liquors although purchased before the hours of closing to be consumed in such premises," is liable to a penalty. By s. 10 "nothing in this Act . . . contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises, from selling such liquor at any time to bonâ fide travellers or to persons lodging in his house." The appellant, a licensed innkeeper, sold and supplied to a bonâ fide lodger in his house intoxicating liquors which were consumed, during the time at which the premises are directed to be closed, in a private room on the premises by the lodger and bonâ fide guests of the lodger after a dinner given by him to them:—Held, that the appellant was not liable to be convicted under s. 9 of the Act. *Pine v. Barnes*, 20 Q. B. D. 221; 57 L. J., M. C. 28; 58 L. T. 520; 36 W. R. 473; 52 J. P. 199—D.

Selling Liquor at Unlicensed Place—Wife Licensed—Husband taking Spirits to Unlicensed House to be Ruffed for.—The appellant, Mrs. S., a married woman, who had a licence to sell intoxicating liquor, was convicted under the 3rd section of the Licensing Act, 1872, of selling intoxicating liquor at a place where she was not authorised by her licence to sell the same. The husband of the appellant was about to be called as a witness for the respondent, but it was objected that he was not a competent, or if competent, not a compellable witness, and the objection was allowed. Evidence, however, was given by a constable of a statement made to him by the husband, in the wife's presence, to the effect that, "on the 24th December, 1883, he took spirits from the licensed house of the appellant to the house of one B.; the drink was then raffled for, and he was present during the raffle; the money was put in a basin on the table, and it was afterwards brought to the inn and put on a table there; one or other of them, the landlady or the husband himself, took it from the table; during the time of the raffle

he took some spirits up to B.'s house; he took it all." Other witnesses proved that the liquor brought from the appellant's house by her husband was raffled for at B.'s house, the husband himself being present at the time. The justices convicted the appellant of selling the liquor at B.'s house:—Held, that what took place at B.'s house was a transaction in the nature of a sale within the meaning of s. 62 of the act, and that, as the appellant was a competent witness and did not contradict the statement made by her husband, there was sufficient evidence to support the conviction. *Seager v. White*, 51 L. T. 261; 48 J. P. 436—D.

Sale of Intoxicating Liquor in marked Measure.—By the Licensing Act, 1872, s. 8, all intoxicating liquor which is sold by retail, and not in cask or bottle, and is not sold in a quantity less than half a pint, is to be sold in measures marked according to the imperial standards. A publican, being asked for a pint of beer by a customer, went into an inner room, where he drew the beer into a marked measure and poured it into a jug, which he then brought into the room where the customer was sitting and handed to him. The customer could not see the beer drawn, and never saw it while in the measure. The publican having been convicted of an offence under s. 8:—Held, that the sale was not complete until the beer was handed to the customer, that the beer was not sold in a marked measure as required by the statute, and that the conviction was right. *Addy v. Blake*, 19 Q. B. D. 478; 56 L. T. 711; 35 W. R. 719; 51 J. P. 599; 16 Cox, C. C. 259—D.

Constable's Demand to enter Premises—Excise Licences only.—The respondent, being a person duly licensed as a dealer in spirits in England under 23 & 24 Vict. c. 114, s. 195, and holding an additional excise licence authorising him to sell by retail, in any quantity not less than one reputed quart bottle, at a shop, spirits not to be drunk or consumed on the premises, under 24 & 25 Vict. c. 21, s. 2, refused to admit the respondent, a constable, who demanded to enter the appellant's premises in pursuance of s. 16 of the Licensing Act, 1874. Upon complaint by the appellant, justices refused to convict the respondent:—Held, upon a case stated, that s. 16 of the Act of 1874 applies only to premises in respect of which a licence, as defined by the Licensing Act, 1872, s. 74, has been granted and is in force, and not to the respondent's premises, which were required to be licensed by the Excise only, and that the justices were right. *Harrison v. McI'Neil*, 50 L. T. 210; 48 J. P. 469—D.

— Intention of Constable.—S., a police constable, within the hours of closing on Sunday, knocked at the door of a public-house, and demanded entry, the sole reason given being that he wanted to visit the house. He was told there was no one inside, and the door being locked, he was refused entry. In point of fact the constable's object was to inspect all the licensed houses to prevent or detect offences, but he had no special ground of suspicion:—Held, that the conviction could not be set aside if the justices were satisfied as to the bonâ fide intention of the constable to prevent violation of the act. *Reg. v. Dobbins*, 48 J. P. 182—D.

Conviction of Tenant—Forfeiture of Licence—Application by Owner for Licence—Refusal—Right of Appeal.]—The appeal clauses of 9 Geo. 4, c. 61 (the Intoxicating Liquors Licensing Act, 1828) are incorporated in 37 & 38 Vict. c. 49 (the Licensing Act, 1874), s. 15, and therefore when the licence of a public-house keeper is forfeited by conviction under 35 & 36 Vict. c. 94, s. 9, and the owner of the premises duly applies under 37 & 38 Vict. c. 49, s. 15, to special sessions for a licence and it is refused, he has a right of appeal to quarter sessions. *Reg. or Newton v. West Riding JJ.*, 11 Q. B. D. 417; 52 L. J., M. C. 99; 48 J. P. 149—D.

—Appeal by Owner—"Person aggrieved"—Record of Conviction on Licence.]—Where a licensed person is convicted of an offence under the Licensing Acts, 1872-74, and the justices direct the conviction to be recorded on his licence, the owner of the licensed premises, who was not and could not have been a party to the proceedings before the justices, is not a "person aggrieved" within s. 52 of the act of 1872, and has no right of appeal against the order. *Reg. v. Andover JJ.*, 16 Q. B. D. 711; 55 L. J., M. C. 143; 55 L. T. 23; 34 W. R. 456; 50 J. P. 549—D.

Against Excise.]—*See supra*, 1.

6. COVENANTS RESPECTING LICENSED HOUSES—LICENSEES.

Mortgagees in Possession, Lease by—Clause binding Tenant to take Beer, &c., from them—Account—Interest.]—A leasehold public-house was mortgaged to brewers who entered into possession, and after carrying on the business for some time, leased the public-house to tenants, with agreements binding the tenants to take their beer, &c., from them, under which they derived a large profit from the sale of beer, &c. They afterwards sold the public-house under the power of sale in the mortgage:—Held, in an action by the mortgagor for an account, that the mortgagees were not entitled to interest on the cost of beer supplied while they were carrying on the business; that they were not bound to account for the profits derived from the sale of beer, &c., to the tenants of the public-house; but that they were chargeable with the increased rent they might have obtained if the tenants had been under no restriction as to purchasing their beer. *White v. City of London Brewery Company*, 39 Ch. D. 559; 58 L. J., Ch. 98; 60 L. T. 19; 36 W. R. 881—North, J. Affirmed, W. N. 1889, p. 114—C. A.

Covenant to take Beer from Lessors—Proviso for Reduction of Rent on Performance of Covenant—Penalty.]—The lease of a public-house contained a covenant that the lessee and his assigns would, during the term, purchase all beer required for the business from the lessors, a proviso for re-entry on non-payment of rent, or non-performance of the covenants, and a provision for reduction of the rent so long as the lessee should purchase beer from the lessors:—Held, that the covenant to purchase beer was an absolute one, and that the lessee had not the alternative of dealing with a rival brewer and

paying the unreduced rent. *Hanbury v. Cundy*, 58 L. T. 155—Stirling, J.

Licence attached to Freehold Premises—Proceeds of Sale—Real or Personal Estate.]—The proceeds of sale of a deceased publican's retail spirit licence constitute personal estate, although such licence is attached to premises of freehold tenure. *Brennan v. Dorney*, 21 L. R., Ir. 353—C. A.

Delivery up of Spirit Licence—Order for.]—In an action by a mortgagee, claiming possession of licensed premises, and a delivery up of a licence attached thereto, the court has power to order such licence to be delivered up to the plaintiff. *Crowley v. Fenry*, 22 L. R., Ir. 96—Q. B. D.

Sale of Licensed Premises—Assignment of Licence—Bankruptcy—Rights of Assignee.]—Under a writ of fi. fa. against G., certain chattels and his interest in licensed premises were seized, advertised for sale, and sold on the 31st January, 1885, by the sheriff. No reference to the licence was made either in the advertisements, conditions of sale, or deed of assignment, which was dated the 10th Feb., 1885, except that in the latter the premises were described as "licensed," as occupied by G. as a licensed publican, and the deed did not purport to assign the licence. The sheriff was not possessed of the licence, but it was subsequently indorsed and delivered by G. to the purchaser. On the 4th April, 1885, G. was adjudicated a bankrupt. The purchaser, however, obtained an ad interim transfer of the licence on the 14th April, and an absolute transfer at the October Sessions. In August the hearing of a charge and discharge, raising a question as to the property in the licence, was adjourned by consent to November, on the terms that the position of the parties should be considered at the hearing as if unaltered:—Held, that the licence did not pass under the sheriff's assignment; that the subsequent indorsement, delivery, and transfer of it by G. to the purchaser were void as against the assignees in bankruptcy of G., and that the licence formed part of the estate and effects of G. in the bankruptcy matter; but having regard to the proceedings at the licensing sessions, the court declined, for the time being, to make any order for the transfer of the licence to the assignee in bankruptcy, or to award damages against the purchaser for withholding the licence. *Gilmer, In re*, 17 L. R., Ir. 1—Bk.

INVENTION.

See PATENT.

INVESTMENT.

See TRUST AND TRUSTEE.

IRELAND.

Land Law (Ireland) Act, 1881—Pasture—Land Let to be used wholly or mainly for Pasture.—By a lease in 1861 lands in Ireland of more than 100 acres were demised for twenty-one years, the tenant covenanting that he would not without the landlord's consent break up or have in tillage in any one year any greater quantity than ten acres, out of a certain specified portion, and that he would manage the land in a good and husbandlike manner and in due and regular course, so that the same might not be in any way injured. At the time of the demise there were only fifteen acres in tillage, and the rest was used as a pasture, but was not ancient pasture, the whole farm having been put in tillage (in different portions at different times) between 1852 and 1861. The tenant used the farm as a dairy farm; frequently mowing different portions (about twenty acres each year), and sometimes selling hay off the land:—Held, that the farm was not a "holding let to be used wholly or mainly for the purpose of pasture" within the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), s. 58, sub-s. (3). *Westropp v. Elligott*, 9 App. Cas. 815; 52 L. T. 147—H. L. (Ir.).

ISLE OF MAN.

Equity to a Settlement.—The doctrine of a wife's equity to a settlement is unknown to Manx law. *Marsland, In re*, 55 L. J., Ch. 581; 54 L. T. 635; 34 W. R. 540—Kay, J.

JERSEY.

See COLONY.

JOINT TENANCY.

Partition of.—See PARTITION.

Creation of, by Will.—See WILL (INTEREST PASSING).

In other Cases.—See TENANT.

JUDGMENT.

Foreign.—See INTERNATIONAL LAW.

Practice as to.—See PRACTICE (JUDGMENT).

Judgment Creditor, Rights of.—See ante, EXECUTION.

Filing Consent Order for.—See DEBTORS ACT.

In County Court.—See COUNTY COURT.

Estoppel by.—See ESTOPPEL.

Judgment Debt—Interest—Insolvent Debtor—Surplus in hands of Assignee after Payment of Principal of all Debts.—The effect of s. 17 of 1 & 2 Vict. c. 110, is that interest at the rate of four per cent. is a debt necessarily attached to every judgment debt, and recoverable at law as a debt; and the judgment creditor is not confined to the remedy by execution mentioned in the section. Therefore, where, in the case of a deceased insolvent debtor who became insolvent before 1869, a sum of money subsequently came to the hands of the assignee, out of which the principal of all the debts entered in the debtor's schedule was paid, it was held that the judgment debts were not satisfied within the meaning of s. 92 (since repealed) of that Act until interest was paid, and the assignee was ordered to pay interest before handing over any surplus to the representatives of the insolvent. *Lewis, Ex parte, Clagett, In re*, 36 W. R. 653—C. A.

Merger of Several Liability by Joint Judgment.—The firm of D. having been employed by the executors of B. to sell certain crops, &c., paid over a part of the proceeds, but were adjudicated bankrupt on the petition of the executors of B. in 1880 upon a judgment for the balance. The executors of B. proved as creditors of the joint estate. Subsequently H. S. D., one of the partners in the bankrupt firm, became entitled to a legacy and to other moneys, and the executors of B. attempted to withdraw the proof against the joint estate and prove against the separate estate of H. S. D. The trustee rejected the proof on the ground that the creditors were bound by their election, and his decision was reversed by the county court judge. On an appeal from his decision:—Held, that the ground upon which the trustee had rejected the proof was wrong, but that, in order to entitle them to prove against the separate estate of H. S. D., the respondents must prove that they had a separate cause of action against him. Held, also, upon an argument that the separate cause of action was merged in the joint judgment, that it was not so merged. *Chandler, Ex parte, Davison, In re*, 13 Q. B. D. 50; 50 L. T. 635—Cave, J.

Merger of Covenant by Judgment—Interest.—A mortgage deed contained a covenant for payment of a principal sum and interest at five per cent. on a certain day; and there was a further covenant by the mortgagor that if the said principal sum should remain unpaid after the date fixed for payment, he would, so long as the same or any part thereof should remain unpaid, pay interest thereon at five per cent. The mortgagee recovered judgment for principal, interest to date, and costs:—Held, that the covenant to pay the principal sum was merged in the judgment, that the true construction of the separate covenant was only to pay interest so long as any part of the principal sum remained

due under the covenant, and that therefore the mortgagee was, as from the date of the judgment, entitled to interest on the judgment debt at four per cent. only, and not to interest at five per cent. on the principal sum. *Popple v. Sylvester* (22 Ch. D. 98) distinguished. *Fewings, Ex parte, Sneyd, In re*, 25 Ch. D. 338; 53 L. J., Ch. 545; 50 L. T. 109; 32 W. R. 352—C. A.

Semble (per Fry, L. J.), a covenant to pay interest may be so worded as not to merge in a judgment for the principal. *Ib.*

Registration—Omission to Register within Five Years—Priorities.—A., B., and C. were judgment creditors of D. A. registered his judgment on the 12th of March, 1840, but never re-registered. B. registered his judgment in April, 1842, and re-registered in March, 1848. C. registered his judgment on the 18th of March, 1845, and re-registered on the 16th of March, 1850. Questions having arisen as to the priorities of the several judgment creditors, the fund in court being insufficient for payment in full:—Held, that on the construction of the statutes 1 & 2 Vict. c. 110, s. 19, 2 & 3 Vict. c. 11, s. 4, and 3 & 4 Vict. c. 82, s. 2, and upon the principle laid down in *Beavan v. Earl of Oxford* (6 D. M. & G. 492), C. was first entitled to take out of the fund the sum found due on A.'s judgment, and then that B. was entitled to be paid the full amount of his judgment before C. took anything more in respect of his judgment. *Kensington (Lord), In re, Bacon v. Ford*, 29 Ch. D. 527; 54 L. J., Ch. 1085; 53 L. T. 19; 33 W. R. 689—Chitty, J.

JUDICIAL SEPARATION.

See HUSBAND AND WIFE.

JURISDICTION.

Of English Court over Foreigners.—See INTERNATIONAL LAW.

Acquiescence or Consent does not give.—Acquiescence or consent does not give to a court a jurisdiction of which the court is not possessed. *Bischoffsheim, Ex parte, Aymer, In re*, 20 Q. B. D. 262; 57 L. J., Q. B. 168; 36 W. R. 231—per Lord Esher, M. R.

S. P. *Reg. v. Shropshire County Court Judge*, 20 Q. B. D. 248; 57 L. J., Q. B. 143; 58 L. T. 86; 36 W. R. 476—per Hawkins, J.

JURY.

See PRACTICE (TRIAL).

JUSTICE OF THE PEACE.

1. *Disqualifications*, 1062.
2. *Notice of Action*, 1063.
3. *Clerk to Justices*, 1063.
4. *Jurisdiction*, 1063.
5. *Practice and Procedure*, 1067.
6. *Special Case stated by*.
a. In what Cases, 1070.
b. Practice on Hearing, 1071.
7. *Quarter Sessions—Appeal to*, 1071.
8. *Compelling Justices to Act.*—See MANDAMUS.

1. DISQUALIFICATIONS.

Summoned as Witness.—The mere fact of a subpoena having been served on a magistrate to give evidence in a particular case, does not disqualify him from sitting as a magistrate in the hearing and adjudication of that case. *Reg. v. Tooke*, 32 W. R. 753; 48 J. P. 661—D.

Interest—Bias—Advice given by Justice—Attempt to bring about Settlement.—Any pecuniary interest in the subject-matter of the litigation, however slight, will disqualify a magistrate from taking part in the decision of a case. If a magistrate has such a substantial interest, other than pecuniary, in the result of the hearing, as to make it likely that he will have a bias, he is disqualified. The fact that a magistrate has been subpoenaed, and that it is intended to call him as a witness at the hearing, is not a legal disqualification, and the High Court will not on that ground prohibit the magistrate from sitting. A magistrate, who was a surgeon, attended a patient professionally for injury caused by an assault. He endeavoured to induce his patient not to prosecute for the assault, and conveyed to him a message, sent by the person who had committed the assault, offering an apology and suggesting a settlement. A summons was issued for the assault, the magistrate was subpoenaed to give evidence for the prosecution, and a writ of prohibition was obtained to prohibit him from sitting at the hearing. The magistrate moved to set aside the prohibition:—Held, that the acts of the magistrate did not show that he had such a substantial interest in the result as to make it likely that he would have a bias, and that the fact of his being subpoenaed did not disqualify him from sitting, and therefore the prohibition must be set aside. *Reg. v. Farrant*, 20 Q. B. D. 58; 57 L. J., M. C. 17; 57 L. T. 880; 36 W. R. 184; 52 J. P. 116—D. Cp. *Fobbing Commissioners v. Reg.*, 11 App. Cas. 449; 56 L. J., M. C. 1; 55 L. T. 493; 34 W. R. 721; 51 J. P. 227—H. L. (E.).

Justice taking active Part in Defending Appeal.—Where a justice of the peace is shown to have taken an active part in defending an appeal against a decision of which he approves, but to which he was no party, he is disqualified on the ground of probability of bias from taking part in deciding the appeal. *Reg. v. Cumberland JJ.*, 58 L. T. 491; 52 J. P. 502—D.

Clerk to Justices acting as Solicitor.—The clerk to the justices should not act as solicitor for one of the parties on a prosecution before his own bench of justices, but such an interest in the clerk does not affect the jurisdiction of the bench. *Reg. v. Brakenridge*, 48 J. P. 293—D.

2. NOTICE OF ACTION.

Negligence in building Police Station.]—The building of a police station is an act done by justices in the execution of their office; and the justices, if sued for negligence in the building or maintaining thereof, and for damage arising therefrom, are entitled to the protection afforded by 11 & 12 Vict. c. 44. *Hardy v. North Riding J.J.*, 50 J. P. 663—Huddleston, B.

3. CLERK TO JUSTICES.

Acting as Solicitor for Prosecution.]—See *Reg. v. Brakenridge*, supra.

4. JURISDICTION.

Defect in Summons—Appearance without Objection.]—The jurisdiction of justices is not necessarily ousted by a defect in a bastardy summons, and their order is not a nullity if the defendant appears and takes no objection at the hearing. *Reg. v. Fletcher*, 51 L. T. 334; 32 W. R. 828; 48 J. P. 407—D.

Wrongful Arrest—Effect of.]—G., licensed to sell tobacco in his house in the city of N., was found hawking and selling at a public-house in the county division of T., four miles distant, and was arrested and conveyed before justices at N. next day, but as no justices were then sitting he was, on his own recognizance, remitted to justices who sat in T., seven days after the offence, and was convicted. G. objected to the jurisdiction, as the justices were not acting forthwith, nor near the place within 5 & 6 Vict. c. 93, s. 13:—Held, that whether G. was illegally arrested and detained or not, the justices of T. having jurisdiction, and he being charged before them, the conviction was valid. *Gray v. Commissioners of Customs*, 48 J. P. 343—D.

"Order," what is—Compensation—Settlement by Two Justices.]—The "settlement" of compensation by two justices for lands taken or injuriously affected under s. 22 of the Lands Clauses Act, 1845, is not an "order" within Jervis's Act, and the complaint need not be made within six months of the matter arising; neither is it a decision by which "damages are directed to be paid" enforceable by distress within s. 140 of the Railways Clauses Act, 1845. *Edmundson, In re* (17 Q. B. 67), overruled. *Reg. v. Edwards*, 13 Q. B. D. 586; 53 L. J., M. C. 149; 51 L. T. 586; 49 J. P. 117—C. A.

Offence committed in one Petty Sessional Division—Committal in different Division.]—Justices of the peace sitting in and acting for one petty sessional division of a county have jurisdiction to commit for trial on a charge arising in another petty sessional division of the same county, and are not bound to remand such charge for hearing in the division in which the offence was committed. *Reg. v. Beckley*, 20 Q. B. D. 187; 57 L. J., M. C. 22; 57 L. T. 716; 36 W. R. 160; 52 J. P. 120; 16 Cox, C. C. 331—C. C. R.

Assault—Complaint by or on behalf of the Party aggrieved—Condition precedent.]—A complaint by or on behalf of a person aggrieved by a common assault or battery is a necessary condition precedent to give justices jurisdiction to summarily convict the offender under 24 & 25 Vict. c. 100, s. 42. A police-constable who takes a charge of common assault from the person assaulted is not, on the failure of the complainant personally to prefer the charge before the justices, a party who can prefer the complaint on behalf of the person aggrieved. *Nicholson v. Booth*, 57 L. J., M. C. 43; 58 L. T. 187; 52 J. P. 662; 16 Cox, C. C. 373—D.

— Claim of Right.]—A person making a bonâ fide claim of right to be present as one of the public in a law court at the hearing of a suit, is not justified in committing an assault upon a police-constable and an official who endeavour to remove him. Such a claim of right does not oust the jurisdiction of the magistrate who has to try the charge of assault, and he may refuse to allow cross-examination and to admit evidence in respect of such a claim. *Reg. v. Eardley*, 49 J. P. 551—D.

Claim of Right—Title to Land—Trespass.]—To oust the summary jurisdiction of justices on the ground that a bonâ fide question of title arises, it is sufficient to show that the act complained of as a trespass was committed in the exercise of a supposed right, which the alleged trespasser bonâ fide believed that he possessed. *Mathews v. Carpenter*, 16 L. R., Ir. 420—Ex. D.

— Trespassing on Railway—Public Right of Way before Railway made.]—The appellant was convicted by justices in petty sessions—(1) under the 38th section of 45 & 46 Vict. c. ccciv., for having unlawfully trespassed on a railway in such a manner as to expose himself to danger; and (2) under the 23rd section of the Regulation of Railways Act, 1868, for having been unlawfully on the railway after receiving warning not to go or pass thereon. There was, prior to the making of the railway, and prior to the Acts of Parliament authorizing the same, a public right of way for persons on foot over the land now occupied by the railway at the place where the appellant crossed, and the appellant went upon and crossed the railway, in the assertion of the right of way which formerly existed, and believing that he was entitled to do so by virtue thereof:—Held, that the conviction on both summonses was wrong—(1) because the claim of the right of way set up by the appellant ousted the jurisdiction of the justices to determine the case; and (2) because there were no provisions in the Act of Parliament extinguishing the right of way, which was consequently still in existence. *Cole v. Miles*, 57 L. J., M. C. 132; 60 L. T. 145; 36 W. R. 784; 53 J. P. 228—D.

— Obstruction in Street—Highway.]—A shopkeeper in a borough placed goods upon the pavement in front of his shop for sale. Upon being summoned under the Towns Police Clauses Act, 1847, for obstructing the footway, he contended that he bonâ fide claimed the right to place his goods there. The justices con-

sidered that their jurisdiction was ousted, but stated a case:—Held, that the justices ought to determine whether the land on which the goods were placed was part of the public highway or not, that no question of title was involved, and that their jurisdiction was not ousted. *Leicester Urban Sanitary Authority v. Holland*, 57 L. J., M. C. 75; 52 J. P. 788—D.

Order for Delivery of Money "charged" to have been fraudulently obtained.—By 2 & 3 Vict. c. 71, s. 29, "if any money or goods charged to be stolen or fraudulently obtained shall be in the custody of any constable by virtue of any warrant of a justice, or in prosecution of any charge of felony or misdemeanour in regard to the obtaining thereof, and the person charged with stealing or obtaining possession as aforesaid shall not be found, or shall have been summarily convicted or discharged, or shall have been tried or acquitted, or if such person shall have been tried and found guilty, but the property so in custody shall not have been included in any indictment upon which he shall have been found guilty, it shall be lawful for any magistrate to make an order for the delivery of such goods or money to the party who shall appear to be the rightful owner thereof."—An accused person, having been arrested by a police constable, was taken to a police station, where she was searched, and a sum of 108*l.* was found upon her, and taken possession of by the police. In the charge-sheet kept at the police station the following charge against her was entered:—"Fraudulently obtaining on the 10th instant the sum of 5*s.* from Miss M., and also the sum of 5*s.* from Miss B., by representing that she (the prisoner) was collecting subscriptions for the children's treat of St. Peter's, Eaton Square, and further with endeavouring to procure charitable contributions by false pretences." On the following day she was brought before a metropolitan police magistrate, who had the charge-sheet before him, and convicted her summarily in respect of the two first offences specified therein, and sentenced her to two consecutive terms of imprisonment. At the hearing, in addition to Miss M. and Miss B., three other ladies were called who proved that she had obtained from them various small sums, amounting to about 2*l.* 5*s.*, by making similar fraudulent representations:—Held, upon those facts, that the money found upon the prisoner was not money "charged" before the magistrate to be stolen or fraudulently obtained within the meaning of s. 29, and therefore that he had, after the conviction, no jurisdiction to make an order under that section for the delivery to her of the whole of the 108*l.* by the constable in whose custody it had remained. The word "charged" in s. 29 is used in its technical legal sense, and imports a formal charge made before a magistrate against an accused person of having stolen or fraudulently obtained specific goods or money, which charge the accused is called upon to answer, and is given an opportunity of answering. *Reg. v. d'Eyncourt*, 21 Q. B. D. 109; 57 L. J., M. C. 64; 37 W. R. 59; 52 J. P. 628—D.

Res judicata—What is a Hearing.—L. was charged with night poaching under 9 Geo. 4, c. 69, and in course of cross-examination of prosecutor's witnesses, the justices considered he had been illegally arrested, and discharged him. L.

was again summoned for the same offence on the same facts, when the justices held that they had no jurisdiction, as the former case was *res judicata*:—Held, that the justices had rightly decided. *Reg. v. Brackenridge*, 48 J. P. 293—D. See also ante, col. 732.

Wrongful Assumption of Jurisdiction.—Where there has been a taking and exercise of the jurisdiction of magistrates, even if that jurisdiction has been wrongly exercised, and, in the judgment of the court, wrongly assumed, the court will not interfere by appeal to correct it. *Id.*—Per Coleridge, C. J.

Dispersing Meeting believed to be Unlawful—Apprehended Breach of the Peace.—In an action for assault and battery, the defendant pleaded that he was a justice of the peace for the county where the alleged assault was committed; and in paragraphs 11 and 12 (substantially the same) of his defence alleged that divers persons unlawfully conspired together to solicit tenants, in breach of their respective contracts, to refuse to pay rent to the owners of their lands; and that on the day of the alleged assault, the plaintiff, being one of such conspirators, and divers other persons, met and assembled in the said county with intent, as the defendant believed, and had reasonable and probable grounds for believing, to promote and carry into effect the said unlawful conspiracy; that the defendant being present at the meeting, requested the plaintiff and others so assembled to disperse, and upon their failing to do so the defendant laid his hand on the plaintiff to separate and disperse the meeting; using no more force than was necessary; such being the assault and battery complained of:—Held, that the 11th and 12th paragraphs were bad on demurrer, for not alleging, as matter of fact, that the meeting was being held for the purpose of promoting or carrying into effect the objects of the alleged conspiracy. *O'Kelly v. Harvey*, 14 L. R., Ir. 105; 15 Cox, C. C. 435—C. A.

The 13th paragraph of the defence set out certain inflammatory placards posted by the promoters of the meeting and their opponents, that informations were sworn, from which it appeared that if the meeting was held the public peace would be broken; and that the defendant believed, and had reasonable grounds for believing, that a breach of the peace would occur if the meeting were allowed to be continued, and that the public peace and tranquillity could not otherwise be preserved than by separating and dispersing the plaintiff and others so assembled; that the defendant, being present, requested them to disperse, which they neglected to do; and that thereupon the defendant laid his hand on the plaintiff in order to separate and disperse the plaintiff and other persons so assembled, using no more violence than was necessary for that purpose; which was the assault and battery complained of. There was not, in the opinion of the court, any allegation in the 13th paragraph shewing that the meeting was in itself an unlawful assembly:—Held, on demurrer, that the 13th paragraph of the defence was a good answer to the action, and that, even assuming that the plaintiff and others assembled with him were engaged in no unlawful act, yet, as there were reasonable grounds appearing on the pleadings for the belief of the defendant that there would be

a breach of the peace if the meeting continued ; and as it was alleged in the defence that there was no other way of averting such breach of the peace, except by stopping the meeting, the defence sufficiently shewed that the defendant was justified in taking the necessary steps to stop and disperse the meeting. *Ib.*

Public Peace — Disturbance of — Salvation Army.—A. B. and S., members of the Salvation Army, led a crowd by a circuitous route through certain of the streets of the town of H., to the meeting-house of the Army, S. during the march blowing the cornet loudly and in a discordant manner, and A. and B. marching with him singing hymns, beating time, and shouting loudly "Alleluia," and other expressions. Several of the inhabitants of the streets through which they passed were disturbed by the loud and discordant noises, but there were not more than fifteen members of the Salvation Army present, much of the noise being caused by a mob of 400 or 500 persons following them and hostile to their proceedings. Information having been preferred against A. B. and S. under a local act, by which a penalty was imposed on any person who should "make, excite, or join in any brawl, or otherwise disturb the public peace," it was found as a fact that they had disturbed the public peace and they were convicted:—Held, on a case stated, that there was no evidence of the offence charged upon which the defendants could be rightly convicted under the act of disturbing the public peace, and that the conviction must be quashed. *Beaty v. Glenister*, 51 L. T. 304—D.

To grant Judicial Separation.—*See* HUSBAND AND WIFE, III. 11.

To grant Maintenance to Wife.—*See* HUSBAND AND WIFE, VIII. 5.

Over Gas Companies.—*See* GAS AND GAS COMPANY.

In Metropolis — Detention of Dog.—*See* ANIMALS.

— **Excise Penalty.**—*See* *Reg. v. Ingham*, post, REVENUE (EXCISE).

On Appointment of Assistant Overseer.—*See* POOR LAW.

In Bastardy Cases.—*See* BASTARDY.

In Cases relating to Attendance at School.—*See* SCHOOLS.

As to Payment of Rates under Public Health Act.—*See* HEALTH, IV.

In Cases relating to Licences.—*See* INTOXICATING LIQUORS.

5. PRACTICE AND PROCEDURE.

Petty Sessional Court-house.—In a borough which had no separate commission of the peace, the mayor and a county justice used to sit at the Town Hall, where they held petty and special

sessions. Since the Summary Jurisdiction Act, 1879 (s. 20), petty sessions had been held at the County Hall only, but latterly, since the Summary Jurisdiction Act, 1884, the justices again sat in the Town Hall:—Held, that the Town Hall was a petty sessional court-house within the meaning of s. 20 of the Summary Jurisdiction Act, 1879, being a place where justices were accustomed to assemble. *Jones v. Jones*, 51 J. P. 198—D.

Hearing at Petty Sessions—Adjournment.—Justices sitting at petty sessions have not only the power of adjournment given them by the Petty Sessions Act (14 & 15 Vict. c. 93), but also an inherent power of adjourning a case at any time to any further sessions. But where a case is fully heard by several justices, and only adjourned for the purpose of determining and pronouncing the order, the same justices who heard the case must also concur in the order pronounced. *Reg. v. Cork (Justices)*, 18 L. R., Ir. 99—Q. B. D.

Conduct of Case by Complainant in Person—Cross-Examination of Witnesses.—An inspector of a society for the prevention of cruelty to animals may, under the 14th section of Jervis's Act, conduct the case and examine and cross-examine witnesses at the hearing before the magistrates of an information preferred at the instance of the society. *Duncan v. Toms*, 56 L. J., M. C. 81 ; 56 L. T. 719 ; 35 W. R. 667 ; 51 J. P. 631 ; 16 Cox, C. C. 267—D.

Cross-examination by Defendant's Solicitor—Discretion to Prohibit.—Certain justices at a preliminary inquiry into an alleged case of highway robbery declined to permit the solicitor representing the prisoners to cross-examine the witnesses for the prosecution, believing that they possessed a discretionary power in the matter. S. 7 of the Summary Jurisdiction Act, 1884, provides that the expression "court of summary jurisdiction" in s. 50 of the Summary Jurisdiction Act, 1879, shall include justices, a justice or magistrate, whether acting under the Summary Jurisdiction Acts, or any of them, or under any other act, or by virtue of his or their commission or by the common law:—Held, that the justices had no discretion to prohibit the solicitor to the prisoners from cross-examining the witnesses for the prosecution, and that the right to cross-examine is absolute both under the Summary Jurisdiction Acts and by the common law. *Reg. v. Griffiths*, 54 L. T. 280 ; 16 Cox, C. C. 46—Pollock, B.

Charge dismissed—Binding Prosecutor over under Vexatious Indictments Act.—Where a prosecutor bonâ fide prefers before a justice, and within his jurisdiction, a charge or complaint in respect of an offence within the Vexatious Indictments Act, 1859, and the justice dismisses it for want of evidence, such dismissal is equivalent to a refusal to commit, and the prosecutor is entitled to require the justice to take his recognisance to prosecute the charge or complaint by way of indictment. *Reg. v. London (Mayor)*, 54 L. T. 646 ; 50 J. P. 711 ; 16 Cox, C. C. 77—D.

Trial by Jury—Night-Poaching—"Imprisonment for a Term exceeding Three Months."—By the Summary Jurisdiction Act, 1879, s. 17, a person when charged before a court of summary

jurisdiction with an offence in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, may claim to be tried by a jury:—Held, that the offence of night-poaching, whereby the person charged is liable under 9 Geo. 4, c. 69, to imprisonment for a period not exceeding three months, and at the expiration of that period to a further imprisonment of six months in case he fail to find sureties for his not so offending again, is not within the act so as to entitle the person charged to be tried by a jury. *Williams v. Wynne*, 57 L. J., M. C. 30; 58 L. T. 283; 52 J. P. 343—D.

Recognizances—Practice in Taking—Irregularity.]—The usual practice in taking the recognizance of a person convicted at quarter sessions is, that the person so convicted, before he is allowed to leave the court, enters orally into the recognizance before the officer of the court, who makes a minute of it; and the recognizance is not formally drawn up till afterwards. J. had been convicted in May, 1885, at Middlesex Sessions, and was sentenced, *inter alia*, to enter into her recognizance in a certain amount. She swore that after sentence she went into an outer office, where a clerk took a note of her entering into the recognizance. She, on a subsequent day, attended at the clerk of the justices of the peace's room at the sessions house, and the clerk in attendance wrote something in a book. That was all that was done. The recognizance was subsequently estreated, and an application had been made to reduce it in vain:—Held, that no good cause had been shown to set aside the recognizance as having been irregularly taken. *Jeffreys, Ex parte*, 52 J. P. 280—D.

Two separate Offences charged.]—D. was charged contrary to bye-laws with emitting smoke and steam from a tramway engine, and contended that these were two separate offences, and the summons was contrary to 11 & 12 Vict. c. 43, s. 1:—Held, that the justices were right in overruling the objection, as emitting smoke was not the less an offence because steam was mixed with it. *Davis v. Loach*, 51 J. P. 118—D.

One Penalty for Two Offences—One Conviction bad.]—Where justices had convicted a person in one penalty for two alleged offences, and the conviction was bad as to one of them:—Held, that it was bad altogether. *Bettesworth v. Allingham*, 16 Q. B. D. 44; 34 W. R. 296; 50 J. P. 55—D.

Penalties — To whom payable — Borough Justices or County Treasurer.]—In the borough of O., a borough having a separate commission of the peace, it is provided by a local act that any penalty recovered upon the information or complaint of any peace officer or constable within the borough is to be paid by the treasurer and carried to the borough fund or to the police superannuation fund, as the corporation may decide. In an action by the treasurer of the county of L. to enforce the provisions of 11 & 12 Vict. c. 43 (Jervis's Act), s. 31:—Held, that the effect of the provisions in the local act was, so far as the borough of O. was concerned, to repeal the provisions of the general act; and that

penalties imposed by the borough justices for offences against the general law under statutes containing no directions as to the application of the penalties were payable to the treasurer of the borough. *Alison v. Charlesworth*, 49 J. P. 294—D.

— Imprisonment for Non-payment—Hard Labour.]—The 5th section of the Summary Jurisdiction Act, 1879, authorises the infliction of imprisonment with hard labour for default in payment of a penalty adjudged to be paid by a summary conviction where the Act on which the conviction is founded authorizes the infliction of imprisonment with hard labour as a punishment for the offence. *Reg. v. Tynemouth JJ.*, 16 Q. B. D. 647; 55 L. J., M. C. 181; 54 L. T. 386; 50 J. P. 454; 16 Cox, C. C. 74—D.

Whether a statute which authorizes the punishment of an offence with a penalty, or in the discretion of the court, with imprisonment with or without hard labour, is an Act which authorizes the punishment of imprisonment with hard labour within the meaning of the exceptions in s. 5 of the Summary Jurisdiction Act, 1879, *quære*. *Reg. v. Tynemouth JJ.* (16 Q. B. D. 647) not followed. *Reg. v. Turnbull*, 16 Cox, C. C. 110—D.

Order imposing Fine—Criminal Prisoner.]—A. was committed to prison in default of distress for non-payment of a fine of 1*l.*, adjudged to be paid by a Court of Summary Jurisdiction on an information under s. 31 of the Vaccination Act, 1867:—Held, that the order imposing the fine was a conviction as distinguished from an order in its technical sense, and that A. was properly treated in prison as a criminal prisoner. *Kenward v. Simmons*, 50 L. T. 28; 48 J. P. 551; 15 Cox, C. C. 397—Lindley, L. J.

6. SPECIAL CASE STATED BY.

a. In what Cases.

Under Summary Jurisdiction Act, 1879, s. 33.]—A court of summary jurisdiction has no power to state a special case under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, unless an application has been made to the court in writing, and unless a copy of such application has been left with the clerk of the court within seven days from the date of the proceeding to be questioned, according to the Summary Jurisdiction Rules, 1886, r. 18. *South Staffordshire Waterworks Company v. Stone*, 19 Q. B. D. 168; 56 L. J., M. C. 122; 57 L. T. 368; 36 W. R. 76; 51 J. P. 662; 16 Cox, C. C. 300—D.

When justices stated a case under 20 & 21 Vict. c. 43, they may be taken to have stated it under all their powers, including those of 42 & 43 Vict. c. 49. *Rochdale Building Society v. Rochdale (Mayor)*, 51 J. P. 134—D.

— Oral Demand — Service of Notice on Clerk.]—There is no right of appeal from justices by case stated under the Summary Jurisdiction Act, 1879, s. 33, unless the directions of the rules made under that section with regard to the mode of application for a case have been observed. Therefore in a case where no notice

of application for the case in writing had been given to the justices making the order appealed against, though a notice of application in writing had been served on their clerk:—Held, that there was no power to state a case, and that the appeal must be dismissed. *South Staffordshire Waterworks Company v. Stone* (19 Q. B. D. 168), approved and followed. *Lockhart v. St. Albans (Mayor)*, 21 Q. B. D. 188; 57 L. J., M. C. 118; 36 W. R. 800; 52 J. P. 420—C. A.

Recovery of Sewers Rate.—A special case under s. 33 of the Summary Jurisdiction Act, 1879, may, by the operation of s. 7 of the Summary Jurisdiction Act, 1884, and notwithstanding s. 10 of the latter act, be stated by a justice sitting to hear a proceeding for the recovery of a sewers rate under s. 194 of the City of London Sewers Act, 1848. *Reg. v. London (Mayor)*, 57 L. T. 491; 52 J. P. 70—D.

Rate under Public Health Act.—Justices, sitting as a court of summary jurisdiction to hear an application to enforce payment of rates under s. 256 of the Public Health Act, 1875, have power to state a case in respect of matters arising out of such application under s. 33 of the Summary Jurisdiction Act, 1879. *Sandgate Local Board v. Pledge*, 14 Q. B. D. 730; 52 L. T. 546; 33 W. R. 565; 49 J. P. 342—D.

b. Practice on Hearing.

Setting down Special Case—Practice as to.—The practice as to setting down special cases stated by justices is the same as that in setting down demurrers under Ord. XXVII. r. 6; and if the special case is not set down for argument within ten days after it is lodged, it cannot afterwards be set down or appear in the list for argument. *South Dublin Union v. Jones*, 12 L. R., Ir. 358—Ex. D.

Counsel appearing for Justices.—The justices have no right to be heard in support of their decision, upon the argument of a case stated by them for the opinion of the court under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). *Smith v. Butler*, 16 Q. B. D. 349; 34 W. R. 416—D.

Power to reduce Penalty.—The High Court of Justice has no power under 20 & 21 Vict. c. 43, s. 6, to reduce a penalty on a case stated by justices. *Evans v. Hemingway*, 52 J. P. 134—D.

Costs on Case stated.—See COSTS, II. 5.

Appeal to Court of Appeal.—See APPEAL, II. 2, c.

7. QUARTER SESSIONS—APPEAL TO.

Separate Court of Quarter Sessions.—The parish of R. was subject to the jurisdiction of quarter sessions of S., but not to those of the county in which it was situate. In 1878 R., with a part of the county called the “added area,” was put under commissioners for paving, etc., by a local act, which provided that if a charter were granted to the whole district, the quarter sessions of S. should have jurisdiction over the “added area,” and that the “added

area” should cease to be liable to county rates. In 1884 a charter was granted, which incorporated the whole district as the borough of R.:—Held, that the borough of R. was a borough having a separate court of quarter sessions, and that the “added area” was no longer liable to county rates. A separate court of quarter sessions in s. 150 of the Municipal Corporations Act, 1882, means a court separate from that of the county. *St. Lawrence (Overseers) v. Kent JJ.*, 51 J. P. 262—D.

Two Notices of Appeal.—Upon the hearing on an appeal to quarter sessions under the Summary Jurisdiction Act, 1879, it appeared that two notices of appeal had been given within the time limited by the Act, and the appellant had elected to proceed upon the second, which was found to be bad for want of the prescribed recognizance:—Held, that the first notice remained good, and that the appellant was entitled to proceed upon it after failing upon the second. *Reg. v. Wolverhampton (Recorder)*, 35 W. R. 650—D.

Grounds of Appeal—Neglect to repair Highway—Order for Expenses.—A complaint having been made to justices that certain roads alleged to be highways under the jurisdiction of a highway board were out of repair, a summons was issued against such board. Upon the hearing, a land surveyor was appointed to view and report on the state of the roads in question. The report was duly made, and the justices, upon the evidence and admissions before them, ordered the highway board to do the repairs. The highway board neglected to obey this order; and the justices appointed such land surveyor to put the highway in repair, and ordered the board to pay the expenses. At several hearings before the justices, the highway board never denied that they were liable to repair the roads in question. The board appealed to quarter sessions against the order upon them for the expenses of repairing the roads. The following were the grounds of appeal:—“1. That the said justices had no jurisdiction to make the said order. 2. That the said order is contrary to law. 3. That the said order is contrary to the evidence. 4. That the justices wrongfully admitted evidence of witnesses other than the person appointed by them under s. 18 of 25 & 26 Vict. c. 61. 5. That at the time of the making of the said order the said highways had been put into a state of complete and effectual repair. 6. That the sum mentioned in the said order to be spent in putting the said roads into repair is excessive. 7. That the said highway board was and is not liable to repair the said highways, and that the liability to repair the said highways was at all the hearings before the said justices recited in the said order, and also at the time of the hearing when the said order was made, and at the time of the making thereof, disputed.” Upon the appeal it was contended on behalf of the board that the roads in question were not highways, and the order was quashed on that ground:—Held, that the highway board were entitled to appeal to quarter sessions against the order, but were not entitled on the appeal to raise the question whether the roads were highways—(1) because they were estopped by their admissions before the justices; (2) because their grounds of appeal gave no notice

that the point would be taken ; and (3) because the question was not open to them when the order appealed against was made. *Ullingworth v. Bulmer East Highway Board*, 52 L. J., Q. B. 680 ; 48 J. P. 37—D.

Held, also, that the quarter sessions, by deciding the question, did not thereby necessarily decide that it was open to the highway board to raise it. *Ib.*

Appeal in Licensing Matters.]—*See Garrett v. Middlesex JJ.*, ante, col. 1052, and *Reg. v. Newcastle-upon-Tyne JJ.*, ante, col. 1053.

Appeal against Valuation List.]—*See POOR-LAW.*

Action for Costs—Taxation by Clerk of Peace—Abandonment of Order.]—An action lies to recover costs which have been taxed by the clerk of the peace, and which arise out of an order made by justices in the case of a pauper lunatic under 16 & 17 Vict. c. 97, s. 97, and subsequently abandoned after notice of appeal to quarter sessions has been given. *Dewsbury Union v. West Ham Union*, 56 L. J., M. C. 89 ; 52 J. P. 151—D.

LACHES.

Effect of, on Legal Rights.]—Where a plaintiff comes to the court to enforce a legal right, his delay in taking proceedings is no defence, if it has not continued long enough to bar his legal right. The case is different where the plaintiff endeavours to enforce an equitable right. *Maddever, In re, Three Towns Banking Company v. Maddever*, 27 Ch. D. 523 ; 53 L. J., Ch. 998 ; 52 L. T. 35 ; 33 W. R. 286—C. A.

Effect of, on Right to sue Executor for Devastavit.]—Mere laches in abstaining from calling upon the executors to realise for the purpose of paying his debt will not deprive a creditor of his right to sue the executors for devastavit, unless there has been such a course of conduct, or express authority on his part, that the executors have been thereby misled into parting with the assets, available to answer his claim. *Birch, In re, Roe v. Birch*, 27 Ch. D. 622 ; 54 L. J., Ch. 119 ; 51 L. T. 777 ; 33 W. R. 72—Chitty, J.

See WAIVER AND ACQUIESCENCE.

LADING (BILL OF).

See SHIPPING.

LANCASTER.

Duchy of—Right to exhibit Information.]—An information cannot be exhibited in the High Court of Justice by the Attorney-General of the

Duchy of Lancaster even in respect of matters concerning the duchy. *Attorney-General (Duchy of Lancaster) v. Devonshire (Duke)*, 14 Q. B. D. 195 ; 54 L. J., Q. B. 271 ; 33 W. R. 367—D.

Palatine Court.]—*See* COURT.

LAND.

Drainage.]—*See* DRAINAGE.

Sale of.]—*See* VENDOR AND PURCHASER.

Tax.]—*See* REVENUE.

LANDLORD AND TENANT.

I. AGREEMENTS FOR LEASES, 1075.

II. DESCRIPTION OF TENANCY, 1076.

III. LEASES.

1. *Parties*, 1076.
2. *Construction—Reservations*, 1077.
3. *Covenants*.
 - a. Joint or Several, 1078.
 - b. Who entitled to Benefit of, 1079.
 - c. Running with the Land, 1079.
 - d. To Repair, 1080.
 - e. Fixtures, 1082.
 - f. Quiet Enjoyment, 1083.
 - g. Not to Assign or Underlet, 1084.
 - h. As to Rates and Taxes, 1085.
 - i. Trade or Business, 1086.
 - j. For Renewal of Lease, 1088.
 - k. Relating to Husbandry, 1089.
 - l. What Covenants Implied, 1090.
 - m. In other Cases, 1091.
4. *Disclaimer on Bankruptcy.—**See* BANKRUPTCY, VIII. 1, a.

IV. RENT.

1. *Rights and Liabilities*, 1092.
2. *Distress*.
 - a. In General, 1095.
 - b. What Goods may be Seized, 1096.

V. TERMINATION OF TENANCY, 1098.

VI. FORFEITURE.

1. *In what Cases*, 1102.
2. *Relief against*, 1102.

VII. ASSIGNMENT OF TERM, 1104.

VIII. AGRICULTURAL HOLDINGS ACT, 1107.

IX. FURNISHED HOUSES, 1109.

X. LODGING HOUSES, 1110.

XI. ACTIONS FOR RECOVERY OF LAND.

1. *In County Court*, 1110.
2. *In other Cases.—**See* PRACTICE.

I. AGREEMENTS FOR LEASES.

Restrictive Covenant — Representations amounting to Collateral Agreement.—S. was the owner of various houses in Cromwell Gardens, purchased from the commissioners of the Exhibition of 1851, in the conveyance of each of which was a covenant that he would not carry on or permit to be carried on any trade or business, but would keep the house as a private dwelling-house. S. let one of the houses to M.; S.'s solicitor sent to M. a draft lease with a letter ending:—"I may perhaps add that the draft is the form used for all the houses on S.'s estates." The draft contained a restrictive covenant of the same nature as that in the conveyance to S., and against it was a note:—"There is a covenant to this effect in the conveyance to S." Six years afterwards, M. negotiated with S. for a long lease of the same house at a high premium, and a draft agreement was sent, which contained a provision that the lease should contain such covenants on the part of the lessee as were usually inserted by the lessor in leases of his other houses in Cromwell Gardens. M.'s solicitor thereupon wrote for the form of lease used by S., and a copy of a lease containing the restrictive covenant was sent, and a lease was granted to M. containing a similar covenant:—Held, that the representations, made by S. to a person negotiating for a lease, that this was the form of lease used by S., amounted not merely to a statement that this was the then form of lease, but to a collateral contract with the intending lessee, that the neighbouring property of S. should continue to be managed on that footing:—Held, therefore, that M. was entitled to restrain S. from authorising any of the adjoining houses to be used for the purpose of trade. *Martin v. Spicer*, 34 Ch. D. 1; 56 L. J., Ch. 393; 55 L. T. 821—C. A. Affirmed on different grounds, 14 App. Cas. 12; 58 L. J., Ch. 309; 60 L. T. 546; 37 W. R. 689; 53 J. P. 516—H. L. (E.).

Agreement for Purchase of Lease.—See VENDOR AND PURCHASER.

Agreement to enter into Agreement — Damages.—An agreement was made between W. and F., that W. would enter into an agreement with O. for a lease at a certain rent for such term and subject to such covenants as O. should approve, and would accept such lease and execute a counterpart:—Held, that F. was entitled to recover damages from W. for breach of the agreement between them. *Foster v. Wheeler*, 38 Ch. D. 130; 57 L. J., Ch. 871; 59 L. T. 15; 37 W. R. 40—C. A.

Agreement that Underlease shall contain the same Covenants as Original Lease.—The plaintiff, who was lessee of part of the property of a hospital, agreed with the defendant to grant him an underlease, "to contain all usual covenants (including a covenant not to assign or underlet without the consent of the plaintiff, such consent not to be withheld if the proposed assignee or tenant be respectable and responsible), together with such other covenants, clauses, and provisos as are contained in the lease under which the premises are held." The original lease contained (1) a covenant that if any dispute relating to the demised premises should arise between the lessee and any other tenant of the hospital, it

should be referred to the arbitration of the hospital; (2) that the lessee, his executors, administrators, or assigns, would not assign or sublet without the licence of the hospital; (3) that all demises and assignments of the demised premises should be prepared by the solicitors of the hospital:—Held, that the covenants in the original lease were not to be taken as models and inserted in the underlease with the names of the underlessor and underlessee substituted for the names of the original lessors and lessee respectively, but that the plaintiff was entitled to have them inserted without modification, so as to bind the underlessee to refer disputes with tenants of the hospital to the arbitration of the hospital, not to assign or underlet without the consent of the hospital, and to have his demises and assignments prepared by the solicitors of the hospital. *Williamson v. Williamson* (9 L. R., Ch. 729) distinguished. *Haywood v. Silber*, 30 Ch. D. 404; 54 L. T. 108; 34 W. R. 114—C. A.

Forfeiture—Application of s. 14 of the Conveyancing Act, 1881.—See cases post, col. 1103.

Specific Performance of.—See SPECIFIC PERFORMANCE.

Contents of Memorandum—Statute of Frauds.—See CONTRACT, I. 6.

II. DESCRIPTION OF TENANCY.

In Common—House—Repairs—Contribution.—One tenant in common of a house who expends money on ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution. *Leigh v. Dickeson*, 15 Q. B. D. 60; 54 L. J., Q. B. 18; 52 L. T. 790; 33 W. R. 538—C. A.

Action for Use and Occupation.—Where one tenant in common has by lease demised his interest to his co-tenant in common, if the tenant in common who was lessee continues in occupation as tenant at sufferance after the expiration of the lease, he will be liable in an action for use and occupation at the suit of his co-tenant in common who was lessor. *Id.*

For Years—Waste.—A tenant for years is liable for permissive waste. *Davies v. Davies*, 38 Ch. D. 499; 57 L. J., Ch. 1093; 58 L. T. 514; 36 W. R. 399—Kekewich, J.

Week to Week.—A weekly tenancy is a letting of the premises by the landlord at the beginning of each successive week. *Sandford v. Clarke*, 21 Q. B. D. 398; 57 L. J., Q. B. 507; 59 L. T. 226; 37 W. R. 28; 52 J. P. 773—D.

At Will.—Where a tenant is in possession of land under an agreement for a lease for twenty-one years but has paid no rent, he is a tenant at will and the landlord may determine the tenancy by giving notice to quit. *Coatsworth v. Johnson*, 55 L. J., Q. B. 220; 54 L. T. 520—C. A.

III. LEASES.

I. PARTIES.

Infant—Surrender of Lease.—The provisions of the act 11 Geo. 4 & 1 Will. 4, c. 65, for the

surrender of a lease to which an infant is entitled, apply to a lease to which an infant is only beneficially entitled, the legal estate being vested in a trustee for him. *Griffiths, In re*, 29 Ch. D. 248; 54 L. J., Ch. 742; 53 L. T. 262; 33 W. R. 728—Pearson, J.

By Mortgagee.]—See MORTGAGE.

Grant under Settled Estates Act.]—See SETTLEMENT.

2. CONSTRUCTION—RESERVATIONS.

Reservation of Shooting Rights—Regrant.]—The defendant demised to the plaintiff a large landed estate in Ireland ("excepting and always reserving out of this demise" to the lessor, timber and other trees, mines, minerals, and quarries, "and also reserving to the lessor, his heirs and assigns, and his and their servants, agents, and workmen, liberty of ingress," &c., to cut, work, and take away the trees and minerals; "and also by way of grant, and not of reservation, the exclusive right of hunting, coursing, and shooting upon and over the said demised premises, or otherwise to destroy the game and wildfowl thereon being"), to hold the said demised premises with the appurtenances (except as before excepted) to the lessee for a term of years at an annual rent:—Held, that the right of shooting was re-granted to the lessor, and that the words "and also by way of grant, and not of reservation," were not a resumption of the parcels of the lease so as to pass the right of shooting to the lessee. *Houstoun v. Sligo (Marquis)*, 55 L. T. 614—H. L. (E.).

Reservation of Mines and Minerals—Pre-historic Chattel found beneath the Surface.]—In land demised to a gas company for ninety-nine years, with a reservation to the lessor of all mines and minerals, and covenants under which the lessees were authorised, under the inspection of the lessor's surveyor and according to plans to be previously approved, to erect a gasholder and other buildings, a pre-historic boat, embedded in the soil six feet below the surface, was discovered by the lessees in the course of excavating for the foundations of the gasworks:—Held, that the boat, whether regarded as a mineral, or as part of the soil in which it was embedded when discovered, or as a chattel, did not pass to the lessees by the demise, but was the property of the lessor, though he was ignorant of its existence at the time of granting the lease. *Elwes v. Brigg Gas Company*, 33 Ch. D. 562; 55 L. J., Ch. 734; 55 L. T. 831; 35 W. R. 192—Chitty, J.

—Custom of Country—Whether Reservation includes Flints.]—A farm was let under a written agreement, reserving to the landlord "all mines and minerals, sand, quarries of stone, brick earth and gravel pits." A local custom (which, it was suggested, had grown up within the last thirty or forty years) allowed tenants of such farms, let with a similar reservation, to take away the flints that were turned up in the ordinary course of good husbandry, and to sell them for their own benefit. If the flints were not turned up and removed such farms could not be properly cultivated:—Held, that the

custom was reasonable and valid; and when read into the written agreement was not inconsistent with the reservation, even assuming (but without deciding) that the reservation of "mines and minerals" included such flints. *Tucker v. Linger*, 8 App. Cas. 508; 52 L. J., Ch. 941; 49 L. T. 373; 32 W. R. 40; 48 J. P. 4—H. L. (E.).

—Building Lease—Right to remove Soil.]—The holder of a building lease where minerals are reserved has a right to dig foundations for buildings about to be erected, and dispose of the materials dug out, but not to do so in order to improve the surface as a building site. *Robinson v. Milne*, 53 L. J., Ch. 1070—North, J.

"Heirs or Assigns"—Easement—Regrant to Lessee—Surrender—Merger.]—In 1820 A., B., and C., who were tenants in common in fee, demised a strip of land intersecting their estate to T., for a term of 1000 years for the purpose of making a canal. The lease contained a proviso that nothing therein contained should prevent the lessors, their heirs and assigns, from using all or any of the demised land, or from granting any way-leaves, or roads over or across the same in like manner as they could or might have done if the lease had not been granted, but so as not to injure the canal or the navigation thereof, or the towing-path, or any works for the convenience of the lessee. In 1838 the estate was partitioned between A., B., and C., by deed, the reversion of part of the canal being conveyed to B., and the lands abutting on it to A. and C. respectively. In 1839 B. conveyed his reversion in that part of the canal to the lessee. Upon a claim by A. to exercise over that part of the canal the rights reserved by the lease of 1820:—Held, that the right of way across the canal was reserved to the lessors and their assigns as owners of the reversion and not as owners of the adjoining lands, and consequently that the conveyance by B. in 1839, by causing the term to become merged in the reversion, extinguished the rights of A. and C. over that part of the canal included in that conveyance. *Dynevor (Lord) v. Tennant*, 13 App. Cas. 279; 57 L. J., Ch. 1078; 59 L. T. 5; 37 W. R. 193—H. L. (E.).

Grant of Easement—Appurtenances.]—See Thomas v. Owen, ante, col. 672.

Reservation of Right to obstruct Lights.]—See Mitchell v. Cantrill, ante, col. 677.

3. COVENANTS.

a. Joint or Several.

Demise to Two as Tenants in Common.]—Premises were demised to G. and A., "their executors, administrators, and assigns," habendum to "the said G. and A., their executors, administrators, and assigns, as tenants in common and not as joint tenants," at a single yearly rent; and G. and A. covenanted "for themselves, their executors, administrators, and assigns that they the said G. and A., or some or one of them, their executors, administrators, or assigns," would pay the said yearly rent and keep the premises in repair. G. having died during the term, the lessor sued A. and the

executors of G. for breaches of covenant occurring after G.'s death :—Held, that the covenants were in form joint and not several, and that G.'s executors were not liable. *Whyte v. Tyndall*, 13 App. Cas. 263; 57 L. J., P. C. 114; 58 L. T. 741; 52 J. P. 675—H. L. (1r.)

b. Who entitled to Benefit of.

Lease by Mortgagor subsequent to Mortgage—Notice to pay Rent to Mortgagees.]—A mortgagor in possession let the mortgaged property without the concurrence of the mortgagees. The lease was one authorised by s. 18 of the Conveyancing Act, 1881. The lessee then advanced certain moneys to the mortgagor upon the terms that the lessee should retain the rent as it became due until the monies were repaid. Subsequently the mortgagees gave notice to the lessee informing him of the mortgage, and requiring him to pay them the rent thereafter to become due, and not to pay it to the mortgagor. The lessee having refused to comply with the notice, the mortgagees brought an action to recover possession under a condition of re-entry upon non-payment of rent contained in the lease :—Held, that, by the combined effect of ss. 10 and 18 of the Conveyancing Act, 1881, the mortgagees, after giving the above notice to the lessee, were entitled as reversioners to enforce the covenants and provisions in the lease, and were therefore entitled to recover possession of the property under the condition of re-entry; and, further, that the agreement between the mortgagor and lessee as to the retention of the rent was not binding upon the mortgagees. *Municipal Permanent Building Society v. Smith*, 22 Q. B. D. 70; 58 L. J., Q. B. 61; 37 W. R. 42—C. A.

c. Running with the Land.

Covenant to pay Collateral Sum of Money.]—By an underlease, dated in 1869, A. demised the Y. premises, comprised in two original leases, dated in 1848 and 1863, save and except such parts of the premises (Z.) comprised in the lease of 1848 as were comprised in an underlease, dated in 1867, to B. for the residues of the original terms except the last day of each. The underlease to B., of 1869, contained a covenant by B. for himself, his assigns, &c., that he would during the terms granted, pay all future rates, taxes, &c., payable in respect of the Y. premises, and also would, during the said term, pay all such sums (not exceeding 100*l.* in any one year) as should for the time being be payable by the lessor, his assigns, &c., on account of the like rates, taxes, &c., in respect of the Z. premises. The Y. premises were subsequently assigned to C. for the residue of the terms :—Held, that the covenant, as to taxes, &c., in respect of the Z. premises, was a covenant to pay a collateral sum of money, and did not run with the land, and, therefore, that C. was not liable. *Gouver v. Postmaster-General*, 57 L. T. 527—Kay, J.

Covenant to Repair and Maintain Road.]—The doctrine in *Tulk v. Moxhay* (2 Ph. 774) is limited to restrictive stipulations, and will not be extended so as to bind in equity a purchaser

taking with notice of a covenant to expend money on repairs or otherwise which does not run with the land at law. Semble, that the burden of a covenant (not involving a grant) never runs with the land at law, except as between landlord and tenant. *Cooke v. Chilcott* (3 Ch. D. 694) overruled on this point. *Morland v. Cook* (6 L. R., Eq. 252) explained. *Holmes v. Buckley* (1 Eq. C. Ab. 27) discussed. *Austerberry v. Oldham Corporation*, 29 Ch. D. 750; 53 L. T. 543; 33 W. R. 807; 49 J. P. 532—C. A.

A. by deed conveyed for value to trustees in fee a piece of land as part of the site of a road intended to be made and maintained by the trustees under the provisions of a contemporaneous trust deed (being a deed of settlement for the benefit of a joint stock company established to raise the necessary capital for making the road); and in the conveyance the trustees covenanted with A., his heirs and assigns, that they, the trustees, their heirs and assigns, would make the road and at all times keep it in repair, and allow the use of it by the public subject to tolls. The piece of land so conveyed was bounded on both sides by other lands belonging to A. The trustees duly made the road, which afforded the necessary access to A.'s adjoining lands. A. afterwards sold his adjoining lands to the plaintiff, and the trustees sold the road to the defendants, both parties taking with notice of the covenant to repair :—Held, that the plaintiff could not enforce the covenant against the defendants. *Ib.*

Consideration of the circumstances under which a covenant will be held to touch or concern the land of the covenantee so that the benefit may run with the land. *Ib.*

Offensive Trade.]—See *Hall v. Edwin*, post, col. 1088.

d. To Repair.

To leave Premises in Repair—Damages—Repairs no longer necessary to command Rent.]—In an action against the assignee of a lease of a house for breach of covenant to leave the premises in repair at the end of the term, it appeared that owing to changes in the surrounding property the house had so far altered in value since the commencement of the lease that it would be as valuable for letting purposes if some of the repairs required by the covenant according to its strict meaning were either omitted or executed at a cheaper rate than was usual under such a covenant :—Held, that the facts above mentioned were no ground for limiting the liability of the defendant under the covenant, and that the measure of damages for a breach of it was the amount required to put the premises into such repair as was originally contemplated by the covenant. *Morgan v. Hardy*, 35 W. R. 588—C. A. Affirming 17 Q. B. D. 770—Denman, J.

— Damages—Lessor effecting Structural Alterations.]—A lessor is not deprived of any part of the ordinary damage recoverable on a breach of covenant by the lessee to deliver up the demised premises in good repair, by reason of the lessor's effecting structural alterations in the premises after the determination of the lease.

Inderwick v. Leech, 1 C. & E. 412—Lopes, J. Affirmed in C. A.

— **Liability of Tenant after Bankruptcy.**—

A tenant in possession of premises under an agreement for a lease for twenty-one years, from Michaelmas, 1861 (the lease to contain a covenant to repair and leave in repair) liquidated by arrangement in 1872, and got his discharge in 1880. The trustee took no steps with regard to the premises, which the tenant continued to occupy till Michaelmas, 1882:—Held, that the tenant was bound to leave the premises in the state of repair required by the agreement. *Ponsford v. Abbott*, 1 C. & E. 225—Lopes, J.

To leave Premises in Tenantable Repair—Dwelling-house.—

Under an agreement for a lease for five years of a dwelling-house, the tenant was to leave the house in tenantable repair. In an action by the landlord at the end of the tenancy (which continued for seventeen years) for damages, upon the footing that the tenant was liable to paper and paint, and leave the house in the same condition as when he took it:—Held, that the landlord was not entitled to damages on that footing, but that he was entitled to compensation for waste, the tenant being liable to paint sufficiently to preserve the woodwork, but not to do papering or decorative painting. *Crawford v. Newton*, 36 W. R. 54—C. A.

Waiver—Acceptance of Rent.—A notice, requiring a tenant to remedy a breach of covenant by repairing premises within three months, expired on February 1st, 1884. No repairs were then done, and on February 2nd, the rent due at Christmas, 1883, was accepted:—Held, that the acceptance of the rent was no waiver of the breach of covenant. *Cronin v. Rogers*, 1 C. & E. 348—Denman, J.

Letting of Farm and Mill—Liability to repair Mill-wheel.—An agreement for the letting of a farm and mill provided that the tenant "should keep and leave the messuages and buildings in good and substantial repair," &c. In an action by the landlord to recover damages for non-repair of the mill-wheel:—Held, that the tenant was liable. *Openshaw v. Evans*, 50 L. T. 156—D.

Covenant to Repair by Landlord—Necessity for Notice.—In an action by a tenant against a landlord for breach of an agreement to keep drains in repair, the jury found that neither party knew of the defective condition of the drains before the damage occurred, and that the plaintiff had not, and the defendant had, the means of knowing:—Held, that the defendant was not liable. *Hugall v. McKean*, 53 L. T. 94; 33 W. R. 588—C. A. Affirming 1 C. & E. 391—Wills, J.

Not to commit Waste—Damages—Action by Reversioner against Tenant.—A covenant by a tenant not to commit waste on the demised property is not, with regard to the measure of damages for the breach of it, the same thing as a covenant to deliver up the property at the end of the term in the same state as that in which the tenant received it. Therefore, in an action by the reversioner against the tenant for waste,

the measure of damages is not necessarily the sum which it would cost to restore the property to its condition before the waste; the true measure of damages is the diminution in the value of the reversion, less a discount for immediate payment. *Whitham v. Kershaw*, 16 Q. B. D. 613; 54 L. T. 124; 34 W. R. 340—C. A.

Penalty or Liquidated Damages.—Lessees, who had been granted the privilege of placing slag from blast furnaces on land let to them, covenanted (inter alia) to pay the lessor 100l. per imperial acre for all land not restored at a particular date:—Held, that the sum, although described in one part of the agreement as "the penalty therein stipulated," was not a penalty; but estimated or stipulated damages. *Elphinstone v. Monkland Iron and Coal Company*, 11 App. Cas. 332; 35 W. R. 17—H. L. (Sc.).

Where one lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious, and others but trifling, damage, the presumption is that the parties intended the sum to be penal, subject to modification; but where the payments stipulated are made proportionate to the extent of which the contractors may fail to fulfil their obligations, and they are to bear interest from the date of the failure, payments so adjusted, with reference to the actual damage, are liquidated damages. *Id.*

e. Fixtures.

What are Fixtures.—The question whether a particular article is a moveable chattel or a fixture depends on the degree of annexation to the freehold, and the object of annexation. *Cosby v. Shaw*, 19 L. R., Ir. 307—V. C.

To keep and yield up in Repair Premises and all Improvements at date of Demise, or thereafter to be made.—In 1804, owners of the fee-simple of certain premises agreed, by indented articles, to demise them for lives renewable for ever, and the intended lessees agreed to pull down a mill on the premises, and build a new one, and covenanted to keep the mills and works in constant working order, repair, and condition. On the 30th July, 1823, a lease was executed in pursuance of this agreement, and the lessee thereby covenanted to preserve and keep the premises, and all buildings and improvements then or thereafter to be made thereon, in good order and repair; to keep the mills, works, and machinery therein in working order, repair, and condition; to yield up the premises, and all buildings and improvements, in like good order, repair, and condition, and to keep the mills and works thereto belonging, or in any-wise appertaining, in constant working order and repair. The lease was renewed in 1829, the renewal containing similar covenants by the tenant. On the 8th November, 1834, an under-lease, at a profit rent, was made of the mills and premises for 999 years, which disclosed the existence of a head lease. In 1862 S. & Co. became assignees of the sub-lease, and, having entered into possession, took out the old millstone, and erected a quantity of new machinery in the mill, of an improved description. In 1865 a fee-farm grant was made by the plaintiff,

as owner of the reversion, to the owners of the superior lease, with covenants by the grantees similar to the lessee's covenants in the original lease and renewal, and also to keep the mills and works in constant working order, repair, and condition. In 1874 an agreement was executed between the head landlord and S. & Co. reciting the original lease, its renewal, the underlease, and the derivative title to it, and giving S. & Co. liberty to erect an engine-house and shed, in pursuance of which the defendants erected a steam-engine and boiler, and buildings for the same. In 1886 S. & Co. sold, and proceeded to remove, the new machinery placed by them in the mill:—Held, that S. & Co. were precluded by the terms of the contract of tenancy having regard to the covenants in the several instruments constituting their title, and of which they had notice, from removing tenants' fixtures, including the new and improved machinery, and its accessories. *Ib.*

Removal before Termination of Lease—Bankruptcy.—A lease of a mill and warehouse for twenty-one years contained a covenant by the lessors with the lessees (inter alia): (4) that certain articles mentioned in a schedule should be the property of the lessees, and should be removeable by them, they making good all damage done by such removal. The articles mentioned in the schedule were iron columns, beams, floors, brick piers, and things ejusdem generis. There was a proviso (2) that the lessees might by notice determine the term at the end of seven or fourteen years, (1) that on the tenant's bankruptcy the term should cease, and (3) that on the determination or cesser of the term all the machinery and also all the buildings erected by the lessees should be their property, and should be removed by them previously to the determination or cesser of the term, unless it should then be mutually agreed that the lessors should purchase them, the lessees in cases of removal to make good all damages which might be caused by such removal. The tenants failed and the lease determined:—Held, that the official receiver was nevertheless entitled to the articles mentioned in clause (4) of this covenant and clause (3) of the proviso as being the property of the lessees. *Gould or Gould, Ex parte, Walker, In re*, 13 Q. B. D. 454; 51 L. T. 368; 1 M. B. R. 168—D.

f. Quiet Enjoyment.

Notice by Superior Landlord to pay Rent to him—Damages.—The defendants granted the lease of certain premises to the plaintiff, with a covenant by the lessors for quiet enjoyment thereof by the lessee, and a covenant by the lessee to pay rent to the lessors. At a time when the plaintiff was in arrear with his rent, the defendants sent a notice to his tenants requiring them to pay their rent to the defendants' agent instead of to the plaintiff. One of the plaintiff's tenants accordingly paid his rent to the defendants' agent. The plaintiff having brought an action against the defendants for breach of the covenant for quiet enjoyment:—Held, that this notice was a breach by the lessors of the covenant for quiet enjoyment; that non-payment of the rent by the lessee did not disentitle him to the protection of that covenant; and that he was entitled to more than nominal damages for the breach of it. *Edge v.*

Boileau, 16 Q. B. D. 117; 55 L. J., Q. B. 90; 53 L. T. 907; 34 W. R. 103—D.

Title and Possession not Affected—Drainage—Causing Floods.—In order to constitute a breach of covenant for quiet enjoyment in a lease of land, it is sufficient that the lessee's ordinary and lawful enjoyment of the demised land be substantially interfered with by the acts of the lessor or those lawfully claiming under him, although neither the title to the land nor the possession of the land be otherwise affected. By a general system of drainage made by the defendants in a particular district, various farms in that district were drained by several underground drains, by which the water was carried through all such farms. The defendants let one of these farms to the plaintiff with the usual covenant for quiet enjoyment against the acts of the lessors or any person lawfully claiming through or under them. The defendants had previously let another of such farms adjoining, but lying above the plaintiff's farm, to one C., with a right to use the drains through the plaintiff's land, so far as they were adequate to carry the water from C.'s farm. C., during the plaintiff's tenancy, first, by an excessive user of the drainage system, which was properly constructed for the purpose of drainage, caused the water passing down the drains in his farm to escape and overflow into the plaintiff's farm and damage his crops. Secondly, by a proper user by C. of the drains passing through the plaintiff's farm, damage was also done to a field in the plaintiff's farm by the escape of water, but this arose from one of the drains there having been imperfectly and improperly constructed:—Held, that the defendants were liable to the plaintiff for a breach of their covenant for quiet enjoyment in respect of this last damage, as there had been within the meaning of such covenant a substantial interruption by a person who lawfully claimed through the defendants; but that the defendants were not liable for the damage done by the excessive user by C. of the drainage system, which was properly constructed, either under their covenant for quiet enjoyment or under the law of trespass or nuisance. *Sanderson v. Berwick-upon-Tweed (Mayor)*, 13 Q. B. D. 547; 53 L. J., Q. B. 559; 51 L. T. 495; 33 W. R. 67; 49 J. P. 6—C. A.

Liability of Mortgagor—Estoppel.—Where a mortgagor demised incumbered land, and covenanted for quiet enjoyment, and the lessee was ejected by the mortgagees:—Held, that although the legal estate was outstanding in the mortgagees, yet as there was a reversion in the landlord by estoppel, he was liable upon his covenant. *Hartcup v. Bell*, 1 C. & E. 19—Manisty, J. Affirmed in C. A.

g. Not to Assign or Underlet.

Lessor's Consent—Responsible Person.—A lease of a farm contained a clause of forfeiture if (inter alia) the lessee should underlet or part with the possession of the demised premises, or any part thereof, without the consent in writing of the lessor first had and obtained, provided always that such consent should not be withheld if the proposed assignee or lessee were a respectable and responsible person:—Held, that the consent of the lessor was not necessary if the

lessee underlet or parted with possession of the premises to a respectable and responsible person. *Burford v. Unwin*, 1 C. & E. 494—Huddleston, B.

Indorsement of Consent.—A lease, made in 1866, contained a clause that the lessee should not assign the premises without the consent in writing of the lessor, to be indorsed on the lease. The lessee assigned with the contemporaneous consent in writing of the lessor, which was indorsed on the lease, but not on the assignment:—Held, that the assignment was valid. *Ulster Permanent Building Society, In re*, 13 L. R., Ir. 67—M. R.

Lessor's Consent whether Implied.—When a lease is not assignable without the landlord's assent, the fact that the landlord did not object to the assignees taking possession cannot, irrespective of all other circumstances, be held sufficient to imply his recognition of the assignees. *Elphinstone v. Monkland Iron and Coal Co.*, 11 App. Cas. 332—H. L. (Sc.)

h. As to Rates and Taxes.

Liability of Assignor of Lease—Ambassador, Immunities of.—A lease of a dwelling-house contained a covenant by the lessee to pay the sewers rate and all other rates, taxes, and assessments, and impositions of what nature or kind soever, and whether parliamentary, parochial, or otherwise, which then were, or at any time thereafter during the term should be assessed, charged, or imposed upon the demised premises, or on the landlord in respect thereof. By a local act relating to parochial rates in the parish in which the demised premises were situated, it was provided that every rate or assessment made, laid, or assessed by virtue of the act in respect of any land, ground, house, &c., which any ambassador, envoy, resident, agent or other public minister of any foreign prince or state, or the servant of any such ambassador, envoy, resident, agent, or public minister, or any other person not liable by law to pay such rate or assessment then did or thereafter should inhabit, should be paid by and be recoverable from the landlord, owner, lessor, or proprietor of such land, ground, house, &c. The lessee of the demised premises assigned the same to an attaché of a foreign embassy, who occupied them as his residence. The assignee having claimed exemption from liability to pay a parochial rate made in respect of the premises under the local act, the parish authorities enforced payment of the same against the lessor. In an action brought against the lessee by the lessor to recover the amount so paid by him:—Held, that payment of the rate was not enforceable against an attaché of a foreign embassy; that the rate was therefore under the local act recoverable from the lessor; and that the lessee was under the covenant bound to repay to the lessor the amount of the rate so paid by him. *Parkinson v. Potter*, 16 Q. B. D. 162; 55 L. J., Q. B. 153; 53 L. T. 818; 34 W. R. 215; 50 J. P. 470—D.

"Outgoings"—Owner's Proportion of Paving Street.—The lessee of a house in a new street within the metropolitan district covenanted with his lessor to pay during the term "all existing and

future taxes, rates, assessments, land-tax, tithe or tithe rent-charge, and outgoings of every description for the time being payable either by the landlord or tenant in respect of the said premises": Held, that the owner's proportion of the cost of paving the street under 25 & 26 Vict. c. 102, s. 96, was an "outgoing" payable by the lessee under this covenant. *Aldridge v. Ferne*, 17 Q. B. D. 212; 55 L. J., Q. B. 587; 34 W. R. 578—D.

"All Rates, Taxes, and Assessments"—Expenses of Paving Street.—By an agreement of lease the tenant agreed to pay "all rates, taxes, and assessments payable in respect of the premises during the term":—Held, that a sum assessed upon the owners as their proportion of the expense of paving the street upon which the premises abutted, was not a rate, tax, or assessment within the meaning of the covenant, but a charge imposed upon the owner for the permanent improvement of his property. *Wilkinson v. Collyer*, 13 Q. B. D. 1; 53 L. J., Q. B. 278; 51 L. T. 299; 32 W. R. 614; 48 J. P. 791—D.

"Rates, Assessments, Impositions and Outgoings"—Sewering Street under Public Health Act.—A lessee covenanted to pay the tithe or rent charges in lieu of tithes and tax (if any), sewers rates, main drainage rates, and all other taxes, rates, and assessments, and impositions and outgoings whatsoever then or thereafter to be charged or imposed on or in respect of the said premises or any part thereof:—Held, that the lessee was not liable to pay the amount charged by the urban authority for sewerage, levelling, and paving the road on which the demised premises abutted, under s. 150 of the Public Health Act, 1875. *Hill v. Edward*, 1 C. & E. 481—Mathew, J.

Lessor to pay "all Rates chargeable in respect of Demised Premises"—Water Rate.—In a lease of a shop and basement and of three rooms on the third floor of the same house, the lessor covenanted to pay "all rates and taxes chargeable in respect of the demised premises." Water was separately supplied by a water company to the shop and basement, and paid for by the tenant. In an action to recover from the lessor the amount so paid:—Held, that such charge was a "rate" within the meaning of the covenant. *Direct Spanish Telegraph Company v. Shepherd*, 13 Q. B. D. 202; 53 L. J., Q. B. 420; 51 L. T. 124; 32 W. R. 717; 48 J. P. 550—D.

i. Trade or Business.

Business, what is—Charitable Institution where no Payment received.—The lease of a house contained a covenant that the lessee should not use, exercise, or carry on upon the premises any trade or business of any description whatsoever:—Held, that a charitable institution called a "Home for Working Girls," where the inmates were provided with board and lodging, whether any payment was taken or not, was a business, and came within the restrictions of the covenant. *Rolls v. Miller*, 27 Ch. D. 71; 53 L. J., Ch. 682; 50 L. T. 597; 32 W. R. 806—C. A. Affirming 48 J. P. 357, 518—Pearson, J.

It is not essential that there should be payment in order to constitute a business; nor does pay-

ment necessarily make that a business which without payment would not be a business. *Id.*

— **Using House as Hospital.**]—A covenant not to use a house for “the exercise or carrying on of any art, trade or business, occupation or calling,” is broken by using the house for the purpose of a hospital association, established without a view to profit, to provide accommodation for patients able and willing to pay for it. *Portman v. Home Hospitals Association*, 27 Ch. D. 81, n.; 50 L. T. 599, n.—Jessel, M. R.

Any Art, Trade, &c.—Teacher of Music—Constructive Notice—Parties.]—In 1857 A. granted a lease of a house for a term of ninety-three years, with a restrictive covenant against the user of the house for any art, trade, or business. The term granted by the lease became vested in B., and in October, 1883, B. granted a lease of the house to C. for twenty-one years, with an express permission that he might use the house in his profession of teaching music and singing, and with the usual covenant for quiet enjoyment. There was constructive notice of the original lease in the underlease, but C. had no personal knowledge or notice of the restrictive covenant. A breach of this covenant having been committed by C., the devisees in trust of A. brought an action against B. and C., claiming an injunction and damages:—Held, that the plaintiffs were entitled to an injunction against C., and damages against B., who was a proper party to the action. *Tritton v. Bankart*, 56 L. T. 306; 35 W. R. 474—Kekewich, J.

“Annoyance, Nuisance, or Grievance”—Hospital—Infectious or Contagious Diseases.]—A lease of premises in a residential neighbourhood in London contained a covenant against carrying on certain specified trades, or any other noisome, obnoxious, or offensive trade or business, or doing anything upon the premises which might be or grow to the annoyance, nuisance, grievance, or damage of the lessor, or the inhabitants of the neighbouring or adjoining houses. The tenant used the premises as an hospital for diseases of the throat and various other diseases. Diseases known to be of an infectious or contagious nature were not treated:—Held, that the hospital was a grievance within the covenant. *Tod-Heatley v. Benham*, 40 Ch. D. 80; 58 L. J., Ch. 83; 60 L. T. 241; 37 W. R. 38—C. A.

Not to permit or suffer Premises to be occupied by Person carrying on Offensive Trade—Sub-lessee.]—A lease contained a covenant by the lessee and his assigns “not to use, exercise, or carry on upon the demised premises, or permit or suffer any part thereof to be occupied by any person who shall use, occupy, or carry on therein any noisome or offensive trade.” E. purchased an underlease of the premises with notice of the covenant in the original lease, and made a further sub-demise, containing a similar covenant, to M. M., after being in occupation some months, began to carry on an offensive business on the premises. In an action by the original lessor, claiming an injunction against both E. and M.:—Held, that no injunction ought to be granted against E., there being no evidence to show that E. had authorised or sanctioned M. to occupy the premises to carry on therein an offensive business; and that E.

was not to be compelled by means of an injunction to bring an action of ejectment against M. The doctrine of *Tulk v. Mowhay* (2 Ph. 774), explained. *Haywood v. Brunswick Building Society* (8 Q. B. D. 403), and *Austerberry v. Oldham Corporation* (29 Ch. D. 750), followed. *Hall v. Ewin*, 37 Ch. D. 74; 57 L. J., Ch. 95; 57 L. T. 831; 36 W. R. 84—C. A.

Seemle, that the words “shall not suffer or permit” in a covenant of this kind ought not to be construed as equivalent to “shall hinder and prevent,” but rather as “shall not authorise or sanction.” *Id.*

j. For Renewal of Lease.

Power of Leasing — Sanction of Court — “Best Rent” — Specific Performance.]—A covenant for renewal in a lease executed by a lessor under a power of granting leases in possession at the best rent is good, and may be enforced against the lessor, provided that, at the time for its performance, the new lease reserves the best rent that can then be obtained, and contains only stipulations then authorised by the power. But if at the time when performance of the covenant is claimed, the stipulated rent is not the best rent, the lessee is not entitled either to specific performance or damages, even though the original lease had been sanctioned by the court in the presence of all the beneficiaries. *Gas Light and Coke Company v. Towse*, 35 Ch. D. 519; 56 L. J., Ch. 889; 56 L. T. 602—Kay, J.

A private act of 1828, relating to a testator's real estate, empowered his trustees to grant building leases in possession not exceeding seventy-five years at “the best yearly rent.” In 1860 under an order in certain suits relating to the estate, the surviving trustee, in pursuance of the power and with the approval of the judge (some of the cestuis que trust being also before the court, and others being represented by trustees) demised certain copyhold land to a gas company (then in occupation under an agreement for the lease, which agreement had also been sanctioned by the court) for thirty years at the yearly rent of 30*l.*, the lessor covenanting to renew at the end of the term for a similar term at the like rent, if the lessees previously signified their desire for renewal by notice in writing delivered to the lessor, “his heirs or assigns, or left at his or their usual place or places of abode.” The lessor had obtained from the lord of the manor of which the copyhold land was held a licence to grant leases covering fifty-one years from the date of the lease. Under the agreement for the lease and before the lease was executed, the company spent a considerable sum in erecting a large purifying-house on the land. Before the expiration of the lease the solicitors to a new gas company, the successors to the original lessees, gave notice in writing to the solicitors to the then trustees, the original lessor having died, of the lessees' desire for renewal, but the lessors declined to renew on the grounds (amongst others) that, as the fact was, the value of the property had very largely increased, that the original rent was therefore not now “the best yearly rent,” and that the covenant for renewal was not authorised by the power. In an action by the company against the present trustees and their cestuis que trust claiming specific perfor-

mance of the covenant or damages:—Held, (1) that the covenant was not *ultra vires*; but (2) that specific performance of it could not be enforced, as the original rent was not now the best rent; (3) that the act 12 & 13 Vict. c. 26, enabling the court to remedy defects in leases in certain cases, did not apply to the present case, there having been no “mistake or inadvertence” on the part of the lessor, nor “ignorance of title on the part of the lessees;” and (4) that on the doctrine of *Bain v. Fothergill* (7 L. R., H. L. 158), the lessees could not recover damages for a breach of covenant arising from infirmity of title. *Quære*, whether giving notice for renewal to the lessor’s solicitors was a proper compliance with the terms of the lease as to notice. *Ib.*

On dropping of one or more Lives.]—A lessor demised hereditaments to the lessee, his heirs and assigns, for the natural lives of the lessee and two other persons and the longest liver of them, with a covenant that the lessor, his heirs and assigns (upon the lessee, his heirs or assigns, “surrendering this present demise as hereinafter mentioned”) should at any time thereafter at the request of the lessee, his heirs or assigns, “as often as one or two life or lives of and in the said hereditaments” should drop and be determined, renew and grant a further term “for any other life or two lives of any other person or persons to be nominated by the lessee, his heirs or assigns, in the stead of the person’s life or lives so dropping or determining;” the lessee, his heirs or assigns, paying to the lessor, his heirs or assigns, “for every such renewal for every life or lives of such person or persons so to be renewed as aforesaid the sum of 40s. only, and at the same time surrendering this present demise to be cancelled”:—Held, that upon the true construction of the covenant the right of renewal was neither perpetual, nor limited to one renewal for not more than two new lives, but was a right of renewal as often as any of the three original lives should drop, so that any such renewal might take place either on the dropping of any one of the said three lives, or after the dropping of any two of them, as the lessee might from time to time request. *Swinburn v. Milburn*, 9 App. Cas. 844; 54 L. J., Q. B. 6; 52 L. T. 222; 33 W. R. 325—H. L. (E.).

K. Relating to Husbandry.

To pay Interest on Incoming Valuation—Duty on Quitting.]—An agreement was entered into by a tenant under a lease to pay interest at 5 per cent. on the amount of his incoming valuation, and “upon quitting to leave a valuation of tenant rights equal in value, and of the same nature and kind:”—Held, not to create a personal debt to the lessor, but to enure for the benefit of a subsequent landlord. *Wagstaff v. Clinton*, 1 C. & E. 45—Field, J.

To keep Farm properly Stocked—Injunction.]—An injunction will not be granted to restrain a threatened breach by a tenant of a stipulation in a farming agreement requiring him to keep on the farm a proper and sufficient stock of sheep, horses, and cattle. *Phipps v. Jackson*, 56 L. J., Ch. 550; 35 W. R. 378—Stirling, J.

Bankruptcy of Tenant—Disclaimer—Trustee

claiming Hay and Straw.]—A lease of a farm contained a covenant by the lessee not to sell, without permission in writing of the landlord, the hay, straw, &c., grown upon the farm. A resolution was passed under the Bankruptcy Act, 1869, by the creditors of the lessee for the liquidation of his affairs by arrangement, and a trustee was appointed. The trustee disclaimed the lease, but claimed to be entitled to the hay, straw, &c., grown on the farm:—Held, that the statute 56 Geo. 3, c. 50, s. 11, which provided that the assignee of a bankrupt should not take any hay, &c., on any farm which the bankrupt could not take, applies to a trustee in liquidation or in bankruptcy under the Bankruptcy Act, 1869, and that, notwithstanding the disclaimer of the lease by the trustee, he was not entitled to sell the hay, &c., grown on the farm. *Lybbe v. Hart*, 29 Ch. D. 8; 54 L. J., Ch. 860; 52 L. T. 634—C. A.

A tenant of a farm, restrained by agreement from selling the hay and straw grown on the farm, became bankrupt. The trustee in bankruptcy removed and sold a quantity of the hay in breach of the agreement and then disclaimed the lease. The landlord sued the trustee for the removal of the hay:—Held, that the trustee was personally liable for his wrongful act in selling the hay; that he was not protected by s. 55, sub-s. 2, of the Bankruptcy Act, 1883. *Schofield v. Hinecks*, 58 L. J., Q. B. 147; 60 L. T. 573; 37 W. R. 157—D.

1. What Covenants Implied.

Liability of Landlord—Injury caused by defective Repair of demised Premises.]—The plaintiff was injured through a defect in the condition of a coal-plate in the pavement in front of a house let by the defendant on a weekly tenancy, and such defect, though not shown to have been in existence at the commencement of the tenancy, had existed for nearly two years before the accident:—Held, that having regard to the nature of the tenancy, there had been a re-letting of the premises after the nuisance was created, and that the defendant, as reversioner, was liable. *Gandy v. Jubber* (5 B. & S. 78; 9 *Ib.* 15) discussed. *Sandford v. Clarke*, 21 Q. B. D. 398; 57 L. J., Q. B. 507; 59 L. T. 226; 37 W. R. 28; 52 J. P. 773—D.

—Overstocking of Land with Game—Injury to Crops.]—The plaintiff was the tenant of a farm over which the shooting rights were reserved to the landlord. The defendants were lessees of the shooting rights over the estate of which the plaintiff’s farm formed part. The plaintiff brought his action in the county court against the defendants for compensation for injury done to his crops by pheasants brought into a coppice adjoining his farm. It was proved at the trial that the defendants had brought from another part of the estate 450 pheasants, and turned them down in the coppice adjoining the plaintiff’s farm, and that the pheasants came out of the wood and did damage by feeding on the crops in his field, which was contiguous to the coppice. The amount of the damage done was not disputed. The county court judge held that the plaintiff was entitled to recover the amount claimed.

The defendants appealed:—Held, on appeal, that the county court judge was right, and the plaintiff was entitled to recover, as the damage complained of had been done by reason of an undue quantity of game having been brought near to his farm, and that the sporting rights of the defendants had been exercised in an unreasonable manner. *Farrer v. Nelson*, 15 Q. B. D. 258; 54 L. J., Q. B. 385; 52 L. T. 766; 33 W. R. 800; 49 J. P. 725—D.

Duty of Landlord to protect Premises.]—Where premises are let as a jeweller's shop to be occupied during hours of business only, the landlord, in the absence of express stipulation, is under no liability for a loss occasioned by a robbery during the night, even though the premises were insufficiently protected. *Espir v. Todd*, 1 C. & E. 155—Cave, J.

m. In other Cases.

Option to purchase Fee Simple—Nature of Interest conferred on Lessee—Real and Personal Representatives.]—A lease of land contained a covenant by the lessor with the lessee, his executors, administrators, and assigns, that if the lessee, his executors, administrators, or assigns, should at any time thereafter be desirous of purchasing the fee simple of the demised land, and should give notice in writing to the lessor, his heirs and assigns, then the lessor, his heirs or assigns, would accept 1,200*l.* for the purchase of the fee simple, and on receipt thereof would convey the fee simple to the lessee, his heirs or assigns, or as he or they should direct. The lessee died intestate, and nearly twenty years after his death, his heir, who was also administrator of his personal estate, called on the devisee of the lessor to convey the fee simple to him in accordance with the covenant, and a conveyance was executed accordingly. The heir afterwards contracted to sell part of the property thus conveyed to him:—Held, that the option to purchase was attached to the lease and passed with it; that it consequently passed as part of the lessee's personal estate to the administrator, and that the administrator could not make a good title to the purchaser, unless the next-of-kin of the lessee would concur in the sale. *Adams and Kensington Vestry, In re*, 27 Ch. D. 394; 54 L. J., Ch. 87; 51 L. T. 382; 32 W. R. 883—C. A.

To Employ Particular Person to draw Assignments and Underleases—Assignment of Underlease.]—A lease granted by the warden and commonalty of the Mercers' Company contained a covenant that on the assignment of the lease or the grant of any underlease thereunder, the clerk to the company should be employed or a fine of 5*l.* be paid. The purchaser from an underlessee of his underlease raised the objection that the assignment should be prepared by the clerk to the Mercers' Company or the penalty paid:—Held, that the objection was untenable as the covenant did not apply to the assignment of an underlease. *Collett v. Young*, 33 W. R. 543—North, J. Cp. *Haywood v. Silber*, ante, col. 1076.

Not to erect Buildings—Hoardings.]—The erection of wooden hoardings for the purpose of advertisement fastened to the demised premises

constitutes a breach of a covenant not to "erect or make any other building, or erection, on any part of the demised premises." *Pocock v. Gilham*, 1 C. & E. 104—Mathew, J.

Public-house—Covenant to take Beer from Lessors—Reduction of Rent—Penalty.]—The lease of a public-house contained a covenant that the lessee and his assigns would, during the term, purchase all beer required for the business from the lessors, a proviso for re-entry on non-payment of rent, or non-performance of the covenants, and a provision for reduction of the rent so long as the lessee should purchase beer from the lessors:—Held, that the covenant to purchase beer was an absolute one, and that the lessee had not the alternative of dealing with a rival brewer and paying the unreduced rent. *Hanbury v. Cundy*, 58 L. T. 155—Stirling, J.

To become void on Bankruptcy of Tenant—Election of Landlord.]—See post, col. 1101.

IV. RENT.

1. RIGHTS AND LIABILITIES.

Non-execution of Lease by Lessor—Assignment before Accrual of Rent due.]—In March, 1884, a lease from the plaintiff to the defendants, of premises at the yearly rent of 60*l.*, and containing a covenant to pay such rent, was executed by the defendants, but not by the plaintiff, in whose possession the document remained. The defendants went into possession under the lease, and paid two quarters' rent up to the 29th September, 1884. The defendants afterwards proposed to surrender the lease, or to assign their interest in it to one P., and that he should be accepted as tenant in their stead, and that they should be discharged from further liability under the lease. Both these propositions were rejected by the plaintiff. It was, however, proposed and agreed to between the plaintiff and defendants that the lease should be altered by making the rent payable in advance, and it was re-engrossed, expressed to bear date the 18th October, 1884, and executed by the defendants on the 11th December, 1884, on which day they executed an assignment of it to P., who paid rent up to the 25th March, 1885. The plaintiff did not execute the lease till the 26th April, 1886, when he executed it in the absence of the defendants, and the lease remained throughout in the plaintiff's possession. In an action to recover one year's rent, up to the 25th March, 1886, sued for upon the covenants in the lease of the 18th October, 1884, and in the alternative upon a yearly tenancy, the jury found that the plaintiff had not agreed to discharge the defendants from rent to accrue after the assignment to P., and that the alteration in the lease, making the rent payable in advance, had been made with P.'s consent. The judge at the trial thereupon directed a verdict for the plaintiff:—Held, that the direction was right. *Babington v. O'Connor*, 20 L. R., Ir. 246—Q. B. D.

Apportionment.]—Rent as between landlord and tenant is apportionable under the Apportion-

ment Act, 1870. *Hartcup v. Bell*, 1 C. & E. 19—Manisty, J. Affirmed in C. A.

— **Eviction.**—A landlord who has wrongfully evicted his tenant between two quarter days is not entitled to the apportioned rent up to the day of eviction under the Apportionment Act, 1870. *Clapham v. Draper*, 1 C. & E. 484—Mathew, J.

Action for Loss of Rent—Grantee of Bill of Sale removing Goods—Consent of Grantor.—The Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 13, which provides that all chattels seized under a bill of sale shall remain on the premises where they were so seized for five clear days after seizure, is for the benefit of grantors only. Where, therefore, goods are seized and removed by the grantee, with the grantor's consent, within such period of five days, the grantor's landlord has no right of action against the grantee for loss of rent owing to such removal. *Lane v. Tyler*, 56 L. J., Q. B. 461—D.

Liability of Sheriff—Removal after Notice of Claim.—In an action under 8 Anne, c. 14, s. 1, against the sheriff for removing goods taken in execution without paying the landlord a year's rent, the measure of damages is *prima facie* the amount of rent due, but it is competent to the sheriff to prove in mitigation of damages that the value of the goods removed was less than the amount of rent due. *Thomas v. Mirehouse*, 19 Q. B. D. 563; 56 L. J., Q. B. 653; 36 W. R. 104—D.

In 1881 the plaintiff carried a resolution under the arrangement sections of the Bankruptcy (Ireland) Act, 1857, for a composition with his creditors, it being required by the resolution that the plaintiff's estate and effects should vest in the official assignees and one H., as a security for the creditors, upon trust, in default in payment of the composition, to apply to realize the estate. Afterwards, and before the composition had been carried out or the plaintiff had obtained any certificate, the plaintiff by lease, dated the 13th April, 1883, demised certain premises to T. Goods of T. in these premises were seized under a *fi. fa.* and a quarter's rent then due under the lease was claimed from the sheriff by the plaintiff, and by the official assignees and H. The sheriff paid the official assignees and H., and sold the goods. In an action by the plaintiff against the sheriff for allowing the goods to be removed without satisfying the plaintiff, the above facts being stated in the pleadings:—Held, that the plaintiff was entitled to maintain the action. *Doran v. Moore*, 16 L. R., Ir. 181—Ex. D.

— **Notice to Execution Creditor—Bill given by Execution Debtor and Third Party for Arrears.**—

In an action against a sheriff for abandoning a seizure, it appeared that after seizure the sheriff learned that a year's rent was due to the landlord, and withdrew, without giving notice to the execution creditor that the rent was due; that a bill of exchange, still current, accepted by a third party, had been given to the landlord for a sum equal to a year's rent, and that the value of the goods seized was less than a year's rent. The only evidence given as to the bill of exchange was that of the landlord's agent, who deposed that he took it as a collateral security for the rent,

and that there was no contract binding him not to sue. No question as to any such contract was asked by the plaintiff to be submitted to the jury:—Held, that the currency of the bill did not exonerate the sheriff from responsibility to the landlord, under the Statute of 9 Anne, c. 8, s. 1; and that there is no legal obligation upon a sheriff to give the execution creditor notice of a landlord's claim for rent. *Davidson v. Allen*, 20 L. R., Ir. 16—Q. B. D.

Execution—Goods in Custodiâ Legis.—On the 11th of March the sheriff seized under a *fi. fa.* for an amount exceeding 20*l.* goods and chattels of a tenant upon premises held upon lease, the rent of which accrued due on the usual quarter-days. On the 17th of March the goods were sold by the sheriff by private sale, and the sheriff went out of possession. On the 23rd of March a bankruptcy petition founded on the seizure and sale was presented against the tenant, upon which he was on the 5th of May adjudicated bankrupt. On the 10th of April the purchaser from the sheriff removed the goods. On the 15th of April the landlord gave notice to the sheriff requiring payment, under 8 Anne, c. 14, of two quarters' rent, due on the 25th December and the 25th of March preceding. The sheriff paid the proceeds of the sale to the trustee of the bankrupt's estate:—Held, that the landlord was not entitled to payment by the trustee in bankruptcy of the rents, as he might have distrained between the 17th of March and the 10th of April; and that he was not entitled to payment of the quarter's rent due on the 25th of March, as the rent was not due at the time the goods were seized. *Pollen Trustees, Ex parte, Davis, In re*, 55 L. J., Q. B. 217; 54 L. T. 304; 34 W. R. 442; 3 M. B. R. 27—Cave, J.

The purchaser from the sheriff is bound to remove the goods within a reasonable time. If he leaves the goods on the demised premises for his own convenience the landlord can distrain on them. *Id.*

Acceptance of, whether a Waiver of Breach of Covenant.—See *Cronin v. Rogers*, ante, col. 1081.

What Arrears—Insolvent Estate—Administration.—Upon the construction of ss. 42 and 125 of the Bankruptcy Act, 1883, an order obtained in the Chancery Division by a creditor for administration of a deceased debtor's estate, not followed by any proceedings in bankruptcy, is not equivalent to or included in the term "order of adjudication" (s. 42) so as to limit the power of the landlord, or other person to whom rent is due from the deceased person's estate, to recover by distress one year's rent only accrued due prior to the date of the administration order. *Fryman's Estate, In re, Fryman v. Fryman*, 38 Ch. D. 468; 57 L. J., Ch. 862; 58 L. T. 872; 36 W. R. 631—Chitty, J.

Injunction to Restrain Distribution of Assets of Company.—See ante, col. 428.

Liability of Lessee after Assignment.—See post, col. 1105.

Liability of Executor.—See EXECUTOR AND ADMINISTRATOR, 11. 1.

Right to Recover Rent due—Surrender by Operation of Law.]—The right to recover rent accrued due, and which has been reserved on a parol demise, is not extinguished by a surrender of the term by operation of law, notwithstanding the absence of a personal covenant by the tenant to pay such rent, but can be enforced by an action for the use and occupation of the premises demised, under the provisions of s. 14 of 11 Geo. 2, c. 19. *Shaw v. Lomas*, 59 L. T. 477; 52 J. P. 821—D.

—Agreement for Surrender between Lessor and Assignee, saving Rights against Lessee.]—Where a lessor agrees in writing with an assignee of the lease to accept a surrender without prejudice to his rights against the original lessee, and takes actual or constructive possession of the premises, there is a surrender of the lease by operation of law, and the lessor is not entitled to subsequent rent from the original lessee. *Clements v. Richardson*, 22 L. R., Ir. 535—Q. B. D.

Action for Rent by Lessee of Furnished House unfit for Occupation.]—See *Bird v. Greville* (Lord), post, col. 1110.

Estoppel by Payment of Rent.]—See *Carlton v. Bowcock*, post, col. 1105.

2. DISTRESS.

a. In General.

Distraining for Rent, in case of Bankruptcy or Winding-up.]—See BANKRUPTCY, XI. 2—COMPANY, XI. 6.

Attornment—Payment of Rent by Assignee.]—See *Hazeldine v. Heaton*, post, col. 1105.

Moneys due from Tenant to Landlord for Goods supplied—Bill of Sale.]—See *Pulbrook v. Ashby*, ante, col. 229.

Entry by raising Window partly open.]—Entry into a house for the purpose of distraining may lawfully be made by further opening a window which is partly open. *Cyabtree v. Robinson*, 15 Q. B. D. 312; 54 L. J., Q. B. 544; 33 W. R. 936; 50 J. P. 70—D.

By Mortgagor in his own Name.]—A mortgagor in possession has, in the absence of interference by the mortgagee, an implied authority from the mortgagee to distrain upon the tenant of the mortgaged property for the rent due in respect thereof; and, although it may be necessary for the mortgagor to justify the distress as bailiff of the mortgagee, it is not necessary that the distress should be made in the mortgagee's name. *Reece v. Strousberg*, 54 L. T. 133; 50 J. P. 292—D.

Evidence of Value of Goods.]—The price realised at a sale by auction of goods seized under a distress is *prima facie* evidence of their value. *Rapley v. Taylor*, 1 C. & E. 150—Cave, J.

Liability of Landlord—Wrongful Act of Bailiff—Liability of Bailiff to compensate Landlord.] The defendant was employed by the plaintiff to levy a distress for rent on the goods of the

plaintiff's tenant for 15*l.* The defendant realised 20*l.* 11*s.*, and deducted 6*l.* 1*s.* for the costs and charges of distress, which was more than is allowed by 57 Geo. 3, c. 93; the tenant claimed damages from the plaintiff for the excessive distress, and the plaintiff paid him 6*l.* 1*s.* :—Held, that the plaintiff was entitled to recover from the defendant the amount the plaintiff had paid the tenant in satisfaction of his claim for excessive distress. *Megson v. Mapleson*, 49 L. T. 744; 32 W. R. 318—D.

—Excessive or Illegal Distress—Withdrawal.]—On the 1st September, 1882, W. distrained for 8*l.* rent due to him from T. who held three rooms under him at the weekly rent of 10*s.* T. had underlet one of the rooms at the weekly rent of 3*s.* 6*d.* (none of which was in arrear) to the plaintiff, who claimed the goods seized as being her sole property, and on the 5th gave W. the proper notice with a written declaration and inventory in the form required by s. 1 of the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79). W., in consequence of this claim and of his immediate tenant T. paying him 1*l.* on account of the rent, and engaging to pay the remaining 7*l.* by weekly instalments of 10*s.*, withdrew the distress. On the 21st of September two more weeks' rent having become due from T. and he having failed to pay any of the instalments as agreed, W. again distrained on the same goods for 8*l.*, being 7*l.* of the rent for which the first distress was put in and 1*l.* for the two weeks' subsequently accruing rent. No fresh declaration and inventory having been served upon him by the plaintiff, W. caused the goods to be carried away and sold. At the sale they realised 5*l.* 11*s.* In an action at the suit of the lodger for wrongfully breaking and entering the premises and converting and selling her goods :—Held, first, that as between the defendant and his immediate tenant, the distress on the 21st of September was not wrongful or illegal, but at the most excessive, and therefore not the subject of an action in the absence of an allegation and proof of special damage; secondly, that the declaration and inventory served on the 5th of September were not applicable to the distress levied on the 21st, and consequently that the plaintiff could not avail herself of the benefit of the Lodgers' Goods Protection Act, 1871. *Thwaites v. Wilding*, 12 Q. B. D. 4; 53 L. J., Q. B. 1; 49 L. T. 396; 32 W. R. 80; 48 J. P. 100—C.A.

—Sale of Distress before Expiration of Five Days.]—A landlord, having on the 17th of October distrained for rent goods of his tenant's lodger upon the demised premises, sold the same on the 22nd, *i.e.*, before the expiration of five clear days from the distress, contrary to the provisions of 2 Will. & M. sess. 1, c. 5, s. 2 :—Held, that an action was maintainable by the lodger against the landlord for so selling his goods. *Sharp v. Fwile*, 12 Q. B. D. 385; 53 L. J., Q. B. 309; 50 L. T. 758; 32 W. R. 539; 48 J. P. 680—D.

b. What goods may be Seized.

Lodgers' Goods—Sufficiency of Declaration.]—By s. 1 of the Lodgers' Goods Protection Act, 1871, if any superior landlord shall levy distress on any goods of any lodger for arrears of rent due to such superior landlord by his immediate

tenant, such lodger may serve such superior landlord with a declaration in writing made by such lodger setting forth (inter alia) "whether any and what rent is due, and for what period, from such lodger to his immediate landlord":—Held, that if no rent is in fact due from the lodger to his immediate landlord, the declaration need not state that fact; and also that such declaration need not state that the person by whom it is made is a lodger. *Harris, Ex parte*, 16 Q. B. D. 130; 55 L. J., M. C. 24; 53 L. T. 655; 34 W. R. 132; 50 J. P. 164—C. A.

— **Second Distress after Withdrawal—Declaration and Inventory on First Distress.**—*See Thwaites v. Wilding*, supra.

— **"Lodger," who is—Occupation for Business Purposes.**—The appellant occupied the first floor and basement of premises at a yearly rent, carrying on the business of a publisher there, but sleeping and residing elsewhere. He had no key of the outer door, which was under the control of his immediate landlord, who admitted him every morning:—Held, that the appellant was not a "lodger" within the meaning of s. 1 of the *Lodgers' Goods Protection Act*, 1871. *Heavood v. Bone*, 13 Q. B. D. 179; 51 L. T. 125; 32 W. R. 752; 48 J. P. 710—D.

Gas Stoves Lent on Hire.—*See GAS AND GAS COMPANY.*

Distress under Agricultural Holdings Act.—*See post*, cols. 1108, 1109.

Rolling Stock — "Work"—A locomotive engine, which was hired by a railway contractor from the respondents, was seized under a distress for rent due from the contractor to the appellants. At the time the engine was seized it was standing in a shed which the contractor rented from the appellant, and which was connected by a siding with the railway:—Held, that the engine was rolling stock in a "work" within the meaning of s. 3 of the *Railway Rolling Stock Protection Act*, 1872, and was therefore not liable to distress for rent payable by the tenant of the work. The "work" in s. 3 means any establishment or place, used for the purpose of trade or manufacture, which is connected with a line of railway by sidings along which the rolling stock may be propelled. *Easton Estate Company v. Western Waggon Company*, 54 L. T. 735; 50 J. P. 790—D.

Agent—"Public Trade."—Where an agent under an agreement with a firm of carpet manufacturers took premises, and put his principal's name outside as well as his own, and was entitled to carry on other agency business, but was in fact agent for only one other firm:—Held, that the agent was not carrying on a "public trade" so as to exempt his principal's goods on his premises from distress. *Tupling v. Weston*, 1 C. & E. 99—Cave, J.

Things delivered to a Person Exercising a Trade.—Goods belonging to a third party which are on the premises of a person exercising a public trade for the purpose of being dealt with in the way of such trade, are not exempt from distress for rent, unless they have been sent

or delivered to the trader. A shipbuilder contracted to build a ship on premises which he held as tenant to the defendants; the ship was to be paid for by instalments at certain stages of the work. After the ship had been partly paid for, it was seized by the defendants as a distress for rent due from the builder. The person for whom the ship was being built paid the rent under protest, and sued to recover the amount:—Held, that assuming the property in the ship to have passed to the plaintiff under the contract, still the ship, not having been sent or delivered to the builder, was liable to distress, and the plaintiff was not entitled to recover. *Clarke v. Millwall Dock Company*, 17 Q. B. D. 494; 55 L. J., Q. B. 378; 54 L. T. 814; 34 W. R. 698; 51 J. P. 5—C. A.

Property of Third Persons—Goods wrongfully removed.—A landlord cannot distrain upon the goods of third persons brought by himself on to the demised premises without the authority of the third person, even though the goods had been originally placed on the premises by the authority of the third person, and wrongfully removed by some one else. *Paton v. Carter*, 1 C. & E. 183—Cave, J.

Fraudulent Removal of Goods after Rent has become due—Seizure of Goods after Expiration of Tenancy.—A landlord is not justified, under 11 Geo. 2, c. 19, s. 1, in following and seizing, after the expiration of the tenancy and after the tenant has given up possession, goods which have been fraudulently removed from the demised premises for the purpose of defeating the landlord's right to distrain for the rent, for that statute applies only to a case where the landlord has a right to distrain either at common law or under 8 Anne, c. 14, ss. 6 and 7, and it is a condition of the statute of Anne, in order to make it applicable, that the tenant must be in actual possession. *Gray v. Stait*, 11 Q. B. D. 668; 52 L. J., Q. B. 412; 49 L. T. 288; 31 W. R. 662; 48 J. P. 86—C. A.

Effect of Withdrawal of Sheriff by consent in Interpleader.—Where after the making of an interpleader order the sheriff, with the consent of the execution creditor and the claimant, temporarily withdrew from possession:—Held, that the goods were no longer in custodia legis, and the landlord was entitled to distrain upon them, although he knew that the interpleader proceedings were pending. *Cropper v. Warner*, 1 C. & E. 152—Williams, J.

V. TERMINATION OF TENANCY.

Notice to Quit—Yearly Tenancy—Continuance in Possession—Implied creation of New Tenancy.—A yearly tenancy was determined in September, 1877, by notice to quit, and possession was demanded in November, 1877; but the former tenant continued in possession until the present action. After the expiration of the notice to quit, the landlord never accepted rent, though tendered. He told the former tenant that he was a trespasser, and frequently demanded possession, but without success. In an action to recover possession, founded on the notice to quit:—Held, that a verdict was properly directed

for the landlord. *Cusack v. Farrell*, 18 L. R., Ir. 494—C. P. D. Affirmed 20 L. R., Ir. 56—C. A.

— **Abandonment of—Yearly Tenancy—Increase of Rent during Year of Tenancy.**—A notice to quit which is, during its currency, abandoned by the consent of both parties, and not acted on, does not per se put an end to a tenancy from year to year. An increase of the rent payable by a yearly tenant, by an arrangement during a year of the tenancy, does not per se operate to put an end to the old tenancy and create a new one. *Inchiquin (Lord) v. Lyons*, 20 L. R., Ir. 474—C. A.

— **Length of—Monthly Tenancy.**—By agreement in writing the defendant became a monthly tenant to the plaintiffs (a firm of brewers), from the 1st July, 1869, of certain licensed premises, at a monthly rent, payable on the first day of each month, over and above all taxes, &c.; and by another agreement in writing of the same date and made between the defendant, the plaintiffs, and A., reciting that the defendant had become a monthly tenant of the premises, and that the plaintiffs had, at the defendant's request, agreed to transfer the beer and spirit licences attached to the premises to A., in whose name the defendant proposed to carry on the business, in consideration of the sum of 60*l.*, it was agreed that the plaintiffs should hold the licences as security for the said sum, and that the defendant and A. should deal exclusively with the plaintiffs and would keep up the said licences. The plaintiffs, on the 25th September, 1884, served notice to quit on the 1st November then next. In an ejectment on the notice to quit:—Held, that the tenancy was monthly, and determined under the contract by the month's notice given. *Beamish v. Cox*, 16 L. R., Ir. 270—Q. B. D. Affirmed, 16 L. R., Ir. 458—C. A.

— **Tenant not to be found—Delivery at demised Premises.**—A lease of premises for twenty-one years contained a proviso that it should be lawful for the landlord or his assigns to put an end to the demise at the end of the first fourteen years by delivering to the tenant or his assigns six calendar months' previous notice in writing of his intention to do so. In an action by the assignee of the reversion to recover possession of the premises on the ground that the demise had been duly determined by notice under the proviso, it appeared that the lessee had disappeared some years previously, after having mortgaged the premises by way of underlease, that his address could not be found, and that written notice to determine the tenancy directed to him had been sent to his last known address, and had also been delivered to the mortgagee and to the occupier of the premises:—Held, that the action could not be maintained, as there had been no service of the notice on the lessee, and as he had not assigned the premises no other service would satisfy the terms of the proviso. *Hogg v. Brooks*, 15 Q. B. D. 256; 50 J. P. 118—C. A.

— **Agricultural Holdings Act.**—See post, col. 1107.

Possession under Agreement for Lease—Ten-

ancy at Will.—See *Coatsworth v. Johnson*, post, col. 1103.

Right to determine Lease of Furnished House for Breach of Implied Warranty.—See *Maclean v. Currie*, post, col. 1110.

Custom of the Country—Tenant-right—Tenant Abandoning Lease.—A tenant of a farm from year to year, who was entitled to certain tenant-rights, took a lease of the farm for seven years, under which he became entitled to larger tenant-rights and allowances. In the middle of the term, being unable to pay the rent and continue the tenancy, he left the farm, and, in effect, abandoned the position of tenant, and did not bring an ejectment against his landlord who was in possession under a distress for rent, and who remained, at the tenant's request, in possession after the distress was satisfied. No new agreement was made as to the tenant-rights and allowances:—Held that, in the absence of any new agreement, the tenant's rights arose only at the expiration of the lease and on a substantial performance by the tenant of the covenants thereof, and that, as the tenant had in effect abandoned the tenancy, he was not entitled to any tenant-rights under the lease; and further, that any tenant-right he might have had previously while tenant from year to year was extinguished by his accepting the tenant-rights under the lease. *England v. Shearburn*, 52 L. T. 22; 49 J. P. 86—D.

Compensation—Effect of new Lease.—A lease provided that on its termination the tenant should receive compensation for unexhausted improvements. At its termination a new lease of the farm was granted to the tenant, nothing being said about the compensation:—Held, that the tenant was entitled to compensation under the first lease. *Lane v. Moeder*, 1 C. & E. 548—Day, J.

Grant of Easement by Tenant in consideration of Payment—Claim for Rent after Termination.

—The plaintiff was occupier under a lease of a farm and mill. The mill was supplied with water which flowed along a natural watercourse through the farm. The works of the defendants' slate company were contiguous to the farm; and the defendants sought to utilise the flow of the watercourse for the slate works. Accordingly, in 1871, the plaintiff and defendants entered into an agreement by which the plaintiff gave permission to the defendants to use the watercourse, troughs, and landers on the farm, and from time to time cleanse, scour, and keep the same free for the passage of the water, and from time to time keep in repair or renew such watercourse, troughs, or landers, the defendants having full liberty of ingress or egress at all times on to the said farm. The parties further agreed that the agreement might be terminated at the expiration of three months' notice, to be given on either side. The rent reserved for the use of the water was 1*l.* per week, which was afterwards increased to 3*l.* per week. In 1876 the plaintiff's interest in the farm expired by effluxion of time, but he retained his occupation of the mill. The farm was subsequently leased by the freeholder to one Darbishire. The position of the mill was lower down the stream or watercourse than the farm. The defendants continued to pay the

rent down to April, 1885, when Darbishire claimed to exclude them from that portion of the farm which was in his occupation. No notice was given by either party to the agreement to terminate the arrangement. The defendants then refused to pay any more rent to the plaintiff. The plaintiff brought his action to recover seven quarters' rent in arrear. The action was tried, and the point of law was reserved for further consideration:—Held, on further consideration, that under the circumstances the defendants were entitled to judgment, because, though there had not been any regular notice to terminate the agreement between themselves and the plaintiff, yet its operation was limited in point of time to the occupation of the farm by the plaintiff, and that on the determination of its occupancy by him his right to the rent for the use of the water ceased. *Jones v. Dorothea Company*, 58 L. T. 80—Denman, J.

Tenancy from Week to Week.—A weekly tenancy is a re-letting of the premises by the landlord at the beginning of each successive week. *Sandford v. Clarke*, 21 Q. B. D. 398; 57 L. J., Q. B. 507; 59 L. T. 226; 37 W. R. 28; 52 J. P. 773—D.

Lessee of Part of Property—Action for Recovery of Land.—Where the owner of the reversion of a theatre having by an order in a winding-up of a company obtained the lease and property of the theatre, the lessee of property, boxes, and stalls, brought an action asking for an injunction to restrain the reversioner from preventing the plaintiff having access to his boxes and stalls:—Held, that the order in the winding-up did not affect the right of third parties; the defendant could only exclude the plaintiff by an action for the recovery of land where third parties would have notice and an opportunity of appearing. *Leader v. Hayes*, 54 L. T. 204—V.-C. B.

On Bankruptcy—Election of Landlord.—Where a lease contains a proviso or condition that on breach of any of the covenants such lease "shall cease, determine and be void to all intents and purposes whatsoever," such words must be construed to mean void at the election of the lessor. Thus, where a lease contained a proviso to the effect that if the lessee should become bankrupt or insolvent the lease shall "cease, determine and be void," and, the lessee having become bankrupt, the trustee in the bankruptcy rejected a proof put in by the lessors founded on such lease upon the ground that on the bankruptcy the lease became void:—Held, that such rejection was wrong and must be reversed. *Leathersellers' Company, Ex parte, Tickle*, *In re*, 3 M. B. R. 126—Cave, J.

— **On Tenant "being Bankrupt."**—A lease (executed in 1880) of a mill and warehouse, for twenty-one years, contained a proviso that in case (inter alia) the lessees should during the term be bankrupts, or file a petition in liquidation, the term should cease. After the Bankruptcy Act, 1883, came into operation, the lessees presented a bankruptcy petition, and a receiving order was made:—Held, that the presentation of the petition caused a forfeiture of the term. *Gould or Gould, Ex parte, Walker*,

In re, 13 Q. B. D. 454; 51 L. T. 368; 1 M. B. R. 168—D.

Surrender.—By Infant.—See *Griffiths, In re*, ante, col. 1077.

— **Right to recover Rent.**—See ante, col. 1095.

Merger of Term in Reversion.—See *Dynevor (Lord) v. Tennant*, ante, col. 1078.

VI. FORFEITURE.

1. IN WHAT CASES.

Invalid Notice or Demand for Rent.—By an agreement in writing dated the 7th March, 1884, made between the plaintiffs and defendants, the defendants agreed to lease to the plaintiffs the advertisement spaces on the cars of the defendants running at N. for three years, from the 7th January, 1884, at a rent of 120*l.* a year, payable quarterly. The agreement provided that the advertising boards and fittings should be found by the plaintiffs; and it contained a condition that in the event of default by the plaintiffs in payment of any moneys due under the agreement for thirty days after demand in writing, the defendants should be at liberty at once to determine the agreement or lease, and on the determination thereof the boards were to become the property of the defendants, who were to have the option of purchasing the other fittings. The plaintiffs usually paid the rent upon the first day of the month. Upon the 7th April, 1885, the plaintiffs not having paid the rent for the past quarter, the defendants sent a written demand for the payment of 30*l.*, "being one quarter's rent under the advertising agreement due on the 1st inst.," and on the 30th May, the rent being still in arrear, they wrote to the plaintiffs determining the agreement:—Held, that the demand of 7th April being inaccurate, was not a demand on which a forfeiture could be founded, and that the agreement was not properly determined. *Jackson v. Northampton Street Tramways Co.*, 55 L. T. 91—Stirling, J.

Two Houses in same Lease—Covenant broken as to one.—The doctrine established by the case of *Darlington v. Hamilton* (Kay, 559)—namely, that where two houses are comprised in one lease, and subject to covenants common to both, an under-lessee of one house is liable to have his underlease determined by re-entry by the original lessor for breach of any covenant relating to the other house—still prevails, and is not affected by s. 14 of the Conveyancing Act, 1881, which merely protects a lessee or under-lessee against re-entry or forfeiture by giving him an opportunity of making good any breach of covenant. *Creswell v. Davidson*, 56 L. T. 811—Kay, J.

2. RELIEF AGAINST.

Conveyancing Act, 1881, s. 14—Tenancy at Will—Agreement for Lease for 21 Years—Right to Re-enter.—The plaintiff entered into possession of a farm under an agreement for a

lease for twenty-one years from the defendant. Before any rent was due or had been paid the landlord gave the plaintiff notice to quit, and turned him out of possession, because he had done that which had amounted to a breach of a covenant contained in the agreement and intended to be inserted in the lease. The tenant brought an action for trespass:—Held, that the plaintiff was not entitled to recover; that as he was in possession under an agreement for a lease for twenty-one years and had paid no rent he was only a tenant at will; that his landlord was therefore entitled so to determine that tenancy; and that the tenancy was not subject to or controlled by the provisions of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14. *Cotsworth v. Johnson*, 55 L. J., Q. B. 220; 54 L. T. 520—C. A.

— **Agreement for Lease.**—An agreement for a lease is not a lease within the meaning of s. 14 of the Conveyancing and Law of Property Act, 1881, and therefore the terms of that section do not apply to a mere tenancy under an agreement for a lease, where there is no actual lease in existence, nor any title to specific performance. The defendant in an action for recovery of land was in possession of the premises as tenant under an agreement for a lease, which provided that the lease to be executed thereunder should contain (inter alia) a covenant to keep the premises in repair and a condition for re-entry for breach of such covenant. Rent had been paid under the agreement, but no lease had been executed. The premises being out of repair the landlord brought the action to recover them as upon a forfeiture. No notice had been given before action under the above-mentioned section:—Held, that, there being no lease in fact executed or title shown to a decree for specific performance by execution of a lease, the section did not apply, and the action was maintainable. *Swain v. Ayres*, 21 Q. B. D. 289; 57 L. J., Q. B. 428; 36 W. R. 798—C. A. Affirming 52 J. P. 500—Charles, J. And see preceding case.

— **"Lessee" — Service of Notice.**—An assignee of a lease is a "lessee" within the meaning of s. 14, sub-s. 1, of the Conveyancing Act, 1881. A notice, under s. 14, sub-s. 1, of the Conveyancing Act, 1881, addressed to A. B. (the original lessee), and "all others whom it doth or may concern," and served on the persons in occupation of the premises demised, is sufficiently addressed to, and validly served on, the assignee of the lease. *Cromin v. Rogers*, 1 C. & E. 348—Denman, J.

— **Tenancy determined by Bankruptcy.**—Where a tenant presents a petition in bankruptcy by reason of which the lease is determined:—Held, that s. 14 of the Conveyancing Act, 1881, has no application. *Gould or Gould, Ex parte, Walker, In re*, supra.

— **Sufficiency of Notice—Mortgagees—Terms.**—A lessee of building property, with a covenant in his lease to complete the buildings by a certain date, failed to complete them within the required time. The lessor commenced an action to eject him, and, in default of his appearance, signed judgment and issued a writ of possession. The lessor, before commencing his action, served the lessee with a

notice stating the breach, but not requiring him to remedy it, or to make compensation, as required by s. 14, sub-s. 1, of the Conveyancing Act, 1881. An application was made by equitable mortgagees of the property to be relieved against the forfeiture on the ground of this informality in the notice. They offered to submit to such terms as the court thought fit:—Held, that no notice sufficient for the purposes of the act had been given, and the equitable mortgagees were entitled to be relieved against the forfeiture on the terms of their undertaking to complete the buildings by a certain time, and, if not so completed, to re-deliver possession of the property to the lessor, and the lessor was ordered to give immediate possession to the mortgagees. *North London Freehold Land and House Company v. Jacques*, 49 L. T. 659; 32 W. R. 283; 48 J. P. 505—V.-C. B.

— **Dilapidated Condition of Premises.**—In an action for the recovery of land for breach of a covenant to repair, relief will be granted under the Conveyancing Act, 1881, although the premises are in a very dilapidated condition, and the relief was not claimed in the pleadings. *Mitchison v. Thompson*, 1 C. & E. 72—Coleridge, C. J.

— **Re-entry for Breach of Covenant and Non-payment of Rent.**—Where a person has gained possession of property, but has no title to it, being in fact a trespasser, the rightful owner is entitled to use force in ejecting him, so long as he does him no personal injury. Lessors had not, before re-entering upon premises for non-payment of rent and breach of covenant, served upon the tenant the notice required by s. 14, sub-s. 1, of the Conveyancing Act, 1881, specifying the breach of covenant complained of:—Held, that by reason of sub-s. 8 of the section, its provisions did not affect the law relating to re-entry for non-payment of rent; and under sub-s. 2 the court had a discretion to refuse relief against re-entry for breach of covenant on the ground of want of notice, and the circumstances of this case were such that the court would refuse such relief. *Scott v. Brown*, 51 L. T. 746—Kay, J.

— **Common Law Procedure Act—Non-Payment of Rent—Costs.**—Where in an action of ejectment upon a forfeiture by non-payment of rent the plaintiff obtains judgment but without costs, the defendant may obtain relief from the forfeiture under the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 1, without being required to pay the plaintiff any costs other than those of the summons for relief. *Croft v. London and County Banking Company*, 14 Q. B. D. 347; 54 L. J., Q. B. 277; 52 L. T. 374; 49 J. P. 356—C. A.

VII. ASSIGNMENT OF TERM.

— **Liability of Executor assigning Lease for Rent.**—See ante, col. 787.

— **Payments by Assignee—Attornment.**—When a lease has been assigned in consideration of certain quarterly payments during the remainder of

the term, the assignee by making one such payment does not attorn to the assignor so as to give him a right of distress for sums subsequently becoming due. *Hazeldine v. Heaton*, 1 C. & E. 40—Stephen, J.

Assignee of Reversion—Estoppel by Payment of Rent—Jus tertii.—Where a person claiming to be assignee of the reversion receives rent from the tenant by fraud or misrepresentation, such payment is no evidence of title; but where there is no fraud or misrepresentation such payment is *prima facie* evidence of title and the tenant can only defeat that title by showing that he paid the rent in ignorance of the true state of the title, and that some third person is the real assignee of the reversion and entitled to maintain ejectment. Hence, in an action for rent by the alleged assignee of the reversion, where rent had been paid by the tenant to the agent of the alleged assignee, it was held to be no defence for the tenant merely to show that the alleged assignee had no title to the reversion. *Carlton v. Bowcock*, 51 L. T. 659—Cave, J.

Surrender by Assignee of Part of Premises—Covenant to pay Rent—Liability of Lessee.—The plaintiff demised a house and premises for a term of years by deed containing a covenant by the lessee to pay the rent reserved. The lessee assigned the term, and the assignee surrendered a small portion of the premises, upon which was a scullery, to the plaintiff, who, in consideration therefor, paid the assignee 25*l.* and built for him a new scullery of equal value upon another part of the premises. The rent apportionable for the part surrendered was 4*l.* a year. In an action against the lessee upon the covenant for a quarter's rent less the sum apportioned for the part surrendered:—Held, without deciding whether the covenant was apportionable or not, that the lessee, by assigning his interest in the term, empowered the assignee to surrender any part of the premises; that therefore there had not been any eviction of the lessee by the plaintiff; that the lessee, notwithstanding the surrender, was still liable on the covenant, and that the liability of the lessee upon the covenant after assignment was not that of surety for the assignee. *Baynton v. Morgan*, 22 Q. B. D. 74; 58 L. J., Q. B. 139; 37 W. R. 148; 53 J. P. 166—C. A. Affirming 59 L. T. 478—D.

Payment by Original Lessee—Salvage—Charge on Property.—A., being lessee of certain lands under a lease, containing the ordinary covenant by him as lessee for payment of the rent, which was payable weekly, and a condition of re-entry in case of non-payment, assigned his interest under the lease to B., who covenanted with A. to pay the rent, and to keep him indemnified against it. B. mortgaged the premises comprised in the lease to C., by way of sub-demise. An arrear of rent becoming due, the lessor compelled A., under his covenant in the lease, to pay the amount in arrear. In an action against B. and the mortgagee, A. sought for a declaration that the sum so paid by him for rent was a salvage payment, and was charged on the premises in priority to the mortgage to C.:—Held, that A. had no interest in the premises authorizing him to make a salvage payment, and he had therefore no lien on the premises for the rent so paid by

him, and that his only remedy was a personal one against B. *O'Loughlin v. Dwyer*, 13 L. R., Ir. 75—V. C.

Covenant to Indemnify—Damages—Costs.—Under a covenant to indemnify against all claims in respect of the covenants of a lease, costs properly incurred in reasonably defending an action brought for a breach of one of the covenants are recoverable as damages. *Murrell v. Fysh*, 1 C. & E. 80—Williams, J.

Right of Assignee to Indemnify from Assignor—Dilapidations.—On the dissolution of a partnership between H. and R., H. assigned to R. all his interest in two houses belonging to the partnership held under sub-leases from C. and D., and R. covenanted to pay the rents and observe the covenants and keep H. indemnified against them. R.'s executors sold the houses to B., and B. to a company which went into liquidation. The landlords C. and D. thereupon sued H. for the rent, and he paid it for the whole of the year 1882. D. also made a large demand against H. for breaches of covenants to repair, but H. made no payment. On the 15th of March, 1883, D. assigned his reversion to H., and in May, 1883, H. acquired C.'s reversion. In June, 1883, H. bought the leasehold interest in both houses from the liquidators of the company, and covenanted thenceforth to pay the rent and observe the covenants. H. sought to prove against the estate of R. for the sums paid for rent, for the rent payable at Lady Day, 1883, on D.'s house, and for the amount of the dilapidations in that house:—Held, that the right of H., under R.'s covenant of indemnity, to prove for the rents which he had paid, was not taken away by his covenant in the assignment by the liquidators, which could not be extended to rents already due and paid. Further, this right was not defeated on the ground that the right of R.'s representatives, if they paid rent, to recover it from the owner of the lease for the time being, was interfered with by the assignment from the liquidators to H., for that this assignment could not take away any right of action which R.'s executors might have against the persons entitled to the houses at the end of 1882, and that an assignor who pays rent has no lien on the term, and so cannot be prejudiced by its subsequent assignment. Neither was the right defeated on the ground that H. on paying the rent became entitled to a right of distress from the reversioners, which he had destroyed by taking an assignment of the leases, and had therefore discharged the estate of R. by releasing a remedy to the benefit of which R. as a surety was entitled, for that a right of distress is not a security or remedy to the benefit of which a surety paying rent is entitled under the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 5:—Held, therefore, that H. was entitled to prove against R.'s estate for the rent paid in 1882 on both houses, and that he was entitled to prove for the Lady Day rent on D.'s house; but that H. was not entitled to prove for the amount of dilapidations, for that he had sustained no damage by reason of them, inasmuch as he bought the leases from the liquidators at a less price in consequence of the breaches of the covenant to repair; nor for the Lady Day rent of C.'s house. *Russell, In re, Russell v. Shoolbred*, 29 Ch. D. 254; 53 L. T. 365—C. A.

VIII. AGRICULTURAL HOLDINGS ACT.

Notice to Quit—Half-year's Notice and Six Months' Notice, Distinction between.]—A tenancy under a written agreement from year to year "until six months' notice shall have been given . . . in the usual way to determine the tenancy," is not one "where a half-year's notice . . . is by law necessary" within the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 33, which therefore does not apply so as to render a year's notice necessary for the determination of the tenancy. *Barlow v. Teal*, 15 Q. B. D. 501; 54 L. J., Q. B. 564; 54 L. T. 63; 34 W. R. 54; 50 J. P. 100—C. A.

Action by Landlord—Counterclaim for Compensation.]—A claim for compensation by a tenant under the Agricultural Holdings Act, 1883, if disputed, must be referred to arbitration only, and cannot form the subject-matter of a counterclaim in an action for rent brought by the landlord in the High Court. *Gaslight and Coke Company v. Holloway*, 52 L. T. 434; 49 J. P. 344—D.

A tenant of a farm, restrained by agreement from selling the hay and straw grown on the farm, became bankrupt. The trustee in bankruptcy removed and sold a quantity of the hay in breach of the agreement and then disclaimed the lease. The landlord sued the trustee for the removal of the hay, and the trustee counter-claimed for unexhausted improvements:—Held, that the counter-claim could not be sustained, as, by the Agricultural Holdings Act, 1883, s. 8, arbitration is rendered compulsory in case of disputes between landlord and tenant. *Schofield v. Hincks*, 58 L. J., Q. B. 147; 60 L. T. 573; 37 W. R. 157—D.

Award giving Compensation generally—No Items—Validity.]—A tenant gave notice of claim for compensation under the Agricultural Holdings (England) Act, 1883, and the landlord gave notice to the tenant of a counterclaim for dilapidations and breaches of covenant. The parties not agreeing as to the amounts payable under their respective claims, the landlord gave the tenant notice, under the Agricultural Holdings Act, 1883, appointing D. to act on his behalf. The tenant acted in the matter as his own referee. The referees did not appoint an umpire before entering upon the reference, but, differences having arisen, they appointed W. to act as umpire. This appointment of the umpire was in a letter signed by both referees as follows:—"We, the undersigned, hereby appoint you our umpire to settle all differences that have arisen between us in this valuation, which relates to compensation for unexhausted lime, manures, and feeding stuff, and counter-claims for dilapidations and breaches of covenant on both sides, under a lease, dated the 20th July, 1880, and under the Agricultural Holdings Act, 1875 and 1883, and we agree to abide by your decision in writing as final and binding on all parties." The umpire made his award in writing as follows: "I do award that the sum of 96l. 11s. is payable by the said Charles Shrubbs to the said William Lee, balance in full satisfaction of all claims made by either party." The landlord appealed against the award upon the grounds (1) that it was obligatory that the award should have been made under the provisions of the

Agricultural Holdings (England) Act, 1883; (2) that the award was invalid, because it awarded a sum generally in respect of claims under the Agricultural Holdings Acts, 1875 and 1883, and of claims arising outside those acts, without distinguishing between the two sets of claims; (3) that the award was bad, as it awarded a sum generally for compensation and did not, as required by s. 19 of the act, specify (a) the several improvements in respect of which compensation was awarded; (b) the time at which each improvement was executed; (c) the sum awarded in respect of each improvement:—Held, that there was abundant evidence to warrant the conclusion that this was an award outside the Agricultural Holdings Act altogether, and that it was none the less so because it may have included some matters which were within the act; that the reference was in fact a common law reference; and that the award was final and binding upon the parties. *Shrubbs v. Lee*, 59 L. T. 376; 53 J. P. 54—D.

Compensation for Improvements—Notice of Claim.]—A notice by a tenant in occupation of a tenancy current at the commencement of the Agricultural Holdings Act, 1883, of a claim for compensation for improvements executed after the commencement of the act, is good if given under the Agricultural Holdings Act, 1883, though the compensation is to be based upon the principles of the Agricultural Holdings Act, 1875. The compensation for such improvements is to be calculated on the basis of the Agricultural Holdings Act, 1875, and not of the Agricultural Holdings Act, 1883. *Smith v. Acock*, 53 L. T. 230—D.

Appeal from County Court.]—*See ante*, col. 558.

Distress—Ordinary Course of Dealing.]—By s. 44 of the Agricultural Holdings Act, 1883, a landlord cannot distress for rent which became due more than a year before the distress, provided that, where according to the ordinary course of dealing, payment of the rent has been allowed to be deferred until the expiration of a quarter or half-year after the rent legally became due, for the purpose of the section the rent shall be deemed to have become due at the expiration of such quarter or half-year, and not when it legally became due:—Held, that in a case within the proviso the landlord was entitled to distress for rent then legally due, but not yet payable according to the course of dealing, and also for rent which had become legally due more than a year previously, but had become payable according to the course of dealing less than a year previously, although the total amount distrained for exceeded one year's rent. *Bull, Ex parte, Bew, In re*, 18 Q. B. D. 642; 56 L. J., Q. B. 270; 56 L. T. 571; 35 W. R. 456; 51 J. P. 710; 4 M. B. R. 94—D.

—Agistment of Cattle—"Live Stock taken in to be Fed at a Fair Price."]—Cattle were distrained while on a holding pursuant to an agreement by which the tenant, in consideration of 2l., allowed the owner "the exclusive right to feed the grass on the land for four weeks":—Held, that the cattle were not "taken in" by the tenant "to be fed at a fair price," within the meaning of the Agricultural Holdings Act, 1883

(46 & 47 Vict. c. 61), s. 45, and were therefore not privileged from distress. *Masters v. Green*, 20 Q. B. D. 807; 59 L. T. 476; 36 W. R. 591; 52 J. P. 597—D.

Live stock agisted for a fair equivalent is within 46 & 47 Vict. c. 61, s. 45 (the Agricultural Holdings Act, 1883), as taken in to be fed at a "fair price," and may therefore be exempt from distress, even although such equivalent be not money. Cows were agisted on the terms "milk for meat," i.e. that the agister should take their milk in exchange for their pasturage.—Held, that the agistment was within the act. *London and Yorkshire Bank v. Belton*, 15 Q. B. D. 457; 54 L. J., Q. B. 568; 34 W. R. 31; 50 J. P. 86—D.

— **Authority to act as Bailiff—Area of Authority.**—A distress was levied upon a holding to which the Agricultural Holdings (England) Act, 1883, applied, by a person having authority to act as a bailiff under the act from a county court judge, but not from the judge of the county court district where the holding was situate.—Held, that the enactment of s. 52—that "no person shall act as a bailiff to levy any distress on any holding to which this act applies unless . . . authorised to act as a bailiff by . . . the judge of a county court"—was satisfied by authority from the judge of any county court, notwithstanding the enactment of s. 61 that "county court" in relation to a holding means the county court within the district whereof the holding or the larger part thereof is situate. *Sergeant, Ex parte, Sanders, In re*, 54 L. J., Q. B. 331; 52 L. T. 516; 49 J. P. 582—D.

— **Percentage—Who entitled to.**—In distress for rent under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), the landlord, and not the bailiff, is "the person making the distress" under s. 49, and is therefore entitled to the "percentage" referred to in the second schedule to the act. *Coode v. Johns*, 17 Q. B. D. 714; 55 L. J., Q. B. 475; 55 L. T. 290; 35 W. R. 47; 51 J. P. 21—D.

IX. FURNISHED HOUSES.

Implied Warranty of Fitness—Insufficiency of Water Supply.—An agreement was entered into between C. and P. for the lease of a partly furnished house, together with a garden and a few acres of ground, for a term of five years. P. alleged that a false representation had been made by C. as to the sufficiency of the water supply, and, on the water supply failing, P. alleged that the house was uninhabitable, and refused to be bound by the agreement. There was evidence that the pipes had become stopped up when the house was in the occupation of P.:—Held, upon the evidence, that there had been no misrepresentation by C.; and that, in a letting of this description, the doctrine laid down in *Smith v. Marrable* (11 M. & W. 5), that there was an implied condition in the letting of a house that it should be reasonably fit for habitation, was inapplicable. *Chester v. Powell*, 52 L. T. 722—V.-C. B.

Infectious Disease—Action for Rent.—One

who has agreed to take a furnished house is not bound to fulfil his contract if the house be infected with measles at the date fixed for the commencement of the tenancy. If in such a case the lessor sue for rent, he must show, to entitle him to succeed, that the house was in fact in a state fit for human occupation at the date fixed for the commencement of the term, notwithstanding a previous intimation by the tenant of his intention to repudiate the contract. *Bird v. Greville (Lord)*, 1 C. & E. 317—Field, J.

Right to determine Lease—Implied Agreement only exists at Commencement.—A tenant is not justified in determining a tenancy of a furnished house, because during the term a portion of the plastering of the ceilings (which were cracked and fractured at the commencement of the tenancy) fell in one room, and the plastering of the ceilings in other rooms was unsound, and liable to fall. On a letting of a furnished house, the implied term that it shall be fit for human habitation only applies to the condition of the premises at the commencement of the tenancy. *Maclean v. Currie*, 1 C. & E. 361—Stephen, J.

X. LODGING HOUSES.

Implied Agreement—Dishonesty of Servant.—To render a lodging-house keeper liable for the wrongful acts of a servant, the lodging-house keeper must have been guilty of such a misfeasance, or such gross misconduct, as an ordinary and reasonable person would not have been guilty of. *Clench v. D'Arenberg*, 1 C. & E. 42—Cave, J.

Lodger's Goods—Protection from Distress.—See ante, cols. 1096, 1097.

Bye-laws as to—Registration.—See ante, col. 864.

XI. ACTIONS FOR RECOVERY OF LAND.

IN COUNTY COURT.

Jurisdiction—Determination of Tenancy—"Legal Notice to quit."—By s. 50 of the County Courts Act, 1856, jurisdiction in ejectment is given to the county courts in cases where neither the rent nor the value of the premises exceeds 50l. a year, and the tenant's term and interest "shall have expired, or shall have been determined either by the landlord or the tenant by a legal notice to quit."—The plaintiff let to the defendant a house for three years at a rent of 3l. 6s. 8d. a month, payable monthly; the agreement of tenancy contained a power of re-entry on non-payment of any part of the rent for twenty-one days after the day of payment, or in case of the breach or non-performance of any of the conditions of the agreement. A month's rent having been in arrear for more than twenty-one days, the plaintiff gave the defendant notice to quit at the end of the next month of the term, alleging as breaches non-payment of rent and a breach of a condition in the agreement:—Held, that a "legal notice to quit" must be taken to

mean the notice to quit required by law and not one depending on the express stipulation of the parties; that the tenancy had not, therefore, been determined within the meaning of the section, and that an action to recover possession of the premises could not be brought in the county court. *Friend v. Shaw*, 20 Q. B. D. 374; 57 L. J., Q. B. 225; 58 L. T. 89; 36 W. R. 236; 52 J. P. 438—D.

LANDS CLAUSES ACT.

I. PURCHASE OF AND ENTRY ON LAND.

1. *Who may Sell*, 1111.
2. *Notice to Treat*, 1111.
3. *Entry on Land*, 1115.
4. *What Lands*, 1116.
5. *Other Matters relating to*, 1117.

II. COMPENSATION.

1. *In respect of What Interests or Injuries*.
 - a. *Interests*, 1118.
 - b. *Injuries*, 1118.
2. *Settling Amount and Practice thereon*, 1121.

III. PURCHASE MONEY AND FUNDS IN COURT.

1. *In General*, 1124.
2. *Persons Entitled to*, 1124.
3. *Petition or Summons*, 1127.
4. *Costs*, 1129.

IV. SUPERFLUOUS LANDS, 1133.

I. PURCHASE OF AND ENTRY ON LAND.

1. WHO MAY SELL.

Sale by Lunatic.—*See Tugwell, In re*, post, col. 1125.

Owner under Disability—Declaration by Surveyors.—On a sale by agreement to a company by an owner under disability:—Held, that the requirements of the Lands Clauses Consolidation Act, 1845, s. 9, must be strictly complied with, and that the absence of a declaration in writing annexed to the valuation and subscribed by the surveyors was fatal to a claim by the company for the specific performance of the contract, although the valuation was made by surveyors without formal appointment. *Bridgend Gas and Water Company v. Dunraven*, 31 Ch. D. 219; 55 L. J., Ch. 91; 53 L. T. 714; 34 W. R. 119—Chitty, J.

2. NOTICE TO TREAT.

Service on Tenant—Adoption by Owner.—A corporation, three days before the expiration of their compulsory powers, without making any attempt to discover and serve the owner of the property, served a notice to treat on an occupier of part of the premises comprised in the notice to treat, who was the agent of the owner for the

management of his property. The occupier took it the same day to the solicitor of the owner, and also wrote to the owner; but it did not appear that, as a matter of fact, the notice came to the hands of the owner before the three days had expired. The owner, however, after the expiration of the three days gave a counter-notice under s. 92 requiring the corporation to take the whole of his property. This notice he subsequently withdrew, and required the corporation to proceed with the purchase of the land specified in their notice to treat, which they declined to do:—Held, that the service of the notice to treat was irregular and invalid, and that the owner could not, by his subsequent adoption of the notice, cure the irregularity and compel the corporation to proceed with it. *Shepherd v. Norwich (Mayor)*, 30 Ch. D. 553; 54 L. J., Ch. 1050; 53 L. T. 251; 33 W. R. 841—North, J.

The conditions necessary for service of a notice to treat discussed. *Id.*

Counter-notice — Acceptance by Company's Solicitor — Authority to bind Company.—A railway company served the plaintiff with notice to treat for the purchase of certain property, and the plaintiff served the company with a counter-notice requiring them to take certain other property as well as that comprised in the notice to treat. The solicitors of the company wrote accepting the counter-notice, but the company afterwards insisted on their right to take only the property comprised in the notice to treat. It having been found as a fact that the properties were separate and distinct, and that therefore the counter-notice was bad:—Held, that the acceptance of the bad counter-notice by the solicitors could not bind the company to take land which they were not otherwise compellable to take. *Treadwell v. London and South-Western Railway*, 54 L. J., Ch. 565; 51 L. T. 894; 33 W. R. 272—Kay, J.

Notice and Counter-notice—Right of Abandonment.—*See Morrison v. Great Eastern Railway*, post, col. 1123.

Disputed Interest—Action by Landowner for Declaration of Title — Jurisdiction of High Court.—A., in possession of land under a building agreement, which required the houses to be erected by November, 1885, was in 1882 informed by a railway company of their intention to obtain a special act to extend their railway system, which scheme would affect his land. A. thereupon arranged with his landlord for an extension of the time limited by his agreement—no definite period being fixed—and suspended his building operations. The company obtained their special act in 1883, and in 1884 gave A. the usual notice to treat for part of the land comprised in his building agreement, but A. sent in no claim under the notice. In 1886 the company took adverse possession of the land in question, treating the building agreement as at an end, and insisting that A. had no interest whatever in the land. On action brought by A. against the company for a declaration that the building agreement was still subsisting, and that he was entitled to have his interest thereunder assessed in the usual way:—Held, that the jurisdiction of the court was not ousted by

the procedure under the Lands Clauses Consolidation Act, 1845, and that A. was entitled to the declaration he claimed. *East and West India Docks Company v. Gatliffe* (3 Mac. & G. 155), and *London and Blackwall Railway v. Cross* (31 Ch. D. 354), distinguished. *Birmingham and District Land Company v. London and North Western Railway*, 36 Ch. D. 650; 57 L. J., Ch. 121; 57 L. T. 185; 36 W. R. 414—Kekewich, J. Affirmed 40 Ch. D. 268; 60 L. T. 527—C. A.

Validity — Estoppel by Conduct — Negotiations.—The plaintiff was owner of six adjacent houses, five in G. place, and one in Butler's alley. Four of the houses in G. place adjoined Butler's alley. On the 2nd of December, 1884, the commissioners of sewers resolved to alter, widen, and extend Butler's alley, and adjudicated that the plaintiff's six houses were required for that purpose. Shortly afterwards they served the plaintiff with a notice to treat, which stated that the houses were required for altering and widening Butler's alley. The plaintiff sent in a claim for 2,500*l.* The parties could not agree about the price, and in October, 1885, the negotiations having come to an end, the commissioners proceeded to summon a jury. The plaintiff then made inquiry as to their plans, and commenced this action to prevent them from taking the property. It appeared from a plan sent to the plaintiff in November, 1885, which was the first information he had as to the nature of the alterations proposed by the commissioners, that the part of Butler's alley which lay at the back of the four houses in G. place was only to be widened by a strip tapering from the width of twelve inches to a point, and it appeared that considerable alterations were to be made in the level of G. place and Butler's alley. The plaintiff moved for an injunction:—Held, that *Thomas v. Daw* (2 L. R., Ch. 1) was inapplicable, as in that case the plaintiff knew all along what the plans of the commissioners were, whereas in the present case the plaintiff did not know them till after the negotiations were at an end, and was justified in believing the representation in the notice that his houses were required for altering and widening Butler's alley, and that the plaintiff's conduct had not been such as to debar him from asserting his rights. Held, further, that it was a question to be tried at the hearing whether the only real object of the commissioners as to the part of Butler's alley adjoining the plaintiff's houses was not to lower its level, and whether the minute widening of that street was not merely colourable, and proposed in order to give them power to purchase under their act, which gave them a power of compulsory purchase for the purpose of widening streets, but not for the purpose of altering levels. Held, therefore, that the commissioners ought to be restrained, till the hearing or further order, from proceeding to assess the value of the plaintiff's houses. *Lynch v. Commissioners of Sewers*, 32 Ch. D. 72; 55 L. J., Ch. 409; 54 L. T. 699; 50 J. P. 548—C. A. Reversing 34 W. R. 226—Kay, J.

An adjudication of the commissioners that a certain property is required for the purpose of alterations cannot be supported if there are no grounds on which any reasonable person could come to the conclusion that it was so required. The commissioners cannot validly adjudicate

that a property is required for the purposes of an improvement until they have determined what the improvement is to be, so far as to furnish materials for judging whether the property is required. *Ib.*

Easement—Right to cross Line of another Company — Subscription of Capital.—By the act incorporating the S. Railway Company, the Lands Clauses Act, 1845, except where expressly varied thereby, was incorporated therewith, and it was enacted that the words to which meanings were assigned by the Lands Clauses Act should in the special act have the same meanings unless there was something in the subject or context repugnant thereto. The S. Company, "subject to the provisions of this act," were empowered to purchase any of the lands in their deposited plans. By s. 8, which was inserted for the protection of the G. W. Railway Company, it was provided (sub-s. 1), that the S. Company should not enter upon or interfere with or execute any work over or under the line of the G. W. Railway until plans had been approved by the engineer of the G. W. Company or an engineer appointed by the Board of Trade. Sub-s. 2 provided that the railway of the S. Company should be carried in one place over and in another under the G. W. Railway by a bridge and tunnel. By sub-s. 4 the bridge and tunnel were to belong to the G. W. Company. By sub-s. 8 the S. Company were not to interfere with the land of the G. W. Company except for the purposes of the above crossings, and it was enacted that the S. Company should not purchase or take any land of the G. W. Company, but that the S. Company might purchase and the G. W. Company should grant an easement or right of using the crossings in perpetuity. By sub-s. 9 every dispute between the two companies respecting the above matters or any of them was to be referred to arbitration. The S. Company were proceeding to make the crossings, and the G. W. Company brought their action to restrain them from doing so, on the ground that the capital of the S. Company had not been subscribed, and that under the 16th section of the Lands Clauses Act they could not proceed to put in force any of their powers for the compulsory purchase of land until it had been subscribed:—Held (Lord Watson diss.), that the right given by the special act was a right of taking easements, not the exercise of running powers, nor the right of compulsory taking of "lands" within the Lands Clauses Act, 1845, s. 16, and that the notice to treat was good, *Great Western Railway v. Swindon and Cheltenham Railway*, 9 App. Cas. 787; 53 L. J., Ch. 1075; 51 L. T. 798; 32 W. R. 957; 48 J. P. 821—H. L. (E.).

Under what Section.—The notice to treat was good, because it was given not under the Lands Clauses Act, s. 18, but under s. 8, sub-s. 8, of the special act. *Ib.*—Per Lord Fitzgerald.

The notice was good, because even if given under s. 35 of the Lands Clauses Act and not under the above section of the special act, nevertheless the respondent company were entitled to proceed before their capital was subscribed, because under the Lands Clauses Act, 1845, s. 85, the land is not "taken" but only entered upon. *Ib.*—Per Lord Bramwell.

3. ENTRY ON LAND.

Effect of.]—An entry on land is not a “compulsory taking” within the meaning of the Lands Clauses Act, 1845. *Great Western Railway v. Swindon and Cheltenham Railway*, supra—Per Lords Bramwell and Watson.

Abandonment of Railway—Costs of “Taking Land.”]—A railway company gave notice to treat for a piece of land, and no agreement having been come to with the owners, they entered on the land under the powers of the 85th section of the Lands Clauses Act, and paid the deposit into court. Afterwards the company obtained an act by which they were empowered to abandon that part of their undertaking, but it was enacted that the abandonment should not prejudice any landowner’s rights to compensation for damage done by entry and occupation, and that the compensation should be determined in the manner provided by the Lands Clauses Act. The owners of the land then entered into an agreement with the company fixing the amount of compensation at 1,350*l.*, but providing that this should not include costs, charges, and expenses which the owners might be entitled to recover under the company’s acts, but that such costs, charges, and expenses should be recoverable from the company in addition to the compensation as if the agreement had not been entered into. The company objected to pay the costs of ascertaining the amount of the compensation on the ground that the land had not been taken within the meaning of the 80th section of the Lands Clauses Act. They also objected to pay the costs of the preparation of the agreement:—Held, that the land had been “taken” within the meaning of the 80th section, and that the company must pay the costs of ascertaining the amount of compensation and of the preparation of the agreement. *Charlton v. Rolleston*, 28 Ch. D. 237; 54 L. J., Ch. 233; 51 L. T. 612—C. A.

Shortly before Expiration of Period for Completion.]—The special act of a railway company enacted that “the powers of the company for the compulsory purchase of lands for the purposes of this act shall not be exercised after the expiration of three years from the passing of this act;” and that “if the railways are not completed within five years from the passing of this act, then on the expiration of that period the powers by this act granted to the company for making and completing the railways or otherwise in relation thereto shall cease to be exercised, except as to so much thereof as is then completed.” A few years before the expiration of the three years the company served on a landowner a notice to treat for part of his land. A correspondence ensued, no agreement was come to, and the compensation was not assessed. Thirteen days before the expiration of the five years the company, having complied with the requirements of s. 85 of the Lands Clauses Act, 1845, entered and proceeded to make the railway, the landowner objecting and resisting. The land was *bonâ fide* required for the railway:—Held, that whether the railway could or could not have been completed within the thirteen days, the entry under s. 85 was lawful; that the company could not be restrained by injunction, but were entitled to remain and complete the railway after the ex-

piration of the five years. *Tiverton and North Devon Railway v. Loosemore*, 9 App. Cas. 480; 53 L. J., Ch. 812; 50 L. T. 637; 32 W. R. 929; 48 J. P. 372—H. L. (E.).

4. WHAT LANDS.

“House”—Residential Property—Detached portion of Property.]—Upon a compulsory purchase of a house under the powers of the Lands Clauses Act, the promoters are bound to take only the entire property which, as a matter of legal construction, would pass under a grant or devise simpliciter of the particular house in question in each particular case. *Kerford v. Seacombe, Hoylake, and Deeside Railway*, 57 L. J., Ch. 270; 58 L. T. 445; 36 W. R. 431; 52 J. P. 487—Kekewich, J.

The plaintiff, in the year 1853, acquired land on the north side of a road, on which he built a residence for his own occupation. In the year 1864 he acquired a plot of land on the south side of the same road immediately opposite his residence, whereon he built stables and formed a kitchen garden, and this property had since been continuously occupied by him as an adjunct to his residence. The defendants gave notice to exercise their compulsory powers in respect of the stables and garden only:—Held, that the property included in the notice was not part of the plaintiff’s “house” within s. 92 of the act, and the defendants could not be compelled to take the plaintiff’s residence itself. *Quære*, whether under such circumstances a piece of land detached from a residence may not be part of the “house” within the meaning of the section. *Id.*

House and adjoining Paddock.]—The owner of a property consisting of a strip of land about 100 yards long by 30 yards wide, with a road at each end, containing front garden, house, back garden and paddock, the latter abutting on the back road, and with private roads from the house to the front road, and from the house along the side of the paddock to the back road, received notice from a railway company of their intention to take the whole of the end of the paddock and private road, so as to cut him off from the back road:—Held, that they must take the whole property. *Barnes v. Southsea Railway*, 27 Ch. D. 536; 51 L. T. 762; 32 W. R. 976—V.-C. B.

Two Houses—Internal Communication.]—Where a man used two houses with internal communication as one house for the purpose of one business, holding them under separate leases of even date from the same lessor, the court held that the two houses constituted one entire house within the meaning of the Lands Clauses Act, 1845, s. 92, so that, if the company took the premises comprised in one lease, they were bound to take those comprised in the other. *Siegenberg v. Metropolitan District Railway*, 49 L. T. 554; 32 W. R. 333—V.-C. B.

Part of Manufactory—Taking whole—Place of Business as distinguished from Manufactory.]—B. and Sons, tea merchants, carried on their business at P. House and also in houses in G. street in the immediate vicinity. In the houses in G. street the tea was stored, blended and milled, and by those and similar processes special teas of a distinct quality were produced and sold

in the market under B. and Sons' trade mark. In P. House the packing requisites were prepared and made, and the tea packed, and thence it was delivered to customers. The Metropolitan Board of Works desired to take P. House under their compulsory powers:—Held, that manufacture meant producing something new from raw material, which was not the case here; but that, even supposing a manufacture was carried on at G. street, there was no manufacture carried on at P. House, and as the business and manufacture were carried on in distinct premises, it was not incumbent on the Board to take the premises as a whole. Consequently, B. and Sons were not entitled to an injunction restraining the Board from taking P. House without taking the whole. *Benington v. Metropolitan Board of Works*, 54 L. T. 837; 50 J. P. 740—Chitty, J.

5. OTHER MATTERS RELATING TO.

Private Way—Construction of Conveyance—“Rights, Members, &c.”—In a conveyance to a railway company of a piece of land on which was a stable, the words, “rights, members, and appurtenances,” used in the form given in Schedule A., appended to the Lands Clauses Act, were inserted. The vendor had many years previously made a private road from the highway to the stable, over his own land, for his own convenience, and had used it ever since. The soil of the road was not conveyed to the company, and no express mention of it was made in the conveyance:—Held, that the right of way passed to the company. *Bayley v. Great Western Railway*, 26 Ch. D. 434; 51 L. T. 337—C. A.

Agreement to Purchase—Flaw in Title—Specific Performance—Possession.—The plaintiff, a lessee of premises required for a street improvement, contracted to sell a lease of the premises for twenty-one years to the Metropolitan Board of Works. The purchasers required an abatement on the ground that the lease was found to be determinable at the end of seven or fourteen years by the lessor. The plaintiff claimed specific performance. Pending the action the Board applied to be let into possession on payment into court of the whole purchase-money claimed, and Pearson, J., made an order for letting them into possession on their paying into court that sum with interest:—Held, on appeal, that though the Board could, by taking the steps prescribed by the Lands Clauses Act, have obtained immediate possession of the property, yet as they had not done so, they were in the same position as any other purchaser who was defendant to an action for specific performance, and were not entitled to have possession given to them pending the action. *Bygrave v. Metropolitan Board of Works*, 32 Ch. D. 147; 55 L. J., Ch. 602; 54 L. T. 889; 50 J. P. 788—C. A.

By School Board.—See SCHOOL.

Deficiency of Assessment to Poor Rate—Liability of Promoters.—See POOR LAW (RECOVERY OF RATES).

Stamps on Conveyance.—See REVENUE.

II. COMPENSATION.

1. IN RESPECT OF WHAT INTERESTS OR INJURIES.

a. Interests.

Tenancy—Right to use Room.—A right for directors to use a board-room for certain purposes, at certain times, and for a clerk to use a desk in an office for certain purposes, does not constitute a tenancy so as to entitle the company to recover compensation for disturbance under the Lands Clauses Acts. *Municipal Freehold Land Company v. Metropolitan and District Railways*, 1 C. & E. 184—Cave, J.

Interesse Termini.—The plaintiff agreed to take a theatre for eight weeks, to commence on a future day. Before the commencement of the term, and before entry by the plaintiff, the defendants, by excavating on their property, deprived the theatre of the support of the adjacent land, so that the theatre was rendered unsafe, and was closed during the eight weeks by order of the proper local authorities. The plaintiff sued the defendants in respect of the damage suffered by him in consequence of their acts:—Held, that the defendants had injured a proprietary right of the plaintiff, who was, therefore, entitled to maintain the action. *Gillard v. Cheshire Lines Committee*, 32 W. R. 943—C. A.

Termination of Interest of Claimant.—A railway company commenced to build warehouses which were intended to be 100 feet in height. The lessee of a warehouse, the light of which would be affected when the buildings were completed, gave notice to the railway company that he held on a lease for an unexpired term of fourteen years, which could be determined by six months' notice, to expire on November 11 then next, and required the company to determine whether they would take over the lease, or whether he should give the requisite notice. The company declined to interfere, and the lessee on May 6 gave notice to determine his tenancy. There was no evidence that at the time the building had progressed so far as to affect the light to the warehouse. Afterwards the lessee gave notice to the company of his claim for compensation for injuriously affecting his lands, and an inquiry was held before the sheriff and a jury:—Held, that the act of the lessee in giving notice to terminate his lease, not being the natural result of the acts of the railway company, but a free exercise of will on his part, he could not recover compensation on the footing that he was entitled to a fourteen years' lease. *Reg. v. Poulter*, 20 Q. B. D. 132; 57 L. J., Q. B. 138; 58 L. T. 534; 36 W. R. 117; 52 J. P. 244—C. A.

b. Injuries.

“Injurious affecting”—Property adjoining Land taken.]—Part of land laid out as a building estate was taken by a local board under an act incorporating the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), for the purposes of a sewage farm, whereby the value of other parts of the land near to the part so taken was depreciated, even in the absence of any nuisance arising from the sewage farm when made:—Held, that the owner of the estate was entitled to compensation

under the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), s. 63, not only in respect of the land taken, but also for damage sustained by reason of the "injuriously affecting" the other lands by the exercise of the statutory powers. *Reg. v. Essex*, 14 App. Cas. 153—H. L. (E.). Reversing 17 Q. B. D. 447; 55 L. J., Q. B. 313; 54 L. T. 779; 34 W. R. 587; 51 J. P. 3—C. A.

—Alteration of Levels—Loss of Access to Street.]—By a deed of conveyance land was conveyed to the respondents' predecessor in title, "the situation, dimensions, and boundaries whereof are particularly described in the map or plan drawn on these presents . . . together with all streets, ways, rights, easements, and advantages." The plan showed a piece of land at the intersection of "G. street" and "M. street," which were delineated communicating on a level. The land was in fact, at the date of the conveyance, waste building land on the outskirts of a town, and neither of the streets had been made or dedicated to the public. The soil of the intended streets was the property of the vendor. Houses were built on the land fronting M. street, and both streets were made and used as streets; but the appellant company afterwards made a branch line passing under G. street, near the property in question, and thereby altered the level of that street, and cut off the access for horses and vehicles from M. street into G. street; a means of access for foot-passengers remained:—Held, that the conveyance granted to the purchaser a right of way from M. street into G. street, and that the alteration of levels had "injuriously affected" the land within the meaning of the Railway Clauses Act, 1845, so as to entitle the respondents to compensation. *Furness Railway v. Cumberland Building Society*, 52 L. T. 144; 49 J. P. 292—H. L. (E.).

—Diversions of Road from Public-house—Special Value as a Public-house.]—Under statutory powers conferred by an act incorporating the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), a railway company stopped up a street in which were a house and premises used as an hotel, whereby the value thereof for using, selling, or letting as an hotel and public-house was diminished:—Held, that the owner was entitled to compensation under the Lands Clauses Act, 1845, for the depreciation in the special value of the premises as an hotel and public-house. *Wadham v. North-Eastern Railway*, 16 Q. B. D. 226; 55 L. J., Q. B. 272; 34 W. R. 342—C. A. Affirming 52 L. T. 894; 49 J. P. 599—D.

Prospective Injury.]—A claimant cannot recover compensation in respect of an injury which is merely prospective and does not exist at the time of making the claim. *Reg. v. Poulter*, supra.

During the Execution of the Works.]—Under the Lands and Railways Clauses Consolidation Acts the owner or occupier of lands injuriously affected during the execution of the works authorised by the special act is entitled to compensation, if the injury is sufficient to lessen the value of the property. Observations of Lord Chelmsford, L.C., in *Ricket v. Metropolitan Railway* (2 L. R., H. L. 175, at p. 194) commented on. *Ford v. Metropolitan and Metropolitan District Railways*, 17 Q. B. D. 12; 55 L. J., Q. B. 296; 54 L. T. 718; 34 W. R. 426;

50 J. P. 661—C. A. Affirming 1 C. & E. 593—Day, J.

A house was divided into a front and a back block; and the plaintiffs were lessees of three rooms on the first floor in the back block. The lease did not expressly grant any mode of access. Access to the rooms demised to the plaintiffs was gained from the street by passing through a hall or vestibule, and then up some stairs to the plaintiffs' rooms. The defendants in the exercise of compulsory powers under the Railways Clauses Consolidation Act, took down the front block of the house, and removed the hall. The interference with the hall and the injury to the access to the rooms of which the plaintiffs were lessees, lessened their value. An arbitrator having awarded compensation to the plaintiffs under the Lands and Railway Clauses Consolidation Acts:—Held, that the award was valid on the grounds, first, that compensation may be obtained under the Railways Clauses Consolidation Act, 1845, for injury done to land by the execution of the works, if it is sufficient to lessen the value thereof; secondly, that the access through the hall was not a way of necessity, but was in the nature of a continuous and apparent easement which passed under the demise of the rooms, and that an interference with this quasi easement was sufficient to give rise to a valid claim for compensation. *Id.*

Sewer—Right of Access to.]—The plaintiffs, in 1843, under the authority of a local act, constructed a sewer on land part of which had been bought by the defendants, a railway company, but had not then been used for their works. Part of the remainder was bought by the defendants after the construction of the sewer, but no part of the land was the plaintiffs', or had ever been granted to them. The local act not only authorised the plaintiffs to make the sewer, but vested it in them, with the duty to repair it, without, however, giving them any express right of access thereto. In 1863 the defendants, in exercise of the powers conferred on them by their special act, with which was incorporated the Railway Clauses Consolidation Act, 1845, constructed an embankment over the sewer which, though it made it less easy, did not prevent the plaintiffs getting access to the sewer in order to repair it. The plaintiffs being obliged afterwards to repair and having incurred extra expense in doing so in consequence of such embankment, claimed compensation from the defendants under s. 68 of the Lands Clauses Consolidation Act, 1845, and s. 6 of the Railways Clauses Consolidation Act, 1845, for injuriously affecting the plaintiffs' interest in the sewer:—Held, by the Queen's Bench Division, that the plaintiffs had no interest in land within the meaning of the Lands Clauses Consolidation Act, 1845, s. 68, and therefore could not maintain the claim to compensation:—Held, by the Court of Appeal, that as a right of access to the sewer had not been expressly given by the local act but had to be implied, the right of access which ought to be implied was not any particular mode of access, but such only as was reasonably necessary for enabling the repair of the sewer to be done, and as that had not been prevented by the defendants' embankment, but only rendered less easy and convenient, the plaintiffs had no right to compensation. *Birkenhead*

(Mayor) v. *London and North-Western Railway*, 15 Q. B. D. 572; 55 L. J., Q. B. 48; 50 J. P. 84—C. A.

Ancient Lights—Act of Parliament—Construction.—By an act incorporating the Lands Clauses Consolidation Acts the Metropolitan Board of Works were authorised to acquire specified land for the purpose of (among others) the G. street improvement, and to purchase easements over such land. By s. 33 of their act they were required to sell or let specified portions of the land for the construction and maintenance of artisans' dwellings, so that the land should be cleared of existing houses by degrees and a minimum number of dwellings should be provided. By an amendment act the board were required to devote three plots of land, the subject of the G. improvement, to provide a minimum number of artisans' dwellings, and s. 33 of the principal act was repealed with respect to the G. improvement:—Held that provisions as to selling and letting similar to those contained in s. 33 of the principal act were implied by the amendment act:—That an adjoining owner had no right to an injunction to restrain a tenant of the board from obstructing ancient lights by building artisans' dwellings on one of the plots of land devoted to that purpose, but that his right was to compensation from the board under s. 63 of the Lands Clauses Consolidation Act, 1845; and that the board could not impose on their tenant a liability to be restrained from building the artisans' dwellings so as to obstruct access of light to ancient lights. *Wigram v. Fryer*, 36 Ch. D. 87; 56 L. J., Ch. 1098; 57 L. T. 255; 36 W. R. 100—North, J.

2. SETTLING AMOUNT AND PRACTICE THEREON.

Injunction to restrain Proceedings.—The lessee of a ferry served a notice on a railway company on behalf of himself and his lessors claiming compensation for injury to the ferry, and requiring the dispute to be submitted to arbitration under the Lands Clauses Act. The lessors had not given authority to use their names; the act of the railway company provided for compensating the lessors of the ferry, but did not mention their lessee; and the notice claimed one lump sum without distinguishing the interests of the lessors and the lessee. The railway company brought an action for an injunction to restrain the lessee from proceeding to arbitration under the notice:—Held, that a proceeding in the name of a person who had given no authority ought to be stayed, and that an injunction ought to be granted, the unauthorised use of the name of the lessors distinguishing the case from *North London Railway v. Great Northern Railway* (11 Q. B. D. 30):—But held, on appeal, that though the court in which an action is brought has jurisdiction to stay proceedings in it if it has been brought without authority, the court has no general jurisdiction to restrain persons from acting without authority, and that an injunction could not be granted to restrain a person from taking proceedings out of court in the name of a person who had given no authority to use it. *London and Blackwall Railway v.*

Cross, 31 Ch. D. 354; 55 L. J., Ch. 313; 54 L. T. 309; 34 W. R. 201—C. A.

Arbitrator neglecting to act—Power of other Arbitrator to proceed ex parte.—Where arbitrators have been appointed under s. 25 of the Lands Clauses Act, 1845, and one arbitrator refuses or neglects for seven days to concur in the appointment of an umpire, the other arbitrator has power, under s. 30 of the act, to proceed ex parte to make an award, and the previous appointment of an umpire is not in such a case a condition precedent to the ex parte proceedings. *Shepherd v. Norwich (Mayor)*, 30 Ch. D. 553; 54 L. J., Ch. 1050; 53 L. T. 251; 33 W. R. 841—North, J.

Settlement of Amount by Justices—Limitation of Time.—The determination by justices under s. 24 of the Lands Clauses Act, 1845, of the compensation to be paid by a railway company to a landowner for having in the construction of the railway injuriously affected his land, is not an order of the justices for the payment of money within s. 11 of 11 & 12 Vict. c. 43 (which limits the time for making a complaint to six months from the time when the matter of such complaint arose), and therefore the justices have jurisdiction under s. 24 of the Lands Clauses Act, 1845, to hear and determine the question of such disputed compensation, although the application be made more than six months after the land has been so injuriously affected. *Edmundson, In re* (17 Q. B. 67), overruled. *Reg. v. Edwards*, 13 Q. B. D. 586; 53 L. J., M. C. 149; 51 L. T. 586; 49 J. P. 117—C. A.

Form of Warrant to Jury—Notice and Counter-notice.—The Great Eastern Railway Act, 1882, contained a clause common to most railway acts of recent years, providing that, notwithstanding s. 92 of the Lands Clauses Act, the company might take a portion of the lands, buildings, and manufactories in the schedule without being compelled to take the whole, "if such portion can, in the judgment of the jury, arbitrators, or other authority assessing or determining the compensation under that act, be severed from such properties without material detriment thereto." The company gave to the plaintiffs the usual notice to treat for a portion of the premises occupied by them as a confectionery manufactory. The plaintiffs gave a counter-notice requiring the company to take the whole. The company issued a warrant to the sheriff to summon a jury to determine the amount of compensation to be paid by them for the portion comprised in their original notice. The plaintiffs gave the company notice that they should raise the question whether that portion could be severed without material detriment to the property. A dispute having arisen whether in this state of things the company would be bound to take the whole if the jury decided against them on the question of severance, the plaintiffs brought an action and moved for an injunction to restrain the company from proceeding further on their warrant, unless and until they should have consented to take the whole of the property if the jury decided the portion could not be severed without material detriment:—Held, that the company could not be deprived of their right, if the jury decided against them, to abandon their notice to treat altogether, but

that the warrant should have raised two issues : (1) whether the portion could be severed without serious detriment to the property ; (2) if so, the amount of compensation to be paid by the company, including damage for severance. *Morrison v. Great Eastern Railway*, 53 L. T. 384—Pearson, J.

Inquisition—Excessive Jurisdiction—Misdirection—Certiorari.—Money spent *bonâ fide* on land is not conclusive evidence as to the value of the land ; it is only evidence to be taken into consideration in ascertaining the value, and may be regarded or disregarded when the land is taken compulsorily. At the hearing of an inquisition held for the purposes of ascertaining and determining the value of the land taken under the Lands Clauses Act, 1845, the high bailiff used somewhat loose language, which might lead one to infer that he told the jury to disregard the amount spent *bonâ fide* by the claimants on the land and premises in question :—Held, that the fact was not sufficient in itself to entitle the claimants to a writ of certiorari to bring up the inquisition that it may be quashed, inasmuch as the jury had had all the facts before them, and had had an opportunity of viewing the land, before giving their verdict. *Streatham Estates Company v. Public Works Commissioners*, 52 J. P. 615—D.

Costs—Verdict of Jury—“Sum previously offered.”—By s. 38 of the Lands Clauses Consolidation Act, 1845, promoters, before issuing their warrant for causing a jury to be summoned in cases of disputed compensation, shall give not less than ten days’ notice of their intention to summon a jury to the other party, and in such notice shall state what sum of money they are willing to give for the interest in the lands sought to be purchased from him, and for the damage to be sustained by him by the execution of the works ; and by s. 51, on every such inquiry before a jury where the verdict of the jury shall be given for a greater sum “than the sum previously offered” by the promoters, all the costs of the inquiry shall be borne by the promoters, but if the verdict be given for a less sum, the costs shall be borne equally between the parties in the manner specified in that section. In a proceeding to take and purchase the claimant’s lands under the Lands Clauses Consolidation Act, 1845, the promoters, on the 9th of March, gave him the notice required by s. 38, and stated that they were willing to give him 600*l.* as and for purchase-money and compensation. On the 19th of March the promoters served a second notice upon the claimant that they were willing, and thereby offered, to pay 900*l.* as purchase-money and compensation. This notice did not refer to the previous one. Neither offer was accepted by the claimant, and on the 29th of March the promoters issued their warrant for causing a jury to be summoned, who assessed the sum to which the claimant was entitled at 750*l.* :—Held, first, that in cases to which s. 38 was applicable, the words “the sum previously offered” in s. 51 applied only to an offer made under s. 38 ; secondly, that the promoters were not entitled to rely upon their second offer of 900*l.* as an offer made under s. 38, and that the costs of the inquiry must, therefore, be borne by them. *Reg. v. Smith, or Westfield and Metropolitan Railway Companies, In re, or Westfield*

v. Metropolitan District Railway, 12 Q. B. D. 481 ; 53 L. J., Q. B. 115 ; 32 W. R. 275—D.

An offer made after litigation has commenced, if it is to have the effect of avoiding the payment of costs by an unsuccessful party, must amount in substance to an offer of everything which the court eventually holds the successful party entitled to. *Birmingham and District Land Co. v. London and North-Western Railway*, 36 Ch. D. 650 ; 57 L. J., Ch. 121 ; 57 L. T. 185 ; 36 W. R. 414—Kekewich, J. Affirmed in C. A. See ante, col. 1113.

III. PURCHASE MONEY AND FUNDS IN COURT.

1. IN GENERAL.

Unpaid Purchase-money—Interest from what time payable.—In the case of a compulsory purchase under the Lands Clauses Consolidation Act, 1845, interest is payable to the vendor by the purchaser from the time when possession might have been taken, it appearing that a good title could be shown. And the land being subject to mortgage, interest is payable by the vendorto the mortgagee in lieu of notice. *Spencer-Bell to the London and South-Western Railway*, 33 W. R. 771—Chitty, J.

Settled Land Act—Effect of.—Lands belonging absolutely to a charity were taken by a public body, and the purchase-money paid into court under the Lands Clauses Act :—Held, that the purchase-money could be dealt with under the provisions of the 32nd section of the Settled Land Act, 1882, as “money liable to be laid out in the purchase of land to be made subject to a settlement.” *Byron’s Charity, In re*, 23 Ch. D. 171 ; 53 L. J., Ch. 152 ; 48 L. T. 515 ; 31 W. R. 517—Fry, J.

Service for Payment out—On Landowner—Lapse of Time.—In 1867 a railway company paid a deposit into court under s. 85 of the Lands Clauses Act, in respect of the interest of a tenant for life in certain settled lands required for their undertaking, and took possession of their lands. Shortly afterwards the company purchased the fee simple of the lands from the trustees of the settlement, and the conveyance to which the tenant for life was a party was duly executed. The money was left in court, and in 1884 was included in the return issued from the Paymaster’s office under R. S. C. Fund Rules, 1884, r. 101, of credits, which had not been dealt with for fifteen years. The tenant for life had died in 1883. In 1886 the company petitioned for the payment out of the fund without serving the representative of the landowner :—Held, that service on the landowner might be dispensed with, considering the lapse of time since the conveyance. *Lancashire and Yorkshire Railway, In re*, 55 L. T. 58—North, J.

—On Official Trustees of Charity.]—See *Stafford’s Charity, In re*, post, col. 1131.

2. PERSONS ENTITLED TO.

Lands of Lunatic not so found—Real or Personal Representatives.—Sect. 7 of the Lands

Clauses Consolidation Act, 1845, does not authorise a person of unsound mind to sell land to a company or public body who have statutory power to take it; the section only authorises the committee of a lunatic to sell. A public body having given notice under their statutory powers to take land belonging to a lady of unsound mind not so found, the value of the land was ascertained by two surveyors, one appointed by an uncle of the lady, who purported to act on her behalf, and the other by the public body; the sum thus ascertained was paid into court, and the public body took possession of the land. The lady afterwards died intestate, being still of unsound mind, and her heir-at-law petitioned for payment of the money to him:—Held, that the land had never been converted into personality, and that the heir was entitled to the money. *Flamank, Ex parte* (1 Sim. (N. S.) 260) dissented from. *Tugwell, In re*, 27 Ch. D. 309; 53 L. J., Ch. 1006; 51 L. T. 83; 33 W. R. 132—Pearson, J.

Payment out of Small Sum.—Where a sum of 34*l.* had been paid into court under the Lands Clauses Act, 1845, payment out was directed to a tenant for life, he undertaking to expend the same in lasting improvements. *Kells Union, In re, Smith, Ex parte*, 21 L. R., Ir. 346—M. R.

Trade Premises and Goodwill—Mortgage.—A public body acting under the powers of their act and of the Lands Clauses Consolidation Act gave notice to the plaintiff, who was a tailor, to take his house, which was leasehold. After some negotiation they offered him 400*l.*, of which 150*l.* was to be apportioned to his leasehold interest, and 250*l.* to his trade damage and personal expenses, to which the plaintiff agreed. The plaintiff had mortgaged his leasehold interest and could not make a good title. The plaintiff then brought an action for specific performance of the agreement, and the defendants afterwards paid the 400*l.* into court under the 26th section of the Lands Clauses Act, executed a deed-poll, and took possession:—Held, that the plaintiff was entitled to judgment in the action, and to have the 250*l.* paid at once to him, with interest from the time when the defendants took possession. *Cooper v. Metropolitan Board of Works*, 25 Ch. D. 472; 53 L. J., Ch. 109; 50 L. T. 602; 32 W. R. 709—C. A.

Although in some cases the goodwill of trade premises passes to a mortgagee, that does not apply to a case where the goodwill depends on the personal skill of the owner. *Id.*

Appropriation of Payments.—A. was entitled as tenant for life to leasehold premises, where she carried on the business of a hotel-keeper, with remainder to B. By deed dated the 11th October, 1864, B., in consideration of 107*l.* advanced to him, assigned all his interest in the premises to C., with a proviso that, in case B. or any of his children, within three years after the accrual of B.'s title, should be desirous of repurchasing, C. would re-assign the premises on payment of the said sum of 107*l.* and interest at 6 per cent. The South City Market Company, being a public body, acting under the powers of their Act, and the Lands Clauses Consolidation Act, 1845, and the Railway Clauses Consolidation Act, 1851, required these leasehold premises. The arbitrator awarded a sum of 1,251*l.*, of

which sum 451*l.* was stated by the award to be for the purchase of the interest of A. and D. (in whom C.'s interest under the deed of the 11th October, 1864, was then vested) as lessees, and A. as occupier, and 800*l.* awarded to the same persons under the heading "Compensation for severance or other injury." A. and D. traversed the award, and a consent between the Company and A. and D. (but to which the representatives of B., who was then deceased, were not parties), was made a rule of the Queen's Bench Division, by which the award was increased by a sum of 1,249*l.*, of which sum 800*l.* was stated by the consent to be for trade loss in respect of the property, and the consent order further directed that of the sum of 1,251*l.* lodged by the Company, 901*l.* should be dealt with as representing the leasehold interest in the premises, and the residue, 350*l.*, together with the further sum of 1,249*l.*, payable by the Company, should be paid to A. in respect of her trade disturbance in the premises. A. having claimed the whole of the 800*l.*, and 799*l.* increase thereon, under the consent order:—Held, that the sum of 800*l.* should (under the circumstances) be deemed part of the compensation for taking of the premises and not in respect of any personal grievance of A., and that A. (under the circumstances of the case) was entitled to the 799*l.* absolutely. *South City Market Company, In re, Bergin, Ex parte*, 13 L. R., Ir. 245—V.-C.

Adverse Claimants—Claim of the Crown.—A railway company, under the powers of its act, gave notice to a lord of the manor to take a piece of land on the seashore, which he claimed as part of the waste of his manor. The purchase-money was assessed by arbitration, but an adverse claim having been made by the Crown, the company paid the purchase-money into court under the 76th section of the Lands Clauses Act. The Crown filed an information against the lord of the manor claiming the land, together with other land, as part of the foreshore. The lord of the manor having filed a petition for payment of the purchase-money to him:—Held, that as the Crown could not be brought before the court under the Lands Clauses Act to contest the claim of the petitioner, the petition ought to stand over till the information had been heard. *Lowestoft (Manor of), In re, Reeve, Ex parte*, 24 Ch. D. 253; 52 L. J., Ch. 912; 49 L. T. 523; 32 W. R. 309—C. A.

Quere, as to the course which ought to have been pursued if the rival claimant had been a subject. *Id.*

Person "becoming absolutely entitled" — Trustees with Power of Sale.—A share of stock in court, which represented money paid into court by a railway company for the purchase of land taken under their statutory powers, had been assigned by the beneficial owner to trustees, on trust for sale and conversion, at the request in writing of herself during her life and afterwards at the discretion of the trustees, and to hold the proceeds on certain trusts:—Held, that, the settlor joining in the petition, and the company not objecting, the share might be transferred to the trustees as persons "becoming absolutely entitled" within the meaning of s. 69 of the Lands Clauses Consolidation Act, 1845. *Ward's Estate, In re*, 28 Ch. D. 100; 54 L. J., Ch. 231; 33 W. R. 149—Pearson, J.

Charity—Capital Expenditure.]—A petition was presented by the parson, churchwardens, and parishioners of a certain parish for payment out of court to them of 514*l.*, which had been paid in by the respondents, the Commissioners of Sewers, in respect of certain land taken by them from the petitioners. The petitioners proposed to expend 1,000*l.* in rebuilding the north porch of the parish church, and they petitioned that the 514*l.* should be paid out to them upon their undertaking to apply that sum in rebuilding the porch. The petitioners had no power of sale, and the consent of the Charity Commissioners to the application had not been obtained. The respondents did not oppose the application:—Held, that the 514*l.* might be paid out to the petitioners on the chief clerk's certificate, that at least that sum had been spent in the rebuilding, the respondents to pay the costs. *St. Alphege (Parson), In re*, 55 L. T. 314—Chitty, J.

A petition was presented by a company, as governors of a charity, for payment out of the sum of 1,000*l.* which had been paid into court to the account of the company, under the provisions of the Lands Clauses Consolidation Act, 1845, in respect of land taken for the purposes of a railway. The land formed part of an estate belonging to the company, the rentals and profits whereof were applied for the purposes of the charity. The part of the estate which remained in the possession of the company was let by them on a building lease, and the company had, out of moneys in their hands representing income of the charity, expended 1,000*l.* in enabling the builder to improve the lands comprised in the building lease by buying up certain rights over roads claimed by a neighbouring landowner. This expenditure had been sanctioned by the Charity Commissioners, and they approved the present application, although they gave no express consent, because the moneys were under the control of the court:—Held, that the Charity Commissioners had practically authorised this outlay as capital expenditure; and that the company were entitled to have the money paid out, as being absolutely entitled thereto. *Haberdashers' Company, Ex parte*, 55 L. T. 758—Chitty, J.

Sale of Land not Superfluous.]—The Metropolitan Board of Works in the exercise of compulsory powers purchased land of the Chelsea Waterworks Company, which was not superfluous land, and paid the purchase-money into court. On petition to pay the money out to the waterworks company:—Held, first, that the money was rightly paid into court; and, secondly, that inasmuch as the money could not be applied to any of the purposes mentioned in s. 69 of the Lands Clauses Act, 1845, the waterworks company was absolutely entitled to the money. *Chelsea Waterworks Company, In re*, 56 L. J., Ch. 640; 56 L. T. 421—Kay, J.

3. PETITION OR SUMMONS.

Payment out—Permanent Investment.]—In applications for payment out of court and investment under the Settled Land Act, 1882, of funds in court representing the purchase-money of lands taken under the provisions of the Lands Clauses Act, 1845, the court has a discretion under the Rules of Supreme Court, 1883, Ord.

LXX. r. 1, and, where an application by petition is cheaper and more expeditious than by summons, will not disallow the costs of a petition, although the proceeding falls within the Rules of the Supreme Court, 1883, Ord. LV. r. 2, sub-s. 7, as business to be transacted in chambers. In such cases, however, the option of proceeding by petition or summons is at the applicant's risk. *Bethlehem and Bridewell Hospitals, In re*, 30 Ch. D. 541; 54 L. J., Ch. 1143; 53 L. T. 558; 34 W. R. 148—Chitty, J. See also *Stafford's Charity, In re*, post, col. 1131.

— **Alteration of Buildings.**]—Upon an application by the sole surviving trustee under a will that 1,330*l.*, part of a sum of 2,100*l.* in the Bank of England, being the purchase money and compensation for lands vested in him and taken by the Bradford Corporation under the Lands Clauses Consolidation Act, 1845, and the Bradford Water, &c., Act, 1881, might be paid to the applicant, he undertaking to apply it in converting a dwelling-house and two shops into three shops, and that the balance, 770*l.*, might be invested in Three per Cent. Annuities:—Held, that the application did not come within the meaning of Ord. LV., r. 2, sub-s. 7, of the Rules of Court, 1883, and might be made by petition. *Hargreave's Trust, In re, Bradford (Mayor), Ex parte*, 58 L. T. 367—Kay, J.

— **Additional Buildings.**]—Upon an application by the master and fellows of a college that certain funds in court amounting to about 7,000*l.*, and representing the purchase-moneys of lands belonging to the college, and taken by a railway company under the Lands Clauses Consolidation Act, 1845, might be paid to the applicants, they undertaking to apply it in building two residences as an addition to the college:—Held, that the application was not an "application for interim and permanent investment, and for payment of dividends" within the terms of Ord. LV. r. 2, sub-s. 7, of the Rules of Court, 1883, and might be made by petition. *Jesus College, Cambridge, Ex parte*, 50 L. T. 533—Kay, J.

— **Amount not exceeding £1,000.**]—An application for payment out of court to a person absolutely entitled of a sum of cash not exceeding 1,000*l.* paid in under the Lands Clauses Consolidation Act, 1845, is rightly made by summons, not by petition. *Madgwick, In re*, 25 Ch. D. 371; 53 L. J., Ch. 333; 49 L. T. 560; 32 W. R. 512—V.-C. B.

Rule 2 (7) of Ord. LV. of the Rules of the Supreme Court, 1883, though it affects the jurisdiction, and not merely the procedure of the court, is not ultra vires, being in accordance with the power conferred by 18 & 19 Vict. c. 136, s. 16, and in fact intended to be made under the powers of that act, as well as under those conferred by the Judicature Acts. *London (Mayor), Ex parte*, 25 Ch. D. 384; 53 L. J., Ch. 6; 49 L. T. 437; 32 W. R. 87—Kay, J.

The new rules do not authorise a judge at chambers to order payment out of court of money paid in under the Lands Clauses Act, 1845. *Calton's Will or Trusts, In re*, 49 L. T. 398; 32 W. R. 150—Pearson, J.

But on a subsequent day, on the case being again mentioned, it was held that such an application must in future be by summons, and not

by petition. *Ib.* 25 Ch. D. 240; 53 L. J., Ch. 329; 49 L. T. 566; 32 W. R. 167—Pearson, J.

The general words of Ord. LV. r. 2, sub-s. 2, not being cut down by sub-s. 7 of the same rule, applications for payment out of sums not exceeding 1,000*l.*, paid in under the Lands Clauses Act, must now be made by summons in chambers and not by petition. *Maidstone and Ashford Railway, In re*, and *Bala and Festiniog Railway, In re*, 25 Ch. D. 168; 53 L. J., Ch. 127; 49 L. T. 777; 32 W. R. 181—Chitty, J.

Application was made by summons for payment out of court of a sum not exceeding 1,000*l.*, liberated by the death of an annuitant. Orders of court had been made from time to time directing payment to the present applicant of part of the same funds already released by the death of another annuitant, and also of the surplus interest, after satisfying the remaining annuities:—Held, that there had been an order declaring his rights within Ord. LV. r. 2, sub-s. 1, and that the application was properly made by summons, and not by petition. *Brandram, In re*, 25 Ch. D. 366; 53 L. J., Ch. 331; 49 L. T. 558; 32 W. R. 180—V.-C. B.

Sealing Summons.—A summons by a railway company for payment out of a sum of less than 1,000*l.* to their secretary, was directed to be sealed in analogy to the practice in case of petitions. *Maidstone and Ashford Railway, In re*, and *Bala and Festiniog Railway, In re*, supra.

4. COSTS.

Jurisdiction of Court—Incorporation of Lands Clauses Act with Special Acts.—Commissioners were incorporated by 3 & 4 Vict. c. 87 (1840), for the purpose of taking lands and carrying out thereon certain public works, and by 9 & 10 Vict. c. 34 (1846), powers to construct a new street were conferred upon such commissioners, and it was enacted that all and singular the enactments and provisions of the act of 1840 should extend to the new improvements as if they had been authorised by the former act. Neither of these acts contained any provision for payment by the commissioners of the costs of applications for payment out of purchase-moneys in court in respect of lands taken under the powers of the acts. On petition for payment out of court of purchase-money of lands taken by the commissioners:—Held (following *Cherry's Settled Estates, In re* (4 D. F. & J. 332)), that the Lands Clauses Consolidation Act, 1845, could not be treated as incorporated with the special acts (3 & 4 Vict. c. 87, and 9 & 10 Vict. c. 34), so as to make the commissioners liable to pay the costs of the petition for payment out. Dictum of Lord Esher, M.R., in *Wood's Estate, In re* (31 Ch. D. 607, 617, 618), disapproved. *Mills' Estate, In re*, 34 Ch. D. 24; 56 L. J., Ch. 60; 55 L. T. 465; 35 W. R. 65; 51 J. P. 151—C. A.

The Judicature Acts and Rules of Supreme Court, 1883, Ord. LXV. r. 1, do not enable the court or a judge to order costs to be paid by persons who before the acts came into operation could not have been ordered to pay them; the effect and intention of the acts and orders being not to give any new jurisdiction to award costs, but only to regulate the mode in which costs are to be dealt with in cases where the

court antecedently had jurisdiction, either original or statutory, to award costs. *Foster v. Great Western Railway* (8 Q. B. D. 516) followed. *Mercers' Company, Ex parte* (10 Ch. D. 481) questioned. *Ib.*

The Act 18 & 19 Vict. c. 95, empowered the Commissioners of Works and Public Buildings, whom it incorporated for the purpose, to take land compulsorily for the purpose of building public offices. S. 9 provided that certain sections (including s. 49) of a previous act (3 & 4 Vict. c. 87), which had empowered the Commissioners to execute other works, should be deemed to be repeated in the later act, with the alterations necessary to make the same applicable to its purposes. S. 11 provided that any purchase-money payable into the bank should be paid to the account of the accountant-general of the Court of Chancery, and should be applied under the directions of that court in like manner as moneys were by the earlier act directed to be applied under the directions of the Court of Exchequer, "with such power to the Court of Chancery with regard to costs" as by the earlier act were vested in the Court of Exchequer. S. 49 of the earlier act provided that, when purchase-money was required to be paid into the bank in the name of the accountant-general of the Court of Exchequer, and to be reinvested in land, it should be lawful for the court to order the expenses of all purchases from time to time to be made under the act to be paid by the commissioners. This act contained no other provision as to costs:—Held, that the effect of these enactments was to introduce the incorporated sections of the earlier act into the later act, just as if they had been enacted in it for the first time, and that, consequently, the later act, with those sections in it, must be treated as having been passed after the Lands Clauses Consolidation Act, 1845. Therefore, the provisions of s. 80 of the Lands Clauses Act were, by virtue of s. 1 of that act, incorporated with the Act of 18 & 19 Vict. c. 95, and the court has power to order the commissioners to pay the costs of an application for the payment out of purchase-money to the persons who had become absolutely entitled to the land in respect of which the money had been paid in. *Cherry's Settled Estates, In re* (4 D. F. & J. 332) disapproved. *Wood's Estate, In re, Commissioners of Works and Buildings, Ex parte*, 31 Ch. D. 607; 55 L. J., Ch. 488; 54 L. T. 145; 34 W. R. 375—C. A.

A private charity incorporated by Royal charter, and having, under a subsequent special act, power to take land compulsorily, is not an "undertaking or work of a public nature" within the meaning of s. 1 of the Lands Clauses Consolidation Act, 1845; and, therefore, in the absence of express provision, s. 80 of the last-named act (as to costs) is not incorporated with the charity's special act. *Sion College, In re, London (Mayor), Ex parte*, 57 L. T. 743—C. A.

Purchase of Charity Lands—Official Trustee.]

—A scheme for the regulation of a certain charity contained provisions that the legal estate in the lands belonging to the charity, and all terms, estates, and interest therein, should be vested in the "Official Trustee of Charity Lands" and his successors, in trust for the charity, with the intent that such lands might be managed and administered by the trustees of the charity subject to and in conformity with the provisions

of the scheme; and that all stock in the public funds and other securities should be transferred to and vest in the "Official Trustees of Charitable Funds," by whom the dividends and income arising therefrom should be from time to time paid to the local trustees or their order. The Metropolitan Board of Works took the lands of the charity under their statutory powers, and paid the purchase-money into court. The trustees then presented a petition that the fund in court might be invested in Consols, and when so invested carried over to the account of the Official Trustees of Charitable Funds, and that the dividends might be paid to the treasurer for the time being of the charity. The title to the lands sold had been approved by the purchasers, but the conveyance to the Metropolitan Board of Works had not yet been executed. Therefore, the legal estate remained vested in the Official Trustee of Charity Lands under the scheme. The Official Trustees of Charity Lands and Charity Funds were served with the petition, and a question arose whether their costs should be paid by the Metropolitan Board of Works. Another question was, whether the application should have been by petition or by summons:—Held, that an order ought to be made for an interim investment and payments of dividends as asked; and that, having regard to the provisions of the scheme, the petitioners were justified in proceeding by petition, and were also justified in serving the official trustees. *Stafford's Charity, In re*, 57 L. T. 846—Chitty, J.

Lessor and Lessee.—A petition was presented by the lessee of certain property compulsorily taken by a railway company for payment out of court of a fund representing his compensation under an award made in Nov. 1884. At the date of the award rent was due to the lessor, who had the usual right of re-entry in default of payment. At the date of payment of the fund into court the railway company had not completed the purchase of the lessor's interest. Subsequently to the purchase of his interest the lessor gave notice to the railway company of his claim to have his unpaid rent paid out of the fund in court claimed by the lessee. Accordingly he received notice of the presentation of the petition from the railway company, and appeared at the hearing, although not served nor made a formal respondent to the petition. His claim was settled by the petitioners, but the question arose as to whether or not the railway company should pay his costs:—Held, that the right of re-entry was an incumbrance on the leasehold interest, and therefore on the fund in court, and notice having been given to the railway company by the lessor, he was rightly before the court for their protection, and they must pay his costs. *London Street, Greenwich, and London, Chatham, and Dover Railway, In re*, 57 L. T. 673—Chitty, J.

Lands vested in Trustee.—Land which was vested in a sole trustee, and which was the subject-matter of an action, was taken by the Metropolitan Board of Works under their compulsory powers, the purchase-money was paid into court, and the land conveyed by the trustee to the board. Afterwards, a petition was presented by the beneficiaries for the transfer of the purchase-money to the credit of the action, and served on the trustee, who appeared and

asked for his costs:—Held, that the trustee was entitled to appear, and that the board must pay his costs. *English's Trusts, In re*, 39 Ch. D. 556; 57 L. J., Ch. 1048; 60 L. T. 44; 37 W. R. 191—North, J.

Incumbrancers on Fund after Payment into Court.—After payment into court by a company of the purchase-money of land belonging to a tenant for life and remaindermen, some of the latter mortgaged their reversionary interests in the fund. Upon the death of the tenant for life, the owners of the fund and their incumbrancers presented a petition for payment of the fund out of court:—Held, that the company were not liable to pay the costs incurred by the mortgagees in proving their incumbrances. *Great Western Railway, Ex parte, Gough's Trusts, In re*, 24 Ch. D. 569; 53 L. J., Ch. 200; 49 L. T. 494; 32 W. R. 147—V.-C. B.

To Credit of Lunatic—Appointment of New Committee—Payment of Dividends.—The dividends arising from a sum of stock in court, to the credit of H. D. R., a lunatic, ex parte the Metropolitan Board, which represented the purchase-money of land belonging to the lunatic taken by the Board under the Lands Clauses Act, 1845, were ordered to be paid to the joint committees of the estate of the lunatic. Upon the death of one of the joint committees the survivor was appointed sole committee, but the master declined to order the dividends to be paid to him, and a petition intitled in Lunacy and in the Chancery Division was presented for that purpose:—Held, that the dividends ought to be transferred to the lunacy and paid to the committee, and that upon the appointment of a new committee the order appointing him ought to direct payment to him of the dividends, and that the Metropolitan Board need not be served with the application, and that the Board ought to pay the costs of the petition. *Ryder, In re*, 37 Ch. D. 595; 57 L. J., Ch. 459; 58 L. T. 783—C. A.

Order directing that Mortgage should be Permanent Investment.—The compensation moneys of lands compulsorily taken by a railway company were invested in reduced annuities, the company paying the costs. The fund was subsequently reinvested on mortgage, the company again paying the costs. On this occasion it was ordered that for the purposes of costs of any future application, such reinvestment should be treated as a permanent reinvestment. An arrangement for a transfer of the mortgage security having been entered into by the owner of the fund, an application was made to the court for a declaration that the transferees were absolutely entitled to the moneys secured by the mortgage. The question was whether under s. 80 of the Lands Clauses Act, 1845, the company was liable to pay the costs of this application:—Held, that the company was not liable to pay such costs, the meaning of the previous order being that it was not to be subjected to the payment of the costs of any future application in respect of the purchase-moneys. *Gedling Rectory, In re*, 53 L. T. 244—Kay, J.

Architects' and Surveyors' Fees.—Where the purchase-moneys in court of lands compulsorily taken are authorised to be paid out and applied

in defraying the expenses of erecting buildings, and it is ordered that the costs of such investment, pursuant to s. 80 of the Lands Clauses Act, 1845 (including therein all reasonable charges and expenses incidental to the investment), shall be borne by the parties by whom the lands were taken, the fees payable to the architect and surveyor for planning and superintending such buildings will come within the term "expenses of building," and are not costs, charges, and expenses of and incidental to the investment. *Butchers' Company, In re*, 53 L. T. 491—Kay, J.

Transfer to Account—Form of Entry.—Where a fund, representing the price of houses taken for the purpose of a public undertaking, had been transferred to the credit of an administration suit "ex parte the undertakers' account of estates devised by the will," not specifying the special act or the Lands Clauses Act:—Held, that the undertakers were liable to pay costs of re-investment. *Drake v. Greaves*, 33 Ch. D. 609; 56 L. J., Ch. 133; 55 L. T. 353; 34 W. R. 757—North, J.

IV. SUPERFLUOUS LANDS.

Sale of Land previously subject to Statutory Prohibition against Building.—An Inclosure Act, passed in 1806, provided that no buildings should at any time thereafter be erected on a certain strip of land. In 1865 a railway company under their statutory powers acquired a portion of the strip of land for the purposes of their undertaking. A part of the land thus acquired became superfluous land, and the company in 1868 sold and conveyed the superfluous part to a purchaser who demised it to the defendant. The defendant in 1885 commenced building on the land:—Held, that the land acquired by the company was freed from the prohibition of building only for the purposes of the company's undertaking, and that, when part of it was sold as superfluous land, the prohibition of building revived in respect of that part. An injunction to restrain the defendant from building on the land in contravention of the provisions of the Inclosure Act was granted at the suit of an owner of adjoining land. *Bird v. Eggleton or Ponsford*, 29 Ch. D. 1012; 54 L. J., Ch. 819; 53 L. T. 87; 33 W. R. 774; 49 J. P. 644—Pearson, J.

Absolute Sale—Title to be forced on Purchaser.]

—A railway company, upon a sale of superfluous lands, arranged with the purchasers for the postponement of the payment of the purchase-money until a given date, which was beyond the period prescribed for the sale by the railway company of its superfluous lands. Part of the arrangement consisted in a declaration by the parties that the railway company should have a lien on the lands sold until payment of the purchase-moneys. The purchasers from the railway company having contracted to sell the lands to another person:—Held, on a summons under the Vendor and Purchaser Act, 1874, that the court would not compel the person, who agreed to purchase from the purchasers from the railway company, to complete. Whether the sale by the railway company was an absolute

sale, quære. *Thackwray and Young, In re*, 40 Ch. D. 34; 58 L. J., Ch. 72; 59 L. T. 815; 37 W. R. 74—Chitty, J.

Surplus Land—Debenture Stock—Charge—Priority.—*See Hull, Barnsley and West Riding Railway, In re*, post, RAILWAY.

LAND REGISTRY.

See DEED AND BOND, II.

LAND TAX.

See REVENUE.

LARCENY.

See CRIMINAL LAW.

LEASE AND LEASEHOLDS.

Between Landlord and Tenant.—*See* LANDLORD AND TENANT.

LECTURE.

See COPYRIGHT.

LEGACY.

Powers of Executors with regard to.—*See* EXECUTOR AND ADMINISTRATOR.

Construction of, and other Matters relating to.—*See* WILL.

Duty.—*See* REVENUE.

LEGITIMACY.

See HUSBAND AND WIFE.

LETTERS.

Property in—Restraining Publication.]—The property in and the right to retain letters remain in the person to whom they are sent; but the sender has still that kind of interest, if not property, in the letters which enables him to restrain their publication, unless it can be clearly shown that such publication is necessary for the vindication of character. *Lytton (Earl) v. Devey*, 54 L. J., Ch. 293; 52 L. T. 121—V.-C. B.

Contract by.]—See CONTRACT, I. 6, a.

Addressed to Agent at Principal's Office—Compelling Agent to rescind Order to Post-office.]—B. was employed to manage one of L.'s branch offices for the sale of machines, and resided on the premises. He was dismissed by L., and on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at L.'s branch office. He admitted that among the letters so forwarded to him were two which related to L.'s business, and that he did not hand them to L., but returned them to the senders. L. brought an action to restrain B. from giving notice to the post-office to forward to B.'s residence letters addressed to him at L.'s office, and also asking that he might be ordered to withdraw the notice already given to the post-office:—Held, that the defendant had no right to give a notice to the post-office, the effect of which would be to hand over to him letters of which it was probable that the greater part related only to L.'s business; and that the case was one in which a mandatory injunction compelling the defendant to withdraw his notice could properly be made, the plaintiff being put under an undertaking only to open the letters at certain specified times, with liberty for the defendant to be present at the opening. *Hermann Loog v. Bean*, 26 Ch. D. 306; 53 L. J., Ch. 1128; 51 L. T. 442; 32 W. R. 994; 48 J. P. 708—C. A.

Proof of Posting—Entry by Deceased Person.]—Neither proof of an entry made by a deceased person in the ordinary course of business in a postage-book of a letter to be posted, nor proof of possession by the deceased person for the purpose of posting, is sufficient evidence of postage. *Rowlands v. De Vecchi*, 1 C. & E. 10—Day, J.

“Without Prejudice.”]—The effect of letters without prejudice discussed. *Kurtz v. Spence*, 57 L. J., Ch. 238; 58 L. T. 438—Kekewich, J.

LIBEL.

See DEFAMATION.

LICENCE.

Of Public Houses.]—See INTOXICATING LIQUORS.

Dancing.]—See DISORDERLY HOUSE.

To carry Gun.]—See REVENUE (EXCISE).

To use Patent.]—See PATENT.

Duty towards Licensees.]—See NEGLIGENCE.

LIEN.

Of Solicitors.]—See SOLICITOR.

Of Vendors.]—See VENDOR AND PURCHASER—RAILWAY.

Of Agent.]—See PRINCIPAL AND AGENT.

Maritime.]—See SHIPPING.

Of Auctioneer.]—See SALE.

Of Banker.]—See BANKER.

Of Carriers.]—See CARRIER.

On Policy of Insurance for Premiums.]—See INSURANCE, I. 3.

Charge during Detention.]—A workman detaining a chattel in respect of a lien for work done thereon, has no claim for warehouse charges during such detention. *Bruce v. Everson*, 1 C. & E. 18—Stephen, J.

General Lien—Winding-up of Company—Effect of, on Agreement.]—In 1876 an agreement was entered into between the L. Coal Company and the G. W. Railway Company, by which the charges for coal consigned by the coal company were carried to a “ledger account,” one condition of which was, that the goods and waggons belonging to or sent by the person having a ledger account should be subject to a general lien in favour of the railway company for all moneys due to them, &c., from such person on any account, such lien to take effect immediately after the failure of payment on demand of any sums appearing to be due on the ledger account; “in case of bankruptcy, insolvency, or stoppage of payment, such lien to take effect immediately for any sum appearing due in the books of the company,” with a right to sell such goods and waggons, and out of the proceeds to retain the sums due. The coal company became insolvent, and on the 16th December, 1885, a petition was presented for winding-up; on the 20th January, 1886, a provisional liquidator was appointed, and in February, 1886, an order to wind up was made. When the petition was presented the coal company was indebted to the railway company in respect of charges for freight. Of the fifteen waggons in use by the coal company, and employed in carrying coal

over the railway company's line, nine had been received by the railway company prior to presentation of the winding-up petition, and had been detained by them ever since; four in the possession of the railway company when the petition was presented had travelled up and down the line since, but returned into the possession of the railway company before the date of the winding-up order; two did not come into the possession of the railway company until between the presentation of the petition and the winding-up order. The liquidator claimed delivery up by the railway company of the fifteen waggons which the company claimed to retain in satisfaction of the general lien under the agreement:—Held, that the lien given to the railway company by the agreement, which was made for the ordinary purposes of the coal company's business, was good and valid, and took effect upon the insolvency of that company, and had not been displaced by anything that had taken place in the winding-up proceedings. *Llangoed Coal Company, In re*, 56 L. T. 475—Chitty, J.

Real Estate—Bond Debt and Interest.—In 1806 a bond was executed by A. in favour of B., and by a contemporaneous settlement it was settled by B. the obligee, upon certain trusts. By his will, dated in 1812, A., the obligor, charged his real and personal estate with payment of the bond debt. He shortly afterwards died. The plaintiff claimed, as assignee of the bond, a valid equitable lien on the obligor's real estate in respect of the bond debt and interest. The defence was, that the obligor died possessed of personal estate amply sufficient to pay the bond debt and interest, and that the plaintiff's predecessors in title ought to have obtained payment out of such personal estate, and that not having done so, they waived their right to have recourse to the real estate:—Held, that the plaintiff was entitled to a valid charge in equity for the amount of the bond and interest upon the real estate of the obligor. *Justice v. Fooks*, 57 L. T. 868—Chitty, J.

Payment of Rent by Lessee—Effect of, on Land in hands of Assignee and Mortgagee.—A. being lessee of certain lands under a lease containing the ordinary covenants by him as lessee for payment of rent, and a condition of re-entry in case of non-payment, assigned his interest under the lease to B., who covenanted with A. to pay the rent and to keep him indemnified against it. B. mortgaged the premises comprised in the lease to C. by way of sub-demise. Arrears of rent became due which the lessor compelled A. to pay under the covenant in the lease. In an action against B. and C., A. sought for a declaration that the sum so paid by him for rent was a salvage payment, and was charged on the premises in priority to C.'s mortgage:—Held, that A. had no interest in the premises authorising him to make a salvage payment, and that therefore he had no lien on the premises for the rent so paid by him. *O'Loughlin v. Dwyer*, 13 L. R., Ir. 75—V.-C.

LIFE INSURANCE.

See INSURANCE.

LIGHT AND AIR.

See EASEMENT.

LIGHTHOUSES.

See SHIPPING.

LIMITATION OF LIABILITY.

See SHIPPING.

LIMITATIONS, STATUTE OF.

I. PERSONAL ACTIONS AND PROCEEDINGS.

1. *Trusts*, 1138.
2. *Devastavit*, 1140.
3. *Negligence*, 1141.
4. *Bills of Exchange—Cheques*, 1142.
5. *Fraud*, 1143.
6. *In Other Cases*, 1143.
7. *Acknowledgment of Debts*, 1146.

II. ACTIONS RELATING TO LAND, 1149.

III. EQUITABLE DEMANDS, 1154.

I. PERSONAL ACTIONS AND PROCEEDINGS.

1. TRUSTS.

Trust for Payment of Debts.—A trust in a will for the payment of debts out of real estate does not prevent the operation of the Statute of Limitations, if the testator in fact leaves no real estate to support the trust. *Smith, Ex parte, Hepburn, In re*, 14 Q. B. D. 394; 54 L. J., Q. B. 422—Cave, J.

Breach of Trust—Fiduciary Capacity—Solicitor and Client.—In 1868, upon the death of the mortgagor, the mortgaged property was sold by A., the mortgagee, under the power of sale contained in the mortgage deed. The balance of the proceeds after payment of the mortgage debt was retained by B., who in effecting the mort-

gages, had acted as solicitor for both parties, and conducted the sale on behalf of A. The power of sale in the mortgage deed contained the usual provision that the surplus proceeds should be paid to the mortgagor, his heirs, or assigns. The mortgagor had died unmarried and intestate, and being illegitimate left no next of kin. Administration had not been taken out to him. A. died in 1877, having left all his property to his widow C., whom he appointed his executrix. C. died in 1878, having appointed B. and R. her executors. Upon the death of B. in 1881, R., as being through C. the legal personal representative of A., claimed as against B.'s estate the balance of the proceeds of the sale in 1868 of the mortgaged property:—Held, that B., having received this balance in a fiduciary character as agent for A., and with full knowledge that A. was an express trustee of the balance for the mortgagor, and, in the circumstances, liable to a claim by the Crown, had brought himself within the principle of *Burdick v. Garrick* (5 L. R., Ch. 233), and, accordingly, that the Statute of Limitations could not be set up as a bar to the claim. *Bell, In re, Lake v. Bell*, 54 Ch. D. 462; 56 L. J., Ch. 307; 55 L. T. 757; 35 W. R. 212—Chitty, J.

P., who was a solicitor, had acted as agent for the late husband of M. in several matters of business, including investments of money. P. collected the personal estate, and received large sums on foot of it. He acted not only as solicitor, but as general agent for M., and furnished her with accounts of his receipts and disbursements. While acting as agent for M. in 1871, P. invested 1,500*l.* on a mortgage to H., upon security which proved to be worthless. There was no evidence that P. was authorised to lend on this or on any special security. P. acted as solicitor both for M. and H. in the matter of the loan. The interest was paid for some years on the 1,500*l.*, but afterwards H. ceased to pay any interest. Proceedings were undertaken, and expenses incurred by M. in endeavouring to realize the security, which proved fruitless. Upon P.'s death M. claimed as a creditor, in an administration action, the sum of 1,500*l.*, arrears of interest, and the costs of the proceedings taken by her to realize her security:—Held, that there was a fiduciary relation between the parties, which precluded the personal representative of P. from relying on the Statute of Limitations, and that M. was entitled to reject the investment and to insist on the disallowance of the 1,500*l.* credit in P.'s account. *Power v. Power*, 13 L. R., Ir. 281—V.-C.

— **Trustee and Cestui que Trust—Pleading.**—A cestui que trust under a will brought an action against the administratrix and the heir-at-law of the sole trustee who had died intestate, to make his estate liable for the loss which had accrued to the trust estate owing to a breach of trust committed by him. The Statute of Limitations was not pleaded, and at the trial an account was directed on the footing of the liability of the heir; he raised the defence of the statute on the further consideration:—Held, that the statute should have been pleaded, and that the heir-at-law could not set up the statute in answer to a claim arising out of a breach of trust committed by the person whose estate had descended to him. *Brittlebank v. Goodwin* (5

L. R., Eq. 545) applied. *Burge, In re, Gillard v. Lawrenson*, 57 L. T. 364; 52 J. P. 20—Stirling, J.

2. DEVASTAVIT.

When a Defence to Action.—Testator mortgaged freeholds, and died in May, 1867, having devised all his real and personal estate to A. and B. upon certain trusts, and having appointed them his executors. The executors, without making provision for the mortgage debt, applied the whole of the personal estate in payments to simple contract creditors and beneficiaries. In 1869 A. died, and C. was appointed trustee in his place in 1871. The rents of the real estate were received by the trustees, and after payment of the interest on the mortgage the balance was applied in accordance with the trusts of the will. The mortgage property became an insufficient security, and, interest having fallen into arrear, the mortgagees in 1886 commenced proceedings against B. and C., under which accounts of the testator's personal estate received by A. and B., or by B. alone, were directed, and also the usual accounts of the testator's real estate, including an account of rents and profits, against B. and C. Accounts were accordingly carried in, in which B. and C. claimed credit for all payments and disbursements made to simple contract creditors and beneficiaries, and, further, that as to such of the payments as were made by A. and B. upwards of six years prior to the action, any claim on a devastavit was statute-barred, and that as to the rents and profits they were not liable to account for them at all:—Held, following *Marsden, In re* (26 Ch. D. 783), on this point, and distinguishing *Gale, In re, Blake v. Gale* (22 Ch. D. 820), that B. could not set up his own and A.'s wrongful payments by way of devastavit as a defence, in order to claim the benefit of the Statute of Limitations. *Hyatt, In re, Bowles v. Hyatt*, 38 Ch. D. 609; 57 L. J., Ch. 777; 59 L. T. 297—Chitty, J.

A testator mortgaged leaseholds. On his death his executors took possession of his estate, including the leaseholds, and received the rents, and for a long time paid the interest on the mortgages, and applied the surplus of the rents for the benefit of the beneficiaries. The mortgaged property proved insufficient to pay the mortgage debt, and in an action for the administration of the testator's estate the executors claimed to be credited with the payments made to the beneficiaries on the ground of acquiescence on the part of the mortgagees, and as to such of them as were made more than six years before the commencement of the action they relied on the Statute of Limitations:—Held, that acquiescence by the mortgagees had not been established, and that as the executors were trustees for the creditors, the Statute of Limitations furnished no bar to a claim in respect of a devastavit committed by them. *Marsden, In re, Bowden v. Layland, Gibbs v. Layland*, 26 Ch. D. 784; 54 L. J., Ch. 640; 51 L. T. 417; 33 W. R. 28—Kay, J.

A testator mortgaged an estate to plaintiffs, and devised it to three executors upon trusts in favour of his daughters, and after the death of all his children for sale. The executors distributed the whole personal estate without providing for the mortgage debt. After this one of

the executors died. The daughters occupied the farm for twenty years after the distribution of the personal estate, paying rent to the executors, and, until 1880, paying the interest on the mortgage. The mortgagees then brought an action for foreclosure or sale, and claimed to have any deficiency made good by the two surviving executors and the executors of the deceased executor:—Held, that any claim founded on the devastavit in distributing the personal estate was barred after six years, but that the plaintiffs were entitled to foreclosure, and to an order for administration of the mortgagor's estate. *Gale, In re, Blake v. Gale*, 22 Ch. D. 820; 53 L. J., Ch. 694; 48 L. T. 101; 31 W. R. 538—V.-C. B.

3. NEGLIGENCE.

Of Solicitor—Mortgage.]—A solicitor in advancing money on mortgage may be employed, (1) to invest in a particular mortgage; (2) to find securities to be approved by the client and then invest the money; (3) to find securities and invest the money, the client taking little or no part in the business. In an action for negligence against the solicitor, the Statute of Limitations is a good defence in the first case and also in the second case if the client has approved of the mortgage, no relation of trustee and cestui que trust then existing between them. *Dooby v. Watson*, 39 Ch. D. 178; 57 L. J., Ch. 865; 58 L. T. 943; 36 W. R. 764—Kekewich, J.

— **From what Time running.]**—Trust property was transferred to new trustees in July, 1875. The solicitor employed in the transaction did not give certain notices necessary to perfect the title of the new trustees; and in April, 1879, a subsequent mortgagee of the property obtained priority over the trustees by giving notice of his charge:—Held, that there was no complete cause of action against the solicitor in respect of negligence till April, 1879, from which date the Statute of Limitations therefore ran. *Bean v. Wade*, 1 C. & E. 519—Cave, J.

— **Action against Firm.]**—In 1869, P., a member of a firm of solicitors, by his advice induced the plaintiff to invest moneys upon the security of an equitable mortgage of a lease which he represented as renewable, and which had previously been renewed by custom every fourteen years, but the future renewal whereof was prohibited by a statute passed in 1868. In 1875 P. fraudulently, and without the knowledge of his partners, gave a legal mortgage of the lease to a third party without notice of the plaintiff's mortgage. The security proved insufficient, and P. having absconded, the plaintiff sought to make P.'s firm liable for the loss sustained by him:—Held, that since the transaction of 1869 was within the ordinary limits of the partnership business, the firm was liable for negligence in respect thereof, but that the remedy against them was barred by the statute 21 Jac. I. c. 16; that P.'s fraud of 1875 not being committed in the ordinary course of the business, the firm was not liable in respect thereof. *Hughes v. Twissden*, 55 L. J., Ch. 481; 54 L. T. 570; 34 W. R. 498—North, J.

Concealment until within Six Years before

Action—Fraud.]—In an action for negligence, concealment of the negligence until within six years before action is no answer to the defence of the Statute of Limitations if the defendant has not been guilty of fraud. *Armstrong v. Milburn*, 54 L. T. 723—C.A.

4. BILLS OF EXCHANGE—CHEQUES.

Undated Cheque.]—An undated cheque was given by C. B. to A. J. P. in March, 1878, and accepted by the latter in discharge of a larger sum. C. B. went abroad in March, 1878, and died there in 1884. At the time of drawing the cheque C. B. had not sufficient moneys at his bank to meet it, and was negotiating a loan, which he expected shortly to complete, out of which the cheque would be paid. The loan was not completed. A. J. P. was informed of that fact. The cheque remained undated, and was never presented for payment. In 1885 A. J. P. commenced proceedings upon the cheque:—Held, that the Statute of Limitations barred the claim, as the six years began to run when the letter was received stating that the loan would not be completed, and had long since elapsed. *Bethell, In re, Bethell v. Bethell*, 34 Ch. D. 561; 56 L. J., Ch. 334; 56 L. T. 92; 35 W. R. 330—Stirling, J.

Presentment and Dishonour of Bill of Exchange—Delay.]—B. was possessed of considerable funds invested in Consols. In consequence of doubts having arisen as to whether B. was married or not, her bankers refused to receive and pay the dividends on those funds to her until they were satisfied of the fact of her not being married. In August, 1872, in order to raise money, B., who was living in France, drew a document purporting to be a bill of exchange, payable on demand, for 7,000l. in the Bank of England "on account of the dividends and interest due on the capital and dividends registered in the books of" the Bank of England. B. had no account with the bank. The document was in April, 1873, endorsed to G., with whom B. was living, and by him was endorsed in August, 1876, to the claimant. These indorsements purported to be for value, and the claimant, who was not cross-examined, deposed that the indorsement to him had been made to guarantee the payment of loans and advances made by him. B. died intestate in France in 1878. On the 2nd February, 1884, the document was presented on behalf of the claimant to the Bank of England, and on payment being refused it was duly protested. A claim in respect of the amount due under the document was made upon B.'s estate, which was being administered by the court:—Held, that the claim was not barred by the Statute of Limitations, as the time only began to run from the presentment and dishonour, but that G. had no right to deal with the bill, and that the lapse of time between the indorsement to G. and that to the claimant, and before presentment, and other circumstances of suspicion, were such as to affect the claimant with the equities between B. and G., and to disentitle him to receive payment. *Boysse, In re, Crofton v. Crofton*, 33 Ch. D. 612; 56 L. J., Ch. 135; 55 L. T. 391; 35 W. R. 247—North, J.

5. FRAUD.

Debt incurred by—Bankruptcy.]—A debtor who has made an arrangement with his creditors under s. 28 of the Bankruptcy Act, 1869, remains liable under s. 15 of the Debtors Act for a debt incurred by fraud, e.g., in selling as broker his customer's securities without authority. Where the fraud was not discovered until after the adjudication in bankruptcy:—Held, that the Statute of Limitations did not begin to run till the bankruptcy had been annulled. *Crossley, In re, Munns v. Burn*, 35 Ch. D. 266; 57 L. T. 298; 35 W. R. 790—C. A.

Concealed Fraud—Absence of Reasonable Means of Discovery.]—In an action to recover damages for fraudulent representation of the quality (viz., "the sheep-carrying power") of certain lands, whereby the plaintiff was induced to take leases thereof, the defendants pleaded the Statute of Limitations. Reply: That the cause of action relied on is the fraud and fraudulent misrepresentation of the defendants, and the injuries occasioned to the plaintiff thereby; and the plaintiff says that he did not, and could not, by the exercise of reasonable diligence, have discovered the said fraud, or that the said representation was untrue and fraudulent, until within six years before the commencement of this action:—Held, that the reply was no answer to the plea relying on the statute. *Gibbs v. Guild* (19 Q. B. D. 59) commented on and distinguished. *Barber v. Houston*, 18 L. R., Ir. 475—C. A.

The action was nothing more than one for deceit, which before the Judicature Act must have been brought in a court of common law, and would have been barred after six years under s. 20 of the Irish Common Law Procedure Act, 1853, which section the enactment in the Judicature Act (s. 28, sub-s. 2) providing that, in cases of conflict, the rules of equity should prevail, had not the effect of repealing, either expressly or by implication; but in the case of rights and remedies, to which equitable rules are applicable, and to which the Statute of Limitations do not directly apply, the rules of equity will now be enforced, even in the Common Law Divisions. *Ib.*—Per Porter (M.R.).

See also *Armstrong v. Milburn*, ante, col. 1142.

6. IN OTHER CASES.

Disclosure of Misfeasance of Directors to Board not to Company.]—An application was made in the winding-up of a company, seeking to recover from a director the value of shares allotted to him under circumstances which amounted to a misfeasance. It appeared that the transaction in question had been disclosed at a board meeting of the directors in 1873, but that two of the directors then present had taken part in the transaction in question, and the third had received shares under the arrangement:—Held, that disclosure to the directors could not, under these circumstances, be considered as disclosure to the company, and that the claim, therefore, was not barred by the Statute of Limitations. *Fitzroy Bessemer Steel Company, In re*, 50 L. T. 144; 32 W. R. 475—Kay, J. Compromised on appeal, 33 W. R. 312—C. A.

Shares or Stock—Forged Transfers—Forgery by one Executor.]—Railway stock was registered in the names of two persons who were executors and trustees of a will. One of them sold and transferred the stock, forging the signature of the other to the transfers, which were registered by the railway company. On the forgeries being discovered by the other executor, a new trustee of the will was appointed in place of the forger, who then left this country. The two trustees informed the company of the forgeries, and applied to be registered as owners of the stock. The company refused to comply with the application, and the two trustees thereupon brought an action for replacement of the stock in their names. Some of the stock was transferred more than six years before the action was brought:—Held, that the cause of action was the refusal by the company, when the forgeries were made known to them, to treat the plaintiffs as owners of the stock, and that, therefore, time under the Statute of Limitations would not begin to run against the plaintiffs until such refusal. *Barton v. North Staffordshire Railway*, 38 Ch. D. 458; 57 L. J., Ch. 800; 58 L. T. 549; 36 W. R. 754—Kay, J.

—Mortgage of Reversionary Interest—Right when arising.]—Two brothers, A. and B., were entitled, subject to their mother's life interest, to a fund in equal moieties. In 1858 A. mortgaged his reversionary interest to his father, who died, having appointed B. his executor and residuary legatee. The property having fallen into possession on the death of the mother in 1887, B. wrote to A. that, in accordance with her wish that he should hand over to A. the mortgage deed, he gave himself the satisfaction of fulfilling her desire, and he inclosed the deed accordingly. Afterwards B. insisted on his right under the mortgage:—Held, that the Statute of Limitations was no bar to the claim under the mortgage, as the right to enforce the mortgage arose only when the reversionary interest fell into possession. *Hancock, In re, Hancock v. Berrey*, 57 L. J., Ch. 793; 59 L. T. 197; 36 W. R. 710—Kay, J.

Action for Subsidence—Damages, Recovery of, after Satisfaction for previous Injury arising from same Act.]—Lessees of coal under the respondent's land worked the coal so as to cause a subsidence of the land and injury to houses thereon in 1868. For the injury thus caused the lessees made compensation. They worked no more, but in 1882 a further subsidence took place causing further injury. There would have been no further subsidence if an adjoining owner had not worked his coal, or if the lessees had left enough support under the respondent's land:—Held (Lord Blackburn dissenting), that the cause of action in respect of the further subsidence did not arise till that subsidence occurred, and that the respondent could maintain an action for the injury thereby caused, although more than six years had passed since the last working by the lessees. *Nichlin v. Williams* (10 Ex. 259), and *Backhouse v. Bonomi* (9 H. L. C. 503), discussed. *Lamb v. Walker* (3 Q. B. D. 389) overruled. *Darley Main Colliery Company v. Mitchell*, 11 App. Cas. 127; 55 L. J., Q. B. 529; 54 L. T. 882; 51 J. P. 148—H. L. (E.). Affirming 32 W. R. 947—C. A.

Joint and Several Bond—Appointment of Receiver over Estate of one Obligor.—A tenant for life and remainderman executed a joint and several bond with warrant of attorney for confessing judgment thereon, and several judgments were entered up against them by the obligee of the bond. A receiver over the tenant for life's estate was extended to the judgment against the father, and remained in receipt of the rents up to a period within twenty years of the present proceeding, but no payment was ever made on foot of the said judgment:—Held, that the extension of the receiver to the matter of the judgment did not prevent the Statute of Limitations from running in favour of the remainderman. *Greene's Estate, In re*, 13 L. R., Ir. 461—C. A.

Judgment more than Twelve Years Old—Right to Issue Execution.—Execution cannot be issued on a judgment where for twelve years there has been neither payment on foot thereof nor acknowledgment. *Evans v. O'Donnell*, 18 L. R., Ir. 170—C. A.

Administration — Statutory Bar — "Dying Intestate" — "Present Right to Receive."—The operation of 23 & 24 Vict. c. 38, s. 13, is retrospective, so that the limitation of twenty years "next after a present right to receive the same shall have accrued" thereby imposed (in analogy to 3 & 4 Will. 4, c. 27, s. 40) upon claims to recover personal estate of "any person dying intestate, possessed by the legal personal representative of such intestate," is not confined to the case of persons dying intestate after the 31st of December, 1860, the time fixed by the section for commencement of the operation of the enactment. Accordingly, a claim by next of kin for general administration of the estate of an intestate who died in 1848 was barred at the end of twenty-one years from that date; and leave to revive an administration suit relating to the same estate in which no proceeding had been taken since the decree in 1855 was refused. But with respect to assets of the intestate not received by the administrator until 1870 (more than twenty years after the death, and within twenty years before the issue of the writ) the claim of the next of kin to administration, limited to such assets, was not barred; there being no "present right to receive" on the part of the next of kin until the assets had been actually recovered by the administrator. *Johnson, In re, Sly v. Blake*, 29 Ch. D. 964; 52 L. T. 682; 33 W. R. 502—Chitty, J.

— Part Payment.—Part payment by the administrator out of a particular asset which has so fallen in will not revive the right to sue for general administration which was at the time of payment barred by statute. *Id.*

Executor when not allowed to Plead.—See *Swindell v. Bulkeley*, ante, col. 800.

Recovery of Expenses and Rates.—See **HEALTH—METROPOLIS.**

Actions against Guardians of Poor.—See **POOR LAW.**

7. ACKNOWLEDGMENT OF DEBTS.

Unsigned Letter written by Debtor's Wife.—An unsigned letter acknowledging a debt, written by a debtor's wife at his dictation, and sent to the creditor in the same envelope with a letter to the creditor, written and signed by the wife, and which referred to the unsigned letter, is not a sufficient acknowledgment of a debt by a duly authorised agent of the debtor, so as to take the case out of the Statute of Limitations. *Ingram v. Little*, 1 C. & E. 186—Cave, J.

Form and Sufficiency of.—A letter from a debtor to his creditor containing the following expressions:—"I was in hopes of being able to send you some coin by small instalments, but as I have been ordered home, the matter must be in abeyance a little longer, which won't ruin you. I know you must live in hopes as I do, for a good time is rather long coming. . . . I can assure you such behaviour would not induce me to put myself out to attempt to square off your account. I think you ought to know me by this time. When I have had the means, you have got luck"—Held, not a sufficient acknowledgment of a debt to take the case out of the Statute of Limitations. *Jupp v. Powell*, 1 C. & E. 349—Mathew, J. Affirmed in C. A.

J. H. was the trustee of a settlement by which the T. B. estate was settled on the wife of the defendant for life, to her separate use without power of anticipation. J. H. lent money to the defendant, and for some time, with the wife's consent, the rents of the T. B. estate were applied towards payment of the debt, the wife giving receipts for them. In October, 1879, the defendant wrote to J. H., "I thank you for your very kind intention to give up the rent of T. B. next Christmas, but I am happy to say at that time both principal and interest will have been paid in full"—Held, that this was not an acknowledgment which would take the debt out of the Statute of Limitations. *Green v. Humphreys*, 26 Ch. D. 474; 53 L. J., Ch. 625; 51 L. T. 42—C. A.

In an action commenced in 1885 for the administration of C. B.'s estate, on inquiries for creditors, A. J. P. brought in a claim to be paid a sum of 441l. 16s. 7d., for commission and moneys lent before March, 1878. C. B. was sent to the Cape of Good Hope in March, 1878, and died there in 1884. He, while on board ship, wrote a letter in which he asked A. J. P. to make out his account, and send it to him, and added "I will send it to you as soon as possible." The account was sent in March, 1878, and C. B. afterwards wrote letters to A. J. P. in which he said, "I will send you a cheque as soon as I can" and "I will send some coin home as soon as ever I can"—Held, that there had not been an acknowledgment sufficient to enable the court to infer an absolute promise to pay. *Bethell, In re, Bethell v. Bethell*, 34 Ch. D. 561; 56 L. J., Ch. 334; 56 L. T. 92; 35 W. R. 330—Stirling, J.

By a memorandum, dated the 28th April, 1874, it was witnessed that the defendant deposited with the plaintiff certain title-deeds by way of equitable mortgage for 6,000l. and interest. The defendant also agreed to pay to the plaintiff on demand 6,000l. and interest, and to execute a proper mortgage with all the usual powers and authorities usually given to a mortgagee. This memorandum was not under seal. No interest

was paid under this agreement, and nothing was done until about eleven years after the date of it, when this action was brought for the specific performance of the agreement. At the trial it was declared that the plaintiff was entitled to a lien on the property comprised in the deeds for the money advanced, and to have the agreement specifically performed, but that was without prejudice to the defendant's right to insist on the Statute of Limitations as a defence against any principal sum or interest. The question was, whether the plaintiff was entitled to have in the mortgage a covenant for principal and interest. The statute was relied on as a bar to any such right. A correspondence had in 1885 passed between the parties in which the plaintiff had demanded an account of how matters stood between them. The defendant answered that he was unable to make out the account, but that he should be glad to leave the whole thing entirely in the plaintiff's hands, and adopt whatever he suggested. He also wrote: "There is only one thing which gives me uneasiness, which is, that, should I survive you, your executors might sell the land at a forced sale for little or nothing, and make a claim against me, which I have no funds to meet"—Held, that the defendant's letters amounted to an admission of his liability to account, and also of his present liability to the plaintiff; that there was nothing in those letters to prevent the admission from carrying with it a promise to pay; and that the case was taken out of the Statute of Limitations, and the plaintiff was entitled to have a covenant for the payment of principal and interest. *Firth v. Slingsby*, 58 L. T. 481—Stirling, J.

Simple Contract Debt—Payment of Interest by Tenant for Life.—Payment by a devisee for life of interest on a simple contract debt of his testator, is a sufficient acknowledgment to keep the right of action alive against all parties interested in remainder. The law in regard to the payment of interest by a tenant for life on a simple contract debt stands on the same footing as that in respect of payment of interest on a specialty debt. *Roddam v. Morley* (1 De G. & J. 1) discussed and considered. *Hollingshead, In re, Hollingshead v. Webster*, 37 Ch. D. 651; 57 L. J., Ch. 400; 58 L. T. 758; 36 W. R. 660—Chitty, J.

Payment of Interest by Agent.—N., a solicitor, lent money to S., a client, on equitable mortgage, and on the 12th of February, 1866, an account was settled between them as to the amount due. After this there were no entries relating to S. in N.'s ledger. In July, 1878, S. assigned the mortgaged property to his two nephews, subject to all incumbrances. In a diary kept by N., who had since died, was an entry dated the 10th of September, 1878, of the receipt of money from S. for interest. There was nothing else to show payment of interest after 1866. S., in 1863, mortgaged other property to A., a client of N. N. paid interest on the mortgage and charged S. with it in account till 1866. After this N. went on paying interest to A., who believed that it came from S., but it was not shown that N. had ever acted as solicitor to S. after 1866, nor was there anything showing that N. was authorised to make the payments as agent for S.—Held, that assuming the entry

to be admissible in evidence, as to which the court gave no opinion, it proved nothing but a payment on account of interest by a person who, when he made it, had no interest in the mortgaged property, and was not shown to be agent of the assignees, and that this could not take the case out of the statute as against the assignees, and that the payments of interest after 1866 did not take the case out of the Statute of Limitations. *Newbould v. Smith*, 33 Ch. D. 127; 55 L. J., Ch. 788; 55 L. T. 194; 34 W. R. 690—C. A. Affirmed 87 L. T. Jour. 255—H. L. (E.).

Bond by Sureties for Payment of Mortgage Debt—Payment of Interest by Mortgagor.—

In 1867, T. P. mortgaged an estate to L. and A. for 1,000*l.*, and at the same time E. P. and C. P. gave to L. and A. a joint and several bond in the penal sum of 400*l.*, reciting that the 1,000*l.* had been advanced at the bequest of E. P. and C. P., and that they had agreed to give as a better security for part thereof a bond conditioned for payment of 200*l.* and interest. The bond was conditioned to be void if the mortgagor paid the mortgage money and interest according to his covenant. T. P. paid the interest till December 1877, after which it fell into arrear, and in 1880 the mortgagees entered into possession. E. P. died in 1883, without having made any payment or given any acknowledgment. L. and A. as creditors under the bond, took out a summons for administration of his estate. E. P.'s representatives disputed the claim on the ground that this was a proceeding to recover money secured on land, and was barred by the lapse of twelve years under the Real Property Limitation Act, 1874.—Held, that this was not a proceeding to recover money secured on land, but to recover damages because another person failed to pay money secured on land, and that it did not come within the scope of the Real Property Limitation Act, 1874, s. 8. Held, further, that if the remedy on the bond had been barrable by the lapse of twelve years under that section, the payments of interest by the mortgagor would have prevented the bar. Held, therefore, that L. and A. were entitled to rank as creditors against the estate of E. P., and that if his representatives did not admit assets, an administration order must be made. *Sutton v. Sutton* (22 Ch. 511); *Fearnside v. Flint* (22 Ch. D. 579); and *Cockrill v. Sparks* (1 H. & C. 699), distinguished. *Powers, In re, Lindsell v. Phillips*, 30 Ch. D. 291; 53 L. T. 647—C. A.

Payment by other than Mortgagor or Agent.—

The rule that the only person whose payment on account will prevent foreclosure from being barred is the mortgagor, or his privy in estate, or the agent of either of them, must be qualified so as to include any person who by the terms of the mortgage contract is entitled to make payments. Where H. and W. each mortgaged some property to the obligee of their joint and several bond, to secure the amount of the obligation, the latter as between the debtors being surety only, H. being bound to pay principal and interest, and expressly named as a person entitled to redeem both mortgages, W. never having made any payment at all.—Held, in a suit for foreclosure, that the period of limitation prescribed by s. 30 of c. 84 of the Consolidated Statutes of New Brunswick ran in

respect of both mortgages from the date of the last payment of interest by *H. Lewin v. Wilson*, 11 App. Cas. 639; 55 L. J., P. C. 75; 55 L. T. 410—P. C.

II. ACTIONS RELATING TO LAND.

Action to recover Land—Possession of Tenants—Receipt of Rents by Agents—Ratification.] By 3 & 4 Will. 4, c. 27, s. 8, "When any person shall be in possession of any land as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to bring an action to recover such land, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)." In an action to recover land by the plaintiff as assignee of the co-heiresses of D., the owner in fee of the land, who died intestate, it appeared that after D.'s death the defendant, who had previously acted as her agent and bailiff, continued to receive the rents of the land, which he paid into a bank, stating that he was acting on behalf of the true heir-at-law, and that he was ready to account to the heir-at-law when ascertained. It did not appear that these statements were ever communicated to the co-heiresses, or that the plaintiff in any way acted on the faith of them:—Held, that the co-heiresses could not be taken to have been "in possession" of the land through the tenants so as to prevent the statute running from the end of the first year or other period of the tenancy. *Lyell v. Kennedy*, 18 Q. B. D. 796; 56 L. J., Q. B. 303; 56 L. T. 647; 35 W. R. 725—C. A. Reversed, W. N., 1889, p. 160—H. L. (E.).

By 3 & 4 Will. 4, c. 27, s. 34, it is provided that "At the determination of the period limited by this act for making an entry or distress, or bringing an action, the right and title to the land for the recovery whereof an entry, distress, or action might have been made or brought within such period shall be extinguished":—Held, first, that it was not shown that the defendant in receiving the rents had acted in the name of the co-heiresses or the rightful owner of the land; secondly, that in any case it was not competent for the co-heiresses after the expiration of the statutory period to ratify the acts of the defendant so as to make his receipt of the rents their receipt. *Id.*

Act ceases to run against lawful Owner when Intruder relinquishes Possession.]—The Limitation Act (3 & 4 Will. 4, c. 27), does not continue to run against the rightful owner of land after an intruder has relinquished possession without acquiring title under the act. Possession so abandoned leaves the rightful owner in the same position in all respects as he was before the intrusion took place. The act applies not to want of possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. *Trustees and Agency Company v. Short*, 13 App. Cas. 793; 58 L. J., P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132—P. C.

Glebe Land—Purchase of adjoining Land by Rector—Promiscuous Occupation.]—In 1846, H. W., the rector of the parish of C., purchased under the provisions of an Inclosure Act, a number of plots of waste land adjoining the glebe, removed the old boundaries, and occupied the ancient glebe and the new inclosures indiscriminately. H. W. died in 1850, and was succeeded by P. as rector. P. died in 1855, and was succeeded by B. Both P. and B. occupied the whole land, as H. W. had done previously. In 1862, B. built and laid out a school, cottage, and garden on one of the plots of land so purchased by H. W., and the school was placed under the management of a committee. On 12th Nov., 1883, the defendant, who was the grandson and had succeeded to the real estate of H. W., granted a lease of the school, cottage, and garden to B. and the churchwardens and their successors for ninety-nine years at five shillings a year, with a proviso for increase on a certain event. On 14th Nov., 1883, B. resigned the benefice, and was succeeded by the plaintiff, who had no notice of the lease till he had been in possession for three months. In April, 1886, the defendant distrained for two years' rent:—Held, that B. had not as rector acquired a title to the school, cottage, and garden by the Statute of Limitations, and consequently there was no want of title in the defendant. *Gibson v. Wise*, 35 W. R. 409—D.

Semble, that the lease of 12th Nov., 1883, was a valid lease under 31 & 32 Vict. c. 44, s. 1. *Id.*

Receipt of Rent by Father as Bailiff for Infant Son—Tenants in Common.]—A father was entitled in fee to an undivided moiety of gavelkind land, the other moiety of which belonged to his wife in fee. She died in May, 1870, leaving two sons, Samuel and John. John was then an infant. He attained twenty-one in 1877, and died in May, 1884. On the mother's death her moiety descended to her two sons in equal shares, as her co-heirs by the custom of gavelkind, but the father was by that custom entitled to a moiety of the rents of her moiety so long as he remained a widower. On the mother's death he entered into the receipt of the whole of the rents of her moiety, and continued in possession, without accounting to his sons or acknowledging their title in writing, for more than twelve years. On the death of John in 1884, his interest descended to his brother Samuel as heir of the mother. In February, 1884, the father had married a second wife, and in November, 1884, he died:—Held, that, as to that one-eighth of the property to which John became entitled in possession on the death of his mother, the father must be taken to have entered into receipt of the rents as bailiff for his infant son, and that, consequently, the title of John was not barred by s. 12 of the act 3 & 4 Will. 4, c. 27, and that his brother Samuel was entitled to that one-eighth. But held, that, as to Samuel's own one-eighth, the same presumption did not arise, and that, there being no evidence that the father had received the rents as agent for Samuel, or had before the expiration of the statutory period acknowledged his title in writing, or accounted to him for the rents, the title of Samuel to that one-eighth was barred by the statute. Consequently, Samuel was entitled to three-eighths of the whole pro-

party and the remaining five-eighths passed under the father's will. *Hobbs, In re, Hobbs v. Wade*, 36 Ch. D. 553; 57 L. J., Ch. 184; 58 L. T. 9; 36 W. R. 445—North, J.

Particular Estate in Land—Estate in Remainder expectant thereon—Conveyance of Particular Estate—"Person last entitled."]—

Where a person entitled to a particular estate in respect of which land is held or the profits thereof or rent received, and upon which a future estate is expectant, conveys away his estate, he is not, when the particular estate determines, "the person last entitled to the particular estate upon which the future estate was expectant," and consequently the proviso in s. 2 of the Real Property Limitation Act, 1874, does not apply to limit the time within which the person who on the determination of the particular estate becomes entitled to an estate in possession may make an entry or distress or bring an action to recover such land or rent. *Pedder v. Hunt*, 18 Q. B. D. 565; 56 L. J., Q. B. 212; 56 L. T. 687; 35 W. R. 371—C. A.

A testator devised certain land to his sons successively for life, beginning with the youngest, and after their death "to be for ever enjoyed by the oldest surviving heir of his oldest surviving son for their life or lives for ever." The eldest surviving son being in possession executed, more than six years before his death, a conveyance in fee to the defendant. He left one son, who more than six but within twelve years after his father's death brought this action to recover possession of the land, claiming as devisee under the will of the testator:—Held, that the claim was not barred, as the plaintiff's father, having conveyed away his life estate, was not "the person last entitled to the particular estate" on which the plaintiff's estate in remainder was expectant within the meaning of the proviso in s. 2 of the Real Property Limitation Act, 1874. *Id.*

Mortgagor and Mortgagee the same—Payment—Trustees.]—S. was, under a will, entitled for her life to the interest on a sum of money which had been invested by the trustees of the will on mortgage of land. The mortgagor had afterwards conveyed the land (subject to the mortgage) to trustees on trust for S. for her life. During her life she received and retained the rents for more than twenty years:—Held, that though no interest had been actually paid, yet as the person who was entitled to the rents was also entitled to the interest, the rights of the trustee of the mortgage were not barred by 3 & 4 Will. 4, c. 27, s. 40, and that the fact of the rents being payable to one set of trustees and the interest being payable to another set of trustees did not alter the case where the cestui que trust was in each case the same. *Burrell v. Earl of Egremont* (7 Beav. 205) followed and explained. *Topham v. Booth*, 35 Ch. D. 607; 56 L. J., Ch. 812; 57 L. T. 170; 35 W. R. 715—Kekewich, J.

Mortgagee's Right to retain more than Six Years' Arrears of Interest.]—S. 42 of the Statute of Limitations (3 & 4 Will. 4, c. 27) does not affect the right of a mortgagee who has sold under his power of sale to retain out of the proceeds more than six years' arrears of interest. *Marshfield, In re, Marshfield v. Hutchings*, 34 Ch. D. 721;

56 L. J., Ch. 599; 56 L. T. 694; 35 W. R. 491—Kay, J.

Bond by Sureties for Payment of Mortgage Debt.]—

In 1867, T. P. mortgaged an estate to L. and A. for 1,000*l.*, and at the same time E. P. and C. P. gave to L. and A. a joint and several bond in the penal sum of 400*l.*, reciting that the 1,000*l.* had been advanced at the request of E. P. and C. P., and that they had agreed to give as a better security for part thereof a bond conditioned for payment of 200*l.* and interest. The bond was conditioned to be void if the mortgagor paid the mortgage money and interest according to his covenant. T. P. paid the interest till December, 1877, after which it fell into arrear and in 1880 the mortgagees entered into possession. E. P. died in 1883 without having made any payment or given any acknowledgment. L. and A., as creditors under the bond, took out a summons for administration of his estate. E. P.'s representatives disputed the claim on the ground that this was a proceeding to recover money secured on land, and was barred by the lapse of twelve years under the Real Property Limitation Act, 1874:—Held, that this was not a proceeding to recover money secured on land, but to recover damages because another person failed to pay money secured on land, and that it did not come within the scope of the Real Property Limitation Act, 1874, s. 8. *Powers, In re, Lindell v. Phillips*, 30 Ch. D. 291; 53 L. T. 647—C. A.

Mortgage of Reversionary Interest.]—

Time begins to run for the purpose of barring a foreclosure action on an equitable charge on a contingent reversionary interest in land only from the time the interest falls into possession. *Hugill v. Wilkinson*, 38 Ch. D. 480; 57 L. J., Ch. 1019; 58 L. T. 880; 36 W. R. 633—North, J.

Arrears of Annuity charged on Lands.]—

N., being entitled, under his marriage settlement, to certain lands, and also to a reversionary interest in government stock by deed, granted to B., for valuable consideration, an annuity for N.'s life charged on the lands and stock, covenanted with B. to pay the annuity, and granted the lands to a trustee to secure it. In 1856 N. became entitled, in possession, to the stock, and the trustees of the settlement transferred it into court, under the Trustee Relief Act, to the credit of the trusts of the settlement. The annuity was paid until 1867. In 1879 N. died; in 1885, on the distribution of the fund, a claim was lodged by B.'s executors for the arrears of the annuity accrued between 1867 and 1879:—Held, that the claim was barred by the Statutes of Limitation (3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57). *Nugent's Trusts, In re*, 19 L. R., Ir. 140—M. R.

By an indenture executed in 1833, real estate was conveyed to trustees and their heirs upon trust as to one moiety that immediately after the death of M. C. they should out of the moiety and the rents and profits thereof pay unto J. M., and to his heirs and assigns, or permit him or them to receive it, an annuity of 8*l.* half-yearly. M. C. died in 1857. No payment was ever made in respect of the annuity, and the annuitant first made a claim in 1884. The chief clerk had certified that he was entitled to a perpetual annuity. On summons to vary the certificate:

—Held, that by s. 1 of the act 37 & 38 Vict. c. 57, no proceedings to recover any "rent" (which, inasmuch as by s. 9 the act must be construed with the 3 & 4 Will. 4, c. 27, meant by the interpretation clause of that act, any annuity charged upon land) could be taken after twelve years from the time when the right first accrued, therefore if there had not been any trust, those twelve years having elapsed, none of the past instalments of the annuity could be recovered, and that the effect of s. 10 of the 37 & 38 Vict. c. 57, was that no payment of the annuity which became due before the application was made was recoverable, the remedy being only the same as if there had not been any trust. *Hughes v. Coles*, 27 Ch. D. 231; 53 L. J., Ch. 1047; 51 L. T. 226; 33 W. R. 27—Kay, J.

An annuity given by will and charged on all the testator's real and personal estate is within 37 & 38 Vict. c. 57, s. 8, and is barred by non-payment of the gales for twelve years. *Dower v. Dower*, 16 L. R., Ir. 264—M. R.

Periodical Sums charged on Land—Tithes.]—

The statute and decree of 37 Hen. 8, c. 12, provided that the inhabitants of the city of London for the time being should yearly for ever pay their tithes in respect of their houses after certain rates:—Held, that these payments imposed were "annuities or periodical sums of money charged upon land" within the meaning of the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 1, and that that statute (as amended by 37 & 38 Vict. c. 57) afforded a defence to the action. *Payne v. Esdaile*, 13 App. Cas. 613; 58 L. J., Ch. 299; 59 L. T. 568; 37 W. R. 273; 53 J. P. 100—H. L. (B.).

Tithe Rent - charge — "Composition" —

"Rent."]—A tithe rent-charge under the Irish Tithe Commutation Act (1 & 2 Vict. c. 109) is not a "composition" within s. 1 of the Statute of Limitations (3 & 4 Will. 4, c. 27), but a "rent" within s. 2 of the statute, and therefore, where a tithe rent-charge was transferred by act of Parliament from a spiritual corporation sole to a lay corporation:—Held, that at the time of the transfer the period of limitation against the transferees should be reckoned from the time when the right to enter, distrain or bring an action first accrued to the former spiritual corporation sole through whom they claimed. *Irish Land Commission v. Grant*, 10 App. Cas. 14; 52 L. T. 228; 33 W. R. 357—H. L. (Ir.).

Covenant to pay Rent or Royalty—Arrears.]

—A lease, dated in 1859, of mines contained a covenant by the lessees to pay a rent or royalty in respect of minerals from other lands carried, by or by the authority of the lessees, over the surface of the mining ground. In 1883, an action on the covenant was brought to recover royalties in respect of minerals so carried since 1866:—Held, that the act 37 & 38 Vict. c. 57, s. 8, did not apply; but that on the ruling in *Hunter v. Nockolds* (1 Mac. & Gor. 640), the plaintiff was entitled to an account of the royalties become payable since 1866. *Darley v. Tennant*, 53 L. T. 257—North, J.

Chattel Interest in Land—Administrator—Running of Time.]—Under the Statute of Limitations, 1833 (3 & 4 Will. 4, c. 27), s. 6, time begins to run as against an administrator claim-

ing a chattel interest in land from the date of the death of the intestate, and not from the date of the grant of administration. *Williams, In re, Davies v. Williams*, 34 Ch. D. 558; 56 L. J., Ch. 123; 55 L. T. 633; 35 W. R. 182—Stirling, J.

III. EQUITABLE DEMANDS.

Wife's Separate Estate—Simple Contract Debt.]—In 1875 a married woman borrowed money from her husband upon a parol agreement to repay him the amount with interest out of her separate estate. She died in 1884, without having paid anything in respect either of interest or principal, and without having given any acknowledgment in writing of her liability to repay the debt. After her death her husband claimed repayment:—Held, that the debt was barred by analogy to the Statute of Limitations. *Norton v. Turvill* (2 P. Wms. 144) explained. *Hastings (Lady), In re, Hallett v. Hastings*, 35 Ch. D. 94; 56 L. J., Ch. 631; 57 L. T. 126; 35 W. R. 584; 52 J. P. 100—C. A.

Payment off of Mortgage—Claim against Residuary Legatees.]—

In 1843 G. mortgaged to a firm of solicitors a freehold farm, and also the furniture and farming stock, the mortgagor being permitted to use the furniture and stock but not to sell without consent of the mortgagees. In 1859 G. died, having by his will bequeathed the furniture to his unmarried daughters and devised the farm to A., B. and C. upon trust to allow his unmarried daughters to occupy it, they keeping down the mortgage interest, and having bequeathed his residuary personal estate to A., B. and C., whom he appointed executors upon trust for sale and division among his children. By a codicil the testator directed that his unmarried daughters should pay a rent of 600l. for the farm, and on their giving it up it should be let. Under the provisions of the will, and with the knowledge of the mortgagees, who made no objection, two of the testator's four daughters continued to carry on the farm as tenants to the trustees of the will, and for that purpose used the furniture and took part of the farming stock at a valuation as against their shares of residue. In 1861 the executors, with the knowledge of the mortgagees, sold the remainder of the testator's residuary personal estate, consisting almost entirely of farming stock, and distributed the proceeds among the residuary legatees pursuant to the trusts of the will, the two daughters who were tenants of the farm applying their shares in carrying it on. In 1863 one of these two daughters married, whereupon her husband took a lease from the trustees, and bought out the interest of the unmarried daughter in the stock and furniture. The interest on the mortgage was, by the direction of the trustees, paid to the mortgagees by the tenants of the farm out of the rent, the mortgagees giving receipts to the tenants only. In 1882, the interest having been unpaid from August, 1880, and the security being worthless owing to an existing prior mortgage, the legal personal representative of the surviving mortgagee sued G.'s executors for an alleged devastavit in having distributed G.'s residuary personal estate without providing for the mortgage debt (*Blake v. Gale* (22 Ch. D. 820)), when it was declared that the executors were not liable.

for a devastavit, but judgment was pronounced for a sale of the mortgaged premises, and for administration of G.'s estate. Under that judgment the chief clerk certified that the security was unsaleable, and allowed the payments by the executors to the residuary legatees, but the order on further consideration was made without prejudice to any proceedings the plaintiff might take against any other persons than the executors. Thereupon, in 1885, the plaintiff brought an action against the residuary legatees for payment of the mortgage debt out of G.'s assets received by them. The defendants pleaded the Statute of Limitations, delay, and acquiescence:—Held, that although the legal debt under the mortgage was still subsisting, and was in no way barred by statute, yet that the plaintiff's claim against the residuary legatees, being in the nature of an equitable demand, was barred by lapse of time and acquiescence. *Blake v. Gale*, 32 Ch. D. 571; 55 L. J., Ch. 559; 55 L. T. 234; 34 W. R. 555—C. A.

LIQUIDATED DAMAGES.

See PENALTY.

LIQUIDATION.

In Bankruptcy.]—See BANKRUPTCY.

In Winding-up.]—See COMPANY.

LIS PENDENS.

Creditors' Administration Action—Real Estate specifically Devised—Priority.—Where debts are charged upon a testator's real estate by his will, or as judgment debts under the old law, an action by a creditor for the administration of the real and personal estate is a lis pendens which, when registered, gives the plaintiff priority over a purchaser or mortgagee from any defendant entitled to real estate under the will, except where the defendant is in such a position that the purchaser or mortgagee has a right to suppose he is selling or mortgaging for the purpose of paying the testator's debts. *Price v. Price*, 35 Ch. D. 297; 56 L. J., Ch. 530; 56 L. T. 842; 35 W. R. 386—Kay, J.

A creditor's action for general administration may be a sufficient lis pendens, before final decree, so as to entitle the plaintiff to priority over a purchaser or mortgagee taking, subsequently to the registration of the lis, from a specific devisee who is a defendant, if the plaintiff, previously to the purchase or mortgage, has sufficiently indicated the real estate sought to be charged in the action; a mere general claim for

administration of the real and personal estate not being of itself a sufficient indication of intention to make liable the specifically devised real estate. *Drew v. Earl of Norbury* (3 J. & Lat. 267), and *Walker v. Flamstead* (2 Keny., part 2, p. 57), considered. *Id.*

Vacating Registration—Application by Person not a Party to Action.—Where an action is improperly registered as a lis pendens against a person who is not a party thereto, the court has jurisdiction to vacate the registration under 30 & 31 Vict. c. 47, s. 2, notwithstanding that the action is being prosecuted bonâ fide by the plaintiff as against the defendant. *Schofield v. Solomon*, 54 L. J., Ch. 1101; 52 L. T. 679—Kay, J.

Effect of Registration—Notice to Mortgagee.—Registration of a petition for sale by the second mortgagee as a lis pendens, has not the effect of notice to the first mortgagee, so as to affect the priority of further advances made by him in ignorance of such petition and registration. *Haues, Ex parte, Byrne, In re*, 15 L. R., Ir. 373—C. A.

LIVERPOOL.

Court of Passage.]—See COURT.

LOCAL AUTHORITY AND LOCAL GOVERNMENT.

See HEALTH.

In Metropolis.]—See METROPOLIS.

LOCOMOTIVE.

See WAY.

LODGER.

Right of voting at Elections.—See ELECTION LAW.

Protection of Goods from Distress.—See LANDLORD AND TENANT.

Bye-laws as to Lodging-Houses.—See HEALTH.

LONDON.

See METROPOLIS.

Import Dues on Grain.]—See TOLLS.

LOTTERY.

Sale of Packets of Tea containing Coupons for Prizes.]—By 42 Geo. 3, c. 119, s. 2, it is made an offence to keep any office or place to exercise any lottery not authorised by parliament. The appellant erected a tent, in which he sold packets, each containing a pound of tea, at 2s. 6d. a packet. In each packet was a coupon entitling the purchaser to a prize, and this was publicly stated by the appellant before the sale, but the purchasers did not know until after the sale what prizes they were entitled to, and the prizes varied in character and value. The tea was good and worth the money paid for it:—Held, that what the appellant did constituted a lottery within the meaning of the statute. *Taylor v. Smetten*, 11 Q. B. D. 207; 52 L. J., M. C. 101; 48 J. P. 36—D.

Inclosing Money in Packets.]—H. kept a shop for the sale of sweets and sold penny packets of caramel, several of which packets contained a halfpenny in addition to a fair pennyworth of sweets. There had been no advertisement as to these inclosures:—Held, that H. was rightly convicted under 42 Geo. 3, c. 119, s. 2, of keeping a lottery. *Hunt v. Williams*, 52 J. P. 821—D.

LUGGAGE.

See CARRIER.

LUNATIC.

I. THEIR PROPERTY, POWERS AND CONTRACTS, 1158.

II. MAINTENANCE AND ALLOWANCES.

1. *When Ordered by the Court*, 1163.

2. *Maintenance of Paupers*, 1165.

III. INQUISITIONS, 1166.

IV. ACTIONS AND PROCEEDINGS BY AND AGAINST, 1167.

V. CUSTODY OF, 1168.

VI. ILL-TREATMENT OF, 1169.

VII. APPOINTMENT OF NEW TRUSTEES.—See TRUST AND TRUSTEE.

VIII. ASYLUMS—ASSESSMENT OF TO INCOME TAX.—See REVENUE.

I. THEIR PROPERTY, POWERS AND CONTRACTS.

Jurisdiction of Judges of Appeal Court to make Orders in Chancery Division.]—The letter of the Lord Chancellor requesting the judges of the Court of Appeal sitting in Lunacy to act as additional judges of the Chancery Division is not limited to petitions under the Trustee Acts, but applies to all applications in lunacy which require also an exercise of the jurisdiction of the Chancery Division. *Platt, In re*, 36 Ch. D. 410; 57 L. J., Ch. 152; 57 L. T. 857; 36 W. R. 273—C. A.

Charge of Expense of Improvements.]—A lunatic was tenant for life of the H. estate, and tenant in tail in possession of the D. estate. Expenses were incurred by the committee in improvements on both estates, but chiefly on the former:—Held, that there was no jurisdiction to charge the D. estate with the expenses incurred on the H. estate. *Vavasour, In re*, 29 Ch. D. 306; 53 L. T. 412—C. A.

Sale of Land—Lands Clauses Act.]—Section 7 of the Lands Clauses Consolidation Act, 1845, does not authorise a person of unsound mind to sell land to a company or public body who have statutory power to take it; the section only authorises the committee of a lunatic to sell. *Tugwell, In re*, 27 Ch. D. 309; 53 L. J., Ch. 1006; 51 L. T. 83; 33 W. R. 132—Pearson, J.

Order for Sale—Jurisdiction to Appoint Person to Convey.]—An order was made in a partition action in the Court of Chancery of the County Palatine of Lancaster for sale of the leasehold estate in respect of which the action was brought. After a sale had been made it was discovered that one of the beneficiaries was a lunatic, so found by inquisition, but that no committee had been appointed. The Vice-Chancellor then made an order declaring the other beneficiaries seised of the property upon a trust within the meaning of the Trustee Act, 1850, and the Trustee Extension Act, 1852, and appointing another party to the action to convey the property to the purchaser for the estates of the beneficiaries therein other than the lunatic. A petition was then presented to the Lord Chancellor, intitled in Lunacy and in the Chancery Division, asking for a declaration that the lunatic was to be deemed seised of his share upon a trust within the meaning of the Trustee Act, 1850, and that the same person might be appointed to convey such property to the purchaser for all the estate and interest of the lunatic:—Held, that as the order for sale had been made, the lunatic was, under s. 1 of the Trustee Act, 1852, to be deemed to be possessed upon a trust within the meaning of the Act of 1850, and that, although the rest of that section only gave jurisdiction to the Chancery Division, the court sitting in Lunacy could, under ss. 3 and 20 of the Trustee Act, 1850, appoint a person to convey the lunatic's interest. *Watson, In re*, 58 L. T. 509—C. A.

— **Share of Real Estate.**—The court has no jurisdiction under s. 124 of the Lunacy Regulation Act, 1853, to authorise the committee of a lunatic to sell the lunatic's undivided share of land to the owner of the other shares. *Weld, In re*, 28 Ch. D. 514; 52 L. T. 703; 33 W. R. 845—C. A. S. P., *Woolhouse, In re*, 28 Ch. D. 515, n.; 52 L. T. 703, n.; 33 W. R. 845—Turner, L. J.

— **Land of which Lunatic Mortgagee—Power of Sale.**—The master in lunacy having reported that it was desirable that property of which the lunatic was mortgagee should be sold under a power of sale in the mortgage, the court declined to make an order authorising the committee to sell and to convey the estate to the purchaser, but only directed him to sell, leaving the transfer of the legal estate to be dealt with on a subsequent application under the Trustee Act, 1850. *Harwood, In re*, 35 Ch. D. 470; 56 L. J., Ch. 974; 56 L. T. 502; 36 W. R. 27—C. A.

— **To pay Costs—Transfer of Mortgage vested in Lunatic.**—There was no available property of a lunatic wherewith to pay the costs of the inquiry as to his lunacy, and he was entitled to a mortgage of freeholds. The mortgage had been made under a power in a settlement. The trustee was dead, and there was no one competent to take a reconveyance, but a person had been found who was willing to take a transfer of the mortgage:—Held, that the court could effect this by ordering the lunatic's interest in the land to be sold, under s. 116 of the Lunacy Regulation Act, 1833, to pay the costs. *Brown, In re*, 50 L. T. 373—C. A.

Mortgagee of unsound Mind—Appointment of Person to Transfer Mortgage.—Where a person of unsound mind is possessed of an estate by way of mortgage, the court can, under the Trustee Act, 1850, s. 3, appoint a person to convey the estate for the purpose of effectuating a transfer of the mortgage. *Nicholson, In re*, 34 Ch. D. 663; 56 L. J., Ch. 1036; 56 L. T. 770; 35 W. R. 569—C. A.

Power to Mortgage—Debts of Prior Owner.—A lunatic was entitled in fee to one moiety of real estate as one of the two co-heiresses of an ancestor who had died intestate. The real estate was liable as assets for payment of a considerable amount of simple contract debts of the ancestor which his personal estate was insufficient to pay. The court authorised the committee to concur with the other co-heiress in a mortgage of the entirety to raise the amount of the debts, the mortgage being so framed that the lunatic's moiety was only liable for one moiety of the mortgage debt and interest, and could not be made liable for any default of the other co-heiress in payment of the other moiety of the principal and interest, but the court declined to authorise the committee to enter into any covenant on behalf of the lunatic. *Fox, In re*, 33 Ch. D. 37; 55 L. T. 39; 35 W. R. 81—C. A.

Payment off of Mortgage—Ademption.—Where part of a lunatic's estate was subject to a mortgage, which it was desired to pay off, an order was made that the mortgage be paid off without prejudice to the question how the debt should ultimately be borne, and that the mort-

gage must be kept on foot by transferring it to the committee to be disposed of as the court might direct. *Leeming, In re* (3 De G., F. & J. 43) followed. *Melly, In re*, 53 L. J., Ch. 248; 49 L. T. 429—C. A.

Lunacy of one of several Mortgagees.—S. 3 of the Trustee Act, 1850, is not confined to a case where the lunatic or person of unsound mind is a sole trustee or mortgagee, but extends to the case where he is one of several trustees or mortgagees. One of two trustees being of unsound mind, a new trustee was appointed in his place under a power:—Held, that the court had jurisdiction to appoint a person to convey the interest of the trustee of unsound mind in a mortgage, forming part of the trust estate for the purpose of vesting the mortgaged estate in the continuing trustee and the new trustee. *Jones, In re*, 33 Ch. D. 414; 56 L. J., Ch. 272; 55 L. T. 498; 35 W. R. 172—C. A.

Direction to Committee to transfer Mortgage.—The court has jurisdiction under s. 3 of the Trustee Act, 1850, where a mortgagee is a lunatic, to direct the committee to transfer the mortgage. *Peel, In re*, 55 L. T. 554; 35 W. R. 81—C. A.

Consent to exercise of Power of Advancement by Committee.—A marriage settlement contained a power of advancement exercisable by the trustees after the death of the husband and wife, or at any time previously if they or the survivor of them should direct. The husband was found lunatic:—Held, that under the Lunacy Regulation Act, 1853, s. 137, the court had jurisdiction to authorise the committee to consent on behalf of the lunatic to the exercise of the power. *Nevill, In re*, 31 Ch. D. 161; 55 L. J., Ch. 435; 54 L. T. 290—C. A.

Consent to Appointment of New Trustees by Committee.—A will contained a power of appointment of new trustees exercisable with the consent of the tenant for life. The trustees having died, the tenant for life who had been found lunatic, presented a petition in Lunacy and Chancery by the committee of her estate as next friend for the appointment of new trustees:—Held, that there was no jurisdiction in lunacy to appoint new trustees, and that the only proper application in lunacy was to ask for an order authorising the committee to consent on behalf of the lunatic to an appointment of trustees under the power. *Garrod, In re*, 31 Ch. D. 164; 55 L. J., Ch. 311; 54 L. T. 291; 34 W. R. 157—C. A.

Leave to Committee to file Declaration of Insolvency.—Where it appears to be for the benefit of a lunatic that he should be made bankrupt, the court will give leave to the committee in the name of the lunatic to file a declaration of insolvency, or to present a bankruptcy petition under the Bankruptcy Act, 1883, s. 4 (f). *James, In re*, 12 Q. B. D. 332; 53 L. J., Q. B. 575; 50 L. T. 471—C. A.

Power of Committee to sue for Rent accruing after Death of Lunatic.—The committee of a lunatic's estate cannot maintain an action for rent issuing out of a lunatic's freehold estate, which has accrued after the death of the lunatic, though reserved by lease made by the committee on behalf of the lunatic in which the lessee

covenanted with the committee (as such) for payment of rent, and though the lunacy matter has not been dismissed out of lunacy, and the committee has been directed, by order in the matter, to continue in receipt of the rents and income of the lunatic's property. *Foot v. Leslie*, 16 L. R., Ir. 411—Ex. D.

Petition for Application of Property—Notice signed by Agent of Solicitor.—The notice of a petition under the Lunacy Regulation Act, 1862, ss. 12, 13, 14, 15, which was served on an alleged lunatic, was signed by the London agent of the petitioner's solicitor, expressly as agent:—Held, that this was not a compliance with the 59th rule of the Lunacy Order, 1833, which directs the notice to be signed by the petitioner or his solicitor. *Summerville, In re*, 31 Ch. D. 160; 55 L. J., Ch. 367; 54 L. T. 143; 34 W. R. 185—C. A.

Fund in Court—Person in New South Wales of Unsound Mind not so found—Payment to Master in Lunacy in New South Wales.—A lady detained in a lunatic asylum in New South Wales, but not found a lunatic by inquisition, was entitled for life to the income (about 30*l.* a year) of one third of a testator's residuary estate, and was absolutely entitled to a fund of about 2,000*l.* which had arisen from accumulations of this income. She had for years been maintained by the colonial government at a total expense of 803*l.* By the New South Wales Lunacy Act, extensive powers of management of the property of "lunatic patients" (i.e., persons detained as lunatics but not so found by inquisition) were given to the master in lunacy of New South Wales, and he was enabled to sue for and receive debts due to the patient, but the act did not vest the patient's property in him. The master claimed to have the accumulations, which were in England, paid to him, upon which the trustees paid them into court under the Trustee Relief Act. The master petitioned to have them paid out to him. Kay, J., ordered payment to him of the 803*l.*, and also payment to him of the income of the remainder of the fund so long as the patient should be detained as an insane patient in New South Wales, and authorised the trustee to pay to him the patient's share of the income of the residuary estate, which the trustee undertook to do. The master in lunacy appealed:—Held, that although the master could enforce payment in New South Wales of any sums due to the patient, still as the patient had not been found lunatic, and her property was not vested in the master, he could not compel payment of any moneys due to the patient from persons in this country, and that his claim as of right to have the whole of the accumulations made over to him could not be sustained:—But held, that a trustee here, or the court acting as trustee, was justified in paying over to the master anything which the competent authority in New South Wales decided to be necessary for the maintenance or benefit of the patient, and that the order therefore was right in ordering the payments which had been directed:—But held, that it was also right in declining to go further, no case having been made to show that more was required for the comfort or benefit of the patient. *Barlow, In re, Barton v. Spencer*, 36

Ch. D. 287; 56 L. J., Ch. 795; 57 L. T. 95; 35 W. R. 737—C. A.

Fund paid into Court under Lands Clauses Act, 1845—Appointment of New Committee—Payment of Dividends.—The dividends arising from a sum of stock in court, to the credit of H. D. R., a lunatic, ex parte the Metropolitan Board, which represented the purchase-money of land belonging to the lunatic taken by the Board under the Lands Clauses Act, 1845, were ordered to be paid to the joint committees of the estate of the lunatic. Upon the death of one of the joint committees the survivor was appointed sole committee; but the master declined to order the dividends to be paid to him, and a petition intitled in Lunacy and in the Chancery Division was presented for that purpose:—Held, that the dividends ought to be transferred to the lunacy and paid to the committee, and that upon the appointment of a new committee the order appointing him ought to direct payment to him of the dividends, and that the Metropolitan Board need not be served with the application, and that the Board ought to pay the costs of the petition. *Ryder, In re*, 37 Ch. D. 695; 57 L. J., Ch. 495; 58 L. T. 783—C. A.

Partition—Sale by Court—Order to Pay Over—Subsequent Lunacy of Beneficiary.—On the 21st May, 1879, P. N. died intestate, leaving M. H. P. one of four co-heiresses-at-law. On 18th February, 1880, an action was brought asking for sale of P. N.'s real estate in lieu of partition. On the 15th June, 1880, an order was made for sale. The sale took place of the 30th August, 1880, and the proceeds of sale were carried to the credit of the action, "proceeds of the sale of the testator's real estate." On the 22nd of April, 1882, by the order on further consideration in the said action, one-fourth part of the money standing to that account was ordered to be paid to M. H. P., subject to duty. M. H. P. left the money in court, and took no steps concerning it. On the 14th January, 1884, by an order made on a petition presented in lunacy, T. was authorised to apply to the Chancery division for a transfer of the said one-fourth amounting to 434*l.* 17*s.* 9*d.* to the account of M. H. P., a person of unsound mind, "proceeds of the sale of the real estate of P. N.," and the transfer was made accordingly. M. H. P. died on the 10th June, 1884:—Held, that there being no evidence that M. H. P. was of unsound mind at the date of the sale and the order for payment to her, the fund then ordered to be paid to her belonged to her absolutely without any trust or equity for re-conversion, and went on her death to her personal representatives. *Pickard, In re, Turner v. Nicholson*, 53 L. T. 293—Pearson, J.

Sale of Settled Land—Notice by Committee.—The committee of a lunatic tenant for life cannot give a valid notice under s. 45 of the Settled Land Act, 1882, unless he has previously obtained authority from the court of lunacy to do so. *Ray's Settled Estates, In re*, 25 Ch. D. 464; 53 L. J., Ch. 205; 50 L. T. 80; 32 W. R. 458—Pearson, J.

Declaration that Person of Unsound Mind—Sufficiency.—On the application by the curator of T., a person resident in Scotland, for the

transfer of stock standing in his name to the curator, it appeared that the petition on which the Scotch court had appointed the curator stated that T. had been for several years of unsound mind, and was at that time incapable of managing his affairs. The only ground for the petition, stated in the affidavits annexed, was that T. was unsound mind. By a memorandum indorsed on the petition the Scotch court appointed the curator, but the order contained no express declaration that T. was of unsound mind. It was shown that curators were appointed in Scotland, not only in cases of unsoundness of mind, but also when persons were, by illness or absence abroad, incapable of managing their own affairs:—Held, that the memorandum indorsed on the petition amounted to a declaration within the meaning of s. 141 of the Lunacy Regulation Act, 1863, that T. was of unsound mind. *Tarratt, In re*, 51 L. T. 310; 32 W. R. 909—C. A.

II. MAINTENANCE AND ALLOWANCES.

1. WHEN ORDERED BY THE COURT.

Jurisdiction to order—Person of Unsound Mind not so found.]—The Chancery Division has no jurisdiction to direct the application of the property of a person of unsound mind (not so found) for his maintenance unless there is either money belonging to him in court, or the court has control over his property by reason of there being an action or some other proceeding pending relating to the property. *Grimmett's Trusts, In re*, 56 L. J., Ch. 419—North, J.

On a petition by a person of unsound mind not so found, who was married but had no children, and whose sole property consisted of a fund in court, for payment of the whole income of the fund, amounting to 212l. per annum, to the wife of the petitioner, the court made an order as asked, upon the undertaking by the wife to apply the income for the maintenance, comfort, and support of the petitioner. *Silva's Trusts, In re*, 57 L. J., Ch. 281; 58 L. T. 46; 36 W. R. 366—Chitty, J.

Maintenance out of Capital.]—The jurisdiction of the Chancery Division to give directions as to the maintenance of a person of unsound mind not so found is not confined to applying the income for his maintenance, but extends to the application of capital for that purpose. *Tuer's Will, In re*, 32 Ch. D. 39; 55 L. J., Ch. 454; 54 L. T. 910; 34 W. R. 751—C. A.

Allowance for Expenses and preparing Defence preceding Inquiry.]—The court has jurisdiction, where an inquiry as to the unsoundness of mind of an alleged lunatic is pending, to sanction an allowance for the necessary household expenses of the alleged lunatic, and for the expenses of preparing his defence upon the inquiry. *Bullock, In re*, 55 L. T. 722; 35 W. R. 109—C. A.

Property of Small Amount—Payment of Debts.]—The power given by the Lunacy Regulation Act, 1862, s. 12, of making orders for the purpose of rendering the small property of a lunatic available for his maintenance or benefit, is to be exercised only for his benefit, and not

for the purpose of enabling his creditors to obtain payment. *Price, In re*, 34 Ch. D. 603; 56 L. J., Ch. 292; 56 L. T. 77; 35 W. R. 340—C. A.

A person of small means was confined as a criminal lunatic in Broadmoor Asylum, and there appeared no reasonable prospect of his ever being released. His mother and brother applied for an order that his property, along with some property in which they were interested together with him, might be applied in payment of moneys for which the lunatic had given security, the mother undertaking to pay his other debts:—Held, that the application must be refused as not being for his benefit. *Id.*

Petition for Application of Income—Opposition by alleged Lunatic.]—The power given to the Lord Chancellor by s. 12 of the Lunacy Regulation Act, 1862 (extended by s. 3 of the Lunacy Regulation Amendment Act, 1882), to make an order for the application of the property of a person of unsound mind for his maintenance or benefit, when the property is below a specified amount, without directing any inquiry under a commission of lunacy, ought not, even if the jurisdiction extends to cases in which the alleged lunatic appears and denies unsoundness of mind, to be exercised in such cases. *Lees, In re*, 26 Ch. D. 496; 53 L. J., Ch. 1022; 50 L. T. 489; 32 W. R. 1005—C. A.

Allowance out of Lunatic's Estate—Assignment of.]—On a decree for judicial separation an order was made for payment of 60l. a year to the wife as permanent alimony. The husband was afterwards found lunatic by inquisition, and by an order in lunacy and chancery the dividends of a sum of stock to which he was entitled in a chancery suit were ordered to be carried to his account in the lunacy, and 60l. a year to be paid out of them to his wife in respect of her alimony till further order. The wife assigned the annuity to a purchaser, who presented a petition in lunacy, and in the suit to have the annuity paid to her:—Held, that the petition must be refused, on the ground that whether the annuity was considered as alimony or as an allowance made to the wife by the court in lunacy, it was not assignable. *Robinson, In re*, 27 Ch. D. 160; 53 L. J., Ch. 986; 51 L. T. 737; 33 W. R. 17—C. A.

Surplus Income—Allowances to Collaterals.]—The court will not make an allowance out of the surplus income of a lunatic to collaterals unless the evidence shows that the lunatic, if sane, would in all probability have made the proposed allowance himself. Different considerations apply when the lunatic is entitled to landed property and the collateral is also the heir-at-law of the lunatic. *Darling, In re*, 39 Ch. D. 208; 57 L. J., Ch. 891; 59 L. T. 761—C. A.

The court refused to make an allowance to some of the next-of-kin of a lunatic, first cousins, who were in indigent circumstances, although the lunatic was aged eighty-two, and there was a large surplus income beyond the proposed allowance, and the application was not opposed. *Id.*

Allowance to Collateral Tenant in Tail

in Remainder—Increase of Allowance.]—A lunatic bachelor, who was incurable and aged sixty-four, was tenant for life, there being a large surplus income after providing for his maintenance. In 1882 the court made an allowance of 500*l.* per annum to his nephew, the tenant in tail in remainder, who was then unmarried and in possession of an income of 220*l.* per annum, and, as protector of the settlement, consented to the entail being barred to secure the allowance. The remainderman having married and had a son who would take as tenant in tail in remainder if he survived his father, and having an income of 300*l.* per annum without the allowance of 500*l.*—Held, that the allowance ought to be increased by 200*l.* to be charged in the same way as the 500*l.* *Beridge, In re*, 50 L. T. 653—C. A.

2. MAINTENANCE OF PAUPERS.

Guardians of the Poor—Recovery of Arrears.]

—Under s. 104 of the Lunatic Asylums Act, 1853, the guardians of the poor of a parish to which a pauper lunatic is chargeable are entitled in the event of his becoming entitled to property to recover only six years' arrears in respect of the sums paid by them for his maintenance in an asylum. *Newbegin, In re, Eggleston v. Newbegin*, 36 Ch. D. 477; 56 L. J., Ch. 907; 57 L. T. 390; 36 W. R. 69—Chitty, J.

The deceased had, for over six years prior to her death, been supported as a pauper lunatic at the county lunatic asylum. During the whole of this period she was, in fact, entitled to an annuity of 24*l.* 16*s.* 6*d.*, payable by the Commissioners for the Reduction of the National Debt. This fact only came to the knowledge of the guardians at the time of her death, or shortly thereafter:—Held, that the claim of the guardians was not limited to the period of twelve months prescribed by s. 16 of the statute, but that, in respect of such period, they were entitled absolutely to repayment, under the statute, and, as to a further period not exceeding five years (making six years in all), they were entitled to come in and claim as ordinary creditors, notwithstanding the fact of their having taken no steps to recover payment for such expenditure during the lifetime of the deceased pauper lunatic. *Lambeth Guardians v. Bradshaw*, 57 L. T. 86; 50 J. P. 472—Butt, J.

Where A. was maintained as a pauper lunatic, though the guardians knew that he had some property, which was just sufficient to support his wife, on summons under Ord. XLV. r. 1, of the Rules of Court, 1883, for payment of a sum of 56*l.* 6*s.* in respect of such maintenance:—Held, that, though the guardians had not obtained an order from justices during the lifetime of the deceased, they were entitled to payment. *Webster, In re, Derby Union v. Sharratt*, 27 Ch. D. 710; 54 L. J., Ch. 276; 51 L. T. 319—V.-C. B.

Grant of Letters of Administration to Nominee.]—B., a pauper lunatic chargeable to the guardians of the Kingston Union, died, a spinster and without parents, leaving three brothers and one sister her surviving, all of whom renounced their right to administration. One other brother, who had gone to America in 1871, but who had not been heard of since 1883,

was cited by advertisement, under order of the court. The court, upon the application of the guardians, made a grant of administration to the clerk to the board as their nominee. *Byrne, In Goods of*, 52 J. P. 281—Butt, J.

Right of Guardians to Re-imbursement—“Person entitled to receive any Payment as Member of Benefitor Friendly Society.”—A member of a trade union is not “a member of a benefit or friendly society, and as such entitled to receive any payment,” within the meaning of the 23rd section of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 16), inasmuch as the Trade Unions Act, 1871 (34 & 35 Vict. c. 31) expressly declines to enable any court to entertain proceedings to enforce an agreement to apply the funds of a trade union to provide benefits for members; and therefore the guardians cannot under that section obtain from a trade union the repayment of expenses incurred in the relief of a pauper lunatic member. *Winder v. Kingston-upon-Hull*, 20 Q. B. D. 412; 58 L. T. 583; 52 J. P. 535—D.

III. INQUISITIONS.

Order for Inquiry before Judge of the High Court.]—When an issue is directed by an order in lunacy to try the question of the insanity of an alleged lunatic before a judge of the High Court of Justice under the Lunacy Regulation Act, 1862, s. 4, it is not necessary to commence the proceedings by a writ of summons, the order for the issue being sufficient to give jurisdiction to the judge. *Scott, In re*, 27 Ch. D. 116; 54 L. J., Ch. 194; 51 L. T. 735; 32 W. R. 801—C. A.

Inquiry when Lunacy commenced.]—The Lunacy Regulation Act, 1862, s. 3, takes away the power existing under the Lunacy Regulation Act, 1853, s. 47, of directing an inquiry from what time an alleged lunatic has been of unsound mind. Opinion expressed by James, L. J., in *Sottomaior, In re* (9 L. R., Ch. 677), dissented from. *Danby, In re*, 30 Ch. D. 320; 55 L. J., Ch. 583; 53 L. T. 850; 34 W. R. 125—C. A.

Interim Receiver—Appointment Ex parte—Pending Application for Inquisition.]—In a proper case the court will, pending an application for an inquisition, appoint an interim receiver of the estate of the supposed lunatic, and if the case is urgent will do so upon an ex parte application. *Pountain, In re*, 37 Ch. D. 609; 57 L. J., Ch. 465; 59 L. T. 76—C. A.

Insanity of Trustee—Trial of Question.]—The court will not, on a petition under the Trustee Act, 1850, remove a trustee against his wish. Where the ground for a petition for the appointment of a new trustee is the alleged insanity of a trustee, and the insanity is denied by him, the court will not try the question whether the trustee is of sound mind, nor will it (under s. 52) direct a commission in the nature of a writ de lunatico inquirendo to issue concerning such person, the proper mode of establishing the lunacy in such a case being on a petition in lunacy or in an action in the High Court to

remove the trustee. *Combs, In re*, 51 L. T. 45—C. A.

Costs of Defence—Allowance of.—See *Bullock, In re*, ante, col. 1163.

IV. ACTIONS AND PROCEEDINGS BY AND AGAINST.

Partition—Person of Unsound Mind not so found—Next Friend.—An action for partition was brought, whereby the sale and distribution of the proceeds of certain real estate were asked for. One of the two plaintiffs was alleged to be a person of unsound mind not so found by inquisition, suing by his next friend. The defendant and the plaintiff said to be of unsound mind moved that the name of the person of unsound mind might be struck out:—Held that a person of unsound mind not so found may be plaintiff suing by his next friends in an action for the partition or sale of real estate. *Porter v. Porter*, 37 Ch. D. 420; 58 L. T. 688; 36 W. R. 580—C. A.

Action for Recovery of Land—Next Friend—Stay of Action as not beneficial to Plaintiff.—An action for the recovery of land may be brought under Ord. XVI. r. 17, by the next friend of a person of unsound mind not so found by inquisition; and a writ issued in such an action by the next friend, in the name of the person of unsound mind is regular. But where the court is of opinion on the facts of the case that such action is not a beneficial one to the lunatic plaintiff, it will be stayed by the court on that ground. *Waterhouse v. Worsnop*, 59 L. T. 140—D.

Service of Originating Summons—Guardian ad litem.—In an administration action commenced by originating summons when the defendant is lunatic not so found by inquisition, and makes default in appearance, notice of motion for the appointment of a guardian ad litem should be served in the same manner as in the case of default of appearance to a writ of summons. *Pepper, In re, Pepper v. Pepper*, 50 L. T. 580; 32 W. R. 765—V.-C. B.

Appointment of New Trustee on Lunacy.—See TRUST AND TRUSTEE.

Non-compliance with Order for Discovery—Incapacity arising after Writ—Next Friend.—Where, after writ issued, the plaintiff became incapable of transacting business, and his brother, on his behalf, made an affidavit of documents, and answered interrogatories, the defendant took out a summons to dismiss the action for non-compliance with orders to make an affidavit of documents, and to answer interrogatories; the plaintiff then took out a summons for leave to amend by adding a next friend:—Held, that the defendant was not entitled, under rule 21 of Ord. XXXI. of the Rules of Court, 1883, to have the action dismissed. The action still subsisted, and the plaintiff must have leave to amend by adding a next friend; the plaintiff to pay the costs of both summonses. *Cardwell (Lord) v. Tomlin-*

son, 54 L. J., Ch. 957; 52 L. T. 746; 33 W. R. 814—V.-C. B.

Bankruptcy Petition—Affidavit.—When the petitioning creditor is a lunatic so found by inquisition, the affidavit verifying the petition may be sworn by the committee of the lunatic. *Brady, In re*, 19 L. R., Ir. 71—Bk.

—Leave to Committee to File.]—See *James, In re*, ante, col. 1160.

Citation—Service on Person of unsound mind.—Form of order for service of citation on a person of unsound mind, not so found by inquisition. *M'Cormick v. Heyden*, 17 L. R., Ir. 338—Prob.

V. CUSTODY OF.

Jurisdiction of Justices—Personal Examination by Justices of alleged Lunatic.—In order to give two justices jurisdiction to make an order under s. 68 of the Lunatic Asylums Act, 1853, for the reception of a person into a lunatic asylum as a lunatic who is not a pauper, and not wandering at large, but who is not under proper care and control, it is not necessary that they should examine such person in the presence of the medical man whom they have called to their assistance, nor that the examination should be made with the knowledge of the alleged lunatic, so that he should have the opportunity of explaining, if he could, what might otherwise be signs of insanity. Though the examination must not be a sham, yet if it be made by the justices bonâ fide for the purpose of satisfying themselves of the sanity or insanity of the person examined it is sufficient, and their order is not without jurisdiction because the examination lasted only four or five minutes and was made at the door of the carriage in which the alleged lunatic was seated with his attendants preparatory to his being taken to the asylum. *Reg v. Whitfield*, 15 Q. B. D. 122; 54 L. J., M. C. 113; 53 L. T. 96—C. A. Reversing 49 J. P. 230—D.

Where the person deemed to be a lunatic is examined by two justices at his place of abode or elsewhere, the 68th section requires that one of such two justices must already have had, as a condition precedent to the vesting of the jurisdiction of the justices, either an information upon oath, or private or personal knowledge of his own as to the insanity of such person. *Id.*—Per Coleridge, C.J.

Order for Reception—Alteration of Order—Order for Discharge.—The plaintiff was taken to and detained in the defendant's asylum as a person of unsound mind under an order signed by the plaintiff's husband, and containing a statement of questions and answers concerning the plaintiff. To the question "Age?" the answer was "Fifty." To the question, "Whether first attack?" the answer was "For the last twenty years has been subject to what is termed hysteria." To the question, "Age (if known) on first attack?" the answer was "Thirty." To the question, "When and where previously under care and treatment?" the answer was, "During this period of twenty years has been constantly

under treatment." A few days after the plaintiff had been received into the asylum the last answer was altered by adding to it the words "For hysteria" by several doctors whose names were given. No copy of the order as so altered was sent to the commissioners, nor did they sanction the alteration. Afterwards the plaintiff's husband wrote a letter to the defendant begging him to discharge the plaintiff "as soon as you may think it advisable." Notwithstanding this letter the defendant detained the plaintiff for a considerable time. The plaintiff having brought an action against the defendant for maliciously and without reasonable or probable cause assauling and imprisoning her, the defendant relied upon 8 & 9 Vict. c. 100, ss. 99, 105:—Held, that the answers were a sufficient compliance with the requirements of 16 & 17 Vict. c. 96, s. 4, and Sched. A. No. 1; that the alteration not being of a material part of the order did not invalidate the order; that the letter written by the plaintiff's husband to the defendant was not an order of discharge within the meaning of 8 & 9 Vict. c. 100, s. 72; and that there was no evidence for the jury in support of the plaintiff's case. *Lowe v. Fox*, 12 App. Cas. 206; 56 L. J., Q. B. 480; 56 L. T. 406; 36 W. R. 25; 51 J. P. 468—H. L. (E.)

VI. ILL-TREATMENT OF.

By Parent—Person "having the Care or Charge" of Lunatic.—The parents of a lunatic, who resides with them under their care, are persons "having the care or charge" of a lunatic within the meaning of 16 & 17 Vict. c. 96, s. 9, and may be convicted under that section for ill-treating such lunatic. *Reg. v. Rundle* (1 Dear. & Pearce, 482) questioned. *Buchanan v. Hardy*, 18 Q. B. D. 486; 56 L. J., M. C. 42; 35 W. R. 453; 51 J. P. 471—D.

MACHINERY.

Bill of Sale.—See BILL OF SALE.

Removing.—See LANDLORD AND TENANT.

MAGISTRATE.

See JUSTICE OF THE PEACE.

MAINTENANCE.

Of Infant.—See INFANT.

Of Lunatic.—See LUNATIC.

In Divorce Proceedings.—See HUSBAND AND WIFE.

Of Actions.—See CHAMPERTY.

Of Paupers.—See POOR LAW.

MALICIOUS INJURY.

See CRIMINAL LAW, II. 20, 23.

MALICIOUS PROCEDURE AND FALSE IMPRISONMENT.

Procuring Bankruptcy—Adjudication not set aside.—A bankrupt whose adjudication in bankruptcy has not been set aside cannot maintain an action for maliciously procuring the bankruptcy, and such an action may be summarily dismissed upon summons as frivolous and vexatious. *Metropolitan Bank v. Pooley*, 10 App. Cas. 210; 54 L. J., Q. B. 449; 53 L. T. 163; 33 W. R. 709; 49 J. P. 756—H. L. (E.).

Presenting Petition to Wind up Company—Reasonable and Probable Cause.—The defendant, who had been a shareholder in the plaintiff company, instructed certain brokers to sell his shares, and signed a transfer. The brokers informed him that they could not sell the shares, but the transfer was not returned to him. Shortly afterwards he presented a petition to wind-up the company on the ground of fraud in its formation, which was duly advertised. Before serving the petition he discovered that the shares had been sold and the transfer registered, and at once gave notice to withdraw the petition, which was accordingly dismissed with costs. In an action by the company for maliciously and without reasonable and probable cause presenting the petition, the judge asked the jury whether the defendant at the time he presented the petition, honestly believed that he was a shareholder; but they were not asked whether the defendant had taken reasonable care to inform himself of the fact:—Held, that the latter question should have been left, and that there must be a new trial. *Quartz Hill Consolidated Gold Mining Co. v. Eyre*, 50 L. T. 274—D.

Application for Search Warrant—Reasonable Cause for Suspicion.—By 48 & 49 Vict. c. 69 (Criminal Law Amendment Act, 1885), s. 10, it is provided that "if it appears to any justice of the peace, on information made before him on oath by any parent, relative, or guardian of any woman or girl, or any other person who, in the opinion of the justice, is bonâ fide acting in the interest of any woman or girl, that there is reasonable cause to suspect that such woman or girl is unlawfully detained for immoral purposes by any person in any place within any jurisdiction of such justice, such justice may issue a

warrant authorising any person named therein to search for . . . such woman or girl":—Held, that under this section the justice has a judicial duty to perform, and that his decision that there is reasonable cause for such suspicion is a protection to a person who *bonâ fide* applies for a search warrant, and is an answer to an action for maliciously causing the warrant to issue. *Hope v. Evered*, 17 Q. B. D. 338; 55 L. J., M. C. 146; 55 L. T. 320; 34 W. R. 742; 16 Cox, C. C. 112—D.

In an action for malicious prosecution, it is no evidence of malice on the part of the defendant that in applying for a search warrant to issue against the plaintiff, the defendant asked that a warrant at the same time might issue against another person for the same offence. *Utting v. Berney*, 52 J. P. 806—D.

Malicious Prosecution—Newspaper Libel Act—Conviction no Bar.—The plaintiff was indicted under s. 4 of the Newspaper Libel Act, though only committed for trial under s. 5; he therefore brought an action for malicious prosecution:—Held, that the conviction was no bar to an action for malicious prosecution under s. 4 of the act. *Boaler v. Holder*, 51 J. P. 277—D.

Against Corporation Aggregate.—Per Lord Bramwell:—An action for malicious prosecution will not lie against a corporation aggregate. *Abrath v. North Eastern Railway*, 11 App. Cas. 247; 55 L. J., Q. B. 457; 55 L. T. 63; 50 J. P. 659—H. L. (E.).

Reasonable and Probable Cause—Burden of Proof.—In an action for malicious prosecution the judge directed the jury that the burden of proof as to the want of reasonable and probable cause for the prosecution, and as to malice, lay on the plaintiff, and that it was for him to show that the defendants had not taken reasonable care to inform themselves as to the true facts of the case, and asked the jury to find whether they had taken such reasonable care, and whether they honestly believed the case which they laid before the committing magistrates. The jury answered both questions in the affirmative, and the judge entered judgment for the defendants:—Held, that there was no misdirection, and that the judgment was rightly entered. *Ib.*

Reasonable and Probable Cause—Evidence of Malice.—A forged cheque had been presented at the defendants' bank, and the plaintiff, because he was supposed to be one C. who was suspected, was arrested by the police on the charge of uttering it, and was then positively identified by the bank cashier as the man to whom the money was paid. In an action for malicious prosecution:—Held, that there was no evidence of the absence of reasonable and probable cause, that though, when the plaintiff set up an alibi and denied that he was C., the defendants found that evidence would be forthcoming which, if true, would establish these facts, it was no evidence of malice on the part of the defendants that they did not withdraw from the prosecution till the plaintiff had been thrice remanded; that it not being the duty of the defendants to bring this evidence, which they doubted, before the magistrates, their not doing so was no evidence of malice. Held further, that the question whether the plaintiff was in fact C., or whether

he was in fact the guilty person, was not a question relevant to the issue; and it was no evidence of malice on the part of the defendants that they put witnesses into the box, who, as the defendants well knew, would assert their belief that the plaintiff was guilty. *Harrison v. National Provincial Bank*, 49 J. P. 390—D.

False Imprisonment—Arrest on Suspicion of Felony—Acquittal of Plaintiff—Misdirection.

—In an action for false imprisonment the defendant pleaded that the money was stolen from him by some person unknown, and that he gave the plaintiff into custody, suspecting him on reasonable and probable grounds of being the thief, but did not plead that the plaintiff had committed the theft. The plaintiff had been tried on charge of stealing the money, and was acquitted. At the trial of the civil action, evidence was given on both sides as to the question whether the offence had been committed by the plaintiff. The learned judge who tried the case being of opinion that there was no evidence of theft by any person other than the plaintiff, and that the plaintiff's acquittal precluded the question of his guilt being tried in the civil action, directed a verdict for the plaintiff notwithstanding the objection of the defendant's counsel, who required the question "whether the defendant's money had been feloniously stolen by any person" to be left to the jury:—Held, a misdirection, and that it was open to the defendant upon the pleadings to show that the plaintiff had stolen the money, and that he was not precluded from doing so by the acquittal of the plaintiff on the criminal charge. *Cahill v. Fitzgibbon*, 16 L. R., Ir. 371—Q. B. D.

Pawnbroker—Detention of Person offering Article to pawn—Reasonable Suspicion.

—By the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 34, in any case where, on an article being offered in pawn to a pawnbroker he reasonably suspects that it has been stolen or otherwise illegally or clandestinely obtained, he may seize and detain the person so offering the article and the article, or either of them, and shall deliver the person and the article, or either of them (as the case may be) as soon as may be into the custody of a constable. The plaintiff offered in pawn to the defendant, a pawnbroker, a gold horseshoe pin, set with seven diamonds, and a ring. The defendant having previously received from the police a notice of articles recently stolen, amongst which was "a gold horseshoe pin, set with seven diamonds," and a ring, asked the plaintiff if he was a dealer. He replied that he was not. The defendant also asked the plaintiff where he obtained the articles. The plaintiff said that he got them from a publican, whose name and address he stated. The defendant gave the plaintiff into custody of a constable. It was afterwards proved that the articles in the possession of the plaintiff had not been stolen, and that his statements were true. In an action by him for false imprisonment the judge left the question whether the defendant had a reasonable suspicion to the jury, who found their verdict for the plaintiff:—Held, that the question arising under the act whether the defendant reasonably suspected that the pin had been stolen or otherwise illegally or clandestinely obtained was for the judge; that, on the facts,

there was no evidence of absence of reasonable suspicion in the mind of the defendant, and therefore judgment should be entered for him. *Howard v. Clarke*, 20 Q. B. D. 558; 58 L. T. 401; 52 J. P. 310—D.

— **Governor of Prison—Protection of Warrant.**—The governor of a prison is protected in obeying a warrant of commitment valid on the face of it, and an action for false imprisonment will not lie against him for the detention of a prisoner in pursuance of the terms of such warrant. The plaintiff having been convicted by a court of summary jurisdiction and sentenced to seven days' imprisonment, a warrant of commitment was issued directing that the plaintiff should be imprisoned in a certain gaol for seven days. The plaintiff was arrested on August 24, and lodged in prison on August 25. The governor of the gaol kept the plaintiff in prison until and during August 31:—Held, that whether or not the plaintiff's sentence ran from August 24 or August 25, the governor was protected by the warrant, and was not liable to an action for false imprisonment in respect of the plaintiff's detention on August 31. *Henderson v. Preston*, 21 Q. B. D. 362; 57 L. J., Q. B. 607; 36 W. R. 834; 52 J. P. 820—C. A. Affirming 59 L. T. 334—D.

— **Liability of Company for Acts of Servants—Scope of Employment.**—Section 52 of the Tramways Act, 1870, which enacts that "it shall be lawful for any officer or servant of the promoters or lessees of any tramway" to detain any person defrauding the company of his fare, must be construed as limited to any officer or servant appointed for that purpose. A tramway company gave to their conductors printed instructions, in which it was ordered that, except in cases of assault, conductors were not to give passengers into custody without the authority of an inspector or timekeeper. The conductor of a car, in which the plaintiff was a passenger, detained the plaintiff, and gave her into custody on a charge of passing bad money:—Held, in an action for false imprisonment against the company, that the defendants were not liable. *Charleston v. London Tramways Company*, 36 W. R. 367—D. Affirmed 38 S. J. 557—C. A.

A passenger on a tramway tendered a half sovereign to conductor of the car in payment of the fare. The conductor, supposing the coin to be counterfeit, gave the passenger in charge to the police. Ss. 51 and 52 of the Tramways Act, 1870, empower officers or servants of the promoters or lessees of any tramway, to seize and detain any person seeking to avoid payment of his fare:—Held, that the tramway company were liable in an action against them by the passenger for false imprisonment. *Furlong v. South London Tramways Company*, 48 J. P. 329; 1 C. & E. 316—Stephen, J.

MALTA.

See COLONY.

MANDAMUS.

1. *In Particular Cases.*
2. *To Justices of the Peace.*
3. *Practice.*

1. IN PARTICULAR CASES.

To Central Criminal Court.—Mandamus does not lie to the judges and justices of the Central Criminal Court, which is a superior court. *Reg. v. Central Criminal Court JJ.*, 11 Q. B. D. 479; 52 L. J., M. C. 121; 15 Cox, C. C. 324—D.

Commissioners of Inland Revenue.—Sect. 23 of 5 & 6 Vict. c. 79, provides for the return by the Commissioners of Stamps and Taxes of probate duty on proof by oath and proper vouchers to their satisfaction of the payment of debts of the deceased, whereby the amount of probate duty payable on the estate is reduced below the amount which has been paid. By a subsequent act the Commissioners of Inland Revenue are substituted for the Commissioners of Stamps and Taxes. On an application by an administrator for a mandamus to the commissioners to pay to the applicant the amount of duty overpaid by him, on the ground that he had supplied evidence of overpayment and had no other legal remedy:—Held, that the mandamus ought not to issue, for the statute created no duty between the commissioners and the applicant, whose remedy, if the decision of the commissioners could be reviewed, was by petition of right. *Re v. Commissioners of the Treasury* (4 A. & E. 286) disapproved of. *Nathan, In re, or Reg. v. Inland Revenue Commissioners*, 12 Q. B. D. 461; 53 L. J., Q. B. 229; 51 L. T. 46; 32 W. R. 543; 48 J. P. 452—C. A.

Income Tax Commissioners.—Mandamus lies to compel the Commissioners for special purposes of Income Tax to issue orders for repayment of amounts certified by them to be overpaid. *Reg. v. Income Tax Commissioners*, 21 Q. B. D. 313; 57 L. J., Q. B. 513; 59 L. T. 455; 36 W. R. 776—C. A.

Registrar of Joint-Stock Companies.—A writ of mandamus will lie against the Registrar of Joint-Stock Companies, though an official of the Board of Trade, which is a Committee of the Privy Council, if he refuse to perform a mere ministerial act which he is under a statutory obligation to perform. *Reg. v. Registrar of Joint-Stock Companies*, 21 Q. B. D. 131; 57 L. J., Q. B. 433; 59 L. T. 67; 36 W. R. 695; 52 J. P. 710—Per Wills, J.

To Company to Register Shareholder.—A prerogative writ of mandamus will not lie to compel a company to register as a holder of shares therein, a person to whom they have issued certificates in respect of such shares where the company have issued prior certificates in respect of such shares to someone else, without clear proof that the person to whom the last certificates were issued had a better title than the person to whom the earlier ones were issued, even though the person holding the

earlier certificates has not been entered in the company's register as the holder of such shares. *Reg. v. Charnwood Forest Railway*, 1 C. & E. 419—Denman, J. Affirmed in C. A.

2. TO JUSTICES OF THE PEACE.

Refusal to hear Case—Rule to show Cause.]—By the 5th section of 11 & 12 Vict. c. 44, it is enacted that, "whereas it would conduce to the advancement of justice, and render more effective and certain the performance of the duties of justices, and give them protection in the performance of the same, if some simple means, not attended with much expense, were devised by which the legality of any act to be done by such justices might be considered and adjudged by a court of competent jurisdiction, and such justices enabled and directed to perform it without risk of any action or other proceeding being brought or had against them; therefore in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done." An information having been laid against P. under the 51st section of the Highway Act, 1864 (27 & 28 Vict. c. 101), for encroaching on a highway, the justices decided on evidence given that a claim of right set up by P. to the land alleged to have been encroached upon by him was bona fide, and thereupon refused to hear the case on the ground of want of jurisdiction. The complainant having applied under the 5th section of 11 & 12 Vict. c. 44, for a rule for the justices to show cause why they should not hear and determine the case:—Held, that the application was properly made, the statute not being limited to cases in which the justices need protection in the performance of their duties. *Reg. v. Phillimore*, or *Pilling*, 14 Q. B. D. 474, n.; 51 L. T. 205; 32 W. R. 593; 48 J. P. 774—D.

Rule or Mandamus.]—A rule under s. 5 of Jervis's Act, and a rule for a mandamus, calling upon justices to show cause why they should not proceed to hear and determine the matter of an application for a summons are concurrent remedies. A rule under the 5th section of Jervis's Act is not confined to cases where the justices need protection in doing any act relating to their duties. *Reg. v. Byron*, 14 Q. B. D. 474; 54 L. J., M. C. 77; 51 L. T. 429; 49 J. P. 68—D.

To State Case—Question of Fact.]—In proceedings taken by the Fulham Board of Works for the paving of a lane as a "new street," within the meaning of the Metropolis Management Acts, the magistrate held that the lane was not a "street" within the meaning of the acts, and refused to state a case under 20 & 21 Vict. c. 43, as he considered the question one of fact:—Held (discharging a rule for a mandamus to compel the magistrate to state a case), that the question whether the lane was a "street" or not was a question of fact and not of law, and that the

magistrate could not be compelled to state a case. *Reg. v. Sheil*, 50 L. T. 590; 49 J. P. 68—D.

Refusal to issue Summons.]—Where a magistrate has refused a summons on the ground that the information does not disclose an indictable offence, the High Court of Justice has no jurisdiction to review his decision, either as to law or as to fact, and therefore in such a case a rule, under 11 & 12 Vict. c. 44, s. 5, calling upon the magistrate to show cause why he should not hear and determine the application for a summons, will not be granted. *Lewis, Ex parte*, 21 Q. B. D. 192; 57 L. J., M. C. 108; 59 L. T. 338; 37 W. R. 13; 52 J. P. 773—D.

Where justices entertain an application for a summons for a criminal offence, and have considered the materials on which the application is based, and refused to hear more, or to grant the summons, the High Court will not interfere by mandamus to order them to hear it again. *MacMahon, Ex parte*, 48 J. P. 70—D.

Discretion—Vexatious Indictments Act.]—A mandamus will not be granted to interfere with the discretion of a magistrate who has refused to issue a summons for perjury on an information setting forth facts upon which no jury could convict. The provisions of s. 2 of the Vexatious Indictments Act (22 & 23 Vict. c. 17, s. 2), requiring a magistrate to bind over the prosecutor to prosecute, only apply where a charge or complaint has been made, and the person charged has been before the magistrate. *Reid, Ex parte*, 49 J. P. 600—D.

Refusal to take Recognizance under Vexatious Indictments Act.]—If a justice hear an application under the Vexatious Indictments Act, and dismiss it for want of evidence, this is equivalent to a refusal to commit the defendant, and a mandamus will be directed. *Reg. v. London (Mayor)*, 54 L. T. 646; 50 J. P. 711; 16 Cox, C. C. 77—D.

After Adjudication—Rejection of Admissible Evidence.]—The court will not direct a mandamus to issue to compel justices to hear and determine a case upon which after hearing evidence they have adjudicated, though at the hearing they had rejected certain evidence which was properly admissible. *Reg. v. Yorkshire JJ., Gill, Ex parte*, 53 L. T. 728; 34 W. R. 108—D.

Refusal to issue Warrants for Recovery of Rates.]—Where an application for a distress warrant for non-payment of rates is refused by the magistrate on the ground that an appeal is pending from the assessment:—Held, that the application for a mandamus was properly made under 11 & 12 Vict. c. 44, s. 5, the issue of the warrant being a merely ministerial and not a judicial act. *Reg. v. Marsham*, 50 L. T. 142; 32 W. R. 157; 48 J. P. 308—C. A. See also HEALTH, IV.—POOR LAW (RATES).

3. PRACTICE.

Application in Person.]—A rule under s. 5 of Jervis's Act may be moved by an applicant in person. *Reg. v. Byron*, supra.

A prerogative writ of mandamus can only be

moved by counsel. *Reg. v. Eardley*, 49 J. P. 551—D.

Quære, whether a rule in the nature of a mandamus, under 11 & 12 Vict. c. 44, s. 5, can be moved for in person. *Id.*

Return of Unconditional Compliance.]—The practice which allowed a plea to a return of unconditional compliance to a writ of mandamus is in no way affected by the provisions contained in Ord. LIII. r. 9 of the Rules of the Supreme Court, 1883. *Reg. v. Staffordshire JJ.*, or *Pirehill North JJ.*, 14 Q. B. D. 13; 54 L. J., M. C. 17; 51 L. T. 534; 33 W. R. 205; 49 J. P. 36—C. A.

Return of Obedience.]—Upon a mandamus to justices to hear and determine an application for a certificate to sell wine to be consumed on the premises, they made a return of unconditional compliance with the writ. Plea, that the justices were only entitled to refuse the application upon one or more of the four grounds specified in s. 8 of the Wine and Beerhouse Act, 1869, but that they refused the application on other grounds contrary to the statute:—Held, that the plea was good, as it must be taken to mean that in refusing the application the justices had assumed to exercise a jurisdiction which they did not possess, and that they had therefore not substantially heard and determined the matter submitted to them. *Reg. v. King*, 20 Q. B. D. 430; 57 L. J., M. C. 20; 58 L. T. 607; 36 W. R. 600; 52 J. P. 164—C. A.

Alternative Remedy—Remedy equally Convenient and Effectual.]—The remedy of a writ of mandamus will not be granted where there is another remedy, equally convenient and effectual, open to the applicant at the time when it becomes necessary to resort to one or other of such remedies. *Reg. v. Registrar of Joint Stock Companies*, 21 Q. B. D. 131; 57 L. J., Q. B. 433; 59 L. T. 67; 36 W. R. 695; 52 J. P. 710—D.

Fees for Entering Rule.]—Schedule 52 of the Order as to Supreme Court Fees, 1884, which provides for the payment of a fee of 2*l.* on entering or setting down “a cause or matter for trial or hearing in any court in London or Middlesex or at any assizes,” is not confined to cases where the matter for hearing arises in an action. Such fee is therefore payable to the crown office on entering a rule nisi against a police magistrate ordering him to hear an application for a summons. *Hasker, Ex parte*, 14 Q. B. D. 82; 54 L. J., M. C. 94—D.

Rule Absolute—Costs—Not to be drawn up without Leave.]—Licensing justices agreed to grant a provisional licence for a railway refreshment room, according to plans shown, though they directed a change of site, which the applicant agreed to. There never was any further assent of justices to the alteration. At the application for the final order the eight justices were equally divided. No adjournment was granted or asked for. A rule nisi for a mandamus being granted, the justices thereafter met again and agreed by a majority to make the final order:—Held, that the rule for a mandamus might be made absolute, but without costs, and

was not to be drawn up till further application. *Reg. v. Cox*, 48 J. P. 441—D.

Return to Mandamus—Evidence of Pretended Rehearing.]—Licensing justices were ordered by mandamus to hear an application to renew a beer-house licence and made a return that they duly heard and determined it. The prosecutor pleaded to the return by traversing the return, and after issue, a jury found that it was a mere pretended rehearing, and gave a verdict for the prosecutor. The justices had decided the case on the question whether the applicant was the real resident occupier, and the jury acted chiefly on evidence that one of the justices was overheard to say he would hear but would decide against the applicant:—Held, that there was no evidence to justify the finding of the jury that the justices did not hear and decide the case, and verdict set aside accordingly, and judgment entered for the justices. *Reg. v. Pirehill JJ.*, 49 J. P. 453—D.

MANOR.

See COMMONS.

MANSLAUGHTER.

See CRIMINAL LAW.

MARINE INSURANCE.

See INSURANCE.

MARINER.

See SHIPPING.

MARKET.

Right of Crown to grant.]—The Crown has a right to grant a market franchise to one person over the land of another, though it cannot be exercised against the will of the person to whom the land belongs. *Attorney-General v. Horner*, 14 Q. B. D. 245; 54 L. J., Q. B. 227; 33 W. R. 93; 49 J. P. 326—C. A. Affirmed infra.

There is no public right of holding fairs or markets. The right to set up a market or fair is a prerogative right, which can only be granted by the Crown after a preliminary inquiry under a writ of ad quod damnum. *Downshire (Marquis) v. O'Brien*, 19 L. R., Ir. 380—V. C.

Limits of—"In or Near."—A grant of a right to hold a market "in or near" a certain place is not a grant by metes and bounds. *Attorney-General v. Horner*, in C. A., supra—Per Lord Esher, M.R.

Such a market may extend as far as reasonable convenience from time to time requires, if the market overflows honestly. *Id.*

Quære, how far a grant "in or near" a place can lawfully extend. *Id.* in H. L. infra.

— Dedication of Street subject to Market Rights.—By letters patent in 34 Charles 2, the king granted market rights "in sive juxta" a certain place called "Spittle Square" to one who was lessee of the square, and had acquired the greater part of the reversionary interest in it. The grantee or his successors in title laid out the square as a market-place with four internal streets. The land immediately surrounding the square was afterwards laid out in four external streets, but it did not appear to whom the property in this surrounding land at any time belonged. There was evidence of a usage from the time of living memory to grant licences and take tolls for the sale of marketable articles over parts of the external streets as well as over the market-place and the internal streets.—Held, that under the grant "in sive juxta" the market rights extended into the four external streets as well as over the market-place and the four internal streets; and that the inference from the documents and evidence was that the streets were dedicated to the public subject to the exercise of the market rights. *Attorney-General v. Horner*, 11 App. Cas. 66; 55 L. J., Q. B. 193; 54 L. T. 281; 34 W. R. 641; 50 J. P. 564—H. L. (E.).

—"In or at."—Under a grant of the right of holding markets and fairs "in or at" a town, the limits of the franchise include all the town, and the grantee has the right, in the absence of anything in the grant to the contrary, to appoint the place in which the market is to be held. *Downshire (Marquis) v. O'Brien*, 19 L. R., Ir. 380—V. C.

—"Town"—Application to extended Town.—By s. 42 of the Rochdale Market Act of 1822, it is an offence punishable on summary conviction with a fine not exceeding 5*l.* for any person to sell within "the town of Rochdale," other than within the limits of the market-place there (except in the vendor's private dwelling-house or the shop) any . . . vegetables or other marketable commodities or provisions, &c. The respondent sold a quantity of potatoes in a street or place within the present municipal and parliamentary borough of Rochdale, about a mile from and not within the said market-place. The limits of the town are not defined in the act of 1822, nor has any subsequent act defined the meaning of the expression "town of Rochdale" as used in that act; but since 1822 the town has increased, and is now, and for many years has been, a municipal and parliamentary borough, the boundaries of which have been extended and defined by Royal Charter and various acts of Parliament, and the borough as now existing was constituted by the Rochdale Improvement Act, 1872, by s. 3 of which act the boundaries of the town and borough were extended and made co-extensive

with those of the parliamentary borough as specified in the Boundary Act, 1868, and the provisions of the Act of 1872, and of various other acts specified in s. 8, and "of all other acts at present applying to and in force in and in relation to the existing town and borough," were to "apply to and be in force in and in relation to the borough." The street or place where the sale took place is an aggregation of about a dozen houses, and is within the said extended boundaries; but prior to 1822 it was outside the then municipal borough, and though there are one or more detached houses here and there along the road leading from the market-place to the spot in question, there is no continuous line of buildings on any part of the said road. The justices were of opinion that the prohibition in s. 42 of the act of 1822 was limited to the town as it existed in 1822, and that the spot in question was not within "the town of Rochdale" within the meaning of the Act, and that the extension of the borough for municipal purposes did not give a wider meaning to the expression "town of Rochdale" so as to extend the market rights to the extended borough; and that the Improvement Act, 1872, did not extend the provisions of any local acts to the extended borough, but only applied all municipal and general acts relating to sanitary and local government matters in the old borough to the extended borough; and they accordingly declined to convict the respondent of an offence within that section.—Held, on appeal therefrom, that the justices were wrong in not convicting the respondent, inasmuch as the Act of 1822 must have contemplated a growing town, and the expression "town of Rochdale" in s. 42 was intended to include not merely the then existing but the increasing town of coming years; and that, under the Act of 1872, the provisions of the Act of 1822 apply to and are in force within the extended boundaries so as to make the "town of Rochdale" mentioned in the earlier Act comprise, for all the purposes of that Act, the whole of the municipal borough as constituted by the later Act of 1872. *Kilminster v. Pitton*, 53 L. T. 959—D.

On what Days.—Where by the term of a grant a market is to be held on specified days, no length of user will entitle the grantee to hold markets on other days. *Attorney-General v. Horner*, in C. A., supra.

Disturbance—Alleged Failure on part of Owners to provide adequate Accommodation.—Failure on the part of the lord of a market to afford sufficient accommodation for the public is not a defence to an action for disturbance by the setting up of a rival place of sale, although it is a defence to an action against a dealer who cannot find room in the market. In order to make a defendant liable to an action for disturbance of a market, it is not necessary to prove that he acted with the intention of defrauding the plaintiffs of their tolls by taking advantage of the concourse at their market. *Great Eastern Railway v. Goldsmid*, 9 App. Cas. 927; 54 L. J., Ch. 162; 52 L. T. 270; 33 W. R. 81; 49 J. P. 260—H. L. (E.).

A charter was granted by Edw. 3, with the advice of his Parliament, to the city of London, conferring certain privileges on the citizens, and granting that no market should be held within

seven miles of the city. A charter was granted by Car. 2, in 1662, to the plaintiff's predecessors in title, giving them the right to hold a market "in or next to S. Square," which was within seven miles of the city. User of the market was proved from 1723. The plaintiffs built houses at S. Square, and let many of them for purposes unconnected with the market, and there was evidence that the market was very crowded, that it was difficult for dealers to get stalls there, and that substantially the whole market area was let by the year, month, or week, leaving no space for the general public. The defendants, who were a railway company, established a depot or row of shops at their terminus, which was within 300 yards of S. Square, and let them to dealers for the purpose of selling vegetables brought up by their railway; the company also circulated their tenants' advertisements inviting consignments of produce; no persons were allowed to sell except the tenants of the shops. The plaintiffs brought an action to restrain the defendants from interfering with their market rights:—Held, that although the charter of Edw. 3 had the force of an Act of Parliament, the corporation of London might waive their rights as to establishment of markets, and that the court would presume that they consented to the charter of 1662. Held, also, that the depot of the defendants, although not technically a market, was a disturbance of the plaintiffs' rights, and made them liable to an injunction; and that even if the plaintiffs' mode of conducting their market would preclude them from maintaining an action against a tenant of the defendants, yet it did not preclude them from bringing an action against the defendants to restrain them from establishing a rival place of sale in the neighbourhood. *Islington Market Case* (12 M. & W. 20, n., 3 Cl. & F. 513), and *Prince v. Lewis* (5 B. & C. 363), considered. *Ib.*

— **Illegal Tolls.**—Although the taking of tolls on an animal not sold may be illegal, unless such tolls are demanded as stallage, still the levying of them cannot form a justification for setting up a rival market. *Midleton (Lord) v. Power*, 19 L. R., Ir. 1—V. C.

— **Prescribed Limits — Different days — Liability of Persons taking part in Disturbing.**—Where there is a franchise right of holding fairs and markets, and of taking tolls in respect thereof, and an unauthorised fair or market is held within a reasonable distance of the prescribed place, and within the ambit of the grant, and such fair or market is held on the same day as is prescribed by the grant for holding a fair or market, there is an actual intentment of law that there has been a disturbance. If, however, the injury arises from acts done outside the prescribed limit, or done on different days from those specified, a question of fact arises, and proof must be adduced of actual disturbance by the persons sought to be made liable, and of injury to the rights of the patentee. Every person who takes part in an illegal combination to disturb a franchise right of holding fairs, or who knowingly takes advantage of it, is guilty of disturbance. *Downshire (Marquis) v. O'Brien*, 19 L. R., Ir. 380—V. C.

— **Injunction — Damages — Costs.**—In an action for disturbance of the plaintiff's fairs and

markets, it appeared that a combination had been formed to set up rival fairs within the ambit of the plaintiff's grant, and in such a way as to disturb their franchise rights; that the defendants were not parties to such combination, but that they sold at one of the rival fairs with a knowledge that they were infringing the plaintiff's rights. The defendants, by their pleading and evidence in the action, denied the plaintiff's rights as claimed, and attempted to justify the holding of such rival fairs and the conduct of the originators of the combination:—Held, that they had contributed to the disturbance; that they should be restrained by injunction; that they should not be held liable in damages; but that, having regard to the case made by them, they should pay the costs of the action. Semble, if the defendants had by their pleading admitted the plaintiff's rights, and shown that they were mere casual vendors, and that the part they took in the rival fairs was due to inadvertence, they would not have been condemned in costs. *Ib.*

Discontinuance—What is.—Disuser of the fair ground, in consequence of the illegal holding of rival fairs, does not constitute a discontinuance amounting to an abandonment of the patentee's right. *Ib.*

Forfeiture of Grant—Waiver.—The principle laid down in the *Islington Market Case* (3 Cl. & Fin. 513), that whilst the grant of a fair or market remains unrepealed, the default of finding proper accommodation for the public cannot operate in point of law as a ground of granting a new charter to another to hold a market within the common law distance, applies equally to other breaches of duty involving forfeiture of grant, such as holding a fair or market on days other than those appointed by the charter. The Crown only can take advantage of such a forfeiture. A forfeiture may be waived by the Crown as well as by private individuals, and such waiver may be proved by similar evidence, e.g., by the continued acceptance of the Crown rent. *Midleton (Lord) v. Power*, 19 L. R., Ir. 1—V. C.

Waiver of Statutory Rights.—A statute, or charter having the force of a statute, may be waived by the party for whose benefit it was enacted, so as to render the acts of persons disregarding it legal. *Great Eastern Railway v. Goldsmid*, supra.

Power to let Covered Portion of Market for other Purposes.—By 37 & 38 Vict. c. lxxxv., s. 8, the corporation of Edinburgh (who were grantees of a market in Edinburgh) "may cover in a suitable and convenient manner the fruit and vegetable market-place, and improve and better adapt the same for the purposes of such market, and for the accommodation of parties using the same, and of the public, &c. Provided always that the ground floor only of such market-place shall be used for such fruit and vegetable market, and that all vacant portions of such market-place, whether on the ground floor or above the same, and all vacant and unlet stands, stalls, or shops in or on such market-place may be let or used by the corporation for such purposes and for such rents or sales as to them shall seem proper:—Held, that the cor-

poration were not entitled to exclude members of the public from the covered portion of the market during market hours and devote the building to other purposes. *Edinburgh Magistrates v. Blackie*, 11 App. Cas. 665—H. L. (Sc.).

Change of Site—Adequacy of Accommodation.—Per Lord Watson:—When a grant of market is not confined to any particular locality, the grantee may from time to time change the site in order to suit his own convenience; but it is an implied condition of the exclusive privilege that he shall provide a market-place, and that implied condition is satisfied so long as he gives reasonable accommodation to those members of the public who use the market either as buyers or sellers, and the extent of the accommodation which must be afforded in each case must vary with the circumstances. *Ib.*

The patentees of fairs are justified in removing them to any place within the precinct of their grant; and if the accommodation provided by them is inadequate, or the change so injurious as to amount to an abuse of the franchise, the remedy of those injured is not the setting up of a rival affair. If such a change is productive of public injury, the remedy must be with the Crown, who can proceed by indictment or scire facias to repeal the patent; if productive of private injury, the party injured must resort to his action. *Midleton (Lord) v. Power*, supra.

Tolls.—In what Cases payable.—A greengrocer, within the limits of the T. market, used to order vegetables from B., a farmer, outside the limits, and paid monthly. B. was charged with selling marketable goods without paying toll.—Held, that B. was liable to pay the tolls. *Torquay Market Company v. Burridge*, 48 J. P. 71—D.

By a local act, 15 Vict. c. civ., for the establishment and regulation of markets in the borough of L., it was provided that, after the opening of the market places, every person (with certain specified exceptions) who should sell within the limits of the act, other than in some one of the market places, private legal markets, or in his own dwelling-house, shop, warehouse, yard, or store, anything whatever in respect of which tolls were by the act authorised to be taken, should be subject to a penalty. Milk was not one of the articles specified in the act as subject to tolls; but by a subsequent amending act, 25 Vict. c. 23, the bailiffs and servants of the trustees of the markets were authorised to remove to the markets any articles, and, inter alia, milk, illegally exposed for sale in any street or public thoroughfare within the limits of the former act, and by a further amending act (35 & 36 Vict. c. 96), it was provided that it should be lawful for the trustees, if they should think fit, to demand and receive in respect of certain enumerated articles, and, inter alia, milk, exposed or offered for sale in any of the market places provided by the trustees, certain tolls specified in the schedule to the act. In 1882, the trustees issued a public notice that, for the future, tolls should be paid on all cans, tankards, or other vessels of milk, whether sold from door to door, or otherwise, and whether taken to the market or not. The market trustees contended that they were entitled to toll upon milk within the market limits, and summoned the appellant for so selling milk without payment of toll, and the local bench of magis-

trates imposed upon the appellant a pecuniary fine, or in default, imprisonment:—Held, on a case stated, that, under the acts regulating the markets, the trustees were not entitled to levy toll on milk not sold in one of the market places, but sold, as by the appellant, at the dwellings of customers; and that a person delivering milk to customers at their doors, was not liable to a penalty. *Quilligan v. Limerick Market Trustees*, 14 L. R., Ir. 265—Q. B. D.

Regulation Bye-law — Distinction between Wholesale and Retail Trades.—A bye-law for the regulation of a market, setting apart different places for the carrying on of wholesale and retail trade, is not unreasonable as being in restraint of trade. *Strike v. Collins*, 55 L. T. 182; 34 W. R. 459; 50 J. P. 741—D.

Selling within Limits — Potatoes — “Provisions.”—The Taunton Market Act prohibited the selling within certain limits of the market, corn, grain, fish, meat, poultry, or other provisions, or any bulls, sheep, swine, or other live cattle, which are usually sold in public markets:—Held, that a shopkeeper selling potatoes came within the statute, these being “provisions,” and also “usually sold within markets.” *Shepherd v. Folland*, 49 J. P. 165—D.

Power of District Board to erect Posts — Interference with Market.—A district board of works, under the statutory powers conferred by 57 Geo. 3, c. 29, s. 58, and 18 & 19 Vict. c. 120, s. 108, threatened to erect posts by the side of public footpaths along the public roads leading into the area of Spitalfields Market, in order to preserve the rights of the public and to insure the safety of foot-passengers. It was proved that this would seriously interfere with the access to the market, which had been recently enlarged by throwing into it the site of houses which had been pulled down belonging to the plaintiff:—Held, that such an exercise of the board's powers would be an interference with the “rights and privileges vested in the plaintiff in reference to a market” within the exception contained in 18 & 19 Vict. c. 120, s. 91, and an injunction was granted restraining the proposed action of the board. *Horner v. Whitechapel Board of Works*, 55 L. J., Ch. 289; 53 L. T. 842—C. A.

Sale in Market Overt—Liability of Public Sales-Master—Stolen Goods.—The defendants were public sales-masters, and transacted their business in a legally established cattle market, where a market overt for the sale of cattle and sheep was held once a week. A number of sheep, which had been stolen from the plaintiff, were brought on a market day to the stand of the defendants by the thief, who employed the defendants to sell the sheep for him. The defendants, in ignorance of the theft, placed the sheep in their stand, and sold and delivered them to a purchaser, by whom they were removed:—Held, that the defendants were liable to the plaintiff in an action of trover for the value of the sheep. *Delaney v. Wallis*, 13 L. R., Ir. 31; 15 Cox, C. C. 525—C. A.

Contract induced by Fraud—Conviction of Fraudulent Buyer—Revesting of Property.—The owner of goods, induced by fraud, parted

with them under a voluntary contract of sale which vested the property in the fraudulent purchasers. The goods were then sold in market overt to a purchaser without notice of the fraud. The fraudulent purchasers were afterwards, upon the prosecution of the original owner, convicted of obtaining the goods by false pretences. The judge before whom the prisoners were tried refused to make an order of restitution:—Held, that under 24 & 25 Vict. c. 96, s. 100, the property in the goods re-vested in the original owner upon conviction, and that he was entitled to recover them from the innocent purchaser. *Moyce v. Newington* (4 Q. B. D. 32) overruled. *Bentley v. Vilmont*, 12 App. Cas. 471; 57 L. J., Q. B. 18; 57 L. T. 854; 36 W. R. 481; 52 J. P. 68—H. L. (E.).

MARKET OVERT.

See supra.

MARRIAGE.

See HUSBAND AND WIFE.

MARTIAL LAW.

See ARMY AND NAVY.

MASTER.

Shipping.—*See* SHIPPING.

Taxing.—*See* COSTS—SOLICITOR.

Of High Court.—*See* APPEAL—PRACTICE.

MASTER AND SERVANT.

I. RIGHTS AND LIABILITIES OF MASTER AND SERVANT.

1. *The Contract of Hiring.*

a. Wages and Remuneration, 1186.

b. Termination of—Wrongful dismissal, 1187.

c. Other Rights under the Contract, 1189.

2. *Injuries to Servant in course of Employment.*

a. At Common Law, 1189.

b. Employers' Liability Act.

i. Workman—Who is, 1190.

ii. Notice of Injury, 1191.

iii. Acts of what Servants, 1192.

iv. In respect of what Plant, Works, &c., 1193.

v. Effect of Contributory Negligence, 1196.

vi. Risk voluntarily incurred, 1197.

vii. Practice, 1198.

II. LIABILITY OF MASTER TO THIRD PERSONS, 1198.

1. RIGHTS AND LIABILITIES OF MASTER AND SERVANT.

1. THE CONTRACT OF HIRING.

a. Wages and Remuneration.

Payment—Deductions—Truck Act.—By an arrangement between employers and their workmen, certain deductions were made from the workmen's wages (which were paid monthly) for a doctor's fund, which was established for the purpose of paying doctors, who attended the workmen and their families, and supplied them with medicines in case of illness. The sums thus deducted were handed over by the employers to the doctor from time to time. There was no contract in writing between the employers and workmen, authorising the employers to make the deductions, nor was there any evidence that the doctor had accepted the liability of the employers. The employers filed a liquidation petition, and at this time there stood to the credit of the "doctor's fund," in their books, a sum of 149*l.*, which had arisen from deductions thus made from the workmen's wages, and had not yet been paid over to the doctor:—Held, that there had been no valid payment within the Truck Act, of the 149*l.* to the workmen, and that they were entitled to be paid the 149*l.* in full out of the employers' estate as wages. *Cooper, Ex parte, Morris, In re*, 26 Ch. D. 693; 51 L. T. 374—C. A.

Quære, whether, if the 149*l.* had been, in pursuance of the agreement, actually paid over by the employers to the doctor, in discharge of a debt for which the workmen were liable, or if the doctor had accepted the liability of the employers, the Truck Act would have applied notwithstanding the absence of a contract in writing, signed by the workmen. *Id.*

Forfeiture—Servant Absenting himself.—T. was employed by A., a cotton-spinner, at a weekly wage of 15*s.*, ending on Wednesdays; the rules stated that a workman absenting himself would forfeit his wages. On Tuesday morning at 6 a.m., T. was late, and being refused entrance, said he would leave for the day, and went away. After breakfast he came again and went in unobserved, till, being noticed by the overlooker, he was told his work had been distributed, and T. went away again. On suing for the week's wages:—Held, that the county court judge was wrong in finding that T. had not

absented himself on those facts, and therefore T. could not recover his wages. *Tomlinson v. Ashworth*, 50 J. P. 164—D.

— **Absence through Illness.**—P. was by deed apprenticed in 1881 for seven years to W., and in the fifth year W. covenanted to pay 14s. a week. In that year P. had a tumour in his hand and was in hospital; he claimed wages while so absent and incapable of work under s. 5 of the Employers and Workmen Act, 1875:—Held, that W. was liable to pay the wages during the illness of P. *Patten v. Wood*, 51 J. P. 549—D.

— **Yearly Salary payable Quarterly—Dismissal—Part accrued Due.**—Previous to the registration of a company, A., as trustee for the company, entered into an agreement with B., by which, amongst other things, it was agreed that he should be managing director of the company when formed, with a salary at the rate of 800l. per annum. The articles of association provided that B. should be the first managing director of the company, and that his salary should be 800l. per annum, payable quarterly. B. afterwards entered into an agreement with the company, by which, after reciting the former agreement with A., the company adopted the former agreement, and it was agreed that it should "be binding on the company in the same manner, and be read and construed in all respects as if the company had been in existence at the date thereof, and had by these presents ratified the same":—Held, that the salary being under the agreement payable annually, B. was not entitled to the salary for the quarter which had accrued due previous to his dismissal for misconduct, as the article was an agreement only between the shareholders and the company, and regulated the way in which the payment should be made, and the way in which the accounts should be kept. *Boston Deep Sea Fishing Company v. Ansell*, 39 Ch. D. 339; 59 L. T. 345—C. A.

In Mines.—See MINES AND MINERALS.

b. Termination of—Wrongful Dismissal.

Length of Notice—Telegraph Clerk.—A stationery clerk in a telegraph office, at a salary of 135l. per annum, is entitled to a month's notice. *Vibert v. Eastern Telegraph Company*, 1 C. & E. 17—cor. Stephen, J.

Dismissal, Grounds for—Receipt of Commission.—Charges of misconduct having been made against a managing director of a company, he was dismissed, and an action was commenced against him by the company, alleging the misconduct, and claiming damages and certain accounts. The defendant counter-claimed for damages for wrongful dismissal. At the trial of the action the company failed to prove the original charges, but proved that he had received a commission from a firm of shipbuilders on the price of some ships built for the company. This was only discovered after the commencement of the action. It appeared that he had superintended the building of the ships, and given advice concerning their construction:—Held, that the receipt of the commission entitled the

company to dismiss him, and they were therefore not liable for damages, though they had dismissed him on other grounds which they had failed to prove, and the commission had been received some time before his dismissal, and was an isolated case of misconduct. *Boston Deep Sea Fishing Company v. Ansell*, 39 Ch. D. 339; 59 L. T. 345—C. A.

— **Misconduct—Gambling in "Differences" upon Stock Exchange.**—The plaintiff had been employed as clerk for many years by the defendants, who were merchants, and ultimately they agreed to retain him in their employment for a term of ten years. Before the expiration of that period the defendants discovered that the plaintiff had for many years previously been engaged in speculating in "differences" upon the Stock Exchange to the extent of many hundreds of thousands of pounds, and they thereupon dismissed him from their service:—Held, that the dismissal of the plaintiff was justifiable. *Pearce v. Foster*, 17 Q. B. D. 536; 55 L. J., Q. B. 306; 54 L. T. 664; 34 W. R. 602; 51 J. P. 213—C. A.

Discharge when in Employ of Company—Appointment of Manager and Receiver.—The plaintiff was in the service of the defendant company under a contract which provided that his employment might be determined by six months' notice. A manager and receiver was appointed by order of the Chancery Division at the instance of holders of debentures of the company. The plaintiff, by the instructions of the manager, continued for more than six months to discharge his former duties at the same salary. The business was then sold to a new company, and the plaintiff was dismissed without notice. In an action for wrongful dismissal:—Held, that the appointment of a manager and receiver operated to discharge the servants of the company and that the plaintiff could not recover. *Reid v. Explosives Company*, 19 Q. B. D. 264; 56 L. J., Q. B. 388; 57 L. T. 439; 35 W. R. 509—C. A.

— **Resolution to wind up.**—The passing of a resolution to wind up a company operates as notice of dismissal to the company's servants. Circumstances may exist which would amount to a waiver of such implied notice, or which would be evidence of a new agreement between the liquidator and the servant; but clear and satisfactory evidence is necessary to establish such a case. *Schumann, Ex parte, Forster & Co., In re*, 19 L. R., Ir. 240—V. C.

— **Order for Winding up.**—The rule that an order for winding up a company operates as a notice of discharge to the servants when the business of the company is not continued after the date of the order, applies though the liquidator without continuing the business employs the servants in analogous duties with a view to reconstruction. *Chayman's Case* (1 L. R., Eq. 346) followed; *Harding, Ex parte* (3 L. R., Eq. 341), distinguished. *Oriental Bank Corporation, In re, MacDowall's Case*, 32 Ch. D. 366; 55 L. J., Ch. 620; 54 L. T. 667; 34 W. R. 529—Chitty, J.

Damages for Wrongful Dismissal.—Only nominal damages are recoverable for breach by the employer of a contract of hiring, if the person hired could have at once obtained other employ-

ment of a precisely similar kind, which a reasonable man would have accepted. *Macdonnell v. Marsden*, 1 C. & E. 281—Mathew, J.

c. Other rights under the Contract.

Servant must Account to Master for Bonuses received.—The managing director was before the formation of the plaintiff company a shareholder in two other companies, and in consequence of employing them to supply ice to the plaintiff company's ships, and to take away the fish from them, he received from those companies certain bonuses paid out of surplus profits after payment of dividends at a fixed rate. Under an agreement with the company he was allowed to engage in any other business or venture not prejudicial to the interests of the company, and the articles provided that the directors might enter into contracts, and do business with the company:—Held, that he must account to the plaintiff company for the bonuses, though the plaintiff company could not have obtained them from the other companies. *Boston Deep Sea Fishing Company v. Ansell*, supra.

Written Character defaced by Master.—In an action for maliciously defacing the written character of a servant by writing upon it a disparaging statement, the plaintiff may recover substantial damages. *Wennhak v. Morgan*, 20 Q. B. D. 635; 57 L. J., Q. B. 241; 59 L. T. 28; 36 W. R. 697; 52 J. P. 470—D.

2. INJURIES TO SERVANT IN COURSE OF EMPLOYMENT.

a. At Common Law.

Unsafe Premises—Knowledge of Master and Servant.—In an action of negligence brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew, but that the servant was ignorant of the danger. *Griffiths v. London and St. Katharine Dock Company*, 13 Q. B. D. 259; 53 L. J., Q. B. 504; 51 L. T. 533; 33 W. R. 35; 49 J. P. 100—C. A.

Fellow Servant—Hiring Another's Servant.

—A stevedore contracted to load a ship and hired an engine from P., who sent his servant N. to work it. M., a servant of the stevedore, gave the signals to N., and by N.'s negligence a sack fell and killed M. The wages of M. were paid by P.:—Held, that N. was the servant of P., and that P. was liable to M.'s representatives for compensation. *Moore v. Palmer*, 51 J. P. 196—C. A.

The plaintiff, employed as foreman of a stevedore to unload a ship with the assistance of the crew, was injured by the negligence of one of the crew in the quasi-employment of the stevedore:—Held, that the shipowners were not liable. *Manning v. Adams*, 32 W. R. 430—D.

Steamer—Condition of Gear—Evidence of Negligence.—H., while in the employment of the defendant company as a second mate on board one of their steamers, sustained injuries, resulting

in his death, from the fall of a derrick while the vessel was discharging cargo. At the time the accident occurred the derrick was, in accordance with the usual custom on the vessel, and for the discharge of the cargo, being hoisted from the deck to its proper place in the mast by a rope which worked through an iron bolt fixed in a trestle-tree. The greater part of the bolt was concealed and could not be examined without being drawn out of the trestle-tree. The bolt broke while the derrick was being hoisted, and it fell upon H. In an action by H.'s widow, under Lord Campbell's Act, it was proved that the bolt, to the extent of two-thirds of its thickness, was in a defective state and incapable of bearing a strain, and it was the common case of both parties that there was no skilled person on board whose duty it was to examine the screws and bolts. It was not shown that the defendants or their officers were in fact aware of the defective condition of the bolt, and no evidence was given as to the usual practice of inspection of vessels of the class, or for what time a bolt of the kind in question would in the ordinary course remain in repair and adequate to its work:—Held, that there was no evidence of negligence on the part of the defendant company, and that the judge at the trial was right in directing a verdict for them. *Hanrahan v. Ardnamult Steamship Company*, 22 L. R., Ir. 55—Ex. D.

b. Employers' Liability Act.

i. Workman—Who is.

"Person engaged in Manual Labour"—Driver of Tramcar.—The driver of a tramcar is not "a person to whom the Employers and Workmen Act, 1875, applies," and therefore is not entitled to the benefit of the Employers' Liability Act, 1880. *Cook v. North Metropolitan Tramways Company*, 18 Q. B. D. 683; 56 L. J., Q. B. 309; 56 L. T. 448; 57 L. T. 476; 35 W. R. 577; 51 J. P. 630—D.

—Omnibus Conductor.—An omnibus conductor is not a "workman" or person "engaged in manual labour" within the meaning of s. 10 of the Employers and Workmen Act, 1875, and therefore is not entitled to the benefit of the Employers' Liability Act, 1880. *Morgan v. London General Omnibus Company*, 13 Q. B. D. 832; 53 L. J., Q. B. 352; 51 L. T. 213; 32 W. R. 759; 48 J. P. 503—C. A.

—Driver of Cart.—The driver of a cart in the employment of a wharfinger who, for the purposes of his business, is the owner of carts and horses, is a "workman" within the act. *Yarmouth v. France*, 19 Q. B. D. 647; 57 L. J., Q. B. 7; 36 W. R. 281—D.

"Workman."—By an agreement in writing between H. & Co., manufacturers, and J., reciting that J. having a knowledge of mechanics, and H. & Co. requiring the services of a person having such knowledge "to assist the firm as a practical working mechanic in developing ideas they (the firm) might wish to carry out, and to himself originate and carry out ideas and inventions suitable to the business of such firm, if such inventions were approved by them," it was mutually agreed that J. should be employed by

the firm "for the purpose above specified"—Held, that J. was not "a mechanic or workman" within the Employers and Workmen Act, 1875. *Jackson v. Hill*, 13 Q. B. D. 618; 49 J. P. 118—D.

J. agreed with H., a frilling manufacturer, to serve for seven years at 5*l.* per week during the ordinary hours. He was described in the agreement as having a knowledge of mechanics, and to assist as a practical working mechanic in developing ideas. He in fact drew designs and had workmen to assist in carrying them out:—Held, that J. was a workman within the meaning of the Employers and Workmen Act, 1875. *Jackson v. Hill*, 48 J. P. 7—D.

Workman employed by "butty" Men—Liability of Owners of Mine.]—The defendants were owners of a coal mine worked under the "butty" system. In mines so worked "butty" men contract with the owners of the mine to bring coal up at so much per ton, and for this purpose employ men under them. The deceased had been so employed, and had been killed by an explosion while working in the mine:—Held, that the deceased had been a workman in the employ of the owners of the mine within the meaning of the Employers' Liability Act, 1880, and that his wife would be entitled to damages if the case came within the terms of sub-s. 3 of s. 1 of that act. *Brown v. Butterley Coal Company*, 53 L. T. 964; 50 J. P. 230—D.

ii. Notice of Injury.

Omission of Date of Injury.]—Sect. 4 of the Employers' Liability Act, 1880, provides that an action to recover compensation under the act shall not be maintainable unless notice of injury is given as provided by the act. By s. 7, the notice shall state (inter alia) the date of the injury; and "a notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein" unless the judge who tries the action shall be of opinion that the defendant is prejudiced in his defence by such defect or inaccuracy, and that it was for the purpose of misleading. A notice of injury given under s. 4 omitted to state the date of the injury, and the judge at the trial found that the defendant was not prejudiced in his defence by the omission, and that it was not for the purpose of misleading:—Held, that the omission of the date was a "defect or inaccuracy" in the notice within the meaning of s. 7, and therefore did not render the notice invalid. *Carter v. Drysdale*, 12 Q. B. D. 91; 53 L. J., Q. B. 557; 32 W. R. 171—D.

Omission of Address and Date.]—It is not a fatal objection to an action brought by a servant under the Employers' Liability Act, 1880, against his employer to omit the address and date in the notice required to be given to the employer under s. 7. *Beckett v. Manchester Corporation*, 52 J. P. 346—D.

Omission to state Address and Cause of Injury—Wrong Date—Notice served by Letter not Registered.]—A notice given to an employer under ss. 4 and 7 of the Employers' Liability Act, 1880, omitted to give the address of the person injured, or to state the cause of the

injury, and the date at which the injury was sustained was wrongly given. The accident occurred on the 9th August. The letter giving notice was served on the defendants by post by an unregistered letter on the 19th September, and to this letter the defendants replied on the 23rd September. The county court judge, before whom the action was tried, found that the defendants had not been prejudiced in their defence by the defects and inaccuracy in the notice, and that such defects and inaccuracy were not for the purpose of misleading. It was proved that the notice was posted on the 19th September:—Held, that the county court judge having found that the defendants were not prejudiced in their defence by the said defects and inaccuracy in the notice, and that they were not for the purpose of misleading, the notice was good within the meaning of ss. 4 and 7 of the Employers' Liability Act, 1880. Held also, that it having been proved that the letter containing the notice was posted on the 19th September, and a reply to it having been received from the defendants, there was sufficient evidence that the notice had been received by the defendants within the time specified in s. 4 of the act, although the letter containing the notice was not registered. *Previti v. Gatti*, 58 L. T. 762; 36 W. R. 670; 52 J. P. 646—D.

iii. Acts of what Servants.

"Person intrusted with Superintendence."]—In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff, with other workmen, was employed by the defendant to stow bales of wool in the hold of a ship. The workmen were divided into gangs, the foreman of the plaintiff's gang being B. B. was himself a labourer, working on deck, and he gave the signal to the men below when the bales were being dropped down the hatchway into the hold. The plaintiff, who was below, was injured by a bale which, according to his statement, was dropped down without sufficient warning being given by B. to enable him to get out of the way:—Held, that the plaintiff was not entitled to recover, as B. was not a person who had superintendence intrusted to him within s. 1, sub-s. 2, as defined by s. 8, nor was there any evidence that the injury resulted from the plaintiff having conformed to any order of B. within s. 1, sub-s. 3, assuming that B. was a person to whose orders the plaintiff was bound to conform. *Kellard v. Rooke*, 21 Q. B. D. 367; 57 L. J., Q. B. 599; 36 W. R. 875; 52 J. P. 820—C. A.

An employer may be liable under s. 1 of the Employers' Liability Act, 1880, where personal injury is caused to a workman, within s. 2, "by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence," although the superintendent, when negligent, is voluntarily assisting in manual labour; the superintendent need not of necessity have actual superintendence over the workman injured. *Ray v. Wallis*, 51 J. P. 519—D.

"Person to whose Orders Plaintiff bound to conform."]—The 1st section of the Employers' Liability Act, 1880, provides that where personal

injury is caused to a workman (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed, the workman, or, in case the injury results in death, his legal personal representatives, shall have the same right of compensation against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work. The plaintiff, a boy employed by the defendants, a railway company, was assisting a carman of the defendants, under whose directions he was, in unloading from a van three large iron window frames. The frames were standing upright in the van, secured at each end to the hoops of the van by a string. The carman untied the string at one end of the frames, and the plaintiff untied the string at the other end. The carman did not expressly order the plaintiff to untie the string, but the plaintiff stated that he did so without orders because he had done so on previous occasions, and that the carman saw him untie the string and made no objection. The carman then removed one of the frames without retying the two remaining frames, leaving them standing unsecured. They directly afterwards fell on the plaintiff, causing him injuries in respect of which he sued the defendants for compensation under the Employers' Liability Act, 1880 :—Held, that there was on the above facts evidence of an injury to the plaintiff by reason of the negligence of a fellow-workman to whose orders he was bound to conform, and did conform, and which resulted from his having so conformed. *Millward v. Midland Railway*, 14 Q. B. D. 68 ; 54 L. J., Q. B. 202 ; 52 L. T. 255 ; 33 W. R. 366 ; 49 J. P. 453—D. And see *Kellard v. Rooke*, supra.

Person having "Charge or Control" of Points.]

—In an action for compensation under the Employers' Liability Act, 1880, the evidence showed that it was the duty of F., a workman employed in the signal department of the defendants' railway, to clean, oil, and adjust the points and wires of the locking apparatus at various places along a portion of the line, and to do slight repairs ; that for these purposes he was, with several other men, subject to the orders of an inspector in the same department, who was responsible for the points and locking gear, which were moved and worked by men in the signal boxes, being kept in proper condition ; and that F. having taken the cover off some points and locking gear, in order to oil them, negligently left it projecting over the metals of the line, whereby injury was caused to a fellow-workman :—Held, that there was no evidence for the jury that F. had "charge or control" of the points within the meaning of s. 1, sub-s. 5 of the Employers' Liability Act, 1880, so as to make the defendants liable for his negligence. *Gibbs v. Great Western Railway*, 12 Q. B. D. 208 ; 53 L. J., Q. B. 543 ; 50 L. T. 7 ; 32 W. R. 329 ; 48 J. P. 230—C.A.

iv. In respect of what Plant, Works, &c.

"Railway," what is.]—The meaning of the term "railway" as used in the 5th sub-section of the 1st section of the Employers' Liability

Act, 1880, is not confined to railways belonging to railway companies such as are subject to the provisions of the Railway Regulation Acts ; but the sub-section applies to a temporary railway laid down by a contractor for the purposes of the construction of works. *Doughty v. Varbank*, 10 Q. B. D. 358 ; 52 L. J., Q. B. 480 ; 48 L. T. 530 ; 48 J. P. 55—D.

"Locomotive Engine"—Steam Crane fixed on a Trolley.]—A steam crane fixed on a trolley, and propelled by steam along a set of rails when it is desired to move it, is not a "locomotive engine" within the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, sub-s. 5. *Murphy v. Wilson*, 52 L. J., Q. B. 524 ; 48 L. T. 788 ; 47 J. P. 565 ; 48 J. P. 24—D.

"Condition of the Way."]—During the building of a house the workmen obtained access to the upper part by ladders placed in a well intended for a staircase. There was another well through the house intended for a lift, down which rubbish had been thrown during the building. Upon the staircase being completed, it was closed to the workmen as a means of access, and the ladders were transferred to the lift-well. No precautions had been taken to prevent workmen from throwing rubbish down the lift-well after the ladders had been so transferred. The plaintiff was ascending one of the ladders when a boy threw a plank down from the third floor which struck the plaintiff and broke his collar-bone :—Held, that this was not a "defect in the condition of the way" within the meaning of sub-s. 1 of s. 1 of the act ; and that the fact of no notice or warning being given to stop the practice of throwing materials down the lift-hole did not have the effect of bringing the case within that sub-section. *Pegram v. Dixon*, 55 L. J., Q. B. 447 ; 51 J. P. 198—D.

"Works"—Wall in course of Construction.]

—In the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1—defining the liability of employers for personal injury caused to their workmen (1) "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer"—the expression "works" must be taken to mean works already completed, and not works in course of construction, which are on completion to be connected with or used in the business of the employer. *Howe v. Finch*, 17 Q. B. D. 187 ; 34 W. R. 593 ; 51 J. P. 276—D.

"Condition of Plant."]—The Employers' Liability Act, 1880, which gives a workman a right of action against his employer for personal injury by reason of any defect in the condition of the plant used in the business of the employer, applies to a case where the plant is unfit for the purpose for which it is used, though no part of it is shown to be unsound. Plaintiff, a workman in defendants' employment, was injured by reason of the breaking of a ladder, which was being used to support a scaffold. The ladder was insufficient for the purpose for which it was being used, and the scaffold and ladder had been placed and were being used under the directions of one of the defendants :—Held, that, under the above circumstances, there was evidence that the

plaintiff had been injured by reason of a defect in the condition of the plant, owing to the negligence of his employer, within the meaning of the Employers' Liability Act, 1880. *Cripps v. Judge*, 13 Q. B. D. 583; 53 L. J., Q. B. 517; 51 L. T. 182; 33 W. R. 35; 49 J. P. 100—C. A.

A wharfinger who for the purposes of his business was the owner of carts and horses, owned one horse of a vicious nature, that was unfit to be driven by a careful driver. The plaintiff was in the wharfinger's employ and had to drive the carts and to load and unload the goods carried in them. In an action for injury by reason of the viciousness of the horse:—Held, that the horse was "plant" used in the business of the wharfinger, and that the vice in the horse was a "defect" in the condition of such plant within the meaning of section 1 of the act. *Yarmouth v. France*, 19 Q. B. D. 647; 57 L. J., Q. B. 7; 36 W. R. 281—D. See also *Weblin v. Ballard*, post, col. 1197.

"Condition of Machinery"—Dangerous Machine.—The mere fact that a machine is dangerous to a workman employed to work with it does not show that there is a defect in the condition of the machine within the meaning of the Employers' Liability Act, 1880, s. 1, sub-s. 1, inasmuch as by s. 2, sub-s. 1, of the act the only defects in respect of which the employer is liable are defects implying negligence of the employer or some one in his service entrusted by him with the duty of seeing that the machine is in proper condition. *Walsh v. Whiteley*, 21 Q. B. D. 371; 57 L. J., Q. B. 586; 36 W. R. 876; 53 J. P. 38—C. A.

The plaintiff in an action under the Employers' Liability Act, 1880, was employed by the defendants to work at a carding machine. Part of the machine consisted of a wheel or pulley upon which, while in motion, the plaintiff had to place a band. The disc of the wheel had holes in it, and, while the plaintiff was putting on the band, his thumb slipped through one of these holes, the result being that it was caught between the wheel and the bed-plate of the machine and cut off. It was proved that, though these wheels were sometimes made without such holes, they were very commonly made with them, the object being to reduce the weight of the wheel and consequent friction. In the defendants' mill there were machines of both sorts, and it did not appear that any complaint had previously arisen with regard to the wheels with holes, the plaintiff himself stating that he had never complained of the machine because it had never entered into his head that it was dangerous:—Held, (Lord Esher, M.R., dissenting), that there was no evidence of any defect in the machine implying negligence in the defendants or any one in their service, and therefore that the defendants were not liable. *Id.*

The Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), which gives a workman a right of action against his employer for personal injury by reason of any defect in the condition of the machinery used in the business of the employer, applies to a case where the machine, though not defective in its construction was, under the circumstances in which it was used, calculated to cause injury to those using it. The deceased, a workman in the employment of the defendants, was killed by a piece of coke falling from a lift used at a blast

furnace belonging to them. The lift consisted of two platforms which ascended and descended alternately, and at the time when the deceased was injured he was removing empty barrows from the platform which was at rest at the bottom of the lift. There was evidence that the accident arose either from the sides of the lift not being fenced so as to prevent coke from falling over, or from the lower platform not being roofed so as to protect those working on it from falling coke:—Held, that under the circumstances there was a "defect in the condition" of the lift for which the defendants were liable. *Heske v. Samuelson*, 12 Q. B. D. 30; 53 L. J., Q. B. 45; 49 L. T. 474—D.

The plaintiff, a lad of nineteen, was employed in the defendants' paper mill at a machine for cutting jute. The material passed under a roller which conveyed it to the cutter; but the roller being in several pieces or sections, with interstices between them into which the jute sometimes got, and so impeded the action of the machine, it was necessary (or usual) to remove it by the hand. In doing this the plaintiff lost three fingers. The defect had been pointed out to the defendants, who, to remedy it, procured a roller in one piece; but the accident happened before the new roller was placed. The maker swore that with care both rollers were equally safe. The jury having found that the injury to the plaintiff was caused by a defect in the machine known to the defendants, and not remedied by them:—Held, that this finding was warranted by the evidence. *Paley v. Garnett*, 16 Q. B. D. 52; 34 W. R. 295; 50 J. P. 469—D.

v. Effect of Contributory Negligence.

As a Defence.—A defence of contributory negligence may be relied on in an action under the Employers' Liability Act. *McEvoy v. Waterford Steamship Company*, 18 L. R., Ir. 159—Ex. D.

Knowledge of Defect.—An employer, when sued under the Employers' Liability Act, 1880, for personal injury to a workman caused by any of the matters mentioned in s. 1 of the act, cannot avail himself of the defence that the injury was caused by the negligence of a fellow servant, or that the workman had contracted to take upon himself the risks incident to the employment; but he may avail himself of the defence of contributory negligence on the part of the workman, and also, under s. 2, sub-s. 3, of his failure to give notice of the defect or negligence which caused the injury. The deceased was employed as fireman at the defendant's brewery. In the engine-room, at some distance from the floor, was a valve to turn on steam to a donkey-engine. This valve was only reached by means of a ladder placed against a lower pipe, but, by reason of a bend in the last-mentioned pipe, the ladder (though in itself perfect), being without hooks or stays, was unsafe for the purpose for which it was used. The defendant had himself seen the ladder so used. The deceased was found dead in the engine-room, having been apparently killed by the ladder slipping while he was upon it. In an action by his personal representative under the Employers' Liability Act, the county court judge found that there was a defect in the condition of the plant within the meaning of s. 1, sub-s. 1, of the act, and that, although the

deceased knew of the defect, he was excused from informing the defendant of it, because he was aware that the latter knew of it.—Held, that this finding was warranted by the evidence, and that contributory negligence on the part of the deceased was not necessarily proved by the mere fact that he knew that the work was of itself dangerous. *Weblin v. Ballard*, 17 Q. B. D. 122; 55 L. J., Q. B. 395; 54 L. T. 532; 34 W. R. 455; 50 J. P. 597.—D.

Where a waggon was in a defective state, of which a workman was aware, and he used it in such a way as to cause injury to himself, when he knew how to use and might have used it so as not to cause injury to himself, he cannot recover under the Employers' Liability Act, 1880, s. 1. *Martin v. Connah's Quay Alkali Company*, 33 W. R. 216.—D.

vi. Risk voluntarily Incurred.

“*Volenti non fit injuria.*”]—The plaintiff was employed in a cooling room in the defendant's brewery. In the room were a boiling vat and a cooling vat, and between them ran a passage which was in part only three feet wide. The cooling vat had a rim raised sixteen inches above the level of the passage, but it was not fenced or railed in. The plaintiff went along this passage to pull a board from under the boiling vat. This board stuck fast and then came away suddenly, so that he fell back into the cooling vat and was scalded. In an action under the Employers' Liability Act, 1880 :—Held (Lord Esher, M.R., dissenting), that the defence arising from the maxim *volenti non fit injuria* had not been affected by the Employers' Liability Act, 1880, and applied to the present case, and that there was therefore no evidence of negligence arising from a breach of duty on the part of the defendant towards the plaintiff, and that the plaintiff was not entitled to recover. *Thomas v. Quartermaine*, 18 Q. B. D. 685; 56 L. J., Q. B. 340; 57 L. T. 537; 35 W. R. 555; 51 J. P. 516.—C. A.

In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff was in the employment of the defendant, who was a wharfinger, and for the purposes of his business the owner of carts and horses. It was the duty of the plaintiff to drive the carts and to load and unload the goods which were carried in them. Among the horses was one of a vicious nature and unfit to be driven even by a careful driver. The plaintiff objected to drive this horse, and told the foreman of the stable that it was unfit to be driven, to which the foreman replied that the plaintiff must go on driving it, and that if any accident happened his employer would be responsible. The plaintiff continued to drive the horse, and while sitting on his proper place in the cart was kicked by the animal, and his leg was broken :—Held (Lopes, L.J., dissenting), that upon the facts a jury might find the defendant to be liable, for there was evidence of negligence on the part of his foreman, and the circumstances did not conclusively show that the risk was voluntarily incurred by the plaintiff. *Thomas v. Quartermaine* (18 Q. B. D. 685) distinguished. Per Lopes, L.J., dissenting, that there was no evidence for the jury of the defendant's liability, inasmuch as the facts showed that the plaintiff,

with full knowledge of the risk to which he was exposed, had elected to continue in the defendant's employment. *Yarmouth v. France*, 19 Q. B. D. 647; 57 L. J., Q. B. 7; 36 W. R. 281.—D.

—Breach of Statutory Duty.]—The plaintiff's husband had been employed in the defendant's coal mine. One of the rules established in the mine under s. 52 of the Coal Mines Regulation Act, 1872, required a banksman to be constantly present while the men were going up or down the shaft, but it was the regular practice of the mine, as the plaintiff's husband well knew, not to have a banksman in attendance during the night. The plaintiff's husband was killed in coming out of the mine at night by an accident arising through the absence of a banksman. In an action under the Employers' Liability Act, 1880 :—Held, that the defence arising from the maxim *volenti non fit injuria* was not applicable in cases where the injury arose from the breach of a statutory duty on the part of the employer, and that the plaintiff was entitled to recover. *Thomas v. Quartermaine* (supra) discussed. *Baddeley v. Granville (Earl)*, 19 Q. B. D. 423; 56 L. J., Q. B. 501; 57 L. T. 268; 36 W. R. 63; 51 J. P. 822.—D.

vii. Practice.

Reviewing Verdict of Jury.]—Upon an appeal from the judgment of a county court awarding compensation under the act, the High Court is not entitled to consider whether the findings are such as the High Court would have arrived at, but can only consider whether or not there was reasonable evidence to support them. *Weblin v. Ballard*, supra.

Limit of Damages—Overtime Wages.]—The plaintiff, in an action brought under the Employers' Liability Act, 1880, proved as damages loss of wages in respect both of his employment with the defendants, and also in respect of certain overtime labour under another employer. The jury awarded damages under both heads, but the county court judge held that the plaintiff was only entitled to receive damages in respect of his estimated earnings under the defendants. The amount of damages awarded was less than the amount he might have been awarded in respect of his estimated earnings for three years in the defendants' service :—Held, that s. 3 of the Employers' Liability Act, 1880, does not give a measure of damages, but only a limit within which the jury may award damages, and that the plaintiff was entitled to recover in respect of both employments. *Borlick v. Head*, 53 L. T. 909; 34 W. R. 102; 50 J. P. 327.—D.

Trial of Action in County Court—Certiorari.]—See COUNTY COURT, 4.

II. LIABILITY OF MASTER TO THIRD PERSONS.

Accidental Damage to Street Lamp.]—A master is not liable under s. 207 of the Metropolitan Local Management Act, for the accidental breaking by his servant of a street lamp, the top

of which projected over the kerb, such accident having been caused by some goods on a van, which the servant was driving, coming in contact with, and wrecking the top of the lamp. *Harding v. Barker*, 37 W. R. 78; 53 J. P. 308—D.

For Servant's Negligence.]—See NEGLIGENCE.

Scope of Employment.]—M. was a cloak-room clerk in the defendants' employ, and assisted at the parcels' office; he "used to take up parcels for passengers from the cloak room to the train, when there was no porter there, and that was a regular thing for him to do." A passenger had asked him to take a parcel to the train, which he did, and as he was running back, he ran against another porter, who in his turn came against the ticket-collector, and the ticket-collector upset the plaintiff's wife, causing injuries which resulted in her death. At the trial the plaintiff was nonsuited, on the ground that there was no evidence that at the time of the accident M. was acting within the scope of his employment. It was agreed at the trial that, if the court should be of opinion that the nonsuit was wrong, judgment should be entered for the plaintiff for 236*l.* and costs:—Held, that there was evidence to go to the jury that at the time of the accident M. was acting within the scope of his employment, that the nonsuit was wrong, and that judgment should be entered for the plaintiff as agreed. *Milner v. Great Northern Railway*, 50 L. T. 367—D.

A passenger on a tramway tendered a half sovereign to the conductor of the car in payment of the fare. The conductor, supposing the coin to be counterfeit, gave the passenger in charge to the police:—Held, that the tramway company were liable in an action against them by the passenger for false imprisonment. *Furlong v. South London Tramways Company*, 48 J. P. 329; 1 C. & E. 316—Stephen, J.

Section 52 of the Tramways Act, 1870, which enacts that "it shall be lawful for any officer or servant of the promoters or lessees of any tramway" to detain any person defrauding the company of his fare, must be construed as limited to any officer or servant appointed for that purpose. A tramway company gave to their conductors printed instructions, in which it was ordered that, except in cases of assault, conductors were not to give passengers into custody without the authority of an inspector or timekeeper. The conductor of a car, in which the plaintiff was a passenger, detained the plaintiff, and gave her into custody on a charge of passing bad money:—Held, in an action for false imprisonment against the company, that the defendants were not liable. *Charleston v. London Tramways Company*, 36 W. R. 367—D. Affirmed 32 S. J. 557—C. A.

A servant who commits an unnecessary assault in levying a distress is not acting within the scope of his employment. *Richards v. West Middlesex Waterworks Company*, 15 Q. B. D. 660; 54 L. J., Q. B. 551; 33 W. R. 902; 49 J. P. 631—D.

MAURITIUS.

See COLONY.

MAXIMS.

Generally.]—I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them. *Yarmouth v. France*, 19 Q. B. D. 653; 57 L. J., Q. B. 7; 36 W. R. 283—Per Escher (Lord), M.R.

"Expressio unius, exclusio alterius."]—I may observe that the method of construction summarised in the maxim, "expressio unius, exclusio alterius," is one that certainly requires to be watched. Perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits. *Colquhoun v. Brooks*, 19 Q. B. D. 406; 57 L. J., Q. B. 70; 57 L. T. 448; 36 W. R. 332—Per Wills, J. See also S. C. in C. A., per Escher (Lord), M.R., 21 Q. B. D. 65; 57 L. J., Q. B. 439; 59 L. T. 661; 36 W. R. 657; 52 J. P. 645.

The maxim "Expressio unius, exclusio alterius" is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice. *Colquhoun v. Brooks*, 21 Q. B. D. 65; 57 L. J., Q. B. 439; 59 L. T. 661; 36 W. R. 657; 52 J. P. 645—Per Lopes, L.J.

"No one can take Advantage of his own Wrong."]—The maxim that no man can take advantage of his own wrong is somewhat obscure; but in my opinion it only means this: that a man cannot enforce against a person whom he has wronged by a breach of contract or a breach of duty, a right created against such person by such breach of contract or duty. The maxim can only be employed by the person against whom the wrong has been done, except where the person having a derivative right has been clothed with the full rights of the person from whom he has derived his title. *London Celluloid Company, In re, Bayley and Hanbury's case*, 39 Ch. D. 190; 57 L. J., Ch. 843; 59 L. T. 109; 36 W. R. 673; 1 Meg. 45—Per Bowen, L.J.

"A Grantor shall not Derogate from his own Grant."]—The maxim that a grantor shall not derogate from his own grant, does not entitle a grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee. *Birmingham Banking Company v. Ross*, 38 Ch. D. 295; 57 L. J., Ch. 601; 59 L. T. 609; 36 W. R. 914—C. A.

"Equity looks on that as Done which ought to be Done."—The maxim that equity looks upon that as done which ought to be done, applies only (in cases depending upon contract) in favour of persons who are entitled to enforce the contract, and cannot be invoked by volunteers. *Anstis, In re, Chetwynd v. Morgan*, 31 Ch. D. 596; 54 L. T. 742; 34 W. R. 483—C. A.

"Actio personalis moritur cum Personâ."—See PRACTICE (PARTIES).

"Cujus est Solum ejus est usque ad cælum."—See *Wandsworth Board of Works v. United Telephone Company*, 13 Q. B. D. 904; 53 L. J., Q. B. 449; 51 L. T. 148; 32 W. R. 776; 48 J. P. 676—C. A.

"Damnum Absque Injuria."—See *Street v. Union Bank of Spain and England*, 30 Ch. D. 156; 55 L. J., Ch. 31; 53 L. T. 262; 32 W. R. 901—Pearson, J.

"In pari delicto potior est conditio possidentis."—See *Herman v. Zeuchner*, 15 Q. B. D. 561; 54 L. J., Q. B. 340; 53 L. T. 94; 33 W. R. 606; 49 J. P. 502—C. A.

"Nemo his vexari debet."—See *Brunsdon v. Humphrey*, 14 Q. B. D. 141; 53 L. J., Q. B. 476; 51 L. T. 529; 32 W. R. 944; 49 J. P. 4—C. A.

"Omnis nova constitutio futuris formam imponere debet et non præteritis."—See *Hough v. Windus*, 12 Q. B. D. 224; 53 L. J., Q. B. 165; 50 L. T. 312; 32 W. R. 452; 1 M. B. R. 1—C. A. And *Reid v. Reid*, 31 Ch. D. 102; 55 L. J., Ch. 294; 54 L. T. 100; 34 W. R. 333—Per Bowen, L. J.

"Omnia præsumuntur rite esse acta."—See *Lauderdale Peerrage, The*, 10 App. Cas. 692—H. L. (Sc.).

"Qui facit per alium facit per se."—See *Mills v. Armstrong*, 13 App. Cas. 1; 57 L. J., P. 65; 58 L. T. 423; 36 W. R. 870; 52 J. P. 212; 6 Asp. M. C. 257—H. L. (E.).

"Qui prior est tempore potior est jure."—See *Société Générale de Paris v. Walker*, 11 App. Cas. 20; 55 L. J., Q. B. 169; 54 L. T. 389; 34 W. R. 662—H. L. (E.); and *Lambert's Estate, In re*, 13 L. R., Ir. 234—C. A.

"Quando aliquid prohibetur fieri, ex directo prohibetur et per obliquum."—See *Rosher, In re, Rosher v. Rosher*, 26 Ch. D. 821; 53 L. J., Ch. 722—Pearson, J.

"Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud."—See *Murray v. Scott*, 9 App. Cas. 519; 53 L. J., Ch. 745; 51 L. T. 462; 33 W. R. 173—H. L. (E.).

"Quidquid plantatur solo, solo cedit."—See *Ainslie, In re, Swinburn v. Ainslie*, 30 Ch. D. 485; 55 L. J., Ch. 615; 53 L. T. 645; 33 W. R. 910; 50 J. P. 180—C. A.

"Respondet Superior."—See *White v. Peto*, 58 L. T. 710—Kay, J.; and *Harding v. Barker*, 37 W. R. 78; 53 J. P. 308—D.

"Sic utere tuo ut alienum non lædas."—See *Whalley v. Lancashire and Yorkshire Railway*, 13 Q. B. D. 131; 53 L. J., Q. B. 285; 50 L. T. 472; 32 W. R. 711; 48 J. P. 500—C. A.; *Love v. Bell*, 9 App. Cas. 286; 53 L. J., Q. B. 257; 51 L. T. 1; 32 W. R. 725; 48 J. P. 516—H. L. (E.); and *Farrer v. Nelson*, 15 Q. B. D. 258; 54 L. J., Q. B. 385; 52 L. T. 769; 33 W. R. 800; 49 J. P. 725—D.

"Verba chartarum fortius accipiuntur contra proferentem."—See *Birrell v. Dryer*, 9 App. Cas. 345; 51 L. T. 130; 5 Asp. M. C. 267—H. L. (Sc.). And *Burton v. English*, 12 Q. B. D. 218; 53 L. J., Q. B. 133; 49 L. T. 768; 32 W. R. 655; 5 Asp. M. C. 187—C. A.

"Volenti non fit Injuria."—See *Thomas v. Quartermaine, Baddeley v. Granville (Lord)*, and *Yarmouth v. France*, ante, cols. 1197, 1198; *Thruswell v. Handyside*, 20 Q. B. D. 359; 57 L. J., Q. B. 347; 58 L. T. 344; 52 J. P. 279—D.; and *Osborne v. London and North Western Railway*, 21 Q. B. D. 220; 57 L. J., Q. B. 618; 59 L. T. 227; 36 W. R. 809; 52 J. P. 806—D.

MAYOR'S COURT.

1. Jurisdiction.
2. Certiorari.
3. Appeal.

1. JURISDICTION.

"Carry on Business"—Solicitor's Clerk.]—A clerk employed by a solicitor at offices in the City of London does not "carry on business" there within the meaning of the Mayor's Court Extension Act, 1857 (20 & 21 Vict. c. clvii.), s. 12, so as to be subject to the jurisdiction of the Mayor's Court. *Lewis v. Graham or Graham v. Lewis*, 22 Q. B. D. 1; 58 L. J., Q. B. 117; 37 W. R. 73; 53 J. P. 166—C. A. Affirming 59 L. T. 35—D.

Claim over £50—Contract by Telegram—Offer received and accepted within City.]—When an offer is sent by telegram and a telegram in reply is sent accepting the offer, the contract is complete on the despatch of the telegram in reply. An action was brought in the Mayor's Court for a sum of 50l. for money had and received, alleged to have been received under bets made by the defendant on behalf of the plaintiff. The plaintiff had sent a telegram, "Put me on so much on such a horse," from a post-office outside the City, to the defendant, a "bookmaker," who had offices within the City. This telegram was received by the defendant within the City, and it was answered by a telegram sent from a telegraph office within the City accepting the offer:—Held, refusing a motion for a prohibition, that the contract (if any) was complete on the receipt of the telegram within the City and the sending the telegram in reply within the City; that the whole cause of action (if any) arose within the City; and that the Mayor's Court had jurisdiction. *Cowan v. O'Connor*, 20 Q. B. D. 640; 57 L. J., Q. B. 401; 58 L. T. 857; 36 W. R. 895—D.

Claim not exceeding £50—Debt incurred without but assigned within Jurisdiction.]—The plaintiff sued the defendant in the Mayor's Court upon a debt which had been incurred outside the jurisdiction, but which had been assigned to the plaintiff within the jurisdiction. On an application for a prohibition to the Mayor's Court:—Held, that the assignment formed part of the cause of action, and that therefore the case fell within the jurisdiction of the Mayor's Court. *Cooke v. Gill* (8 L. R., C. P. 107) followed. *Read v. Brown*, 22 Q. B. D. 128; 58 L. J., Q. B. 120; 60 L. T. 250; 37 W. R. 131—C. A.

— Account stated.]—The plaintiff's solicitor, who carried on business within the jurisdiction of the Mayor's Court, wrote to the defendant demanding payment of 7l. 6s. 6d. for goods sold and delivered by him to the plaintiff. Neither of the parties resided or carried on business, nor was the contract entered into within the jurisdiction. The defendant, in a letter written to the plaintiff's solicitor—posted outside, but received within the jurisdiction—admitted that he owed 5l. 6s. 6d. to the plaintiff. The plaintiff having brought an action in the Mayor's Court to recover 5l. 6s. 6d. on an account stated, the defendant obtained a writ of prohibition:—Held, that the admission of the defendant and the bringing of the action amounted to an account stated within the jurisdiction of the Mayor's Court, and that therefore the Mayor's Court had jurisdiction to try the action. *Grundy v. Townsend*, 36 W. R. 531—C. A.

— Sale of Property—Agreement where made.]—The defendant verbally agreed outside the city of London and the liberties thereof, to purchase from the plaintiff the lease of a shop at New Cross, in Surrey, with the goodwill and stock-in-trade of a drapery business carried on there, and the terms thereof were embodied in two counterpart documents, one of which was signed by the defendant at Bow, in Middlesex, and the other was subsequently signed by the plaintiff within the city, and the documents so signed were then exchanged between the parties' solicitors within the city. Neither of the parties dwelt or carried on business within the city. There remained a sum of 50l., balance of the purchase-money, unpaid, and the plaintiff sued the defendant for it in the Mayor's Court. The defendant thereupon obtained a writ of prohibition to restrain the Mayor's Court from further proceeding with the action:—Held, that the writ had been rightly issued, as no part of the cause of action arose within the jurisdiction of the Mayor's Court. *Alderton v. Archer*, 14 Q. B. D. 1; 54 L. J., Q. B. 12; 51 L. T. 661; 33 W. R. 136—D.

Solicitor of High Court may be Sued in.]—A solicitor of the High Court who had also been admitted a solicitor in the Mayor's Court was sued in the latter court:—Held, that he was not entitled to have the action removed into the High Court on the ground of the privilege of a solicitor of the High Court to be sued in that court only. *Day v. Ward*, 17 Q. B. D. 703; 55 L. J., Q. B. 494; 55 L. T. 518; 35 W. R. 59—D.

2. CERTIORARI.

Amount more than £50—Discretion.]—A party to an action in the Mayor's Court is not entitled as of right to remove the action by writ of certiorari into the High Court, but can only do so by leave of a judge of the High Court in a case where it shall appear to him that the action is one which is fit to be tried there. *Cherry v. Endean*, 55 L. J., Q. B. 292; 54 L. T. 763; 34 W. R. 458—D.

Action "fit to be tried" in Superior Court.]—Rule 12 of the Borough and Local Courts of Record Act, 1872, which is applicable to the Mayor's Court, provides that "no action entered in the court shall, before judgment, be removed or removable from the court into any superior court by any writ or process, except by leave of a judge of one of the superior courts in cases which shall appear to such judge fit to be tried in one of the superior courts," &c. The plaintiff brought an action in the Mayor's Court against the defendant, a stockbroker, for alleged misconduct in connexion with the purchase of certain shares, and claimed 110l. as damages:—Held, that the action was one which was "fit to be tried" in the superior courts, and that the defendant was accordingly entitled to a writ of certiorari. *Simpson v. Shaw*, 56 L. J., Q. B. 92; 56 L. T. 24—D.

Time for lodging Writ.]—By the Mayor's Court of London Procedure Act, 1857, s. 17, "No cause depending in the Mayor's Court shall be removed before judgment therein into any superior court, unless the writ removing such cause shall have been lodged with the proper officer of the court within one month after the service of the plaint, or unless such writ shall have been lodged with such officer before such action shall have been entered for trial according to the practice of the Mayor's Court":—Held, that the section gave alternative periods for lodging the writ, and that the defendant could avail himself of whichever was the longer period. *Prim v. Smith*, 20 Q. B. D. 643; 57 L. J., Q. B. 336; 58 L. T. 606; 36 W. R. 530—C. A.

By the Borough and Local Courts of Record Act, 1872, schedule, r. 12, it is enacted that no action shall before judgment be removed into any superior court except by leave of a judge of one of the superior courts in cases which shall appear to such judge fit to be tried in one of the superior courts, and upon such terms as to payment of costs, security for debt and costs, or such other terms as such judge shall think fit:—Held, that this rule does not override s. 17 of the Mayor's Court of London Procedure Act, 1857, and does not substitute the discretion of a judge for the strict limit of time imposed in that section. *Price v. Shaw*, 59 L. T. 480—D.

3. APPEAL.

To High Court—Claim over £20—Leave to Appeal.]—By the Mayor's Court of London Procedure Act, 1857, s. 8, an appeal from the Mayor's Court to the superior courts is given where the sum sought to be recovered exceeds 20l., and, by s. 9, such appeal is to be by special case. By s. 10, the parties in any case in the Mayor's Court may, if the judge grants leave,

move in the superior courts to set aside the verdict:—Held, that Ord. LIX. r. 10, which provides that all appeals from inferior courts shall be by notice of motion, does not make it necessary where the sum sought to be recovered in the Mayor's Court exceeds 20*l.*, and a motion to set aside the verdict and judgment on the ground of misdirection is made in the High Court, that the leave of the judge of the Mayor's Court should be obtained. *Eder v. Levy*, 19 Q. B. D. 210; 56 L. J., Q. B. 650—D.

MEASURE.

Weights and Measures.—*See* WEIGHTS AND MEASURES.

Of Damages.—*See* DAMAGES.

MEAT.

Sale of Unsound Meat.—*See* HEALTH.

MEDICINE AND MEDICAL PRACTITIONER.

Illegal Agreement—Serving Unqualified Person as Assistant.—The Act 55 Geo. 3, c. 194, prohibiting medical practice by unqualified persons, is not repealed by implication by the Medical Act, 1858. The defendant, a duly qualified medical practitioner, agreed with the plaintiff, a medical practitioner not duly qualified, but who was described in the agreement as "medical practitioner," to serve the plaintiff as assistant in his profession as a medical practitioner, and not to practice at R. within five years after the close of the engagement. The plaintiff applied for an injunction to prevent the defendant from practising at R. in breach of this agreement:—Held, by Pearson, J., that the Medical Act of 1858 does not prohibit unqualified persons from practising medicine, its object being only to enable the public to distinguish between qualified and unqualified practitioners—that the use, by an unqualified person in a private agreement with another medical man, of any of the titles for the wilful use of which by an unqualified person for the purpose of deceiving the public, penalties are imposed by s. 40 of the act, is not an offence within that section—that the agreement therefore was not illegal, and that the plaintiff could enforce its terms, and was entitled to an injunction. The defendant appealed, and on appeal showed that the plaintiff had given various certificates of cause of death, which showed that the plaintiff had attended the deceased persons during their last illness, and from which it was to be inferred

that he attended patients in the way in which a medical practitioner ordinarily attends, and in fact personally acted as an apothecary:—Held, that his doing so was made illegal by the act 55 Geo. 3, c. 194, s. 14, that the agreement therefore was to assist the plaintiff in carrying on a business which he could not lawfully carry on, and that the agreement was illegal and could not be enforced. *Davies v. Mahuna*, 29 Ch. D. 596; 54 L. J., Ch. 1148; 53 L. T. 314; 33 W. R. 668; 50 J. P. 5—C. A.

Semble, if the plaintiff had carried on his business by means of duly qualified assistants, without personally acting as a physician, surgeon, or apothecary, the agreement might have been legal. *Ib.*

Unregistered Assistant—Right of Registered Practitioner to recover for Services of.—A qualified medical practitioner, duly registered under the Medical Act, 1858, established a branch practice under the management of his brother, who was not so qualified or registered, and held no apothecary's certificate under 55 Geo. 3, c. 194. In an action by the assignee of the qualified practitioner to recover charges for medical aid and advice rendered, and the costs of medicines supplied, to the defendant by the brother alone, without consulting the qualified practitioner:—Held, that under ss. 31 and 32 of the Medical Act, 1858, the plaintiff was not entitled to recover. *Huwarth v. Brearley*, 19 Q. B. D. 303; 56 L. J., Q. B. 543; 56 L. T. 743; 36 W. R. 302; 51 J. P. 440—D.

Sale of Drugs—Standard Quality—British Pharmacopœia.—*See* *White v. Bywater*, ante, col. 849.

Agreement not to carry on Business—Restraint of Trade.—*See* *Palmer v. Mallet and Rogers v. Drury*, ante, cols. 487, 488.

Dentist—Registration of—Withdrawal of Diploma.—Where a person has been registered under the Dentists Act, 1878, as a licentiate of a medical authority, the fact that his diploma has since been revoked by such medical authority does not render him liable to be erased from the dentists' register under the act. *Partridge, Ex parte*, or *Reg. v. General Medical Council*, 19 Q. B. D. 467; 36 W. R. 442—C. A. Affirming 56 L. J., Q. B. 609; 52 J. P. 40—D.

MERCHANDISE MARKS ACT.

See TRADE.

MERCHANT SHIPPING.

See SHIPPING.

MERGER.

Equitable and Legal Estates.]—Where an equitable estate in fee by purchase and a legal estate in fee by descent meet in the same person, the equitable estate will merge in the legal, and the descent will be according to the legal title. *Wood v. Douglas*, or *Douglas, In re, Douglas v. Wood*, 28 Ch. D. 327; 54 L. J., Ch. 421; 52 L. T. 131; 33 W. R. 390—Pearson, J.

Semble, where a person takes an equitable estate by election, and a legal estate by descent, he is not a purchaser within the act 3 & 4 Will. 4, c. 106. *Id.*

Charge—Estate for Life with General power of Appointment.]—H. S., by his marriage settlement, assigned a sum of 7,500*l.* to trustees, in trust for himself for life, and after the deaths of both in trust for all the children of the marriage, in such shares, &c., as H. S. should by deed or will appoint; and he charged the 7,500*l.* on an estate to which he was absolutely entitled. There were three children of the marriage, J. G. S., and two daughters. H. S., by his will, in 1851, appointed 5,000*l.* of the fund to J. G. S., and devised to him and the heirs of his body the lands on which it was charged. In 1858, by codicil, he revoked the devise of the lands in the will, and devised them to J. G. S. for life, remainder to such uses as J. G. S. should by deed or will appoint. In 1872 by his marriage settlement, reciting the devises of the lands by the will and codicil, J. G. S. in exercise of his power appointed the lands, after his death, to trustees for 200 years, to secure a jointure for his wife, remainder in strict settlement to the sons and daughters successively of the intended or any subsequent marriage, with an ultimate remainder to himself in fee. No mention or allusion to the charge of 5,000*l.* was made in the settlement:—Held, that there was no merger of the charge, and that the 5,000*l.* continued personal estate of J. G. S. *Smith v. Smith*, 19 L. R., Ir. 514—M. R.

In Judgment.]—See JUDGMENT.

By Leases.]—See *Dynevor (Lord) v. Tennant*, ante, col. 1078.

MERSEY.

See SHIPPING.

METROPOLIS.

I. VESTRY AND BOARD OF WORKS.

1. *Vestries and Their Officers*, 1208.
2. *Actions and Proceedings against*, 1209.
3. *Jurisdiction*.
 - a. Buildings, 1210.
 - b. Streets, 1212.
 - c. Sewers and Drainage, 1215.
 - d. Recovery of Expenses, 1218.

II. RATES.

1. *In General*, 1221.
2. *Valuation Acts*, 1221.

III. TRAFALGAR SQUARE, 1223.

IV. STAGE CARRIAGES, 1223.

I. VESTRY AND BOARD OF WORKS.

1. VESTRIES AND THEIR OFFICERS.

Qualification of Member—Assessment to Poor Rate—Penalty.]—By 18 & 19 Vict. c. 120 (Metropolis Local Management Act, 1855), s. 6, "the vestry elected under this act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than 40*l.* per annum; and no person shall be capable of acting or being elected as one of such vestry for any parish, unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish":—Held, that to be qualified as a vestryman under the act, a person must be the occupier of real property in the parish, and be himself rated or assessed in respect of such occupation to the required amount. *Mogg v. Clark*, 16 Q. B. D. 79; 55 L. J., Q. B. 69; 53 L. T. 890; 34 W. R. 66; 50 J. P. 342—C. A.

Member "interested in Contract"—Acting as Member—Penalty—Evidence—Minute-Book.]—The brother of the defendant entered into a contract with a vestry constituted under the Metropolis Management Act, 1855, and in order to enable him to carry it out, borrowed money from the defendant, who by way of security took an assignment of the contract. Afterwards the defendant was elected a member of the vestry. An action for penalties having been brought against the defendant for acting as member of the vestry, an attendance-book of the members signed by the defendant and the minute-book of the vestry containing his name as a member in attendance were put in as evidence at the trial:—Held, that s. 54 of the Metropolis Management Act, 1855, applied to contracts made as well before as after the election of a member, and that the defendant was "interested" in the contract in question within the meaning of that section: that there was evidence under s. 60 that the defendant had acted as member of the vestry; and that he was liable to penalties for having acted after he had "ceased" to be a member. *Hunnings v. Williamson*, 11 Q. B. D. 533; 52 L. J., Q. B. 416; 49 L. T. 361; 32 W. R. 267; 48 J. P. 135—C. A.

Superannuation Allowance to Officer—Discretion as to Amount.]—A metropolitan vestry has a discretion under 29 Vict. c. 31, s. 1, to grant or to refuse a superannuation allowance to a retiring officer; but, if an allowance be granted, the vestry has no discretion as to the amount, which must be in accordance with the scale prescribed in s. 4. *Reg. v. St. George's Vestry*, 19 Q. B. D. 533; 56 L. J., Q. B. 652; 35 W. R. 841; 52 J. P. 6—D.

2. ACTIONS AND PROCEEDINGS AGAINST.

Penalty—Acting as Vestryman—Disqualification.]—*See supra.*

Compensation—Emoluments of Office.]—The Metropolitan Bridges Act, 1877, provided that compensation should be paid to certain officers, including clerks, but not including solicitors, of the private companies or corporations whose bridges were taken over by the Metropolitan Board of Works under the act, upon a scale to be calculated on the basis of the emoluments actually received by them in the two years previous to the passing of the act. The Deptford Creek Bridge was taken over by the board, and thereby the plaintiff, who had been clerk to the Deptford Creek Bridge Company, lost his office. He had received a salary as clerk, and also payments for legal business done by him as solicitor for the company, and commission on the rents of the company's property which he received. The Deptford Creek Bridge Company had by their act power to appoint a solicitor and receiver as well as a clerk; they had never appointed such officers, and the legal business of the company had always been done and the rents received by the clerk, who had always been a solicitor:—Held, that, by the practice of the company, these duties had been attached to the office of clerk, and that the plaintiff was entitled to compensation in respect of the payments received for discharging them as part of the emoluments of his office; but, as to the payments for legal business done by him, only in respect of his proportion as partner in the firm of solicitors of the net profits after deducting all office expenses necessarily incurred in earning the money. *Drew v. Metropolitan Board of Works*, 50 L. T. 138—C. A.

Held, also, that the board were not entitled to have the bills of costs taxed before the amount of compensation was assessed, as the bills had been paid by the company without taxation. *Id.*

Liability of Vestry for breaking Gas-Pipes laid in Road—Repairing Road—Steam Roller.]—The plaintiffs, a gas company, having statutory powers to place mains and pipes under the highways, and a statutory obligation to supply gas within the parish of K., laid, prior to 1872, certain pipes under certain highways within the jurisdiction of the defendants, who, being the highway authority for the district, were, by virtue of 10 Vict. c. 34, 18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102, bound to repair the highways, and empowered to pave and alter the level of streets under their management. In 1872 the defendants began to use steam rollers of considerable weight for the purpose of repairing the highways, and thereby fractured certain pipes belonging to the plaintiffs laid under the highways:—Held, that the plaintiffs were entitled to an injunction restraining the defendants from using any steam rollers in such a way as to fracture or damage any pipes belonging to the plaintiffs which were properly laid under the highways within the jurisdiction of the defendants. *Gas Light and Coke Company v. St. Mary Abbott's Vestry*, 15 Q. B. D. 1; 54 L. J., Q. B. 414; 53 L. T. 457; 33 W. R. 892; 49 J. P. 469—C. A. Affirming 1 C. & E. 368—Field, J.

Notice of Action.]—Per North, J. Section 106 of the Metropolitan Local Management Acts Amendment Act, 1862, which requires that before any proceeding is instituted against a district board a month's notice shall be served on them by the person intending to take the proceeding, does not apply to actions in equity:—Per Lopes, L.J. (Cotton and Lindley, L.J.J., not dissenting), that that section does not apply to an action for an injunction to restrain a nuisance. *Bateman v. Poplar Board of Works*, 33 Ch. D. 360; 56 L. J., Ch. 149; 55 L. T. 374.

Liability of District Board—Vesting of Sewers—Nuisance.]—*See Bateman v. Poplar Board of Works*, post, col. 1216.

3. JURISDICTION.

a. Buildings.

General Line—Old Buildings.]—The appellants' house was built at the corner of the K. Road and a new street called D. Gardens. The side of the house abutting on the eastern side of D. Gardens projected beyond a row of houses on that side of D. Gardens. Under s. 75 of the Metropolitan Management Amendment Act, 1862 (25 & 26 Vict. c. 102), the superintending architect to the Metropolitan Board of Works gave a certificate that the main fronts of that row of houses was the general line of buildings, on the eastern side of D. Gardens, but did not decide that that was the general line of buildings, either of the row of houses or of the street in which the appellants' house was situate:—Held, that no offence under s. 75 had been committed by the building of the appellants' house, and that there was no jurisdiction for a magistrate's order under that section directing the demolition of the projecting part of the house. *Barlow v. St. Mary Abbott's Vestry*, 11 App. Cas. 257; 55 L. J., Ch. 680; 55 L. T. 221; 34 W. R. 521; 50 J. P. 691—H. L. (E.).

— Jurisdiction of Magistrate—Architect's Decision.]—The certificate of the superintending architect of the Metropolitan Board of Works made under the Metropolitan Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 75, and fixing the "general line of buildings" in a road, is conclusive as to a building erected before the certificate is made; and on the hearing of a summons (issued after the making of the certificate) for an offence under s. 75 alleged to have been committed in respect of such building, the justice has no jurisdiction to review the architect's decision or decide for himself whether the line fixed by the certificate is the true general line. *Simpson v. Smith* (6 L. R., C. P. 87) overruled. *Spackman v. Plumstead Board of Works*, 10 App. Cas. 229; 54 L. J., M. C. 81; 53 L. T. 157; 33 W. R. 661; 49 J. P. 420—H. L. (E.).

Service of "Order in Writing made on" Builder.]—A magistrate made a verbal order under s. 75 directing the builder to demolish part of a house within eight weeks. The builder was present when the order was made, but it was not reduced into writing till the day when the eight weeks expired; after that day a copy was served upon him or came to his knowledge:

—Held, that the order was not "an order in writing made on" the builder within the meaning of s. 7b, and was therefore invalid. *Barlow v. St. Mary Abbott's Vestry*, supra.

"Public Building" — Ambulance Station—Deposit of Plans.—An ambulance station structurally disconnected with any building, and from which the public is rigorously excluded, is not of itself a public building within s. 3 of the Metropolitan Building Act, 1855, so as to require the builder to deposit plans and sections of the building with the notice of its erection to the district surveyor under bye-law 5, made under s. 16 of the Metropolitan Management and Building Acts (Amendment Act), 1878. *Josolyne v. Meeson*, 53 L. T. 319; 49 J. P. 805—D.

Temporary Structure—Continuous Offence.—Where a temporary structure had been erected within the metropolitan district without the licence of the Metropolitan Board of Works, but no complaint of such erection was made until after the expiration of six months from its completion:—Held, that the offence was a continuous one as long as the structure remained existent, and that proceedings for the recovery of the penalties might be taken within six months of the time within which it continued to exist. *Metropolitan Board of Works v. Anthony*, 54 L. J., M. C. 39; 33 W. R. 166; 49 J. P. 229—D.

Bye-Law—Removal of Animal Matter from "Site" underneath Foundations.—By the Metropolitan Management and Building Acts Amendment Act, 1878, s. 16, the Metropolitan Board of Works were empowered to make bye-laws with respect to "the foundations of houses, buildings, and other erections, and the sites of houses, buildings, and other erections to be constructed after the passing of this act, and the mode in which and the materials with which such foundations and sites shall be made, formed, excavated, filled up, prepared, and completed for securing stability, the prevention of fires, and for purposes of health." By s. 14 the term "site" is defined to mean "the whole space to be occupied by such house, building, or other erection between the level of the bottom of the foundations and the level of the base of the walls." The Metropolitan Board of Works made the following bye-law: "No house, building, or other erection shall be erected upon any site or portion of any site which shall have been filled up or covered with any material impregnated or mixed with any faecal, animal, or vegetable matter, or which shall have been filled up or covered with dust, or slop, or other refuse, or in or upon which any such matter or refuse shall have been deposited, unless and until such matter or refuse shall have been properly removed by excavations or otherwise from such site":—Held, that the meaning of the word "site" in the bye-law was governed by the interpretation of that word in the act, so that the bye-law did not authorize the Metropolitan Board of Works to direct the removal of faecal, animal or vegetable matter in the soil below the level of the bottom of the foundations. *Blashill v. Chambers*, 14 Q. B. D. 479; 53 L. T. 38; 49 J. P. 388—D.

New Building—Summons to leave sufficient open Space—Limitation of Time.—G., the

builder of a new house in the metropolis, on 1st April sent notice to B., the district surveyor, with plans. On 4th August, B. served a 48 hours' notice on G. to amend the work and have sufficient area space pursuant to 45 Vict. c. 14, s. 14. The house was then covered in, and nothing was done under the notice. On 1st February following, information of an offence was laid by B.:—Held, that the offence was the refusal to do the work ordered on 4th August, and the information was within the six months' limitation. *Bovill v. Gibbs*, 51 J. P. 485—D.

Artizans' Dwellings—Obstruction of Light—Right to Compensation.—See *Wigram v. Fryer*, ante, col. 1121.

Party Structure — Damage — Liability of Builder.—The plaintiff, an owner in fee simple of a house in London, brought an action against builders claiming damages on the ground that they, in the course of rebuilding an hotel, had caused injury to the plaintiff's house by cracking and displacing the wall, and also asking for an injunction. On the motion for injunction an inquiry as to damage was directed to be taken before a special referee, and the referee assessed the structural damage at 40l., without prejudice to any question of liability. The defendants in their defence raised the contention that the works were executed under the provisions of the Metropolitan Building Act, and that the damage (if any) to the plaintiff's premises was "a necessary consequence of carrying out the said works," and that the plaintiff's remedy (if any) was only against the building owner by whom the defendants were employed:—Held, that the Metropolitan Building Act did not exonerate a builder from liability for damage which had arisen from his negligence and want of care and skill. The maxim "Respondeat superior" does not absolve the inferior, if by his negligence a loss has been sustained. If, in doing the act, he is guilty of negligence whereby loss and damage are occasioned to another, he is personally liable. *White v. Peto*, 58 L. T. 710—Kay, J.

b. Streets.

New Street is a "Street."—See *St. John's, Hampstead v. Hoopel*, post, col. 1217, and *St. John's, Hampstead v. Cotton*, post, col. 1220.

Laying out New Street—Notice to District Surveyor—Complaint more than Six Months after.—L. was summoned by the Metropolitan Board of Works for laying out a new street of less than the required width, contrary to 25 & 26 Vict. c. 102, s. 98. L. gave notice of his intended building in May, 1883, to the district surveyor, and paid his fees, but no notice was given by the surveyor to the board till November, 1883. The complaint was made in March, 1884:—Held, that notice to the district surveyor was the date of the discovery by the board, and, therefore, the complaint was too late, being more than six months after the discovery, and so contrary to 25 & 26 Vict. c. 102, s. 107. *Metropolitan Board of Works v. Lathey*, 49 J. P. 245—D.

— "For Foot Traffic only."—Artizans' dwellings, comprising twenty-six tenements, ac-

commodating about 250 persons, were built, opening on an approach 100 ft. long and 16 ft. wide, entered from a public street through a gateway 10 ft. wide, over which one of the buildings was carried. A roadway had previously existed on the site with warehouses abutting thereon, and the gateway included the site of a former gateway, which had been pulled down and altered to a greater width. The approach did not afford communication with any other public street, and was for the sole use and convenience of the tenants of the dwellings, to the exclusion of the public, no right of way over the same having ever been dedicated to or used by the public at large :—Held, that the approach had not been laid out as “a street for foot traffic only” within the meaning of the 8th section of the Metropolitan Management and Building Acts (Amendment) Act, 1882 (45 Vict. c. 14), so as to require the sanction of the Metropolitan Board of Works to the laying out thereof. *Metropolitan Board of Works v. Nathan*, 54 L. T. 423; 34 W. R. 164; 50 J. P. 502—D.

“**Street**”—**Meaning of—Compelling Statement of Case.**—The G. road was a lane 340 feet long; there were no buildings on either side of it, except four houses at one part of it, and the lane was bounded on the north and south by back gardens and the backs and sides of houses. In proceedings taken by the Fulham Board of Works for the paving of the lane as a “new street” within the meaning of the Metropolitan Management Acts, the magistrate held that the lane was not a “street,” and refused to state a case, as he considered the question one of fact :—Held, that the question whether the lane was a “street” or not, was a question of fact, and not of law, and that the magistrate could not be compelled to state a case. *Reg. v. Sheil*, 50 L. T. 590; 49 J. P. 68—D.

Widening—Power of Commissioners to take Land.—Two houses adjoining Wood Street, in the city of London, having been destroyed by fire, the outer walls being left standing, the Commissioners of Sewers adjudicated that it was desirable to widen Wood Street, and that the two houses, and the land on which they stood, projected into and prevented them from widening the street, and that the possession and purchase of those houses was necessary for that purpose, and they directed their solicitor to treat for the purchase. Notice to treat was accordingly given for the whole of the houses. The owners brought their action for an injunction to restrain the commissioners from proceeding on this notice. It was admitted by the commissioners that they only meant to use a strip of 5½ feet in breadth for widening the street, and intended to sell the rest without giving the plaintiffs any option of pre-emption :—Held, that the plaintiffs were entitled to an injunction, for that the adjudication was ultra vires, the commissioners having no power to adjudicate that the possession of the whole of the piece of land is necessary for the purpose of improvements when they only intend to use a small part of it for that purpose, though if they made such an adjudication in the belief that they should require the whole for the improvements, the correctness of the adjudication could not be questioned. *Gard v. Commissioners of*

Sewers, 28 Ch. D. 486; 54 L. J., Ch. 698; 52 L. T. 827—C. A.

—**Severance.**—If part of a piece of land prevents an improvement, the commissioners have power to take part compulsorily, their power of proceeding compulsorily not being limited to taking the whole. Whether the commissioners, if they only want a part of the site of an existing house for the purpose of an improvement, can adjudicate that the possession and purchase of the whole house are necessary, *quære*. *Id.*

A metropolitan vestry required, for the purpose of widening a street, a part of the buildings and site of an orphanage that would leave a substantial portion of the premises :—Held, that (the owners wishing to sell the part required only) the vestry could not take the whole. *Teuliere v. St. Mary Abbott's Vestry*, 30 Ch. D. 642; 55 L. J., Ch. 23; 53 L. T. 422; 50 J. P. 53—Pearson, J.

Right of Pre-emption.—Semble, that the right of pre-emption given by 57 Geo. 3, c. xxix., s. 96, is not taken away by the City of London Sewers Act, 1851 (14 & 15 Vict. c. xci.), s. 54. *Gard v. Commissioners of Sewers*, supra—Per Kay, J.

Improvements—Failure to carry out—Expiration of Time—Penalties.—By a local act certain persons were nominated directors of a company to establish a certain public market, for which purpose the company had compulsory powers to take the land needed for the market, such powers to expire within three years of the passing of the act. It was also provided that certain streets in the immediate neighbourhood of the market, acting as approaches to the same, should be widened within a stated period under certain penalties, for which purpose of widening the company might acquire land by agreement with the owners of the adjoining property, but not by compulsion. The company never had any real existence, and the whole scheme proved abortive. The time within which the company could exercise its compulsory powers had expired :—Held, that the company having failed to widen the aforesaid streets, the vestry was entitled to the penalties under the statute. *St. Mary, Newington v. South London Fish Market Company*, 52 J. P. 292—Cave, J.

Property in—Overhead Wires.—By the Metropolitan Management Act, 1855, s. 96, “all streets, being highways, shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate.” Defendants, a telephone company, fixed a telephone wire to a chimney, and stretched it across a street, which was vested in plaintiffs as the district board, at a height of about thirty feet from the ground. Plaintiffs brought an action for an injunction to restrain defendants from keeping up the wire :—Held, that what was vested in plaintiffs was the property in the surface of the ground, together with as much space, both above and below the surface, as amounted to the area of ordinary user; and that as the wire in question was above this area, and was not shown to be dangerous, so as to amount to a nuisance, plaintiffs were not entitled to an injunction :—Held, also, that defendants did not require plaintiffs' consent under 26 & 27

Vict. c. 112, s. 12, to entitle them to place the wire across the street. *Wandsworth Board of Works v. United Telephone Company*, 13 Q. B. D. 904; 53 L. J., Q. B. 449; 51 L. T. 148; 32 W. R. 776; 48 J. P. 676—C. A.

Regulation of—Nuisance.—The statute 25 & 26 Vict. c. 102, s. 73, extends to the metropolis the powers of improving and regulating streets, and for suppressing nuisances, contained in 57 Geo. 3, c. 29. S. kept a barrow of chestnuts several hours standing in a street in the F. district, which was outside the area of the Metropolitan Traffic Act, 30 & 31 Vict. c. 135, but within the metropolis, and an officer of the local board desired him to remove, but he refused:—Held, that S. was liable to be convicted of an offence contrary to 57 Geo. 3, c. 29, s. 65. *Fulham Board of Works v. Smith*, 48 J. P. 375—D.

Obstruction—Power of Police to Prosecute.—A person, by singing hymns, occasioned a crowd to assemble, and thereby obstructed a certain highway within the metropolitan police district. An information was accordingly preferred against him by an inspector of police, under s. 72 of the Highway Act:—Held, that the provisions of s. 72 of the Highway Act were applicable to highways within the metropolitan area:—Held, also, that a prosecution under s. 72 of the act might be initiated by anyone, and therefore that the proceedings taken by the police were valid. *Back v. Holmes*, 57 L. J., M. C. 37; 56 L. T. 713; 51 J. P. 693; 16 Cox, C. C. 263—D.

Street Lamp—Accidental Damage to—Liability of Master.—A master is not liable under s. 207 of the Metropolitan Local Management Act, for the accidental breaking by his servant of a street lamp, the top of which projected over the kerb, such accident having been caused by some goods on a van which the servant was driving coming in contact with and breaking the top of the lamp. *Harding v. Barker*, 37 W. R. 78; 53 J. P. 308—D.

Power of District Board to erect Posts—Interference with Market.—A district board of works, under the statutory powers conferred by 57 Geo. 3, c. 29, s. 58, and 18 & 19 Vict. c. 120, s. 108, threatened to erect posts by the side of public footpaths along the public roads leading into the area of Spitalfields Market, in order to preserve the rights of the public and to insure the safety of foot-passengers. It was proved that this would seriously interfere with the access to the market, which had been recently enlarged by throwing into it the site of houses which had been pulled down belonging to the plaintiff:—Held, that such an exercise of the board's powers would be an interference with the "rights and privileges vested in the plaintiff in reference to a market" within the exception contained in 18 & 19 Vict. c. 120, s. 91, and an injunction was granted restraining the proposed action of the board. *Horner v. Whitechapel Board of Works*, 55 L. J., Ch. 289; 53 L. T. 842—C. A.

c. Sewers and Drainage.

Vesting of Sewers in District Board—Connexion with Drain illegally made—Liability

of Board.—The duty imposed by s. 72 of the Metropolitan Local Management Act, 1855, on a district board, to keep the sewers which are by the act vested in them so as not to be a nuisance, is not an absolute duty, but only a duty to use all reasonable care and diligence to keep the sewers in a proper condition. If, therefore, a drain which was originally a private drain, has, by reason of another drain being connected with it, become a "sewer," and therefore by the act vested in the district board, the board will not be liable for a nuisance caused by the drain, if it is shewn that the connexion was made illegally without the knowledge of the board, and that before action brought they did not know, and could not by the exercise of reasonable care have discovered, that the drain was a "sewer." *Hammond v. St. Pancras* (9 L. R., C. P. 316) followed. *Bateman v. Poplar Board of Works*, 37 Ch. D. 272; 57 L. J., Ch. 579; 58 L. T. 720; 36 W. R. 501—North, J.

Drainage by "Combined Operation."—The owner of a plot of ground within the metropolitan district on which he was about to build fifteen contiguous houses, sent to the local board notice of his intention to lay down upon it a pipe drain running parallel to the houses, through which the houses would be drained into the main sewer belonging to the Metropolitan Board. The local board signed their approval of the scheme by letter, and entered their approval in their books, but made no formal order. The owner completed the drain:—Held, by North, J., that s. 74 of the Metropolitan Local Management Act, 1855, which enables a district board to order a group or block of contiguous houses to be drained by a "combined operation," is supplemental to s. 73, and like that section applies only to existing houses; that the local board had therefore no power to make an order for draining by a "combined operation" a set of houses in course of erection, and that if they had, their approval of a scheme proposed by the owner did not amount to an order; that the drain in question was therefore not a "drain for draining any group or block of houses by a combined operation under the order of any vestry or district board," and was a "sewer" and not a "drain" within the meaning of s. 250, and by virtue of s. 68 vested in the local board:—Held, on appeal, by Cotton and Lindley, L.JJ. (dissentiente Lopes, L.J.), that although s. 74 did not give the board power to order drainage by a combined operation except in the case of existing houses, the general words of s. 76 gave them this power in the case of houses about to be built; that their approval of the scheme was an order, and that the drain in question was therefore a "drain" and not a "sewer" within the meaning of s. 250, and did not vest in the local board. *Bateman v. Poplar Board of Works*, 33 Ch. D. 360; 56 L. J., Ch. 149; 55 L. T. 374—C. A.

Notice to Repair by Inspector—Proof of Authority—Recovery of Expenses.—A., the sanitary inspector of S., a metropolitan parish, gave a notice in his own name as inspector to H., an owner of a house, to reconstruct drains, &c., in three days, and afterwards, on default, A. did the work, and the S. vestry took out a summons against H. to recover the expenditure.

No resolution of the vestry, or of any committee thereof to give the notice was proved, but only a meeting of three members of a sub-committee, who were proved to have met and resolved that the inspector should enter and execute the works himself:—Held, that the notice given by the inspector was bad, and the statute not being complied with, the summons against H. was properly dismissed. *St. Leonard's Vestry v. Holmes*, 50 J. P. 132—D.

Connecting Houses with—Right of Vestry to do Work.—A builder made drains from certain houses in a road to the boundary of the forecourts of the houses. The road was what is known as a builder's road, made and coated with gravel and ballasted. The footpaths were made with gravel and kerbed with granite. The houses on either side of the road were not completed and inhabited, but the road was open for carriages and foot-passengers. It was lighted by the parish, but had not been taken to as a public road. The vestry made branches from the drains into a sewer which belonged to them and ran along the centre of the road, and for that purpose they opened the road and footway. The builder declined to repay to the vestry the expenses incurred thereby:—Held (1), that the road was not the less a street within the definition in s. 250 of the Metropolis Management Act, 1855, and s. 112 of the Metropolis Management Act, 1862, because it came within the definition of a new street in the last-mentioned section; (2), that s. 78 of the Metropolis Management Act, 1855, which authorises the opening of the pavement of any street for the purpose of branching private drains into a sewer, applies equally to streets and to new streets; (3), that, looking to the definition of the word "pave" in s. 112 of the Metropolis Management Act, 1862, the road was paved:—That, consequently, the vestry had opened a part of the pavement of a street, and were entitled under s. 78 of the Metropolis Management Act, 1855, to recover the expenses incurred by them. *St. John's, Hampstead, v. Hooper*, 15 Q. B. D. 652; 54 L. J., M. C. 147; 33 W. R. 903; 49 J. P. 471—D.

Deposit of Plans—Mandamus to submit Plans to Metropolitan Board of Works.—The making and branching of sewers within the district of a vestry or district board is by s. 47 of the Metropolis Management Act, 1862, made subject to the sanction in writing of the vestry or district board being first obtained. But a vestry or district board cannot give such sanction by the provisions of s. 48, without the approval of the Metropolitan Board of Works:—Held, that it is no answer to a mandamus requiring a district board to submit to the Metropolitan Board of Works plans and sections of sewers laid before them in pursuance of s. 47, to aver that the board has refused to sanction the making of the roads in which the proposed sewers are intended to be made; and that therefore the district board, having no other objection, it was their duty under s. 48 to submit the plans and sections to the Metropolitan Board of Works. *Reg. v. Wandsworth Board of Works*, 49 J. P. 806—D.

Approval of—Costs of Inspection.—A district board of works has no power under the Metro-

polis Management Act, 1862, if it approve of the plans and sections of sewers proposed to be constructed by a private landowner and branched into the main system, to withhold their sanction in writing to the construction of the same until such private landowner shall pay a sum of money to the board to cover the expenses of the Board in supervising such works. *Reg. v. Greenwich Board of Works*, 1 C. & E. 236—Day, J.

Sweeping Mud into.—By s. 205 of the Metropolis Local Management Act, 1855, it is provided that no scavenger or other person shall sweep, rake, or place any soil, rubbish, or filth, or any other thing into or in any sewer or drain, or use any grate communicating with any sewer or drain . . . and every scavenger who shall so offend shall . . . forfeit and pay any sum not exceeding 5*l*. Scavengers having swept mud to the side of a street, and forced it by means of water through a grating into a sewer, were convicted of an offence against the act:—Held, that "mud" came within the meaning of the words in the above section, and that the conviction was right. *Metropolitan Board of Works v. Eaton or Heaton*, 50 L. T. 634; 48 J. P. 611—D.

d. Recovery of Expenses.

Paving Rates—Covenant to Pay.—See LANDLORD AND TENANT, III., 3, h.

"House"—"Land"—"Owner"—Trustees of Chapel.—By the term "houses," in s. 105 of the Metropolis Local Management Act, 1855, and the term "land," in s. 77 of the Metropolis Local Management Act, 1862, it is intended to include (with certain exceptions) all the frontage of a new street, so as to make all the owners of the frontage liable to contribute to the expense of paving the new street. The word "house" includes every building which is capable of being used as a human habitation. If a building, which is physically capable of being so used, is prevented, either by common law or statute, from being ever put to such a use, it is exempted from the liability to contribute to the expense. A consecrated church of the Established Church of England is exempted, because, by reason of its consecration, it becomes by the common law for ever incapable of being used as an habitation for man. But a leasehold chapel fronting on a new street, the chapel being vested in trustees, on trust to permit it to be used as a place of religious worship by a congregation of Wesleyans, is a house within the meaning of s. 105, for, by the consent of the landlord, the trustees, and the cestui que trustent, the trusts might at any moment be put an end to. *Wright v. Ingle*, 16 Q. B. D. 379; 55 L. J., M. C. 17; 54 L. T. 511; 34 W. R. 220; 50 J. P. 436—C. A.

Held, also, that the trustees were the "owners" of the chapel, and as such liable to contribute to the expense of paving the new street. *Id.*

"Owner of Land"—Land subject to Covenants.—By the Metropolis Local Management Act, 1855, s. 250, the word "owner" shall mean the person for the time being receiving the rack-rent of the lands or premises in connexion with which the word is used, or who would so receive the same if such lands or premises were let at a R R

rack-rent; and by the Metropolis Local Management Acts Amendment Act, 1862, s. 77 (which is to be read as one with the Act of 1855, "owners" of land abutting on any new street are made liable to contribute towards the expenses of paving the same. The appellant, having a strip of land about 4 inches wide and 265 feet in length, abutting upon the north side of a new street, had erected a boundary fence upon the land along its whole extent, under a covenant to erect and for ever after maintain a fence thereon made with his vendor, who was owner of the land adjoining the strip on the north side:—Held, that the appellant was the "owner" of the strip of land within the meaning of s. 250 of the Metropolis Local Management Act, 1855, and therefore liable to contribute towards the expense of paving the new street. *Williams v. Wandsworth Board of Works*, 13 Q. B. D. 211; 53 L. J., M. C. 187; 32 W. R. 908; 48 J. P. 439—D.

New Street in Two Districts—Order for exclusive Management by One.—An order of the Metropolitan Board of Works made under 18 & 19 Vict. c. 120, s. 140, and 25 & 26 Vict. c. 102, s. 86, that a new street in more than one parish or district shall be under the exclusive management of one vestry or district board for the purposes of paving, and the expenses payable by each be divided equally between the two parishes or districts, is valid; but such order does not entitle the managing vestry or board to require the other vestry or board to pay one-half of the expenses. *St. Giles, Camberwell v. Greenwich Board of Works*, 19 Q. B. D. 502; 56 L. J., Q. B. 636; 36 W. R. 126—D.

Stale Demand—Successive Occupier—Statute of Limitations.—In 1871, a metropolitan vestry apportioned paving expenses on the then owner of a house and made demand, but the sum was not paid. In 1885, a fresh demand was made on W., the new owner, and the justices made an order on W., within six months thereafter:—Held, that there was no Statute of Limitations or other bar to the recovery of the said expenses, and that the order was right. *Wortley v. St. Mary, Islington*, 51 J. P. 166—D.

Exemption—Owners of Land abutting on "Street"—New Street.—The words "a street" in s. 53 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), include "new streets" as defined by s. 112, as well as old streets. In 1872 a road in the metropolis which had up to that time been a turnpike road ceased to be a turnpike road and became a common highway. In 1883 the vestry of the parish in which the road was constructed a sewer and apportioned part of the expense of construction on the owner of lands abutting on the road. Previously to 1883 there had been no sewer in this part of the road. Sewers' rates had been levied for five years prior to the 1st of January, 1856, in respect of these lands:—Held, that the case fell under s. 53 and not under s. 52 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102); that the road was a "street" within the meaning of s. 53 as defined by s. 112 of that act, and that the lands were under the proviso in s. 53 exempt from apportionment. *St. Giles, Camberwell v. Weller* (6 L. R., Q. B. 168, n.) and *Sheffield v. Fulham Board* (1 Ex. D. 395) approved. *Sawyer*

v. Paddington Vestry (6 L. R., Q. B. 164) overruled. *St. John's, Hampstead v. Cotton*, 12 App. Cas. 1; 56 L. J., Q. B. 225; 56 L. T. 1; 35 W. R. 505; 51 J. P. 340—H. L. (E.)

Apportionment of Expenses—Power of Vestry.—An apportionment by a vestry or district board of the expenses of paving a new street under s. 77 of the Metropolis Management (Amendment) Act, 1862, is not invalid by reason of its being at a higher rate in the case of one piece of land abutting on the street than in the case of another. Such an apportionment, on the true construction of the section, need not be made on any uniform principle, but it is in the absolute discretion of the vestry or board, and can only be questioned on the ground of want of good faith. *Stotesbury v. St. Giles, Camberwell*, 57 L. J., M. C. 114; 59 L. T. 473; 53 J. P. 5—D.

Payment out of General Rates—Expenses not enforceable against adjoining Owners.—In 1876 a local authority caused the footpaths of a new street (within the meaning of the Act of 1855) to be paved, at a cost of 1,425*l.*, raised out of the general rates, and subsequently repaired them from time to time. Ten years afterwards a resolution was passed at a vestry that these paths should be paved under the powers of s. 105 of the Act of 1855 and s. 77 of the Amendment Act of 1862, and the costs apportioned among the adjoining owners. Upon an objection being taken by an adjoining owner that the local authority, having laid out a substantial sum in making permanent footpaths in 1876, which was then charged to the general rates, were estopped from exercising their power of paving the street again under these sections and throwing the cost upon the adjoining owners:—Held, that the work having been once done the local authority could not, ten years afterwards, throw the burden of paving upon the adjoining owners. *St. Giles, Camberwell v. Hunt*, 56 L. J., M. C. 65; 52 J. P. 132—D.

Payment by Purchaser of Property—Implied Covenant against Incumbrances.—The expenses of paving a new street apportioned under s. 77 of the Metropolis Management Amendment Act, 1862, are not a charge upon the property in respect of which they are payable, and therefore if the owner sells the property while the expenses are unpaid, and conveys as beneficial owner, and the purchaser is compelled to pay such expenses, the purchaser cannot recover the amount so paid from the vendor under the implied covenant against incumbrances contained in the conveyance by virtue of s. 7, sub-s. (A) of the Conveyancing and Law of Property Act, 1881. *Egg v. Blayney*, 21 Q. B. D. 107; 57 L. J., Q. B. 460; 59 L. T. 65; 36 W. R. 893; 52 J. P. 517—D.

Payable out of Capital or Income.—A testator bequeathed leasehold houses and other personal property to trustees, in trust, after payment of "all ordinary outgoings for ground rent, repairs, taxes, expenses of insurance, or otherwise," to pay the income to his wife for life, with trusts over. One of the leasehold houses was held by the testator under a lease which threw upon the lessee all "taxes, rates, assessments, and impositions," and, after his death, the sanitary authority

having served a notice under 18 & 19 Vict. c. 120, s. 73, on the occupier of the house, requiring the execution of certain drainage works, the trustees of the will employed a contractor to execute the works, and deducted the expense from the income of the tenant for life:—Held, that the expense was payable out of the income of the testator's estate, and not out of the corpus, and that the deduction had been properly made. *Crawley, In re, Acton v. Crawley*, 28 Ch. D. 431; 54 L. J., Ch. 652; 52 L. T. 460; 33 W. R. 611; 49 J. P. 598—Pearson, J.

II. RATES.

1. IN GENERAL.

Validity of—Issuing Precept.—By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 158, every vestry and district board shall from time to time “by order under their seal require” the overseers of their parish to levy the sums which such vestry or board may require for defraying the expenses of the execution of the act. By s. 161 the overseers “to whom any such order as aforesaid is issued shall levy the amount mentioned therein according to the exigency thereof” :—Held (diss. Day, J.), that such an order became effective when sealed, and service of it on the overseers was not necessary to authorise them to levy rates, but that rates made by overseers in pursuance of such order, after notice of it having been sealed, were valid. *Glen v. Fulham Overseers*, 14 Q. B. D. 328; 54 L. J., M. C. 9; 51 L. T. 856; 33 W. R. 165; 49 J. P. 519—D.

Refusal of Magistrate to issue Warrant pending Appeal.—The rateable value of certain property having been re-assessed at a much higher sum, the owners appealed. Before the hearing of the appeal it was agreed that a special case should be stated for the opinion of the Queen's Bench Division, and that in the meantime rates should be paid on the former valuation, and these terms were embodied in an order made by a judge on the 23rd March, 1881. In 1883 the overseers applied to the magistrate for a distress warrant for the amount of the rates according to the new assessment, but the application was refused, on the ground that as the appeal was still pending the overseers were bound by the order of the judge. The overseers then applied to the Queen's Bench Division for a mandamus to the magistrate to issue the warrant:—Held, that in consequence of the provisions of 32 & 33 Vict. c. 67, s. 44, which enacts that, pending any appeal from any new assessment, the rate shall be paid according to the new assessment, the judge had no jurisdiction to make the order, and that the consent of the assessment committee to that order did not bind the overseers. *Reg. v. Marsham*, 50 L. T. 142; 32 W. R. 157; 48 J. P. 308—C. A.

2. VALUATION ACTS.

Notice of Appeal—Service on Persons other than the Appellant.—The assessment committee of a union appealed, under s. 32 of the Valuation (Metropolis) Act, 1869, to the general assessment

sessions against the valuation list of the respondent parish, and against the total gross and rateable values appearing therein, on the ground that those values were too low, and it appeared from the case stated by the appellants in compliance with the rules made under the act that they sought to have the total values increased by showing that the assessments in the valuation list of a large number of specified hereditaments were too low:—Held, that the appeal did not “relate to the unfairness or incorrectness of the valuation of any hereditament occupied by any hereditaments occupied by any person other than the appellant” within the meaning of s. 33 of the Valuation (Metropolis) Act, 1869; that those words applied only to appeals in which it was objected that the valuation of particular hereditaments was unfair or incorrect so far as it affected the assessment of the ratepayers of a parish inter se; and therefore that the appellants need not serve notice of appeal under s. 33 upon the occupiers of the specified hereditaments. *Reg. v. General Assessment Sessions*, 17 Q. B. D. 394; 35 W. R. 12; 50 J. P. 724—D.

Supplemental List—Alteration during preceding Twelve Months—Diminution of Income.]

—On an appeal from the assessment committee as to a supplemental valuation list under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), evidence of a falling off in receipts of tonnage rates on vessels coming to certain docks during the twelve months preceding the making of the supplemental list when the rates were the same, and which, as compared with former years, shows a continuous and not accidental falling off, is sufficient if not explained or rebutted to show an alteration in the rateable value of the docks during that period within the meaning of s. 46. When such alteration has been established, and it has therefore to be entered in a supplemental list, the rateable value of the docks is to be ascertained, not by opening up the previous quinquennial or supplemental list, but by assuming the value in the list then in force to be the correct value at the commencement of the twelve months preceding, and by deducting from it the diminution in value from the alteration during that period. *Reg. v. East and West India Dock Company or Poplar Union*, 13 Q. B. D. 364; 53 L. J., M. C. 97; 51 L. T. 97; 48 J. P. 564—C. A. Reversing, 32 W. R. 321—D.

—Reduction in Value within Year—Deterioration not merely Structural.]—Sections 46 and 47 of the Valuation of Property (Metropolis) Act, 1869, are not confined to or applicable only to structural deterioration in property. Therefore a ratepayer who can show a *prima facie* case of reduction in the rateable value of his property from other causes than of a purely structural nature is entitled to call upon the Assessment Committee to appoint a person to make a provisional list, showing the gross and rateable value of his property, as reduced since the making of the valuation list in force. *Reg. v. St. Mary, Islington*, 19 Q. B. D. 529; 56 L. J., Q. B. 597; 57 L. T. 270; 35 W. R. 664; 51 J. P. 789—D.

—Alteration in Value during Year—Power of Overseers.]—Where a requisition is made to

the overseers of a parish to make and send to the assessment committee a provisional list under s. 47 of the Valuation (Metropolis) Act, 1869, containing the gross and rateable value of an hereditament, on the ground that the value has been increased or diminished during the year, the overseers are not bound to comply with the requisition if they are of opinion that no such alteration in value has taken place, and a mandamus will not be granted to compel them to do so. *Reg. v. St. Mary, Bermondsey*, 14 Q. B. D. 351; 54 L. J., M. C. 68; 33 W. R. 414; 49 J. P. 38—D.

— **Special Sessions—Appeal.**—An appeal does not lie to special sessions from the determination of the assessment committee on an objection to a provisional list made under s. 47 of the Valuation (Metropolis) Act, 1869. *Fulham Union v. Wells*, 20 Q. B. D. 749; 57 L. J., M. C., 112; 59 L. T. 103; 36 W. R. 858; 52 J. P. 663—D.

III. TRAFALGAR SQUARE.

Right of Public Meeting.—Semble:—There is no right on the part of the public to occupy Trafalgar Square for the purpose of holding public meetings, but the Commissioners of Works and Public Buildings (in whom the care, control, management, and regulation of the square is vested by 7 & 8 Vict. c. 60, s. 2, and 14 & 15 Vict. c. 42, s. 22) have power to prohibit the holding of such meetings there. *Lewis, Ex parte*, 21 Q. B. D. 191; 57 L. J., M. C. 108; 59 L. T. 338; 37 W. R. 13; 52 J. P. 773—D.

IV. STAGE CARRIAGES.

Use of Manager's Name—Injunction.—The plaintiff, as manager of an omnibus company, became, under the provisions of the statutes and rules for the regulation of metropolitan stage-carriages, the licensee of their vehicles. Having ceased to be such manager:—Held, that he was entitled to an injunction to restrain the company from continuing to use his name upon the number plates affixed to their carriages. *Hodges v. London Tramways Omnibus Company*, 12 Q. B. D. 105; 50 L. T. 262; 32 W. R. 616—D.

MIDDLESEX.

Registration of Deeds.—See DEED AND BOND, II.

MINES AND MINERALS.

1. *In General*, 1224.
2. *Working*, 1226.
3. *Forest of Dean*, 1228.
4. *Regulation of Mines*, 1229.
5. *Wages*, 1230.

1. IN GENERAL.

Payment of Income Tax on.]—See REVENUE.

Winding up of Cost Book Company—Inspection of Books.]—See ante, col. 440.

Grant—Reservation of Rent Charge—Perpetuity.]—Where, in a deed of grant of land, there was a clause that a rent-charge should be paid by the purchaser, his heirs or assigns, to the vendor, his heirs and assigns, if the purchaser, his heirs or assigns, should at any time dig and work, &c., any mines, &c., on the property granted:—Held, that the rent-charge was validly created, and the clause not void as violating the rule against perpetuities. *Morgan v. Davy*, 1 C. & E. 115—Mathew, J.

Rent-charge—Minerals raised but not procured on Lands granted.]—An agreement to pay a sum by way of rent-charge or royalty, in respect of minerals which may be raised or obtained by, from or out of any mine or mines, pit or pits, in, upon, or under the property granted, does not entitle the person in whose favour the rent-charge or royalty is created to receive payment in respect of minerals brought up at the mouth of pits upon, but not procured under, the property granted. *Ib.*

Royalty—"Shipped for Sale."]—D. [in 1824, agreed with S. for the purchase of an estate, and that the purchase-deed should contain a covenant by D. that he, his heirs and assigns, would pay to S., his executors, administrators, and assigns, the sum of 6s. for each chaldron of coals gotten out of the estate and shipped for sale. The purchase deed was subsequently executed by S., but not by D. D., however, entered upon the land, and he and his devisees and their assigns enjoyed the property. Coal was also got and shipped for sale:—Held, that the execution by D. of a counterpart of the deed containing the covenant must be presumed, and that the words "shipped for sale" in the deed meant coal actually shipped for sale. *Witham v. Vane*, 32 W. R. 617—H. L. (E.) Reversing, 44 L. T. 718—C. A.

Conveyance of Land with Reservation.]—Where the owner conveys land to a person, reserving the "liberty of working the coal" in those lands, he must be taken to have reserved the estate of coal (unless there are clear words in the deed qualifying that right of property) with which he stands vested at the date of the conveyance. *Hamilton (Duke) v. Dunlop*, 10 App. Cas. 813—H. L. (Sc.)

Reservation of Minerals in Leases.]—See ante, cols. 1077, 1078.

Reservation in Allotment—Granite—Open Working.]—By an Inclosure Act passed in 1812, certain common lands in Wales were allotted, an allotment being made to the king as lord of the manor in respect of his right to the soil. The act gave the Commissioners of Woods and Forests the right to sell the allotment made to the king, subject to the rights of the king to the "mines, ores, minerals, coal, limestone, or matter whatsoever," in or under the same; and contained a proviso reserving to the king his rights to any "mines, ores, minerals, coal, limestone,

or slate" in the common land, and all rights and royalties previously belonging to the king, and gave a right of compensation to the owners of the land for any damage done in digging, raising, and carrying away such mines, etc. :—Held, that the word "minerals" included granite, and (Fry, L. J., doubting) that the Crown was entitled to win the granite by open workings. *Att.-Gen. v. Welsh Granite Company*, 35 W. R. 617—C. A.

Lease of—Right to Spoil Bank.—The lessee of a coal mine, under covenant to remove the spoil bank at the end of his term, has a property in the material of the bank, giving him a right of action against a stranger removing part of it for brick making. *Robinson v. Milne*, 53 L. J., Ch. 1070—North, J.

Agreement for Mining Lease—Lessee in Possession—Payment of Royalties into Court.—The plaintiffs commenced an action against the defendant for specific performance of an agreement for a lease of a coal mine by the plaintiffs to the defendant at a royalty, as the plaintiffs alleged, of 10*d.* per ton. The defendant counter-claimed to have specific performance with a royalty of less amount. The defendant was in possession, and raising and selling large quantities of coal, but he alleged that he had expended on the mine more than the value of the coal raised. He also brought an action against the plaintiffs in the Queen's Bench Division to obtain damages for misrepresentations alleged to have been made to him for the purpose of inducing him to enter into the agreement, which action was still pending. The plaintiffs moved for an interlocutory order that the defendant might be ordered to pay into court the amount of royalties at 10*d.* per ton on the coal he had raised, but the court refused the motion :—Held, on appeal, that although it would not be right, while the right of royalty was in dispute, to order the defendant to pay into court the amount of royalties at the rate claimed by the plaintiffs, he ought to be ordered to pay in the amount of royalties at the rate which he himself alleged to be the one agreed upon, and that as his carrying away coal diminished the value of the property, he would not have the usual option of giving up possession instead of paying money into court. *Levis v. James*, 32 Ch. D. 326 ; 56 L. J., Ch. 163 ; 54 L. T. 260 ; 34 W. R. 619 ; 50 J. P. 423—C. A.

Mortgage—Accounts—Value of Coal Improperly Worked—Deductions—Costs of Severance and of Raising.—The plaintiffs were mortgagees in possession of a colliery, and were also treated by the court as lessees of the same colliery under a lease for a fixed term of years at a rent and a certain royalty for all coal gotten. The lease contained covenants to leave pillars of coal to support the roof and not to work or remove the pillars. The mortgagees underlet the colliery and gave their sub-lessees permission to work and remove the pillars, which they did :—Held, that in taking the accounts as against mortgagees in possession, the mortgagees having allowed their sub-lessees to take the coal, must be treated as having taken it themselves, and, having so taken it wrongfully in breach of the covenants in the lease, must be charged, not with the amount of the royalty reserved, but with the full value of the coal,

subject to a deduction for the costs of bringing it to the surface, but not for the costs of severance ; and the foreclosure, which had been made absolute before the appeal was heard, was reopened. *Livingstone v. Rawyards Coal Company* (5 App. Cas. 25) distinguished. *Taylor v. Mostyn*, 33 Ch. D. 226 ; 55 L. J., Ch. 893 ; 55 L. T. 651—C. A.

Compulsory Purchase of Surface—Whether Clay is included in "other Minerals."—The 18th section of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), provides that "the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them." The appellants, by virtue of the act and a conveyance containing a reservation of the "whole coal and other minerals in the land in terms of the Waterworks Clauses Act, 1847," purchased from the respondent a parcel of land for the purpose of erecting waterworks. Under the land was a seam of valuable brick clay. The respondent worked this clay in the adjoining land, and having reached the appellants' boundary, claimed the right to work out the clay under the land purchased by the appellants :—Held (Lord Herschell, dissenting), that common clay, forming the surface or subsoil of land, was not included in the reservation in the act, and that the appellants were entitled to an interdict restraining the respondent from working the clay under the land purchased by them. *Glasgow (Lord Provost) v. Farie*, 13 App. Cas. 657 ; 58 L. J., P. C. 33 ; 60 L. T. 274 ; 37 W. R. 627—H. L. (Sc.)

Injury by Laying Down Pipes—Alluvial Deposit worked at a Profit.—In an action brought by J., the owner in fee simple of certain mines of coal, culm, iron, and all other mines and minerals (except stone quarries) against N., a rural sanitary authority, for damages for injury done by reason of N. having constructed certain sewage pipes under the provisions of the Public Health Act, 1875, in respect of his interest in a certain alluvial deposit, being a pure clay of superior quality, used for the manufacture of bricks, underlying the surface :—Held, that J. was entitled to recover, inasmuch as the alluvial deposit came within the reservation of minerals. *Jersey (Earl) v. Neath Union*, 52 J. P. 582—Day, J. Affirmed 22 Q. B. D. 555 ; 37 W. R. 388 ; 53 J. P. 404—C. A.

2. WORKING.

Under Railway.—See RAILWAY.

Injury to Canal caused by Working.—See WATER.

Damage to Surface—Inclosure Act—Manorial Rights.—An inclosure act enacted that allotments should be made to the persons having a right of common upon the waste of the manor, that is, to the owners of every separate ancient dwelling-house within the manor ; that all rights of common should be extinguished ; and that the allotments should be held and enjoyed by the allottees by the same tenure and estates as the respective dwelling-houses : provided that nothing should prejudice, lessen or defeat the title and interests of the lords of the manor or in the royalties, but that the lords

and their successors as owners of the royalties should for ever hold and enjoy all "rents, courts, perquisites, profits, mines, power of using or granting wayleave, waifs, estrays, and all other royalties and jurisdictions whatsoever" to the owners of the manor appertaining "in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this act had not been made." Provided further, that in case the lords or any persons claiming under them should work any mines lying under any allotment, or should lay, make, or use any way or ways over any allotment, such persons so working the mines, or laying, making, or using such way or ways should make "satisfaction for the damages and spoil of ground occasioned thereby to the person or persons who shall be in possession of such ground at the time or times of such damage or spoil"; such satisfaction to be settled by arbitration and "not to exceed the sum of 5*l*. yearly during the time of working such mines or continuing or using such way or ways for every acre of ground so damaged or spoiled." At the time of passing the act there were no customs which enlarged or cut down the common law rights of the lords to work the minerals under the wastes of the manor. Under the act an allotment was made in 1772 to a commoner in respect of an ancient freehold dwelling-house. At that time no house had been built upon the allotment. More than twenty years after a house had been built upon it, the minerals underlying it were worked by lessees of the lords of the manor so as to cause the surface of the land to subside, whereby the house was damaged to an amount exceeding the sum recoverable under the proviso. The land would have subsided if there had been no house. An action for damages having been brought against the lessees by the allottee's successor in title and by his tenant in possession.—Held, that upon the true construction of the act, the proviso for satisfaction did not apply to damage from subsidence; that there was nothing in the act giving the lords the right to let down the surface; that the plaintiffs were entitled to have the house and land supported by the minerals, and to recover damages for the subsidence. *Love v. Bell*, 9 App. Cas. 286; 53 L. J., Q. B. 257; 51 L. T. 1; 32 W. R. 725; 48 J. P. 516—H. L. (E.)

Successive Subsidesces—Statute of Limitations.—In 1868, the defendants worked out a seam of coal in their mine, and thereby caused certain cottages of the plaintiff to subside. The defendants repaired the damage. The mine was no longer worked, and the excavation remained as it was until 1882, when there occurred a second subsidence, which was admitted to be the result of mining operations in 1868, and caused injury to the plaintiff's cottages, whereupon he sued the defendants for damages.—Held (Lord Blackburn diss.), that on the occurrence of the second subsidence a cause of action accrued to the plaintiff, and therefore that his right to maintain an action in 1883 was not barred by the Statute of Limitations. *Darley Main Colliery Company v. Mitchell*, 11 App. Cas. 127; 55 L. J., Q. B. 529; 54 L. T. 882; 51 J. P. 148—H. L. (E.). Affirming 32 W. R. 947—C. A.

Compensation Moneys—Capital or Income—

Successive Tenants for Life—Remaindermen.—Minerals were devised by will upon trust for B. for life without impeachment of waste, with remainder on trust for the defendant for life without impeachment of waste, with remainders over. During the life, and also after the death of B., part of these minerals were won by instroke by the owners of the adjoining mines, who had trespassed innocently and paid compensation moneys for so doing.—Held, that the moneys paid in respect of the minerals so won during the respective lives of B. and the defendant, belonged to the estate of B. and to the defendant respectively. *Barrington, In re, Gamlen v. Lyon*, 33 Ch. D. 523; 56 L. J. Ch. 175; 55 L. T. 87; 35 W. R. 164—Kay, J.

The minerals were leased by the testator. A railway passed over a portion of the lands under which they lay, and after the death of B. the lessee gave the railway company notice of his desire to work the minerals lying under and adjoining a portion of the railway. The company gave a counter notice that these minerals were required for the support of the railway, and ultimately paid compensation money, part of which was apportioned as paid in respect of the lessor's interest.—Held, that as the minerals in respect of which the compensation money had been paid were not of such extent that they could not possibly have been got during the life of the existing tenant for life, the defendant, as such tenant for life, was entitled to such apportioned part of the compensation money under s. 74 of the Lands Clauses Consolidation Act, 1845. *Id.*

Fixtures—Removal—Tenant for Life of Mines and Collieries—Remainderman.—A tenant for life of real estate, who was entitled to hold and enjoy the working stock and plant of certain iron mines and collieries situate on the estate, and carry on such iron mines and collieries, erected on the estate, machinery, &c., blast furnaces, and a railway of considerable length connecting the mines and collieries. On his death the question arose whether, in an account between his executors and the remainderman, the former should be credited with the value of the machinery, &c., or whether the same passed to the remainderman as things annexed to the soil.—Held, that the interest of the tenant for life was a right of enjoyment in the chattels, and not a right to carry on a business; and that therefore his position with respect to the trustee was that of a donee of consumable chattels.—Held, also, that the machinery annexed to the soil for the purpose of rendering the minerals merchantable, if such machinery was capable of being removed therefrom by disturbing the soil without destroying the land, was machinery which could not be said to be so attached to the land as to become part of it and belong to the owner of the land, but was to be deemed to be trade fixtures which passed to the executor as personalty, on the authority of *Wake v. Hall* (8 App. Cas. 195). *Ward v. Dudley (Countess)*, 57 L. T. 23—Chitty, J.

3. FOREST OF DEAN.

Forfeiture of Gale.—An application for a gale in the Forest of Dean must be made at a time

when the gale is vacant. Where a gale had become liable to be forfeited under s. 29 of the Forest of Dean Act, 1838, for non-working:—Held, that the forfeiture was not complete nor the gale become vacant until the Crown had intimated its intention of enforcing the forfeiture. Actual resumption of possession by the Crown is not necessary to complete the forfeiture of a gale, and this independently of the Queen's Remembrancer Act (22 & 23 Vict. c. 21), s. 25. *James v. Young*, 27 Ch. D. 652; 53 L. J., Ch. 793; 51 L. T. 75; 32 W. R. 981—North, J.

4. REGULATION OF MINES.

Gunpowder—Conveyance of—“Case or Canister.”—By the Metalliferous Mines Act, 1872 (35 & 36 Vict. c. 77), s. 23, sub-s. 2, “Gunpowder or other explosive or inflammable substance shall not be taken into the mines except in a case or canister containing not more than four pounds:”—Held, that the word “case” as used in the section must be taken to mean something solid and substantial in the nature of a canister, and that a bag of linen or calico was not such a “case.” *Foster v. Diphwys Casson Slate Company*, 18 Q. B. D. 428; 56 L. J., M. C. 21; 51 J. P. 470—D.

—Compliance with General Rules when Reasonably Practicable.—The Coal Mines Regulation Act, 1872, by s. 51 enacts that certain general rules shall be observed so far as is reasonably practicable, and among them that gunpowder or other explosive or inflammable substance shall not be used in the mine underground, during three months after any inflammable gas has been found in any such mine, if the inflammable gas issued so freely that it showed a blue cap on the flame of the safety-lamp, except when the persons ordinarily employed in the mine are out of the mine “or out of the part of the mine where it is used:”—Held, that the expression “reasonably practicable” did not relate to the carrying on of the mine as a profitable concern, but to physical or engineering difficulties in the way of carrying out the rules, and that the expression “part of the mine,” did not mean the neighbourhood where the gunpowder would be used, but such a part of the mine as could be treated under the statute as a separate mine. *Walls v. Wales v. Thomas*, 16 Q. B. D. 340; 55 L. J., M. C. 57; 55 L. T. 400; 50 J. P. 516; 16 Cox, C. C. 128—D.

—Notice by Inspector of Danger—Objection of Owner—Powers of Arbitrator.—In an arbitration under s. 46 of the Coal Mines Regulation Act, 1872, the duty of the arbitrator is limited to determining whether the matter complained of by the inspector is dangerous and ought to be remedied, and he has no power to determine what is the proper remedy, or to direct that any particular remedy be adopted. *Home Secretary and Fletcher, In re*, 18 Q. B. D. 339; 56 L. J., Q. B. 177; 35 W. R. 232; 51 J. P. 707—C. A.

Check-weigher, Appointment of—Person “Employed in the Mine.”—By the Coal Mines Regulation Act, 1872, s. 18, the persons employed

in a mine, and paid according to the weight of the mineral gotten by them, may, at their own cost, station a check-weigher at the place appointed for the weighing of such mineral, in order to take an account of the weight thereof on behalf of the persons by whom he is so stationed; and “the check-weigher shall be one of the persons employed either in the mine at which he is so stationed, or in another mine belonging to the owner of that mine.” The plaintiff, a check-weigher, duly appointed under s. 18, received a fortnight's notice to quit his employment from the men employed in the mine. Before the notice expired the men held a fresh election, at which the plaintiff (with others) presented himself as a candidate, and was again appointed:—Held, that the true construction of s. 18 was to limit the class of persons from whom the men might appoint a check-weigher to persons employed in the mine by the mine-owner; that the plaintiff ceased to have any employment under the mine-owner when he was first appointed check-weigher by the men; and therefore that his second appointment was invalid. *Hopkinson v. Caunt*, 14 Q. B. D. 592; 54 L. J., Q. B., 284; 33 W. R. 522; 49 J. P. 550—D.

5. WAGES.

Payment by Weight of Mineral—Mode of determining Deductions—Mineral contracted to be gotten.—By the Coal Mines Regulation Act, 1872, s. 17, where the amount of wages paid to persons employed in a mine to which the act applied depends on the amount of mineral gotten by them, such persons are to be paid according to the weight of the mineral gotten by them, subject to deductions in respect of, among other things, “stones or materials other than minerals contracted to be gotten,” such deductions to be determined by the banksman or weigher and check-weigher (if there be one). The plaintiffs worked in the defendants' colliery under a contract which declared that the “mineral contracted to be gotten” should be coal of a certain size, which was to be paid for at 1s. 6d. per ton, that heading slack should be paid for at 7d. per ton, and that no other slack should be paid for. The coal was weighed close to the pit's mouth in the presence of the weigher and check-weigher, and was then carried to a distance and thrown on a screen, and the weight of the slack which passed through the screen was ascertained by a person in the defendants' employ. Wages were paid according to the weight of the coal as ascertained at the pit's mouth after deducting therefrom the weight of the slack which had gone through the screen. In an action to recover the difference between the wages so ascertained and wages computed on the full weight of coal taken by the check-weigher at the pit's mouth:—Held (Fry, L. J., dissenting), that the mineral contracted to be gotten within the meaning of the statute was coal, and that slack being a part of such coal, deductions in respect of it were unauthorised; that so much of the contract as related to such deductions was void, and that the plaintiffs were entitled to recover. *Bourne or Broune v. Netherseal Colliery Company*, 20 Q. B. D. 606; 57 L. J., Q. B. 306; 59 L. T. 751; 36 W. R. 405; 52 J. P. 453—C. A. Affirmed 14 App. Cas. 228—H. L. (E.)

MISREPRESENTATION.

See FRAUD.

MISTAKE.

Ground of Rectification of Deed.]—See DEED AND BOND.

Rectification — Res judicata—Money paid under Compulsion of Law.]—After money has been paid under a judgment founded on the construction of an agreement, an action to rectify the agreement, on the ground that such construction was contrary to the intention of all parties, is barred. *Caird v. Moss*, 33 Ch. D. 22; 55 L. J., Ch. 854; 55 L. T. 453; 35 W. R. 52; 5 Asp. M. C. 565—C. A.

By one Party as to Material Term—Written Agreement.]—After negotiations for a lease of certain premises had been for some time pending, R., who was acting in the matter on behalf of G., the intending lessor, wrote a letter to M., the intended lessee, offering a lease at a rent of 33*l.* 10*s.* yearly, which was immediately accepted in writing by M., and a lease at that rent was afterwards prepared and executed by G. and M. G. afterwards brought an action in the County Court to have the agreement and lease rectified by inserting 53*l.* 10*s.* as a yearly rent, or in the alternative that the agreement and lease might be cancelled:—Held, that the sum of 33*l.* 10*s.* had been inserted by mistake in R.'s offer, and in the subsequently-prepared lease, and that the offer had been accepted and the lease taken by M. with knowledge of the mistake; and therefore the court while holding that it was not a case for re-formation of the contract, directed the lease and the agreement to be delivered up to be cancelled. *Gun v. M'Carthy*, 13 L. R., Ir. 304—Flanagan, J.

Effect on Contract or Deeds—Rectification or Cancellation.]—Where there is mutual mistake in a deed or contract the remedy is to rectify by substituting the terms really agreed to. Where the mistake is unilateral the remedy is not rectification but rescission, but the court may give to a defendant the option of taking what the plaintiff meant to give in lieu of rescission. *Paget v. Marshall*, 28 Ch. D. 255; 54 L. J., Ch. 575; 51 L. T. 351; 33 W. R. 608; 49 J. P. 85—V.-C. B.

Plaintiff wrote a letter offering to the defendant to grant a lease to him of a portion of a block of three houses, consisting of the first, second, third, and fourth floors of all three houses, at a rent of 500*l.* a-year. Defendant wrote in answer, accepting the offer; and a lease was executed whereby all the upper floors of the block were demised by the plaintiff to the defendant at a rent of 500*l.* Plaintiff alleged that the first-floor of one of the houses was included in the offer, and in the lease, by mistake, and that he always intended to reserve such first-floor for his own use. Defendant denied that he accepted the offer, or executed the lease, under any mistake. The court having found upon the evidence that a common mistake was

not sufficiently proved, but that mistake on the part of the plaintiff was, gave judgment for rescission with an option to the defendant to accept rectification instead. *Ib.*

Rescinding Order by Consent.]—See *Elsas v. Williams*, post, PRACTICE (ORDERS).

Of Law—Money paid under—Recovery back of.]—The doctrine that money paid under a mistake cannot be recovered back unless the mistake be one of fact, applies even though the person receiving the payment be one of the persons authorising it to be made. *Miles v. Scotting*, 1 C. & E. 491—Stephen, J. See also *Hooper v. Exeter (Mayor)*, and *Plater v. Burnley (Mayor)*, post, col. 1233.

— Money paid to Trustee in Liquidation—Repayment.]—Where money has been paid to the trustee in bankruptcy or liquidation under a mistake whether of fact or of law, the court will order it to be repaid, provided that no injury or injustice accrue to any one by reason of such order. *Simmonds, Ex parte, Carnac, In re*, 16 Q. B. D. 308; 55 L. J., Q. B. 74; 54 L. T. 439; 34 W. R. 421—C. A.

Where the money so paid had been already distributed in dividends, the court ordered the money to be repaid out of sums subsequently coming to the hands of the trustee. *Ib.*

B., who was one of the trustees of a will and was also beneficially entitled to a share in the testator's estate, acting under a power of sale contained in the will, sold a portion of the estate and appropriated to his own use more than his share of the purchase-money. He afterwards went into liquidation, and an action was instituted for the administration of the testator's estate. In the course of the action further portions of the estate were sold, and out of the purchase-moneys arising from these sales a sum of money was paid to the trustee in the liquidation of B. in respect of his shares thereof:—Held, that inasmuch as B. was not entitled to receive any of the purchase-money arising from the later sales until he had made good the sum which he had appropriated beyond his own share out of the proceeds of the first sales, the payment to his trustee in liquidation was made under a mistake of law; and, in analogy to the rule in bankruptcy laid down in *James, Ex parte* (9 L. R., Ch. 609), and *Simmonds, Ex parte* (supra), the court ordered B.'s trustee in liquidation to refund the sum so paid to him. *Brown, In re, Dixon v. Brown*, 32 Ch. D. 597; 55 L. J., Ch. 556; 54 L. T. 789—Kay, J.

Money had and received—Right to Recall—Privity of Parties.]—R. instructed his agent at A. to remit money to a bank at H. The agent paid the money into plaintiffs' bank at A., with instructions to make the remittance. By mistake the money was paid into the defendants' bank, where R. was a customer, and being indebted to the defendants, the money was placed to his credit in reduction of the debt. On the following day the defendants were informed of the mistake, and were requested to pay the money into the bank at H., which they refused to do, on the ground that the money had been appropriated:—Held, that there was direct privity between the plaintiffs and the defen-

dants, and that the plaintiffs were entitled to recover the money from the defendants. *Colonial Bank v. Exchange Bank of Yarmouth*, 11 App. Cas. 84; 55 L. J., P. C. 14; 54 L. T. 256; 34 W. R. 417—P. C.

MONEY COUNTS.

Account stated—What is—Where stated—Authority of Agent.—The plaintiff's solicitor, who carried on business within the jurisdiction of the Mayor's Court, wrote to the defendant demanding payment of 7*l.* 6*s.* 6*d.* for goods sold and delivered to him by the plaintiff. Neither of the parties resided or carried on business, nor was the contract entered into, within the jurisdiction. The defendant, in a letter written to the plaintiff's solicitor—posted outside, but received within the jurisdiction—admitted that he owed 5*l.* 6*s.* 6*d.* to the plaintiff. The plaintiff having brought an action in the Mayor's Court to recover 5*l.* 6*s.* 6*d.* on an account stated, the defendant obtained a writ of prohibition:—Held, that the admission of the defendant and the bringing of the action amounted to an account stated; that the account was stated within the jurisdiction of the Mayor's Court, and that the plaintiff's solicitor was his agent to receive the admission and to state the account, and that therefore the Mayor's Court had jurisdiction to try the action. *Grundy v. Townsend*, 36 W. R. 531—C. A.

Money had and Received—Compulsory Payment—Overpayment of Water-rate.—The defendants, as sanitary authority for the borough of B., had demanded from the plaintiff, and the plaintiff had paid, a water rate of 8*l.* 15*s.* 4*d.*, such rate being calculated on the "gross rental" of the plaintiff's premises. The plaintiff, contending that such rate ought to have been assessed on the "rateable value" only, brought an action in the county court to recover the difference overpaid. The defendants had no power to distrain for the rates, but they had a power to stop the water supply for non-payment; they had not stopped the water supply, and had not threatened to do so. The county court judge held that the payment was not a voluntary one, and could be recovered back, on the ground that the defendants had a power to stop the water supply:—Held, that the payment was a voluntary one, and could not be recovered back. *Plater v. Burnley (Mayor)*, 59 L. T. 636; 36 W. R. 831—D.

Mistake—Voluntary Payment—Harbour Dues.—The corporation of E. exacted harbour dues from the plaintiff in respect of exempted articles. The plaintiff paid in ignorance of the exemption:—Held, that the plaintiff was entitled to recover back the money so paid. *Hooper v. Exeter (Mayor)*, 56 L. J., Q. B. 457—D.

Money in hands of Agent—Announcement that Dividend would be paid—Revocation by Principal—Liability of Agent.—Agents in London of a foreign government, having money in their hands for the payment of a dividend on

a loan, on the 22nd May advertised that the coupon due on the 1st June would be paid in full; but on the 1st June, being advised by the foreign government, they advertised that the payment would be made less 5 per cent. An action having been brought by a bondholder against the agents:—Held, that the announcement was not an admission of assets which gave the bondholders a right of action for money had and received. *Henderson v. Rothschild*, 56 L. J., Ch. 471; 56 L. T. 98; 35 W. R. 485—C. A. Affirming 33 Ch. D. 459—V. C. B.

Duty of Agent to account for and pay over Money to Principal.—A person who has received money as agent is bound not only to account for the same, but also to pay it over to his principal when requested so to do; and, in an action for money had and received, is chargeable with interest on the amount so received from the date of the refusal to pay it over. *Pearse v. Green* (1 Jac. & W. 135), followed. *Harsant v. Blaine*, 56 L. J., Q. B. 511—C. A.

Waiver of Tort.—See *Gloucestershire Banking Co. v. Edwards*, ante, col. 5.

Illegal Consideration.—Where a person is, upon conviction of a criminal offence, required to find a surety for his good behaviour, and by agreement with his surety deposits money with him, he cannot afterwards sue for the amount as money had and received. The illegal object is sufficiently complete where the deposit has been made and the security executed, and the principal cannot, by repudiating the transaction before the security is forfeited and the money applied as an indemnity, recover the money. *Herman v. Teuchner or Zeuchner*, 15 Q. B. D. 561; 54 L. J., Q. B. 340; 53 L. T. 94; 33 W. R. 606; 49 J. P. 502—C. A. Reversing 1 C. & E. 364—Stephen, J.

Money paid — Goods lawfully seized for another's Debt.—The sheriff had seized goods for the debt of the defendant, and the claim of the plaintiff to the goods was barred upon interpleader, but the defendant had bound himself by admission as between the parties that the goods were the plaintiff's, and had agreed to pay a sum of money in consideration of the seizure:—Held, that the plaintiff was entitled to recover that sum from the defendant. *Edmunds v. Wallingford*, 14 Q. B. D. 811; 54 L. J., Q. B. 305; 52 L. T. 720; 33 W. R. 647; 49 J. P. 549—C. A. Affirming 1 C. & E. 334—Huddleston, B.

Occupier of Part of Holding — Payment of Rent under Threat of Distress.—A., who held certain lands under lease at a rent, gave possession of a small part thereof to B. on the terms that he was to hold rent free, and make certain expenditure in buildings, which was done. C. afterwards acquired the residue of the holding from A., subject to this arrangement, and for many years paid the entire rent reserved by the lease. One year's rent being due, the landlord brought an ejectionment, and B. paid the rent claimed in order to save the lands from eviction:—Held, that he was entitled to recover the amount from C. in an action for money paid. *Murphy v. Davey*, 14 L. R., Ir. 28—C. P. D.

— **Voluntary Payments.**—It has always been clear that a purely voluntary payment cannot be recovered back. Voluntary payments may be divided into two classes. Sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed him to adopt or decline the benefit; in this case, if he exercises his option to adopt the benefit he will be liable to repay the money expended; but if he declines the benefit he will not be liable. But sometimes the money is expended for the benefit of another person under such circumstances that he cannot help accepting the benefit, in fact that he is bound to accept it; in this case he has no opportunity of exercising any option, and he will be under no liability. *Leigh v. Dickeson*, 15 Q. B. D. 64; 54 L. J., Q. B. 20; 52 L. T. 791; 33 W. R. 539—Per Lord Esher, M. R.

MONEY PAID INTO COURT.

See PRACTICE.

MORTGAGE.

I. THE CONTRACT.

1. *Parties*, 1236.
2. *What Property included in*, 1237.
3. *Effect of Fraud on.*—See FRAUD.

II. EQUITABLE MORTGAGE, 1241.

III. ASSIGNMENT AND TRANSFER, 1244.

IV. RELEASE AND RECONVEYANCE, 1245.

V. SEVERAL MORTGAGES.

1. *Tacking and Consolidation*, 1246.
2. *Priority*, 1248.
3. *Notice of Prior Mortgage*, 1255.

VI. RIGHTS OF MORTGAGEES AND MORTGAGORS.

1. *Power of Sale*, 1258.
2. *Leases—Distresses*, 1261.
3. *Mortgages in Possession*, 1264.
4. *In other Cases*, 1265.

VII. REMEDIES FOR NON-PAYMENT OF MORTGAGE MONEY.

1. *Foreclosure*, 1266.
 - a. *Parties*, 1266.
 - b. *Practice*, 1267.
 - c. *Costs*, 1275.
2. *In other Cases*, 1277.

VIII. REDEMPTION, 1279.

IX. PAYMENT OFF, 1282.

X. WHEN REQUIRING REGISTRATION.—See BILLS OF SALE, I., 1.

XI. DEVISE OF PROPERTY SUBJECT TO MORTGAGES—LOCKE KING'S ACT.—See WILL.

XII. OF SHIPS.—See SHIPPING.

I. THE CONTRACT.

1. PARTIES.

By Client to Solicitor.—See SOLICITOR (RELATION TO CLIENTS).

By Companies.—See COMPANY, IV., 2.

To Building Societies.—See BUILDING SOCIETY, II.

Power of Executor to Mortgage.—See EXECUTOR AND ADMINISTRATOR, I., 2.

To Industrial Society.—See INDUSTRIAL SOCIETY.

Married Woman.—When a married woman executes a mortgage there is no obligation on the mortgagee to inquire whether a settlement was made on her marriage. *Lloyd's Banking Co. v. Jones*, 29 Ch. D. 221; 54 L. J., Ch. 931; 52 L. T. 469; 33 W. R. 701—Pearson, J.

In joint Names—Joint Tenancy or Tenancy in Common—Joint Account Clause.—Mortgages in fee were taken in the name of three sisters as joint tenants, each of the deeds containing a clause by which it was declared that the mortgage money belonged to the mortgagees on a joint account in equity as well as at law. The money advanced on the security of the mortgages formed part of the proceeds of the estate of a brother, to which the three sisters were, under his will, entitled as tenants in common. Having regard to this fact and the other facts in evidence:—Held, that notwithstanding the insertion of the joint account clause the mortgagees were entitled to the mortgage money as tenants in common. *Jackson, In re, Smith v. Sibthorpe*, 34 Ch. D. 732; 56 L. J., Ch. 593; 56 L. T. 562; 35 W. R. 646—North, J.

Surviving Partner—Mortgage to secure prior Debt.—A firm consisting of two partners, had secured the balance of their current account with a bank by the deposit of certain deeds. One of the partners died, and the bank requiring further security from the surviving partner to secure the balance then due to them on the account, the surviving partner deposited with the bank a contract for the purchase of some lands as further security, the contract being part of the assets of the firm:—Held, that the surviving partner was entitled to mortgage the assets of the partnership for a past debt. *Clough, In re, Bradford Banking Company v. Cure*, 31 Ch. D. 324; 55 L. J., Ch. 77; 53 L. T. 716; 34 W. R. 96—North, J.

Partner—Mortgage of Share—Right of Mortgagee to Account.—When a partner mortgages his share in the partnership and the mortgagee brings an action to realise his mortgage, the proper order is to direct an account of what the mortgagor's interest in the partnership was at the date when the mortgagee proceeded to take possession under his mortgage, i.e., at the date of the writ; but if a dissolution of the partnership has previously taken place, the date of the dissolution is the date at which the account is to be taken. *Whetham v. Davey*, 30 Ch. D. 574; 53 L. T. 501; 33 W. R. 925—North, J.

Implied Power to Mortgage—Will—Trustees.]

—J. W. by will devised real property upon trust for sale when and as the trustees should think necessary for the purposes of his will. The purposes of the will required under certain circumstances the raising of money. B., the trustee of the will, executed mortgages of the trust estate, received the mortgage moneys, and applied them to his own use. Subsequently some of the beneficiaries under the will brought an action against the trustees to recover certain moneys which they alleged had been received by B. as trustee of the said will. The moneys so claimed included the sums raised by the disputed mortgages. Judgment was recovered in the said action for the whole sum claimed. Execution was levied, and produced 1,300*l.*, which was not enough to pay the whole of the moneys claimed other than the mortgage moneys. New trustees of the will had been appointed, and the new trustees and beneficiaries brought this action against the mortgagees to set aside the mortgages. A foreclosure action by the mortgagees was heard at the same time:—Held, that the will contained no implied power to mortgage, and that the mortgages must be set aside, but only on the terms of the plaintiffs paying to the mortgagees a due proportion of the 1,300*l.* recovered from B. *Walker v. Southall*, 56 L. T. 882—North, J.

By Tenant in Tail in Remainder—Base Fee.]

—In 1841 Lord H., being entitled in remainder (subject to the existing life estate of Lord D.) as tenant in tail to two undivided third parts of certain hereditaments, mortgaged his interest in the property to M. D. In 1842 Lord H. became bankrupt. At the date of his bankruptcy the statute in force was 6 Geo. 4, c. 16, as amended by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74). No disentailing deed was executed by the commissioners in bankruptcy pursuant to s. 64 of that statute; but in 1872 Lord H. executed a disentailing deed. In 1878 Lord D., the tenant for life, died. The plaintiff was a sub-mortgagee from M. D., and brought this action to realise his security:—Held, that the mortgage by Lord H., the tenant in tail in remainder, conferred upon the grantee, not merely an estate for the life of the grantor, but a base fee, voidable by the entry of the issue in tail; that, notwithstanding the intervening bankruptcy, the subsequent disentailing deed by the tenant in tail operated to confirm the base fee; and that, therefore, the plaintiff was entitled under his security, to a base fee, to continue so long as there should be issue of Lord H. who would have succeeded under the entail. *Hankey v. Martin*, 49 L. T. 560—Kay, J.

2. WHAT PROPERTY INCLUDED IN.

“Fixtures”—What are.]—A house fitted up for and intended to be used as a club was mortgaged with all fixtures therein:—Held, that in determining what articles were included as “fixtures,” regard must be had to the intentions of the parties, the one in mortgaging and the other in taking a security for the sum advanced; and that such things as were substantially part of the house so that they could not be removed without depriving the house of what was in-

tended to be used with it must be regarded as fixtures. *Smith v. Maclure*, 32 W. R. 459—Pearson, J.

— Lease by Mortgagor after Mortgage—Rights of Tenant.]

—A mortgagor in possession of premises let them to a tenant who brought on to them certain trade fixtures. The mortgagee subsequently entered and sold the premises under the power of sale contained in the mortgage:—Held, that the fixtures did not pass under the mortgage, but remained the property of the tenant. *Sanders v. Davis*, 15 Q. B. D. 218; 54 L. J., Q. B. 576; 33 W. R. 655—D.

— Belts connecting Machinery.]

—By a registered deed made in 1875, the owners of a mill mortgaged in fee to the plaintiffs, the mill, together with all the engines, plant, machinery, and gear described in the schedule. The schedule included certain driving belts which connected the power machinery with certain machines, which were so affixed as to be part of the realty. The machines could not be worked without the belts, which would only fit other machines of nearly the same size. These belts were passed round the shafting and then laced together and could not be removed from the shafting without being unlaced. They could be slipped off the machines when the machines and shafting were not in motion. The mortgage contained no power to deal with the belts separately from the freehold. The defendant, a trustee in bankruptcy of one of the mortgagors, removed the belts. In an action against him by the plaintiffs to recover the value:—Held, that the belts being essential parts of the fixed machines formed part of the realty, and as such passed under the mortgage deed which, therefore, did not require registration under the Bills of Sale Act, 1854. *Sheffield and South Yorkshire Permanent Building Society v. Harrison*, 15 Q. B. D. 358; 54 L. J., Q. B. 15; 51 L. T. 649; 33 W. R. 144—C. A.

— Trade Machinery.]

—A banking company entered into an agreement dated the 29th May, 1886, to sell certain paper-mills and machinery to the L. Company for 20,000*l.* to be paid by instalments. By clause 2 of the agreement it was provided that upon payment of the first two instalments the bank should convey the premises to the L. Company, upon their executing a mortgage for the balance of the purchase money, and that the mortgage should contain a clause enabling the bank, in case the business of the L. Company should be suspended, to re-enter and take possession of the premises, and of everything which should have been built or placed thereon, and which should not require registration within the Bills of Sale Act, 1878, and to hold the same for their own use and benefit absolutely, but without prejudice to the liability of the L. Company for the unpaid balance of the purchase money. This agreement was not registered as a bill of sale. The first two instalments of the purchase money were paid, but no conveyance or mortgage of the property was executed in pursuance of the agreement. The L. Company entered into and held possession of the property until a winding-up order was made on the 7th February, 1887. The bank thereupon re-entered on the property. The official liquidator of the L. Company asked by summons for delivery up of a paper-making machine and all

other trade machinery attached to the mills. The bank claimed possession of the fixtures and trade machinery under their vendors' lien.—Held, that the position of the parties under the agreement was the same as if a conveyance and mortgage of the property had been actually executed; and that the agreement to mortgage did not extend to any property which required registration under the Bills of Sale Acts, and the trade machinery was therefore not included in the security; and must be delivered up to the liquidator of the L. Company, but in other respects the agreement remained valid. *London and Lancashire Paper Mills Company, In re*, 58 L. T. 798—North, J.

— **First and Second Mortgagees.**—The S. company carried on the business of manufacturing zinc and spelter, sulphuric acid, and zinc oxide on leasehold premises. They had erected a number of cupola and other furnaces for the purposes of their manufacture, which as between them and their landlord, were admitted to be trade fixtures. In 1880 the company conveyed the land and buildings comprised in its lease to trustees for debenture holders upon trust, to permit the company to carry on business until default in payment of the debentures or winding-up, and then to sell. In 1883 the company executed a second mortgage to trustees, for a second set of debenture holders, which comprised, besides the land and buildings, all stock-in-trade, stock of ores, and loose plant and material. It appeared that in the course of smelting metals for the company's business, small quantities of gold and silver were given off in the form of vapour, and became imbedded in the bricks lining the furnaces. The company having been ordered to be wound up, the trustees of the first mortgage deed entered and sold. The second mortgagees took out a summons that they might be allowed to enter, and remove the gold, silver, and other metal embedded in the said bricks, claiming that it was included in their mortgage and not in the first. It was admitted that the metals could not be extracted without pulling down the furnaces and pounding up some of the bricks.—Held, that the doctrine of trade fixtures has no application as between mortgagee and mortgagor, that whatever might have been the case between landlord and tenant, the mortgagee was entitled to everything which his mortgagor, intentionally or not, for trade fixtures or otherwise, had fixed to the mortgaged premises, and that the summons must be dismissed. *Tottenham v. Swansea Zinc Ore Company*, 52 L. T. 738—Pearson, J.

— **Mortgage by Sub-demise.**—Words which are sufficient when used in a conveyance in fee to pass trade fixtures, are also sufficient to pass them when used in a demise. *Southport Banking Company v. Thompson*, 37 Ch. D. 64; 57 L. J., Ch. 114; 58 L. T. 143; 36 W. R. 113—C. A.

By a mortgage by sub-demise, a corn-mill and other leasehold premises, together with certain fixtures specifically mentioned, and constituting the motive power of the mill, were conveyed by sub-demise to the mortgagees, to secure a sum due to them by the mortgagors. The deed contained the following general words:—"Together with all buildings, fixtures, rights, lights, easements," &c.—Held, that the word "fixtures"

in the general words was not restricted to fixtures ejusdem generis with those previously specifically mentioned, but was intended to extend and enlarge that class; and that, therefore, the trade fixtures in the mill passed by the sub-demise to the mortgagees. The observations of Blackburn, J., in *Hautry v. Butlin* (8 L. R., Q. B. 293), explained. *Id.*

Parcels — Description — General Words — Copyholds passing with Freeholds.—A mortgage was expressed to comprise by way of grant in fee "all and every the estate, right, title, property, and interest of the mortgagor of and in all and every those two fields or parcels of land, containing together about twenty-two acres or thereabouts, situate at and abutting upon the main road at "H, and "bounded upon one side by" B. Lane, "and also of and in all and every other, if any, the lands, hereditaments, and premises at H, aforesaid of, in, or to which the mortgagor hath any estate, right, title, property, or interest." All of the mortgagor's property at H. was freehold, except a strip of land of about three-quarters of an acre which lay between the freeholds and B. Lane, and which was of copyhold tenure.—Held, that the copyhold strip passed under the general words and was included in the mortgage. *Rooke v. Kensington* (2 Kay & J. 753), and *Crompton v. Jarratt* (30 Ch. D. 293) distinguished. *Early v. Rathbone*, 57 L. J., Ch. 652; 58 L. T. 517—Kekewich, J.

Semble, having regard to the position of the property and the description in the deed, the copyhold strip was included in the parcels themselves. *Id.*

After-acquired Property — Uncertainty — Divisible Agreement — Property under any Settlement or Will.—A mortgagor by deed assigned to the mortgagee all his household goods and farming stock, and "also all moneys of or to which he then was or might during the security become entitled, under any settlement, will or other document, either in his own right, or as the devisee, legatee, or next of kin of any person;" and also all real and personal property "of, in, or to which he was or during that security should become beneficially seised, possessed, entitled, or interested, for any vested, contingent, or possible estate or interest." The mortgagor afterwards became entitled under a will to a share of the personal estate of the testator.—Held, that the assignment of after-acquired property was divisible; and that although the general assignment of all property to which the mortgagor might become entitled might be too wide, as to which the court gave no decision, the assignment for valuable consideration of all moneys to which he should become entitled under any will operated as a contract which the court would enforce, and that the share of the personal estate of the testator was accordingly included in the mortgagor's security. *Belding v. Read* (3 H. & C. 955) questioned. *Clarke, In re, Coombe v. Carter*, 36 Ch. D. 348; 56 L. J., Ch. 981; 57 L. T. 823; 36 W. R. 293—C. A.

When Goodwill passes—Compensation—Agreement for Personal Compensation.—C. was the occupier of a house under a lease, and carried on the business of a tailor there. In September,

1880, the Metropolitan Board of Works gave him notice to treat for the purchase of his interest in the premises. C. sent a claim for 655*l.* for the value of the lease, damage to trade, costs of removal and fixtures. In March, 1881, the Board, by their solicitor, wrote offering C. 400*l.* in full discharge of all the items of his claim. C.'s solicitor wrote in reply that he would be willing to advise his client to accept 400*l.*, provided that the leasehold interest was assessed at 150*l.*, as they might have some difficulty in giving a proper assignment, and the money might have to be paid into court; and continued, "I, however, don't want to prejudice my client's personal compensation; and as it may never reach him, I am inclined not to insist on what I should think was the full value." The Board at first replied that they could not agree to this; but after receiving a letter from C.'s solicitor urging them to lodge the warrant, and stating that the claim for the leasehold interest was on behalf of C. and his mortgagee, they wrote to C.'s solicitor that if C. would accept 400*l.* in settlement, they would consent to apportion 150*l.* to the leasehold, and 250*l.* to the trade damage and other items of claim; C. agreed to these terms. C. had mortgaged his lease, the mortgagee had disappeared, and C. was unable to produce the lease or to make out a title. The Board declined to pay him any part of the 400*l.* C. brought this action for specific performance. After the action was brought the Board paid the whole sum into court. It was contended on behalf of the Board that the 250*l.* was intended to cover compensation in respect of the goodwill of the business, in which the mortgagee would have an interest:—Held, there was an express agreement that 250*l.* should be paid to C. personally as occupier, and that although in some cases the goodwill of trade premises passes to a mortgagee, that does not apply to the case when the goodwill depends on the personal skill of the owner. *Cooper v. Metropolitan Board of Works*, 25 Ch. D. 472; 53 L. J., Ch. 109; 50 L. T. 602; 32 W. R. 709—C. A.

II. EQUITABLE MORTGAGE.

Oral Promise—Subsequent Oral Direction to hold Title Deeds as Security—Statute of Frauds—Part Performance.—[The bankrupt, being indebted to a banking company, made an oral promise to the directors to give them, when required, security for the debt. He was then entitled to a reversionary interest in one-fifth of a farm, to come into possession on the death of his mother, who was tenant for life, and who held the title deeds. The mother afterwards died, and the title deeds came into the possession of the respondent, who was manager of the bank, and who was also entitled to one-fifth of the property. The respondent told the bankrupt that he had possession of the deeds, and that he held his (the bankrupt's) one-fifth for the bank. The bankrupt expressed his assent:—Held, that the company had not a valid equitable mortgage of the bankrupt's share in the farm, for there was no memorandum in writing to satisfy the Statute of Frauds, and the conversation which took place between the bankrupt and the respondent as to the custody of the deeds, not being followed by any act which altered the legal position of the parties, was not such a part

performance of the oral promise to give security as would exclude the operation of the statute. *Broderick, Ex parte, Beetham, In re*, 18 Q. B. D. 766; 56 L. J., Q. B. 635; 35 W. R. 613—C. A.

Agreement to Charge—Power of Attorney.—[De T. being given up to the authorities of a foreign country, under an extradition treaty, to be tried on a charge of murder, assigned all his property to P., and executed a general power of attorney in favour of P. and T. The object of these instruments was, as the court held, to enable money to be raised for his defence. T. was co-trustee with the plaintiff of a marriage settlement, and proposed to him that Consols belonging to the trust should be sold out, and the proceeds advanced on the security of a charge on De T.'s property. The plaintiff assented, and the Consols were sold and the proceeds paid to T., who produced to the plaintiff a document purporting to be a memorandum of deposit of the assignment and power of attorney, and an equitable charge to secure the advance. The Court held on the evidence that P. knew of the charge, and either actually authorised it or left T. to do as he liked:—Held, that the money had been advanced upon the faith of an agreement to charge the property of De T., that such an agreement was within the powers of P. and T., and that if the agreement had not been fully carried out, the plaintiff was entitled to have the charge carried into effect. *Parish v. Poole*, 53 L. T. 35—North, J. Affirmed in C. A.

Contract to Create—Advance—Possession of Deeds—Evidence.—[In 1878 A. entered into a contract for the sale to him of two freehold houses at the price of 650*l.* The deposit of 50*l.* was paid to him, and 360*l.*, part of the balance, was obtained from his niece B., to whom he gave his I. O. U. On the 21st August, 1878, the wife of A., by his direction, wrote to B. as follows: "A. bought two houses yesterday, and he is going to have them settled and signed in your name, and give them to you. I send you the conditions of sale for you to look at, and I should like you to come and see A. . . . Bring your bank book with you, as what you have might as well go into them as for us to pay interest. It is all right, I can assure you. I sent the 50*l.* by cheque last night, on deposit." On the 25th October, 1878, the two houses were duly conveyed to A., and he directed his wife to hand over the title deeds to B., and he also said to his wife that the deeds belonged to B., and were of no use to his wife. The deeds were sent to B., by A.'s wife. Subsequently A. died intestate, and his eldest brother and heir-at-law commenced an action against B., claiming a declaration that he, the plaintiff, was entitled to the rents and profits of the two houses and the delivery up of the title deeds:—Held, that there was evidence of an intention on the part of A. to give the property to B.; but that no gift of it had in point of law been made; but held, that there was sufficient evidence of a contract to create an equitable mortgage in favour of B., and upon which the possession of the title deeds by B. originated; and that there should be a redemption decree upon that footing, the costs of B. being added to her security. *McMahon, In re, McMahon v. McMahon*, 55 L. T. 763—Chitty, J.

Conveyancing Act, 1881—Sale under Power—Power to convey Legal Estate.]—An equitable mortgagee by deed who sells in exercise of the power of sale conferred by the Conveyancing Act, 1881, cannot convey the legal estate vested in the mortgagor. *Hodson and Howes, In re*, 35 Ch. D. 668; 56 L. J., Ch. 755; 56 L. T. 837; 35 W. R. 553—C. A.

—Sale instead of Foreclosure.]—An equitable mortgagee by deposit of deeds is entitled under s. 25, sub-s. 2 of the Conveyancing Act, 1881, for an order for sale instead of foreclosure, although there is no memorandum of the charge and no agreement by the mortgagor to execute a legal mortgage. *Oldham v. Stringer*, 51 L. T. 895; 33 W. R. 251—Kay, J.

—Account—Order for Sale, but Sale not to take place until three months after Certificate.]—Where an equitable mortgagee by deposit of deeds applied, under s. 25, sub-s. 2 of the Conveyancing Act, 1881, for an order for sale instead of foreclosure, there being a memorandum of the charge, and an agreement by the mortgagor to execute a legal mortgage, the court made an order for sale of the property, such sale not to take place until three months after the chief clerk's certificate, as to the amount due to the plaintiff, should be filed; but refused to order an immediate sale after such certificate. *Green v. Biggs*, 52 L. T. 680—Kay, J.

Priority—Collateral Security by Bond—Judgment.]—When an equitable mortgagee, by deposit of title deeds, took a bond to secure the same debt, and entered up judgment thereon, which he afterwards registered as a mortgage against the lands:—Held, that he did not thereby forfeit his security by equitable mortgage, or defeat its priority. *Jennings' Estate, In re*, L. R., Ir. 277—Flanagan, J.

—Garnishee Order.]—An equitable charge given before a garnishee order is obtained takes priority of the order, even in the absence of notice of the charge. *Badeley v. Consolidated Bank*, 38 Ch. D. 238; 57 L. J., Ch. 468; 59 L. T. 419; 36 W. R. 745—C. A.

Invalid Transfer of Charge—Right to Deed.]—An equitable mortgagee by deposit of a deed cannot pass his interest in the property by a parol voluntary gift accompanied by delivery of the deed; and as his interest in the deed is only incidental to his interest in the mortgage, the donee of the deed has no right to retain it. *Richardson, In re, Skillett v. Hobson*, 30 Ch. D. 396; 55 L. J., Ch. 741; 53 L. T. 746; 34 W. R. 286—C. A.

Cancellation—Letter of Deposit—Subsequently Registered Settlement—Notice.]—M., being entitled to the lessee's interest in certain lands at C., in 1868 deposited, inter alia, the title-deeds with a bank, to secure any balance due or to become due, accompanied by a letter of deposit. On the 21st November, 1870, he wrote to the manager of the bank, O., asking for the title-deeds of C. in exchange for other securities, and stating that he had agreed to put C. in settlement on his marriage; and at the same time he deposited other securities with O. on behalf of

the bank. O. thereupon drew two lines through the memorandum of 1878 in the deposit book; and wrote at foot of the entry, "Annexed list cancelled, and new ones substituted." The bank, however, refused to give up the deeds of C. On the occasion of his marriage, M. executed a settlement, dated the 24th November, 1870, and registered on the 8th February, 1871, charging C. with a sum of 3,000*l.*, which, subject to life interests for himself and his wife, was settled in trust for the children of the marriage. M., who was a solicitor, drew the settlement, and was the only solicitor in the transaction. Subsequently, in 1871, M. gave the bank a further letter of deposit in which the title-deeds of C. were included. None of the letters of deposit were registered. After the settlement M. paid in, to the credit of his current account with the bank, sums of money exceeding the amount due from him at the date of the settlement. In a paper, pinned to the letter of deposit of 1870, O. made a memorandum stating that it was cancelled by the letter of deposit of 1871, which was taken, fearing any irregularity in the former transaction. O. deposited that he did not intend to give up the security of the deposit of 1868; that he had a general authority to substitute one security for another, but not to give up a security altogether. M. and his wife afterwards died, leaving one child, issue of the marriage; M. being at the time of his death indebted to the bank, who claimed priority over the charge created by the settlement:—Held, 1. That the deposit of 1868 was not cancelled, but was still a subsisting security in favour of the bank. 2. That the bank had notice of the settlement of the 24th November, 1870; and consequently all subsequent advances made by them were postponed to the charge of 3,000*l.* 3. That the issue of the marriage was not affected with notice of the equitable mortgage to the bank. *Macnamara's Estate*, 13 L. R., Ir. 158—Land Judges.

III. ASSIGNMENT AND TRANSFER.

Assignment—Power to Execute to a Person other than Mortgagor.]—A building society is not precluded by the provisions of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), from exercising the ordinary right of a mortgagee to transfer his mortgage, by way of assignment, to any third person. *Ulster Permanent Building Society v. Glenton*, 21 L. R., Ir. 124—Monroe, J.

Rights of Assignee — Receipt endorsed for Larger Sum than advanced.]—On the 10th of February, 1879, the plaintiffs mortgaged to B. for 250*l.* their equitable interests in a sum of stock, and also certain policies of assurance. By the mortgage deed they acknowledged the receipt of 250*l.*, and they also signed a receipt for that sum indorsed on the mortgage deed. On the 11th of March, 1879, B. transferred the mortgage to H., who gave full value for it as a mortgage for 250*l.*, and had no notice that the plaintiffs had not received that sum. The plaintiffs brought their action alleging that they had only received 91*l.* instead of 250*l.*, and asking redemption on payment with interest of what they had actually received. The court considered that the evidence would have been sufficient to entitle the plaintiffs to a judgment

on that footing as against B. :—But held, that as against H., who had no notice that the whole 250*l.* had not been advanced, the account must be taken on the footing of its having been advanced; for that, in the absence of any circumstances to cause suspicion, he was entitled to rely on the acknowledgment in the mortgage deed and the indorsed receipt, and had a better equity than the plaintiffs, who, by leaving the documents in the hands of B., had enabled him to commit a fraud. *Bickerton v. Walker*, 31 Ch. D. 151; 55 L. J., Ch. 227; 53 L. T. 731; 34 W. R. 141—C. A.

Transfer—Sale of Property—Vesting Property in Purchaser—Payment into Court.]—A mortgage deed gave the mortgagee an option to purchase in case the debt was not paid on a day named. The trustees in bankruptcy of the mortgagors sold the mortgaged property. A part of the purchase-money was deposited to provide against the mortgage. Pending proceedings on the part of the trustees to set aside the mortgage on the ground of fraudulent preference, an order was made that the money deposited should be paid into court, and on such further sum being paid in as would cover the principal and interest due, and 10 per cent. extra, the mortgaged property should vest in the purchaser. *Milford Haven Railway and Estate Company v. Mowatt*, 28 Ch. D. 402; 54 L. J., Ch. 567; 33 W. R. 597—Pearson, J.

— **Mortgagee of Unsound Mind.]** — See cases, *ante*, cols. 1159, 1160.

IV. RELEASE AND RECONVEYANCE.

Release by Parol—Handing over Mortgage Deed—Absence of Consideration.]—By an indenture made in 1858, G. mortgaged to his father a share of personal estate to which G. was entitled in reversion, expectant on his mother's death. The father died in 1872, having made another son, C., his executor and residuary legatee. The mother died in 1887. C. shortly afterwards sent a letter to G., enclosing the indenture, and stating that he handed it over to G. in compliance with the wish of their late mother. C. afterwards changed his mind and claimed the share under the mortgage. No interest had ever been paid on the mortgage debt by G., and no acknowledgment given by him in respect of it :—Held, that, in the absence of any consideration, the letter, though coupled with delivery of the mortgage deed, was not an effectual release, and was incomplete as a gift, and did not amount to a declaration of trust, and that C. was entitled to the share. *Hancock, In re, Hancock v. Berrey*, 57 L. J., Ch. 793; 59 L. T. 197; 36 W. R. 710—Kay, J.

Reconveyance — Deed — Validity.]—The absence of a seal from deeds of reconveyance, there being no evidence that they had ever been sealed, renders them invalid. *Sandilands, In re* (6 L. R., C. P. 411), considered. *National Provincial Bank of England v. Jackson*, 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597—C. A.

— **When obligatory.]**—Until a mortgagee is paid off, he is not obliged to re-convey. *Lacey v. Wagborne*, 59 L. T. 208—Kay, J.

V. SEVERAL MORTGAGES.

1. TACKING AND CONSOLIDATION.

Assignment by Purchaser for Value without Notice, to Purchaser for Value with Notice.]—The trustee of a mortgagor is not entitled to avail himself of the legal estate for the purpose of altering the priorities of the mortgages. *Ledbrook v. Passman*, 57 L. J., Ch. 855; 59 L. T. 306—Stirling, J.

The owner of a farm mortgaged it in succession to three persons, the third mortgagee having no notice of the second mortgage. By a deed made between the mortgagor and P., in order (as was recited) to stop a forced sale by the mortgagees, the equity of redemption was conveyed to P. upon trust for sale, with power to postpone the sale and raise money by mortgage or otherwise to pay off the mortgages, and the proceeds were to be held by P. upon trust to pay his costs and expenses, and, after payment of the same and the mortgages, to pay the residue to the mortgagor. P., having notice of the second mortgage, paid off the first and third out of his own moneys and took a transfer of the benefit of them, and he subsequently got in the legal estate. Upon an action by the second mortgagee for redemption :—Held, that P. acted as trustee for the mortgagor, and that he was not entitled to tack to the prejudice of the second mortgagee, but that he was entitled to add his costs to his security. *Id.*

Second Legal Mortgagee Paying off Equitable Mortgage—Effect on Prior Legal Mortgage.]—W. was owner in fee of certain property, and prior to the 1st May, 1879, mortgaged it by deposit of title deeds to secure an advance by G. On the 1st May, 1879, W. gave a legal mortgage of the same property to B. to secure a debt owed by him. B. at the time of the execution of the mortgage did not know of the equitable mortgage to G. In June, 1879, W. applied to the defendant to make an advance to pay off the charge held by G. The defendant advanced the money; G. handed the deeds back to W., who handed them to H., who was acting for all parties; and H. in his turn handed them to the defendant. W. on or about the same date executed a legal mortgage of the same premises to the defendant to secure his advance. This deed did not recite the mortgage of the 1st May to B., nor was the defendant aware of its existence. B. subsequently became insolvent, and his trustee in liquidation claimed priority for the mortgage to B. of the 1st May, over that of June, 1879, to the defendant :—Held, that as from the nature of the transaction between the parties it was intended that the defendant should stand in the place of the equitable mortgagee, he was entitled to priority over the first legal mortgage to the extent of the amount of the equitable mortgage. *Mason v. Rhodes*, 53 L. T. 322—D.

Third Mortgagee of Part getting in First Mortgage of Whole.]—See *Atherley v. Barnett*, post, col. 1253.

Trustee Lending Money without Notice of Prior Incumbrance.]—A trustee who has the legal estate and takes from his cestui que trust an assignment of the equitable interest by way of security for money advanced to the cestui que trust, can avail himself of the legal estate as a protection against a prior incumbrance of which he had no notice. *Newman v. Newman*, 28 Ch. D. 674; 54 L. J., Ch. 598; 52 L. T. 422; 33 W. R. 505—North, J.

Building Society—Statutory Receipt—Successful Incumbrancers—Right to call for Legal Estate.]—H. mortgaged leaseholds to building societies established under 6 & 7 Will. 4, c. 32, and executed a second mortgage to the respondents. H. afterwards borrowed a sum from the appellants, part of the loan being applied to paying off the building societies, and the balance being paid directly to H., who executed a mortgage to the appellants to secure the loan. Upon being so paid off the building societies indorsed on their respective mortgages receipts to the mortgagor in accordance with 6 & 7 Will. 4, c. 32, s. 5, and delivered the indorsed deeds with the title deeds to the appellants. Neither the building societies nor the appellants had any notice of the respondents' mortgage. The respondents having brought an action against the appellants for foreclosure and sale:—Held, that the appellants' mortgage had priority over the respondents' mortgage, not only in respect of the moneys applied in paying off the building societies, but also in respect of the balance of the loan paid directly to H. *Pease v. Jackson* (3 L. R., Ch. 576) and *Robinson v. Trevor* (12 Q. B. D. 423), overruled upon this point. *Hosking v. Smith*, 13 App. Cas. 582; 58 L. J., Ch. 367; 59 L. T. 565; 37 W. R. 257—H. L. (E.)

In 1865, L., a member of a building society established under 6 & 7 Will. 4, c. 32, mortgaged certain premises to the society to secure all moneys to become due from him under its rules. In 1868, by a deed reciting the first mortgage, L. mortgaged his interest in the premises to the plaintiff. The first mortgagees received no notice of the second mortgage. In 1875, in pursuance of a previous arrangement with L., the appellants paid off the first mortgage, whereupon the trustees of the society handed to them the title deeds, and also the first mortgage-deed indorsed with a receipt, pursuant to 6 & 7 Will. 4, c. 32, s. 5, and antedated to the date of the arrangement. The appellants, who had no notice of the second mortgage, also made a further advance to L., whereupon he assigned the premises to them to secure the whole sum so paid to him and to the first mortgagees. All three mortgages were duly registered in the North Riding registry in order of date. L. filed a petition for liquidation:—Held, that the appellants were entitled to priority over the plaintiff in respect of the further advance to L. *Pease v. Jackson* (3 L. R., Ch. 576) followed; *Fourth City Mutual Benefit Building Society v. Williams* (14 Ch. D. 140) considered—per Baggeallay, L. J. *Robinson v. Trevor*, 12 Q. B. D. 423; 53 L. J., Q. B. 85; 50 L. T. 190; 32 W. R. 374—C. A. See preceding case.

Indorsed Receipt by Friendly Society.]—T. mortgaged his property first to a friendly society and then to a bank. Afterwards T. applied to a building society for an advance. The building

society, without notice of the second mortgage, paid off the first mortgage, and made a further advance to T. The friendly society reconveyed the property to T. by means of a regular conveyance, and on the same day T. executed a mortgage to the building society:—Held, that the building society was entitled to the legal estate and to priority over the bank for the whole advance. *Pease v. Jackson* (3 L. R., Ch. 576) and *Robinson v. Trevor* (12 Q. B. D. 423) distinguished. *Carlisle Banking Company v. Thompson*, 28 Ch. D. 398; 53 L. T. 115; 33 W. R. 119—North, J.

Voluntary Settlement by Mortgagor—Subsequent Mortgages of Settled and other Property.]

—A. B. having executed a voluntary settlement of the W. estate, mortgaged it in fee to X. Y. He afterwards mortgaged the Q. estate, and that mortgage became vested in X. Y.:—Held, that X. Y. was not entitled to consolidate as against the persons claiming under the voluntary settlement the mortgages on the W. and Q. estates. *Walhampton Estate, In re*, 26 Ch. D. 391; 53 L. J., Ch. 1000; 51 L. T. 280; 32 W. R. 874—Kay, J.

Consolidation on Redemption.]—See *Bird v. Wen*, post, col. 1282.

2. PRIORITY.

Mortgage of Renewable Leasehold—Purchase of Reversion by Mortgagor—Mortgage of Reversion.]

—An ecclesiastical lease of a house for a term of years, which was renewable by custom, though it contained no covenant by the lessors for renewal, was mortgaged, and the equity of redemption was afterwards assigned for value. The Ecclesiastical Commissioners, in whom the reversion had become vested, would not renew the lease, but before its expiration they agreed to sell the reversion to the assignee of the equity of redemption. The conveyance was not executed till after the expiration of the lease. While the negotiation for the purchase of the reversion was in progress the assignee borrowed 300*l.*, giving the lender a memorandum in writing, which stated that the money was to be secured by a mortgage from him of the house "so soon as he had completed the enfranchisement of the property from the commissioners." The lender had no notice of the mortgage of the lease:—Held, that the mortgagor could only hold the fee simple of the property subject to the mortgage of the lease, and that he (and consequently the lender of the 300*l.*) was not entitled to any prior lien on the property for the purchase-money of the reversion, notwithstanding the fact that the mortgagor was under no obligation to the mortgagees of the lease to obtain a renewal of it, or to purchase the reversion. *Leigh v. Burnett*, 29 Ch. D. 231; 54 L. J., Ch. 757; 52 L. T. 458; 33 W. R. 578—Pearson, J.

Purchase by Mortgagor's Trustee in Bankruptcy of First Mortgage.]—A trustee in bankruptcy does not by purchasing from the first mortgagee of the bankrupt extinguish the first mortgage and make the second mortgagee the

first incumbrancer on the estate. *Bell v. Sunderland Building Society*, 24 Ch. D. 618; 53 L. J., Ch. 509; 49 L. T. 555—V.-C. B.

Purchase for Value—Trust to Invest on specific Security—Communication to Cestui que trust.—Plaintiffs were trustees of a settlement, under which H. was tenant for life. P. was their solicitor. P., having trust funds in hand, arranged with H. that a certain sum should be invested on a mortgage. P. advanced the money in his own name, but entered it in his firm's books as a loan on behalf of the trust, and treated it as such in correspondence with H. The plaintiffs were not told of the investment. P. fraudulently deposited the mortgage with the defendants to secure a debt of his firm, the defendants taking bona fide :—Held, that though the plaintiffs could not delegate their trust so as to constitute H. their agent to authorise the investment, and although P. did not hold the fund in trust for investment on any specific security, the plaintiffs were entitled to priority over the defendants. *Hartopp v. Huskisson*, 55 L. T. 773—Kekewich, J.

— **Authority to raise Money—Solicitor and Client—Deposit of Deeds.**—The plaintiff executed a mortgage to his solicitor believing the document to be an authority to raise money on the property. The solicitor deposited the deeds with S. and Co. to secure a present advance and appropriated the money :—Held, that S. and Co.'s equity was prior to that of the plaintiff. *French v. Hope*, 56 L. J., Ch. 363; 56 L. T. 57—Kekewich, J.

Grounds on which Legal Mortgage postponed to subsequent Equitable Security.—The court will postpone a legal mortgage to a subsequent equitable security : (1) where the legal mortgagee has assisted in or connived at the fraud which led to the creation of the subsequent equitable estate, of which assistance or connivance the omission to use ordinary care in inquiring after or keeping the title-deeds may be sufficient evidence where such conduct cannot otherwise be explained; or (2) where the legal mortgagee has made the mortgagor his agent with authority to raise money, and the security given for raising such money has by misconduct of the agent been represented as the first estate. But the court will not postpone a legal mortgage to a subsequent equitable mortgagee on the ground of any mere carelessness or want of prudence on the part of the legal mortgagee. *Northern Counties of England Fire Insurance Company v. Whipp*, post, col. 1252.

The cases where a prior equitable mortgagee has been postponed on the ground of negligence are cases where he has taken no steps although he knew that the mortgagor had made default in performing his obligations, and his omission to take such steps has enabled the mortgagor to commit a fraud; but no case decides that he is to be postponed because he has not taken precautions against a future default by a mortgagor who has not yet, to the knowledge of the mortgagee, been guilty of default. *Union Bank of London v. Kent*, post, col. 1252—Per Fry, L.J.

The rule that the court will not postpone a legal mortgagee to a subsequent equitable mortgagee on the ground of any mere carelessness or want of prudence does not apply as between two

equitable claims. *National Provincial Bank of England v. Jackson*, 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597—C. A.

Negligence—Money left in Hands of Solicitor for Investment—Representation that Money advanced on Mortgage.—A client left moneys for investment in the hands of his solicitors. The solicitors represented that the sum of 11,000*l.*, part of these moneys, was invested on mortgage of freehold property at A., belonging to a firm, and the client made no further inquiry. The solicitors were in fact the holders of a mortgage for 55,000*l.* upon property X. at A., belonging to the firm, and they repaid themselves 11,000*l.* of the 55,000*l.* with the client's money. The firm afterwards bought property Y. at A., and mortgaged it in fee to a bank. The solicitors released the firm from the mortgage debt of 55,000*l.* on property X. and took from them a mortgage for 50,000*l.* on properties X. and Y., subsequently, by arrangement with the firm, purchasing the equity of redemption in both properties, and selling them for shares to a limited company into which the firm was, through their instrumentality, converted. These transactions all took place without the knowledge of the client :—Held, first, that the solicitors must be treated as having become trustees for the client of 11,000*l.* out of the 55,000*l.* secured by mortgage on property X.; and having improperly, as against the client, given up that mortgage in exchange, the client had a right under the circumstances to claim a charge for 11,000*l.* and interest upon property Y. (in which the legal estate was outstanding) as well as upon property X. :—Held, secondly, that there had been under the circumstances no such negligence or want of prudence on the part of the client as to postpone him, and that he was entitled in priority to the limited company to a charge on property Y. in which the legal estate was outstanding. *Waldron v. Sloper* (1 Drew. 193) distinguished. *Vernon, Ewens & Company, In re*, 33 Ch. D. 402; 56 L. J., Ch. 12; 55 L. T. 416; 35 W. R. 225—C. A.

— **Deeds asked for.**—A legal mortgagee had asked for the deeds which the mortgagor, who was his solicitor, made excuses for not giving to him. The mortgagor afterwards deposited the deeds with another mortgagee as security for money advanced without notice of the legal mortgage :—Held, in an action by the legal mortgagee for foreclosure, that he had not been guilty of fraud or negligence amounting to fraud, and that he could not be postponed to the mortgagee by deposit by reason of any negligence short of that. Held also, that the legal mortgagee was entitled to recover the deeds from the mortgagee by deposit, notwithstanding he was a purchaser for value without notice; and that s. 25, sub-s. 11, of the Judicature Act, 1873, did not alter the rule of law on the subject. *Manners v. Mew*, 29 Ch. D. 725; 54 L. J., Ch. 909; 53 L. T. 84—North, J.

— **Trustee of Marriage Settlement.**—In November, 1875, a husband deposited with his bankers the title-deeds of some leasehold houses, together with a memorandum of deposit, as a continuing security to the bankers for any overdraft of his wife's current account with them. In November, 1876, he died, having

bequeathed all his property to his wife, and appointed her his executrix. After his death the deeds remained with the bankers, and the widow was allowed on the security of them to overdraw her account. In May, 1877, she married again. Prior to the marriage the houses were assigned by her to a trustee on trust for herself for life, and after her death on trust for an infant son of her first marriage absolutely. Power was given to the trustee to sell the houses during the life of the wife, at her request, and after her death at the discretion of the trustee. The trustee made no inquiry about the title-deeds, and no notice of the settlement was given to the bankers. In June, 1877, the husband and wife gave notice to the bankers of their marriage, and at their request a balance, which then stood to the credit of the wife's current account, was transferred to a new current account opened by the bankers with the husband. The deeds remained with the bankers, but no notice of the settlement was given to them. In November, 1877, at the request of the bankers, the probate of the first husband's will was sent to them, and at their request, a new memorandum of deposit was, in January, 1878, signed by the husband and wife, making the deeds a continuing security to the bankers for any overdraft of the husband's current account. In April, 1878, the wife died. The deeds were still with the bankers, and at that time the husband's current account was in credit. In 1883 the trustee made some inquiries, and then discovered that the deeds, which he had believed to be in the custody of the solicitor who had prepared the settlement, were with the bankers. He then gave the bankers notice of the settlement, and claimed the deeds. This was the first notice that the bankers had had of the settlement:—Held, that the omission of the trustee to inquire for the title-deeds was negligence of such a character as prevented him from availing himself of the legal estate to give him priority over the equitable charge of the bankers, and that the *cuius in law* stood in no better position. Held also, that the bankers were entitled to priority in respect of the amount due to them on their security at the time when they received notice of the settlement. *Lloyd's Banking Company v. Jones*, 29 Ch. D. 221; 54 L. J., Ch. 931; 52 L. T. 469; 33 W. R. 781—Pearson, J.

— **Duty of Mortgagee to Inquire as to Settlement.**—When a married woman executes a mortgage there is no obligation on the mortgagee to inquire whether a settlement was made on her marriage. *Id.*

— **Mortgage of Building Agreement—Leases granted under it—No Notice to Landlord.**—A company obtained a building agreement of a certain piece of land, by which they covenanted to erect houses thereon, and as they erected houses a separate lease of each house was to be granted to them. They then executed a mortgage deed by which they gave to the mortgagees an equitable mortgage of their interest under the building agreement, and covenanted to give them legal mortgages by demise of the houses when the leases had been granted. The mortgagees did not give notice of their mortgage to the freeholder. Afterwards the company obtained leases of certain houses which they had erected, and deposited them with their

bankers by way of equitable security:—Held, that it was not necessary for the first mortgagees to give notice of their mortgage to the landlord in order to complete their security, and that their omission to give such notice was not such negligence as would postpone them to the subsequent equitable mortgagees. *Mumford v. Stohwasser* (18 L. R., Eq. 556) considered. *Layard v. Maud* (4 L. R., Eq. 397) distinguished. *Union Bank of London v. Kent*, 39 Ch. D. 238; 57 L. J., Ch. 1022; 59 L. T. 714; 37 W. R. 364—C. A.

— **Custody of Deeds.**—C., the manager of a joint stock company, executed a legal mortgage to the company of his own freehold estate, and handed over the title-deeds to them. The deeds were placed in a safe of the company, which had only one lock having duplicate keys, one of which was intrusted to C., as manager. Some time afterwards C. took out of the safe the deeds, except the mortgage, and handed them to W., to whom at the same time he executed a mortgage for money advanced to him by her, without notice of the company's security:—Held, that the mortgage of the company had priority over the mortgage to W. *Northern Counties of England Fire Insurance Company v. Whipp*, 26 Ch. D. 482; 53 L. J., Ch. 629; 51 L. T. 806; 32 W. R. 626—C. A. See also *Garnham v. Skipper*, post, col. 1254.

— **Mortgage by Deposit—Priority as between Equities.**—On the 18th of January, 1883, A., a solicitor, obtained from his sisters, B. and C., their signatures to two deeds, by which, in alleged consideration in each case of the release of a debt of 400*l.* and payment to them of 300*l.*, they conveyed their shares of freehold property, which was subject to a mortgage to K., to A. in fee. No money was at the time due from B. and C. to A., nor was any payment whatever made to them. The deeds were not read over or explained to B. and C., who had no idea that they were thereby conveying their property, and signed in full reliance on A.'s statement that he was going to clear off the mortgage and wanted to send the deeds to K. On the next day A. deposited the deeds with a bank as security for an advance. In applying for the advance before the execution of the deeds, A. had told the managers that B. and C., who were joint owners with himself of the property, were going to convey and "were assisting with the deeds," but that nothing would be paid to them as consideration money, as the money was to be invested in a colliery in which A. was interested. The manager handed over the deeds to the solicitor of the bank and merely told him that he was to exercise great care and diligence in investigating the title. The solicitor being dead, it did not appear what inquiries were made by him, but the advance was made to A. A. having absconded, the property was claimed by the bank as equitable mortgagees, and the claim was resisted by B. and C. on the ground that the conveyances, having been obtained by fraud and misrepresentation, were void as against them:—Held, that inasmuch as B. and C., though they may not have understood the nature of the deeds, knew they were executing something which dealt in some way with their property, the deeds of the 18th of January, 1883, were not void but voidable only. But as the

statements made by A. to the bank manager were such as to have clearly put the bank upon inquiry, which would, if made, have led to the detection of the fraud and to a refusal of the advance, and therefore to have affected the bank with constructive notice of the fraud, the equity of the bank must, on the ground of their negligence, be postponed to that of B. and C. *National Provincial Bank of England v. Jackson*, 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597—C. A.

— **Deeds not Examined.**—By two separate mortgage deeds, dated the 7th August, 1877, N., who was S.'s solicitor, mortgaged to W. and S. two separate estates, A. and B., to secure 1,250*l.* on each estate. The B. estate comprised five separate properties, which were separately described and numbered (1), (2), (3), (4), (5). S. asked N., as it was a trust matter, to send him the deeds, and N. sent a parcel, which S. sent on to his bankers without examination. It was afterwards found to contain only the two mortgage deeds. On the 20th October, 1880, N. deposited the title-deeds relating to (5) with L. to secure 300*l.* On the 18th May, 1881, he deposited the deeds relating to (1), (2), (3), and (4), to secure an overdraft of 3,000*l.* with his bankers, the plaintiffs. The deed relating to the A. estate had been previously deposited with the plaintiffs to secure his overdraft. Neither L. nor the plaintiffs had at the time of their advances any notice of the first mortgage, nor had the plaintiffs any notice of the advance to L. In June, 1882, N. became bankrupt. In July, 1882, the plaintiffs took a transfer of the mortgages to W. and S. They then brought this action for foreclosure, claiming to tack the sum due on their equitable mortgage to that due on the first mortgage of B., so as to gain priority over L. :—Held (1), that S. had not been guilty of such negligence as to postpone his legal mortgage to the subsequent equitable incumbrances; (2), that the general rule as to tacking applied, though the third mortgage did not include that part of the property in the first which was comprised in the second, and that the plaintiffs had a right to recover the whole of their debt in priority to L. out of all the B. estate. *Atherley v. Barnett or Burnett*, 52 L. T. 736; 33 W. R. 779—Pearson, J.

— **Omission to register Letter of Deposit.**—L. was entitled under the will of R. to premises held under three leases for terms of years and assigned to R. by deed of the 31st July, 1846. In 1877 L. deposited this deed with a bank by way of equitable mortgage, accompanied by a memorandum in writing, which the bank did not register. In 1879 the bank having pressed L. for payment, they were informed that L. was about to raise money out of which they would be paid a sum on account of what was due to them, and B., who had investigated the title and searched the registry, immediately afterwards made an advance, upon the deposit of a number of title-deeds of the premises, including the original leases and the probate of R.'s will. B. was at the time informed by L.'s solicitor (both of them being ignorant of the deposit with the bank) that all the title-deeds were delivered to him; but a comparison of the schedule of deeds delivered with the abstract of

title which had been furnished would have shewn that a material title-deed was absent. The greater part of the money so advanced by B. was paid over by L. to the bank :—Held, that B. had the better equity, and that the bank, by not registering their memorandum of deposit, and by allowing L. to retain all the title-deeds but one, and thereby enabling him to raise further sums on the property, without notice of their charge, were guilty of negligence so as to deprive them of their priority. *Lambert's Estate, In re*, 13 L. R., Ir. 234—C. A.

Estoppel by Conduct—Demanding Deed.—The plaintiff, mortgagee of a policy of life insurance, handed it to the mortgagor for a particular purpose. On the plaintiff demanding it back from time to time, the mortgagor made excuses for not doing so; and the plaintiff then forgot that it had not been returned. Afterwards the mortgagor deposited the policy with the defendants to secure an advance. The plaintiff gave notice of his interest to the insurance company before the defendants :—Held, that the plaintiff was entitled to the policy as against the defendants, and that the conduct of the plaintiff had not been such as to estop him from asserting his claim against the defendants. *Hall v. West End Advance Company*, 1 C. & E. 161—Williams, J.

Two Equitable Mortgages—Agreement for Legal Mortgage.—The owner of the A. and B. property deposited with K. some of the earlier title-deeds of the A. property as a security for 300*l.*, promising to execute a legal mortgage. He subsequently executed a legal mortgage of both properties to the plaintiff, who took without notice of K.'s charge, as security for an immediate loan; but the mortgage was stated to be subject to a charge in favour of J., with whom the title-deeds were said to be deposited. J.'s charge was only over the B. property, though she had possession of the title-deeds relating to both properties, except such of the earlier title-deeds of the A. property as were in K.'s possession :—Held, that the mortgage to the plaintiff must take priority over K.'s charge, although the plaintiff had not obtained possession of the title-deeds or made active inquiry about them, and although the mortgagor, before executing the mortgage to the plaintiff, had agreed to give K. a legal mortgage. *Garnham v. Skipper*, 55 L. J., Ch. 263; 53 L. T. 940; 34 W. R. 135—North, J.

Although a mortgagor cannot give the second of two equitable mortgages priority over the first by voluntarily conveying to him the legal estate after the transaction is completed, a person who advances money on an agreement for a legal mortgage will not, when the legal mortgage is executed, be postponed to a prior equitable mortgagee of whom he had no notice, merely because the mortgagor had contracted to execute a legal mortgage to such prior equitable mortgagee. *Manfield v. Burton* (17 L. R., Eq. 15), distinguished. *Id.*

Charging Order—Fund in Court.—A judgment creditor cannot by obtaining a charging order upon money in court belonging to his debtor, obtain priority over a previous mort-

gages. *Bell, In re, Carter v. Stadden*, 54 L. T. 370; 34 W. R. 363—Kay, J.

Insurance Policy—Notice to Company.—The act 30 & 31 Vict. c. 144, is intended to apply only as between the insurance office and the persons interested in the policy, and does not affect the rights of those persons inter se. Accordingly, where a first incumbrancer on a policy had not given such notice as prescribed by the act, and a second incumbrancer with notice of the prior charge had given the statutory notice:—Held, that the second incumbrancer did not thereby obtain priority. *Newman v. Newman*, 28 Ch. D. 674; 54 L. J., Ch. 598; 52 L. T. 422; 33 W. R. 505—North, J.

Registry—Real Estate in Middlesex—Share in Proceeds of Sale of.—The local registry acts are intended to apply only to dealings at law or in equity with the land itself. Accordingly an incumbrancer upon a share in the proceeds of real estate in Middlesex devised in trust for sale obtains no priority over other incumbrancers on such share by registering his mortgage deed, and the priorities of such incumbrancers rank according to the dates of their respective notices to the trustees. *Malcolm v. Charlesworth* (1 Keen, 63) approved. *Arden v. Arden*, 29 Ch. D. 702; 54 L. J., Ch. 655; 52 L. T. 610; 33 W. R. 593—Kay, J.

3. NOTICE OF PRIOR MORTGAGE.

Order of Notices to Trustees.—Although formal notice to the trustee of the proceeds of real estate devised in trust for sale or of a chose in action, of an incumbrance thereupon does not give priority over an earlier incumbrance of which the trustee may have obtained accidental notice, the converse proposition that incumbrances are to rank not in the order of notices given by the incumbrancers but of accidental knowledge obtained by the trustees, does not hold good. *Arden v. Arden*, supra.

Notice to Trustees, Effect of—Mortgagor entitled to two Properties.—A mortgagor was entitled to a reversionary interest in the residuary estate of a testator, and was also entitled to a life interest in certain sums of money under his own marriage settlement. Before 1872 he mortgaged both his reversionary and life interests to divers persons. Notice of all these mortgages was given to the trustees of both funds before any notice of the next-mentioned mortgage had been given. In 1872 he mortgaged his reversionary interest alone to the defendant, who gave notice to the trustees of that fund. In 1876 and subsequent years the mortgagor made five subsequent mortgages of his life interest to the plaintiffs, of which notice was given to the trustees of that fund. The plaintiffs in 1880 took a transfer of the securities prior to the defendant's mortgage of 1872. The defendant took two further charges on the reversionary interest, of neither of which did he give notice to the trustees thereof. An action having been brought by the plaintiffs for foreclosure of the reversionary and life interest:—Held (reversing the decision of Pearson, J.), that the defendant on paying off the plaintiffs'

mortgages which were prior to his mortgage of 1872 was entitled to an assignment of both properties, although his mortgage included only one: Held, that as regards the defendant's two further charges on the reversionary property, and the plaintiffs' five mortgages on the life interests, they must be redeemed in order of date respectively, notwithstanding the plaintiffs' notices as to the life interests:—Held, also, that the plaintiffs thus becoming the last mortgagees as well as the first must pay the costs of the suit if they did not redeem. *Mutual Life Assurance Society v. Langley*, infra.

Notice to Solicitor—Conveyancing Act, 1882, s. 3.—In June, 1875, A. mortgaged his share of trust property to E. by deed, which did not disclose any prior charge, and contained the usual covenant by A. that he was entitled to assign free from incumbrances. Notice of this mortgage and of a further charge created in May, 1877, was served on behalf of E. on the trustees of the property in November, 1881. A's share was subject to a prior mortgage to B., a solicitor, who was paid off in 1873, when a fresh mortgage was executed to C., which in July, 1874, was transferred by C. to D. (with a further charge in February, 1881). B. was solicitor for the trustees and A. the mortgagor, and had acted as solicitor for C. and D. in the mortgage transactions of 1873 and 1874, and also as solicitor for E. in the mortgage transaction of June, 1875. The trustees had not received notice of any charge before receiving notice of E.'s mortgage in November, 1881:—Held, having regard to s. 3, sub-s. 1, cl. 2, of the Conveyancing Act, 1882, that E.'s charge, of which notice was first given, was entitled to priority, as his mortgage deed shewed a title in A. free from incumbrances; and that as the court declined to infer that B. had any recollection, or that inquiries made by him when acting as solicitor for E. in the transaction would have elicited from A. the existence of any prior incumbrance, it could not be said that although B. had acted as solicitor for the parties in the previous mortgage transactions, notice of any prior charge affecting the property had come to his knowledge as the solicitor of E. in the mortgage transaction of June, 1875. *Cousin's Trusts, In re*, 31 Ch. D. 671; 55 L. J., Ch. 662; 54 L. T. 376; 34 W. R. 393—Chitty, J.

Advances by first Mortgagee—Notice of Second Mortgage.—The principle of the decision in the case of *Hopkinson v. Rolt* (9 H. L. C. 514), is not confined in its application to the law of England, but it is applicable also to the law of Scotland. M., who was indebted to the respondent bank, conveyed certain freehold property in Greenock to them to hold in accordance with the terms of a "back letter" "in security and until full and final payment of all sums of money due or which may hereafter become due by me to you." Some time afterwards she assigned all her remaining interest in the property to the appellant bank, as security for the balance due under two bills of exchange, and notice of this assignment was given to the respondents. After notice of the assignment the respondents made further advances to M. She afterwards became bankrupt, and the security proved insufficient to meet the claims of both banks:—Held, that the respondent

bank had no power to bind the security by further advances after they had notice of the assignment to the appellant bank, notwithstanding the terms of the back letter. *Union Bank of Scotland v. National Bank of Scotland*, 12 App. Cas. 53; 56 L. T. 208—H. L. (Sc.) See also *Lloyd's Banking Co. v. Jones*, ante, col. 1251, and *Macnamara's Estate*, *In re*, ante, col. 1244.

A registered deed of mortgage to secure moneys due and further advances is, as regards a puisne mortgage, a valid security for such further advances, if made bonâ fide, and without notice of the subsequent mortgage, though after its registration. *O'Byrne's Estate*, *In re*, 15 L. R., Ir. 373—C. A.

—**Lien of Company for Debts subsequently incurred by Shareholder.**—A member, who was also a customer, of a trading company formed under the Companies Act, 1862, deposited the certificates of his shares with the bank to secure an advance, and notice of the deposit was given to the company. One of the articles of association provided that the company should have "a first and permanent lien and charge" on every share for all debts due to them from the holder:—Held, first, that the notice was not rendered nugatory by s. 30 of the Companies Act, 1862, but affected the company in its trading capacity with knowledge of the appellants' interest; secondly, that the article did not exclude the application of *Hopkinson v. Rolt* (9 H. L. C. 514), and that the company's lien for debts incurred to them by the member after the notice must be postponed to the bank's charge. *Bradford Banking Company v. Briggs*, 12 App. Cas. 29; 56 L. J., Ch. 364; 56 L. T. 62; 35 W. R. 521—H. L. (E.)

Registration of Lis Pendens.—Registration of a petition for sale by the second mortgagee as a lis pendens has not the effect of notice to the first mortgagee, so as to effect the priority of further advances made by him in ignorance of such petition and registration. *O'Byrne's Estate*, *In re*, 15 L. R., Ir. 373—C. A.

Stop Order—Fund in Court.—A second incumbrancer of a fund in court, who at the time of taking his security had notice of the existence of the first incumbrance, cannot, by obtaining a stop order, gain priority over the first incumbrancer, even although the latter never obtains a stop order. *Holmes*, *In re*, 29 Ch. D. 786; 55 L. J., Ch. 33—C. A.

An incumbrancer who obtains a stop order on a fund in court does not lose his priority over a previous incumbrancer who has obtained no stop order, by the fact that he had notice of the previous incumbrance at the time of obtaining the stop order, if he had no notice of it when he took his security. *Elder v. Maclean* (5 W. R. 447) observed upon. *Mutual Life Assurance Society v. Langley*, 32 Ch. D. 460; 54 L. T. 326—C. A. Affirming 53 L. J., Ch. 996; 32 W. R. 791—Pearson, J.

Constructive Notice of Fraud.—See *National Provincial Bank of England v. Jackson*, ante, col. 1253.

VI. RIGHTS OF MORTGAGEES AND MORTGAGORS.

1. POWER OF SALE.

Freeholds and Trade Machinery.—The power of sale incident to the estate of the mortgagee under s. 19 of the Conveyancing Act, 1881, which enables him to sell the "mortgaged property or any part thereof" does not authorise him to sell the trade machinery apart from the freehold. *Yates*, *In re*, *Batchelder or Batchelor v. Yates*, 38 Ch. D. 112; 57 L. J., Ch. 697; 59 L. T. 47; 36 W. R. 563—C. A.

Proviso restricting Exercise—Notice to Mortgagor—Waiver—Purchaser's Protection Clause.—A proviso relieving a purchaser under a power from inquiring as to the regularity of a sale does not protect a purchaser who knows of an irregularity which cannot have been waived:—*Quære* (per Bowen, L. J.), whether the same rule would apply where the irregularity was one which might have been waived. *Parkinson v. Hanbury* (2 L. R., H. L. 1) followed. *Selwyn v. Garfit*, 38 Ch. D. 273; 57 L. J., Ch. 609; 59 L. T. 233; 36 W. R. 513—C. A.

A mortgage deed contained a covenant to pay at the expiration of six months, and a power of sale in the usual form, with a proviso that the power should not be executed until the mortgagee had given notice to the mortgagor to pay off the debt and default should have been made for three months. The deed contained also the usual clause for the protection of purchasers in any sale purporting to be made under the power. The mortgagor subsequently incumbered his equity of redemption. Two months after the date of the mortgage the mortgagee gave notice to the mortgagor to pay off the debt, and seven months after the date of the mortgage sold the property to the defendant:—Held, in an action by the mortgagor to set aside the sale, that three months not having elapsed since default in payment of the mortgage debt, the proviso had not been complied with, and the sale was invalid; that as the purchaser must be taken to have known that the proviso had not been complied with, she was not protected by the protection clause; and that the mortgagor having incumbered his equity of redemption, and, therefore, not being in a position to waive the necessity of notice, the purchaser had no right to assume that there had been any such waiver. *Id.*

Purchase by Disqualified Person—Sub-purchase by Person not Disqualified.—A building society, who were mortgagees from the plaintiff, put up the mortgaged property for sale by auction in lots. The secretary of the society bid on his own account for, and was declared the purchaser of, five of the lots. The bids were more than the reserved prices and were bonâ fide, and the people at the sale knew that the bidder was the secretary of the society, and that the bids were bonâ fide. After the sale the secretary transferred the benefit of his contract as to three of the lots to other persons, who would not themselves have been disqualified as purchasers, and they signed contracts with the society to purchase the three lots. The mortgagor having brought an action to set

aside the sales of the five lots, North, J., held that the sale, as to the two lots retained by the secretary, could not be supported, but that the sales of the three other lots were valid. On appeal, the mortgagor contended that the judgment ought, as to all the five lots, to have declared that the plaintiff was entitled, at his option, either to have the sales set aside, or to have the lots put up again by auction, and the sales set aside only if larger prices were offered at the re-sales:—Held, that, whether this form of relief could have been obtained against the secretary if claimed by the pleadings, it could not be given where not so claimed, and that as the other purchasers had contracted with the mortgagees themselves, the sales to them were good. *Martinson v. Clowes*, 52 L. T. 706; 33 W. R. 555—C. A.

Purchase by Company of which Mortgagee a Member—Action to set aside Sale.—The mortgagors of a quarry brought an action to set aside a sale of the mortgaged property made by the mortgagees under the power of sale in the mortgage to a limited company who were defendants to the action. The sale was impeached on the ground that F., one of the mortgagees, was personally interested in the purchase, being at the time of the sale the holder of shares in the company to the amount of one-tenth of the subscribed capital of the company and also being the solicitor to the company:—Held, that although a mortgagee could not sell to himself, nor could two mortgagees sell either to one of themselves, or to one of themselves and another, the reason being that there could not be any real independent bargaining as between opposite parties, yet where mortgagees sold to a corporation such as a public company, there were *prima facie* two independent contracting parties and a valid contract, and if the bargaining was real and honest, and conducted independently by the mortgagees on the one hand and by the directors on the other, and it was satisfactorily shown that in the concluding terms of the sale the parties were in no way affected by the circumstance that one of the mortgagees had some interest as a shareholder in the company, there was no sufficient reason for setting aside the sale; that in the present case the material terms of the bargain were honestly and independently settled, and were not in any degree affected by the fact that F. subsequently agreed to become a member of and to act as solicitor for the company, and that the sale ought not to be set aside merely because he was a member of and acting as solicitor for the company at the time when the formal contract was signed. *Farrar v. Farrars*, 59 L. T. 619—Chitty, J. Affirmed 40 Ch. D. 395; 58 L. J., Ch. 185; 60 L. T. 121; 37 W. R. 196—C. A.

Injunction to restrain Sale—Payment of Money into Court—Mortgagee in Fiduciary Position.—The ordinary rule that the court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale except on the terms of the mortgagor paying into court the sum sworn by the mortgagee to be due for principal, interest, and costs, does not apply to a case where the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor. In such a case the court will look to all the circumstances of the case, and will

make such order as will save the mortgagor from oppression without injuring the security of the mortgagee. *Macleod v. Jones*, 24 Ch. D. 289; 53 L. J., Ch. 145; 49 L. T. 321; 32 W. R. 43—C. A.

By Mortgagor and First Mortgagee—Notice of Second Mortgage—Application of Proceeds.]

—A mortgagor of a leasehold house, with the concurrence of the first mortgagees, who had notice of a second equitable mortgage, sold the property. Upon completion the balance of the purchase-money, after payment of the first mortgages, was handed to the mortgagor. In an action by the second mortgagees against the mortgagor (who did not appear) and the first mortgagees:—Held, that the first mortgagees were liable to make good to the plaintiffs the amount of their security to the extent of the balance of the purchase-money. The doctrine in *Peacock v. Burt* (4 L. J., Ch. 33) will not be extended. Dictum of Wood, V.-C., in *Bates v. Johnson* (Joh. 304, 313) as to the right of a first mortgagee to transfer to a third mortgagee in preference to the second, questioned. *West London Commercial Bank v. Reliance Permanent Building Society*, 29 Ch. D. 954; 54 L. J., Ch. 1081; 53 L. T. 442; 33 W. R. 916—C. A.

Interest on Surplus Proceeds—Amount understated by Mortgagee—Costs.]

—Where a mortgagee sells under his power of sale and, after he has paid himself his debts and costs out of the purchase-money, a surplus remains in his hands, it is his duty, if he cannot ascertain who are the persons entitled to the surplus, to set it apart so as to be fruitful for their benefit, and if he fails to do so he will be charged with interest at 4 per cent. from the time of the completion of the sale. *Charles v. Jones*, 35 Ch. D. 544; 56 L. J., Ch. 745; 56 L. T. 848; 35 W. R. 645—Kay, J.

A mortgagee in possession sold under his power of sale, and retained surplus proceeds of sale. In an action against him for accounts he admitted that a sum was due from him, and paid such sum into court. On the taking of the accounts it appeared that a considerably larger sum was due:—Held, that he ought not to be allowed his costs of taking the accounts. *Id.*

Mortgagee's Right to retain more than Six Years' Arrears of Interest.]

—S. 42 of the Statute of Limitations (3 & 4 Will. 4, c. 27) does not affect the right of a mortgagee who has sold under his power of sale to retain out of the proceeds more than six years' arrears of interest. *Marshfield, In re, Marshfield v. Hutchings*, 34 Ch. D. 721; 56 L. J., Ch. 599; 56 L. T. 694; 35 W. R. 491—Kay, J.

After the judgment for the administration of the estate of a second mortgagee of real estate, the first mortgagees sold the mortgaged property under their power of sale and received the proceeds. A summons in the action was then taken out by the plaintiff, a beneficiary under the will of the second mortgagee, to determine the question whether the first mortgagees were entitled to retain more than six years' arrears of interest. The first mortgagees were not parties to the action, but consented to appear on the summons to argue the question. The second mortgagee absorbed all the possible surplus of the proceeds of sale:—Held, that the first mortgagees were

entitled to retain more than six years' arrears of interest. *Edmunds v. Waugh* (1 L. R., Eq. 418) approved of. *Id.*

Sale by Auction—Costs of Abortive Sale.—On a sale by auction on behalf of a mortgagee, in exercise of the power of sale contained in his mortgage deed, the acceptance by the auctioneer, on behalf of the vendor and with his concurrence, of a cheque (which was dishonoured on presentation) in lieu of cash for the deposit, is not, having regard to the common practice at sales by auction, unreasonable, and is not such an act of negligence on the part of the mortgagee as to deprive him of his right to the costs of the abortive sale. *Farrer v. Lacy*, 31 Ch. D. 42; 55 L. J., Ch. 149; 53 L. T. 515; 34 W. R. 22—C. A.

Costs—Remuneration of Auctioneer.—A testator's real estate was subject to a mortgage for 3,000*l.* The property was put up for sale by an auctioneer and not sold, as the reserve price (7,000*l.*) was not reached. The auctioneer subsequently sold the property by private contract at the reserve price. On the mortgagees bringing their accounts of the sale before the chief clerk, he allowed the auctioneer only the charges usually allowed in cases of sale in court, and struck off 62*l.* 10*s.* from their bill for commission. An action for the administration of the testator's estate came on for further consideration, together with a summons by the mortgagees to vary the chief clerk's certificate by allowing the 62*l.* 10*s.*—Held, that the auctioneer was only entitled, beyond expenses for outgoings, to a proper remuneration according to the scale allowed by the court in sales of property under its control, and that auctioneers had no right to agree amongst themselves to fix a certain scale of remuneration upon which to charge the persons who employed them, and that the chief clerk was right in disallowing the 62*l.* 10*s.* *Walford, In re, Walford v. Walford*, 59 L. T. 397—Kay, J.

2. LEASES—DISTRESSES.

By Mortgagor subsequent to Mortgage—Notice by Mortgagee to Tenant to pay Rent to him.—C., the owner of a leasehold estate which was subject to a mortgage, entered without the privity of the mortgagees into an agreement with P. to grant him a lease for twenty-one years, and in 1875 P. took possession under this agreement. On the 25th of March, 1881, the mortgagees' solicitors wrote to P. stating that they, on behalf of the mortgagees, had withdrawn C.'s authority to receive the rents, and asking him to pay the rent due that day and all future rent to them. P. wrote to ask C. whether he ought to pay according to the notice, and C. replied that he would be correct in doing so. P. consulted his solicitors, who inspected the mortgage deed, and advised him that the mortgagees could claim rent from him. P. therefore paid the mortgagees the rent due on the 25th of March, and on the 22nd of June gave them notice to determine his tenancy at Christmas. At the end of the year the mortgagees refused to accept possession, and in June, 1882, they and C. commenced this action to compel P. to take a lease according

to the agreement:—Held, that the notice by the mortgagees to the tenant to pay rent to them, and the payment accordingly, did away with the agreement between C. and P., and made P. tenant from year to year to the mortgagees, and that specific performance of the agreement could not be decreed. *Corbett v. Plowden*, 25 Ch. D. 678; 54 L. J., Ch. 109; 50 L. T. 740; 32 W. R. 667—C. A.

Notice to pay Rent to Mortgagee—Rent paid to Mortgagee is Money paid for Landlord.—

A mortgagor let the mortgaged premises subsequently to the mortgage. During the quarter ending at Michaelmas the mortgagees gave a notice to the tenant informing him of the existence of the mortgage, and that the principal sum was still due and owing together with an arrear of interest, and requiring him to pay the rent thereafter to accrue due to them. The rent which became due at Michaelmas being still unpaid, an order was made in an action against the mortgagor appointing the plaintiff, who had recovered judgment, receiver of the rents of the premises, "without prejudice to the rights of any prior incumbrancers who may think proper to take possession of the same by virtue of their respective securities." Subsequently the mortgagees threatened the tenant with legal proceedings unless he paid the rent to them, and the tenant thereupon paid them the quarter's rent due at Michaelmas. The receiver claimed payment of such rent from the tenant:—Held, by the Queen's Bench Division, that the tenant's occupation after notice to pay rent to the mortgagees was evidence from which a tenancy to the mortgagees ought to be inferred, and therefore he was justified in paying the rent to them, and could not be liable for the same rent to the mortgagor or any one claiming under him:—Held, on appeal, that the tenant had not been guilty of any disobedience of the receivership order in paying rent to the mortgagees, they being prior incumbrancers whose rights were reserved by the order; that the tenant, having paid the rent to the mortgagees under compulsion of law and in consequence of his lessor's default, could set up such payment in answer to the claim for the rent by the receiver, who claimed through his lessor; and that consequently the claim of the receiver could not be maintained. *Johnson v. Jones* (9 A. & E. 809) approved and followed. *Underhay v. Read*, 20 Q. B. D. 209; 57 L. J., Q. B. 129; 58 L. T. 457; 36 W. R. 298—C. A.

Notice to pay Rent to Mortgagee—Mortgagee entitled to Benefit of Covenants.—A mortgagor in possession let the mortgaged property without the concurrence of the mortgagees. The lease was one authorized by s. 18 of the Conveyancing Act, 1881. The lessee then advanced certain moneys to the mortgagor upon the terms that the lessee should retain the rent as it became due until the moneys were repaid. Subsequently the mortgagees gave notice to the lessee informing him of the mortgage, and requiring him to pay them the rent thereafter to become due, and not to pay it to the mortgagor. The lessee having refused to comply with the notice, the mortgagees brought an action to recover possession under a condition of re-entry upon non-payment of rent contained in the

lease:—Held, that, by the combined effect of ss. 10 and 18 of the Conveyancing Act, 1881, the mortgagees, after giving the above notice to the lessee, were entitled as reversioners to enforce the covenants and provisions in the lease, and were therefore entitled to recover possession of the property under the condition of re-entry; and, further, that the agreement between the mortgagor and lessee as to the retention of the rent was not binding upon the mortgagees. *Municipal Permanent Building Society v. Smith*, 22 Q. B. D. 70; 58 L. J., Q. B. 61; 37 W. R. 42—C. A.

By Mortgagees in Possession—Clause binding Tenant to take Beer, &c., from them—Account—Interest.—A leasehold public-house was mortgaged to brewers who entered into possession, and after carrying on the business for some time, leased the public-house to tenants, with agreements binding the tenants to take their beer, &c., from them, under which they derived a large profit from the sale of beer, &c. They afterwards sold the public-house under the power of sale in the mortgage:—Held, in an action by the mortgagor for an account, that the mortgagees were not entitled to interest on the cost of beer supplied while they were carrying on the business; that they were not bound to account for the profits derived from the sale of beer, &c., to the tenants of the public-house; but that they were chargeable with the increased rent they might have obtained if the tenants had been under no restriction as to purchasing their beer. *White v. City of London Brewery Company*, 39 Ch. D. 559; 58 L. J., Ch. 98; 60 L. T. 19; 36 W. R. 881—North, J. Affirmed W. N., 1889, p. 114—C. A.

Attornment Clause—Distress—Whether a Bill of Sale.—See *BILLS OF SALE*, I. 1.

Distress by Mortgagor in his own Name.—A mortgagor in possession has, in the absence of interference by the mortgagee, an implied authority from the mortgagee to distress upon the tenant of the mortgaged property for the rent due in respect thereof; and, although it may be necessary for the mortgagor to justify the distress as bailiff of the mortgagee, it is not necessary that the distress should be made in the mortgagee's name. *Reece v. Strousberg*, 54 L. T. 133; 50 J. P. 292—D.

Receiver appointed by Mortgagee—Subsequent Distress by Mortgagor.—A mortgagee appointed a receiver of the income of the mortgaged property under the Conveyancing Act, 1881, and gave notice of the appointment to the mortgagor. The mortgagor nevertheless distrained for rent becoming due after the appointment of the receiver. The mortgagor claimed to distrain for the protection of the property, alleging that the receiver had been negligent in collecting the rent:—Held, that an injunction must be granted to restrain the mortgagor from interfering with the receiver or receiving the rent. *Bayly v. Went*, 51 L. T. 764—Kay, J.

Semble, that even if the mortgagor had proved negligence on the part of the receiver, distraining for the rent was not the proper mode of protecting his interests. *Id.*

3. MORTGAGEES IN POSSESSION.

Lease by.—See *supra*.

Power to Manage Block of Residential Apartments.—A mortgage of a large block of buildings, let out in residential apartments, and containing a common kitchen and salle à manger for the use of the tenants, contained an assignment of the "rents and profits" and a power to the mortgagees to enter on the hereditaments on default of payment and "manage" and receive the rents and profits thereof. The deed contained no assignment of chattels, nor any reference to existing arrangements with tenants, but the mortgagor covenanted to pay moneys expended by the mortgagees for any of the purposes thereby authorised. At the date of the mortgage the apartments were let out to tenants under agreements, made by a former mortgagee (who had been paid off), by some of which the tenants stipulated for the supply by the landlord of attendance and cooked food, such food being generally supplied according to a tariff from time to time fixed by the manager. The mortgagees having entered into possession, continued to supply all the tenants, whether they had contracted for the supply of attendance and food or not, with attendance and cooked food, and in so doing managed the premises at a loss:—Held, in an action by second mortgagees for an account, that the first mortgagees were entitled to be recouped the losses made by them in management, not only out of the rents of the property, but out of the surplus proceeds of sale thereof. *Bompas v. King*, 33 Ch. D. 279; 56 L. J., Ch. 202; 55 L. T. 190—C. A.

Mortgage of Coal Mines—Accounts—Value of Coal Improperly Worked—Deductions—Costs of Severance and of Raising.—The plaintiffs were mortgagees in possession of a colliery, and were also treated by the court as lessees of the same colliery under a lease for a fixed term of years at a rent and a certain royalty for all coal gotten. The lease contained covenants to leave pillars of coal to support the roof and not to work or remove the pillars. The mortgagees underlet the colliery and gave their sub-lessees permission to work and remove the pillars, which they did:—Held, that in taking the accounts as against mortgagees in possession, the mortgagees having allowed their sub-lessees to take the coal, must be treated as having taken it themselves, and, having so taken it wrongfully in breach of the covenants in the lease, must be charged, not with the amount of the royalty reserved, but with the full value of the coal, subject to a deduction for the costs of bringing it to the surface, but not for the costs of severance; and the foreclosure, which had been made absolute before the appeal was heard, was reopened. *Livingstone v. Rawyards Coal Company* (5 App. Cas. 25) distinguished. *Taylor v. Mostyn*, 33 Ch. D. 226; 55 L. J., Ch. 893; 55 L. T. 651—C. A.

Receipt of Rents and Profits—How determined.—The fact that mortgagees are in receipt of the rents and profits of the mortgaged estate does not necessarily make them chargeable as mortgagees in possession. The question whether they are mortgagees in possession depends upon

whether they have taken out of the mortgagor's hands the power and duty of managing the estate and dealing with the tenants. *Noyes v. Pollock*, 32 Ch. D. 53; 55 L. J., Ch. 513; 54 L. T. 473; 34 W. R. 383—C. A.

B. was the agent of a mortgagor, and received the rents of the estate for him, and applied them in payment of the interest to the mortgagees. The mortgagees wrote to B. inclosing notices to the tenants to pay the rents to them, which he was to serve on them if the mortgagor should attempt to interfere. B. replied promising to pay the rents to the mortgagees, and not to the mortgagor. The notices were not served on the tenants, but B. paid the rents as he received them to the mortgagees:—Held, that the mortgagees could not be charged as mortgagees in possession. *Id.*

Occupation Rent, Increase of—Money expended.]—Where a first mortgagee in possession, after decree for redemption, has expended money on permanent improvements on the mortgaged property, he is not to be charged with an increased occupation rent by reason of the value of the property having been increased by the improvements he has effected, unless the expenditure in improvements is allowed to him. *Bright v. Campbell*, 54 L. J., Ch. 1077; 53 L. T. 428—C. A.

Appointment of Receiver.]—Under s. 25, sub. s. 8, of the Judicature Act, 1873, a mortgagee in possession is entitled to the appointment of a receiver, notwithstanding that he has been paid all his interest and costs out of rents received by him while in possession, and that he has surplus rents in his hands. *Mason v. Westoby*, 32 Ch. D. 206; 55 L. J., Ch. 507; 54 L. T. 526; 34 W. R. 498—V.-C. B.

4. IN OTHER CASES.

Liability of Valuer to Mortgagee for Negligence.]—See *Cann v. Willson*, ante, col. 824.

Restraining Mortgagor cutting down Timber.]

—On a motion by a mortgagee for an injunction to restrain the mortgagor from cutting timber standing upon the mortgaged land, it was shown that by a mortgage dated the 19th March, 1874, about nine acres of agricultural land near Banbury were mortgaged to secure 600*l.* and interest. In January, 1880, the mortgagor advertised eleven trees standing upon the land for sale, with other timber standing on adjoining land. The mortgagee brought an action for an injunction to restrain him. It was admitted that the security was insufficient in its present state. The plaintiffs produced evidence that the land might at some time be used as building land, and for that purpose the timber would increase its value. On the other hand the mortgagor produced evidence that the chance of the land becoming building land was very remote, that the trees were ready to cut, and would only deteriorate if left standing, and that if they were cut down the land could be let in allotments at a higher rent. He offered to pay the money received by the sale in reduction of the mortgage debt. The evidence as to the deterioration of the timber by standing was contradicted:—Held, that the

mortgagee had a right to have the timber left standing on the land, and the injunction must be granted. *Harper v. Aplin*, 54 L. T. 383—Pearson, J.

Voluntary Settlement—Trust for Accumulation—Trust for Benefit of Mortgagees.]—By a voluntary settlement certain freehold estates were settled, subject to the mortgages subsisting thereon, to the use of the settlor for life, with remainder to the use of trustees for 500 years, and subject thereto in strict settlement. And the trusts of the term were declared to be that the trustees should during the period of twenty-one years from the death of the settlor receive out of the rents of the estate the annual sum of 1,000*l.* and accumulate it at compound interest, and should at the expiration of that period, or from time to time during that period, as they might think fit, apply the accumulated fund in satisfaction of the mortgages then charged on the estate, and should pay the surplus of the rents to the person entitled to the immediate reversion of the estate. Seven years after the death of the settlor the first tenant in tail in possession barred the entail and acquired the fee simple subject to the mortgages; and he then claimed the right to stop the accumulations and to receive the accumulated fund and the whole future rents of the estate:—Held, that the mortgagees were cestuis que trust under the deed equally with the owner of the estate, and that he could not stop the accumulations or receive the accumulated fund without their consent. The doctrine of *Garrard v. Lauderdale* (2 Russ. & My. 451) does not apply to provisions for creditors which do not come into operation till after the death of the settlor. *Fitzgerald's Settlement, In re*, 37 Ch. D. 18; 57 L. J., Ch. 594; 57 L. T. 706; 36 W. R. 385—C. A.

Right to Recover Mortgage Deeds.]—See *Manners v. Mew*, ante, col. 1250.

Right of Mortgagee to Renewal of Licence of Beer-house.]—See *Garrett v. Middlesew JJ.*, ante, col. 1052.

VII. REMEDIES FOR NON-PAYMENT OF MORTGAGE-MONEY.

1. FORECLOSURE.

a. Parties.

Glebe Land—Patron.]—A vicar is a person having a limited interest within the meaning of s. 3 of the Landowners West of England and South Wales Land Drainage and Inclosure Companies Act, and may charge his glebe land thereunder. To a foreclosure action under such a mortgage, the patron of the living is not a necessary party. *Goodden v. Coles*, 59 L. T. 309; 36 W. R. 828—Kekewich, J.

Trustee of Equity of Redemption.]—A mortgagor having conveyed the equity of redemption together with other property, to a trustee in trust for scheduled creditors:—Held, in a foreclosure action, that the trustee sufficiently represented the creditors. *Doble v. Manley*, 28 Ch. D. 664; 54 L. J., Ch. 636; 52 L. T. 246; 33 W. R. 409—Chitty, J.

Infant Defendant—Day to show Cause.]—In an action by an equitable mortgagee, without any memorandum of deposit of title-deeds, against the widow and infant heir-at-law of the mortgagor for foreclosure :—Held, on motion for judgment, the defendants not having appeared, that the infant heir must be ordered to convey the estate when he attained the age of twenty-one years, and that he must have a day to show cause in the usual way. *Price v. Carver* (3 My. & Cr. 157) followed. *Mellor v. Porter*, 25 Ch. D. 158; 53 L. J., Ch. 178; 50 L. T. 49; 32 W. R. 271—Kay, J.

Judgment for foreclosure was made absolute against an infant without giving time to show cause, the mortgagee offering to pay the infant's costs as between solicitor and client, and the guardian of the infant being of opinion that it was for the benefit of the infant that the order should be made, and there being evidence that the mortgage debt greatly exceeded the value of the property. *Young v. Cocker*, 32 W. R. 359—Chitty, J.

b. Practice.

Statement of Claim—Non-appearance.]—In a foreclosure action by the transferee of the first mortgagee, the statement of claim alleged that the defendants other than the mortgagor claimed to have some charge upon the mortgaged premises subsequent to the plaintiff's charge. None of the defendants, including the mortgagor, put in a defence or appeared at the bar :—Held, that the plaintiff was entitled to a foreclosure judgment on the pleadings, allowing one period for redemption as against all the defendants. *Platt v. Mendel*, 27 Ch. D. 246; 54 L. J., Ch. 1145; 51 L. T. 424; 32 W. R. 918—Chitty, J.

Request for Sale by Parties Interested.]—In an action for foreclosure by first mortgagees of a building estate at Manchester, the second mortgagees and mortgagor requested a sale, and offered to pay into court a sum sufficient to meet the costs of sale. The value of the estate was insufficient to cover what was due on the first mortgage; but the applicants produced evidence stating that since the date of the action such value had, in consequence of the subsequent passing of the Manchester Ship Canal Act, increased, and was likely to continuously increase :—Held, that the court had no power to grant the application, notwithstanding the discretion conferred by the Conveyancing Act, 1881, s. 25, sub-s. 2. *Merchant Banking Company v. London and Hanseatic Bank*, 55 L. J., Ch. 479—Chitty, J.

At the request of a second mortgagee, the court ordered a sale of some settled property that had been mortgaged, and for foreclosure in case a sale were not effected. *Saul v. Pattinson*, 55 L. J., Ch. 831; 54 L. T. 670; 34 W. R. 561—Pearson, J.

Appointment of Receiver.]—A legal mortgagee being in possession of the mortgaged property, applied to the court for the appointment of a receiver :—Held, that although the mortgagee might, under the Conveyancing Act, 1881, appoint a receiver without coming to the court, it was more desirable, where an action was pending, that the appointment should be made by the

court under the Judicature Act, 1873. *Tillett v. Niswam*, 25 Ch. D. 238; 53 L. J., Ch. 199; 49 L. T. 598; 32 W. R. 226—Pearson, J.

— After Foreclosure absolute.]—After judgment for foreclosure absolute, the action being at an end, the plaintiff cannot obtain an order for the appointment of a receiver of the mortgaged property, even though the conveyance of the property to the plaintiff remains to be settled. *Wills v. Luff*, 38 Ch. D. 197; 57 L. J., Ch. 563; 36 W. R. 571—Chitty, J. Affirmed W. N. 1888, p. 191—C. A.

Mortgagor in Possession—Occupation Rent—Receiver.]—In a foreclosure action against a mortgagor in possession, an order having been made for the appointment of a receiver and for the tenants to attorn and pay their rents in arrear and growing rents to such receiver :—Held, that the possession of the mortgagor being rightful, he was liable to pay an occupation rent from the date of demand by the receiver only, and not from the date of the order appointing the receiver. *Yorkshire Banking Company v. Mullan*, 35 Ch. D. 125; 56 L. J., Ch. 562; 56 L. T. 399; 35 W. R. 593—Chitty, J.

Counter-claim for Account—Particulars of Receipts.]—It was alleged by counter-claim to a redemption action that the mortgage comprised : (1) certain commission; (2) a sum also secured by bills of exchange; (3) a sum due on open account, and that the mortgagee had received divers sums in respect of the bills of exchange and on the open account. The mortgagee counter-claimed for an account and foreclosure or sale. Particulars of the sums received by him on the bills of exchange and open account were ordered to be given. *Kemp v. Goldberg*, 36 Ch. D. 505; 56 L. T. 736—North, J.

Accounts and Inquiries.]—In foreclosure actions where there is no preliminary question to be tried, the plaintiff may obtain, under Rules of Supreme Court, 1883, Ord. XV., an order for an account with all necessary inquiries, and the usual directions as in a common foreclosure judgment nisi. Such order should be applied for by summons in chambers, and not by motion in court, and only the costs of a summons in chambers attended by counsel will be allowed. *Smith v. Davies*, or *Davies v. Smith*, 28 Ch. D. 650; 54 L. J., Ch. 278; 52 L. T. 19; 33 W. R. 211—Chitty, J.

— Improvements by Mortgagee in Possession.]—In a foreclosure action by a first mortgagee, who was also third mortgagee, and the mortgagor, the plaintiff having entered into possession of the mortgaged property and laid out sums of money in lasting improvements, an account was directed of all the sums "properly" laid out by the plaintiff "as mortgagee" in lasting improvements upon the property. *Houghton v. Sevenoaks Estate Company*, 33 W. R. 341—Pearson, J.

— Interest—Form of Order.]—A mortgagee claimed payment, or, in default, sale or foreclosure. Judgment was given for immediate payment of principal and interest proved to be due, and, in default, for foreclosure, the account

being directed with interest at the rate provided by the mortgage, the plaintiff bringing into account what, if anything, should be received under the judgment. *Lee v. Dunsford*, 54 L. J., Ch. 108; 51 L. T. 590—North, J.

— **Right of Defendants to insist on Plaintiff's bringing in Account—Amendment of Summons.**—Mortgagees for a term of a colliery brought an action for foreclosure, seeking declarations that the original mortgage deed was a good exercise of a power of leasing, and that the sums secured by a later deed were also charged on the term created by the first deed. They obtained a decree giving them the declarations asked, and directing the usual accounts in the case of mortgagees in possession, with directions for foreclosure in default of payment. A summons was taken out by the defendants to proceed with the judgment, and the chief clerk directed the plaintiffs to bring in their accounts by a certain day, but no order to that effect was drawn up. The plaintiffs afterwards having refused to bring in their accounts on the ground that, as they alleged, the moneys remaining due to them were many times more than the value of the mortgaged property, and that taking the accounts would therefore be useless, the defendants applied on summons for an order that the plaintiffs might bring them in in four days, not asking any alternative relief. The application was refused on the ground that the defendants were not entitled to a four-day order. The defendants appealed.—Held, that the summons must be treated as if it had been asked that the plaintiffs might bring in their accounts in four days, or in such other time as the court might think fit, the summons, if necessary, being amended; and that as the plaintiffs had taken a foreclosure decree, the defendants were entitled to have the accounts brought in, but that the order should be prefaced with a statement that they required them to be brought in. *Taylor v. Mostyn*, 25 Ch. D. 48; 53 L. J., Ch. 89; 49 L. T. 483; 32 W. R. 256—C. A.

Whether this statement would give the court jurisdiction as to the costs if it turned out that the accounts had been asked for vexatiously and unreasonably, and whether the court would not on a substantive application by the plaintiffs stay the taking the accounts if it was satisfactorily shewn that taking them would be useless, *quære*. *Id.*

— **Account of Costs.**—The plaintiff in a foreclosure action is, as a general rule, entitled to an account of only principal and interest due to him on his mortgage, and of the costs of the action. To entitle him to an account of any other costs he must make out a special case. But, where the plaintiff was the transferee of a mortgage, on which interest was overdue at the date of the transfer, and the mortgagor was a bankrupt.—Held, that the plaintiff was entitled to an account of costs generally. *Bolingbroke v. Hinde*, 25 Ch. D. 795; 53 L. J., Ch. 704; 32 W. R. 427—Pearson, J.

— **Adding Accounts and Inquiries after Judgment.**—When some time after a judgment of foreclosure directing accounts against the plaintiffs as mortgagees in possession, but containing no inquiry or direction as to improper working, a probable case was made out that the

mortgaged property had been seriously damaged by the improper working of the mortgagees in possession, or persons acting under their authority.—Held, that the mortgagors should not be absolutely foreclosed and left to the remedy of proceeding against the plaintiffs, either as mortgagees or as lessees in respect of their breach of the covenants of the lease, but were entitled to an inquiry with reference to the injury caused, and to a declaration charging the plaintiffs with the amount of the loss or damage caused thereby. Such an inquiry should be obtained either by means of a supplemental judgment, or by an addition to the existing judgment. *Taylor v. Mostyn*, 33 Ch. D. 226; 55 L. J., Ch. 893; 55 L. T. 651—C. A.

Order for Sale—Conduct of Sale—Security for Costs of Sale.—An action having been brought to foreclose an equitable mortgage, the plaintiff at the hearing asked for a sale. The defendants did not oppose this, but they wished to have the conduct of the sale. The parties left it to the judge to decide who should have the conduct.—Held, that the defendants ought to have the conduct, because it was most to their interest to obtain the best possible price for the property.—Held, also, that, inasmuch as the defendants alone would be liable for the costs of the sale, there was no reason for requiring them to give security for the costs. *Woolley v. Coleman* (21 Ch. D. 169) not followed as to such security. Ordered, that the sale should take place out of court, and that the proceeds of sale should be paid into court. *Davies v. Wright*, 32 Ch. D. 220—North, J.

Default of Appearance—Judgment for Sum due on Covenant—Action for Account and Foreclosure.—A writ was indorsed with a claim for an account of principal, interest, and costs on a mortgage security, and for foreclosure or sale, and also with a claim for a specific sum for principal and interest due under a covenant in the mortgage deed. The defendant did not appear, and no statement of claim was delivered. The plaintiff moved, under Ord. XIII. r. 3, for liberty to forthwith sign final judgment for the amount indorsed on the writ, and under Ord. XV., for the usual foreclosure judgment nisi.—Held, that under Ord. XIII. r. 3, the plaintiff was entitled to sign judgment for the liquidated demand, notwithstanding that the writ was also indorsed with a claim for an account and foreclosure, but that he was not entitled under Ord. XV. to a foreclosure judgment. Observations on *Blake v. Harvey* (29 Ch. D. 827). *Bissett v. Jones*, 32 Ch. D. 635; 55 L. J., Ch. 648; 54 L. T. 603; 34 W. R. 591—Chitty, J.

Action for Redemption and Foreclosure—Form of Judgment.—In an action by a second mortgagee to redeem the first mortgage, and to foreclose the mortgagor, the proper form of judgment is, that in default of the plaintiff redeeming the action is to stand dismissed with costs. *Hallett v. Furze*, 31 Ch. D. 312; 55 L. J., Ch. 226; 54 L. T. 12; 34 W. R. 225—Kay, J.

Form of Judgment—Action on Covenant and for Foreclosure—Time.—A mortgagee being now entitled to combine in one action his right to judgment on the mortgage covenant against the mortgagor personally, with his right to fore-

closure, is entitled:—(a) If the amount of debt and interest is proved, admitted, or agreed to at the trial, to judgment for immediate payment of the whole amount; (b) If the amount is not so proved, admitted, or agreed to, to an account of what is due to him for principal and interest in respect thereof, and to judgment for payment of the whole amount immediately the same is certified—unless in either case the judge in his discretion gives time. *Semble*, the allowance of one month for payment from the date of the certificate is a reasonable exercise of such discretion. *Farrer v. Lacy*, 31 Ch. D. 42; 55 L. J., Ch. 149; 53 L. T. 515; 34 W. R. 22—C. A.

— Personal Judgment against Mortgagor.]

—Form of judgment in a foreclosure action, when a personal judgment is taken against the mortgagor on his covenant for payment of principal and interest. The form in *Grundy v. Grieve*, Seton on Decrees, 4th Ed. vol. ii., p. 1036 (Form No. 2) modified. *Hunter v. Myatt*, 28 Ch. D. 181; 54 L. J., Ch. 615; 52 L. T. 509; 33 W. R. 411—Pearson, J.

Where a mortgagor in his defence to a foreclosure action did not admit the mortgage debt, but afterwards admitted it at the trial, the court, in giving judgment for personal payment under the covenant and for foreclosure, declined to grant a month's time for payment. *Instone v. Elmslie*, 54 L. T. 730; 34 W. R. 592—Stirling, J.

Time for Redemption—Several Defendants—One Period.]

—The settled practice of the court in a foreclosure action, where there are incumbrances subsequent to that of the plaintiff, to grant successive periods of redemption to the subsequent incumbrancers and the mortgagor, will only be departed from where special reason for so doing is shewn. *Lewis v. Aberdare and Plymouth Company*, 53 L. J., Ch. 741; 50 L. T. 451—Kay, J.

The fact that there is a contest as to priorities between the subsequent incumbrancers may be a reason for departing from the ordinary practice. *Id.*

Where such a contest was raised upon the pleadings, and the nature of the property and other special circumstances were such as to render any delay peculiarly disadvantageous to the plaintiffs, the court fixed one period of nine months for redemption by the mortgagors (a company in liquidation), and two sets of incumbrancers subsequent to the plaintiffs. *Id.*

As a general but not invariable rule, when there are several defendants to a foreclosure action, one period for redemption should be allowed to all the defendants. *Mutual Life Assurance Society v. Langley*, 26 Ch. D. 686; 51 L. T. 284; 32 W. R. 792—Pearson, J.

Where there were two defendants to a foreclosure action—the mortgagor and a second mortgagee who had joined in the plaintiff's security to postpone his previously prior right, and as surety for the plaintiff:—Held, that only one period of six months should be allowed for redemption by both defendants. *Bartlett v. Rees* (12 L. R., Eq. 395), and *General Credit and Discount Company v. Glegg* (22 Ch. D. 549) followed. *Smith v. Olding*, 25 Ch. D. 462; 54 L. J., Ch. 250; 50 L. T. 357; 32 W. R. 386—Pearson, J. *Contra*, *Sweet v. Combley*, 25 Ch. D. 463 n.—Fry, J.

A., a first mortgagee, brought an action for foreclosure against the mortgagor, his trustee in bankruptcy, and two subsequent incumbrancers, C. and R. The defendants all appeared, and both C. and R. delivered defences. C.'s defence alleged that his mortgage was registered in Middlesex without notice, and therefore had priority over R. R.'s defence made no answer to this allegation. At the hearing A. asked for a foreclosure decree, giving only one period of redemption for all the defendants. C. and R. both claimed that the decree should give successive periods for redemption:—Held, that the mere fact that R.'s defence did not deny the allegation of priority in C.'s defence could not be taken as an admission by R. of the priority of C.'s mortgage; that, therefore, the priorities were in dispute, and the plaintiff was entitled to have only one period of redemption, as in *Bartlett v. Rees* (12 L. R., Eq. 395). *Semble*, even in a case in which the priorities are not in dispute, the court will not now give successive periods for redemption. *Tufnell v. Nicholls*, 56 L. T. 152—North, J.

A first mortgagee is *prima facie* entitled to a judgment in a foreclosure action limiting only one period for redemption, both as against subsequent incumbrancers and the mortgagor, and where there are conflicting claims as to priority between co-defendants, the practice, as settled by *Bartlett v. Rees* (12 L. R., Eq. 395), is to grant only one period for redemption. Where, however, the defendants have put in a defence or appeared at the bar and have proved or offered to prove their incumbrances, and there is no question of priority between them, the court will at the request of the puisne incumbrancers, but not at the request of the mortgagor, limit successive periods for redemption. A mortgagor has no right in himself to more than one period of six months to redeem. *Platt v. Mendel*, 27 Ch. D. 246; 54 L. J., Ch. 1145; 51 L. T. 424; 32 W. R. 918—Chitty, J.

In a foreclosure judgment against the mortgagor and subsequent incumbrancers, only one period for redemption will be fixed where none of the defendants appear on the motion for judgment; whether it is alleged by the statement of claim that the subsequent incumbrancers are "entitled," or only that they "claim to be entitled" to charges upon the mortgage premises. *Doble v. Manley*, 28 Ch. D. 664; 54 L. J., Ch. 636; 52 L. T. 246; 33 W. R. 409—Chitty, J.

Foreclosure absolute—Evidence of Non-payment—Personal Affidavit.]

—A mortgagee had obtained a foreclosure judgment nisi, and now moved the court to grant him foreclosure absolute. He had made no affidavit of non-payment of moneys due to him, but the solicitor's clerk, who attended on his behalf to receive the money due on the security, had made an affidavit of non-payment. The defendant had not appeared in the action since its commencement:—Held, that, on a motion by a mortgagee for foreclosure absolute, the plaintiff's personal affidavit of non-payment might be dispensed with, in spite of the contrary practice laid down in Seton on Decrees, 4th edit. p. 1091. *Erith v. Cooke*, 52 L. T. 798; 33 W. R. 688—Chitty, J.

Upon an application for an order for foreclosure absolute, where an affidavit of non-payment had been made by the person attending on

behalf of the plaintiff to receive the mortgage moneys, the court declined to dispense with an affidavit by the plaintiff stating that he had not received the mortgage moneys between the date of attendance and the date of the application. *Barrow v. Smith*, 52 L. T. 798; 33 W. R. 743—Kay, J.

— **Enlarging Time fixed for.** — Where mortgaged premises afford an ample security for the mortgage debt and interest, the court will, when there is a reasonable prospect of the mortgagor being able to discharge the debt, enlarge the time fixed for foreclosure absolute upon immediate payment by the mortgagor to the mortgagee of a substantial portion of the interest accrued due and costs. *Forrest v. Shore*, 32 W. R. 356—V.-C. B.

Goodwill of Business—Form of Order. — Where after the commencement of a foreclosure action concerning certain property, subject to a mortgage which included the goodwill of a business, a receiver and manager had been appointed, the court directed a proviso to be inserted in the order for foreclosure, that any person redeeming, or in the event of foreclosure, the plaintiff, should be at liberty to apply to the judge in chambers for payment of any money in court, or in the hands of the receiver. *Smith v. Pearman*, 58 L. T. 720; 36 W. R. 681—Chitty, J.

Order for Delivery of Possession. — A summons for foreclosure asked for delivery of possession in the event of foreclosure. The usual foreclosure order was made without any direction as to delivery of possession. Default in payment having been made, the order for foreclosure was made absolute. The plaintiff then moved in the action for an order on the defendant to deliver up possession of the mortgaged property:—Held, that such an order ought to be made, and that the plaintiff ought not to be obliged to bring a new action for the purpose of recovering possession. *Keith v. Day*, 39 Ch. D. 452; 58 L. J., Ch. 118; 60 L. T. 126; 37 W. R. 242—C. A.

An order for foreclosure absolute in a foreclosure action commenced by summons may, as against the defendant mortgagor in possession (he having been served and not appearing) include an order for delivery of possession by him to the plaintiff, even though the summons did not ask for delivery of possession. *Best v. Applegate*, 37 Ch. D. 42; 57 L. J., Ch. 506; 57 L. T. 599; 36 W. R. 397—North, J.

Under Ord. XVIII. r. 2, of the Rules of the Supreme Court, Dec. 1885, the court has jurisdiction in a foreclosure action to order delivery of possession where possession is asked, not against a third party, but against the mortgagor, notwithstanding that the plaintiff has not asked for possession either in the writ or statement of claim. *Salt v. Edgar*, 54 L. T. 374—Chitty, J.

The minutes of the order in a mortgagee's action, where possession of the mortgaged premises is (inter alia) claimed, should contain a direction that, in default of the defendant redeeming, he should deliver up possession of the mortgaged premises to the plaintiff, inasmuch as the order for possession is a conditional order like a foreclosure order, and requires to be made absolute like a foreclosure order. *Williamson v. Burrage*, 56 L. T. 702—Chitty, J.

Where an order nisi for foreclosure and possession had been made, the order absolute also provided for possession and was made ex parte. *Withall v. Nixon*, 28 Ch. D. 413; 54 L. J., Ch. 616; 33 W. R. 565—Pearson, J.

Receipt of Rents, &c., by Receiver—Effect of Order. — Where a receiver has received rents of mortgaged property between the date of the certificate under a foreclosure judgment and the day fixed for redemption, the mortgagee is not entitled to the rents so received, except on the terms of bringing them into account as between mortgagee and mortgagor, and a fresh date must be fixed for redemption. *Jenner-Fust v. Needham*, 32 Ch. D. 582; 55 L. J., Ch. 629; 55 L. T. 37; 34 W. R. 709—C. A.

The court to save the expense and delay of a further reference to chambers allowed mortgagees to file an affidavit showing the exact amount which would be due to them for principal, interest, and costs, after allowing for everything received, brought down to the day for which notice of motion was given to fix another day for redemption. *Id.*

In a foreclosure action the fact that a receiver appointed by the court has received rents since the certificate under the order nisi, is no bar to an immediate order of foreclosure absolute on default of payment pursuant to the certificate. *Hoare v. Stephens*, 32 Ch. D. 194; 55 L. J., Ch. 511; 54 L. T. 280; 34 W. R. 410—V.-C. B.

The receiver, appointed before judgment in a foreclosure action, received rents both before and after the day fixed for payment of the mortgage money:—Held, that a further account must be taken, and a further period of one month from the date of the new certificate given to the mortgagor to redeem. *Peat v. Nicholson*, 54 L. T. 569; 34 W. R. 451—Kay, J.

At the date limited for redemption in a foreclosure action, money was in court and in the hands of a receiver paid under a mining lease since the issue of the chief clerk's certificate. The foreclosure judgment gave liberty to any person redeeming, or, in the event of foreclosure, to the plaintiffs, to apply for payment to themselves of funds in court or in the hands of the receiver:—Held, that the plaintiffs were entitled to an immediate order for foreclosure absolute, and for payment of the money in court and in the hands of the receiver without any further account. *Jenner-Fust v. Needham* (32 Ch. D. 582) distinguished. *Coleman v. Llewellyn*, 34 Ch. D. 143; 56 L. J., Ch. 1; 55 L. T. 647; 35 W. R. 82—C. A.

Where a receiver was appointed after a judgment for foreclosure, and there was a balance in his hands representing the corpus of the mortgaged property, the plaintiff was held to be entitled to have the foreclosure judgment made absolute. *Welch v. National Cycle Works Company*, 55 L. T. 673; 35 W. R. 137—Chitty, J.

The receiver and manager, appointed before judgment in a foreclosure action, received moneys that represented the gross takings in the business of the mortgaged property, which was a leasehold public-house. The moneys were received from day to day, partly before and partly after the date fixed for redemption. The court made a final order for foreclosure, and directed that the receiver and manager should pass forthwith his final account, and be discharged, his recognisance and bond to be vacated.

The court also directed that the balance of the moneys on the receiver's account should be paid into court, and gave liberty to any of the parties to apply in chambers as to such balance, and also as to the costs of the present application, such costs being reserved. *Holt v. Beagle*, 55 L. T. 592—Kay, J.

Receipt of Rent by Mortgagees—Order.]—

Upon a motion by mortgagees for judgment for foreclosure absolute, and possession of the property, to which the mortgagor did not appear, and the mortgagees had received rents since the date of the certificate, the court enlarged the time for redemption by one month, and directed the plaintiffs to file and deliver to the registrar an affidavit showing what would be the balance due to them up to that date for principal, interest, and costs; and ordered that, if the amount should not be paid, the defendant should be absolutely foreclosed, and the plaintiffs should have possession of the property. *Lacon v. Tyrrell*, 56 L. T. 483—Stirling, J.

— **Opening Foreclosure.**—In an action by executors of a mortgagee against the mortgagor and a puisne mortgagee an order nisi for foreclosure was made, giving successive periods of redemption. After the time fixed for redemption, and before final judgment was obtained against the puisne mortgagee, and before the expiration of the time allowed to the mortgagor, the plaintiffs received a sum of money for rent. A further account had been taken against the mortgagor, and a further day fixed for redemption by him.—Held, that it was irregular to fix a further time for the mortgagor to redeem until the puisne mortgagee had been finally foreclosed; and that the receipt of moneys for rent after the time fixed for the puisne mortgagee to redeem and before final judgment obtained against him did not open the foreclosure against him. The order was to foreclose the puisne mortgagee absolutely, and to take a further account against the mortgagor. *Webster v. Patteson*, 25 Ch. D. 626; 53 L. J., Ch. 621; 50 L. T. 252; 32 W. R. 581—Kay, J.

c. Costs.

— **County Court Scale.**—In an action to foreclose a mortgage for 65*l.* 18*s.* 10*d.*, where both plaintiff and defendant lived at the same place.—Held, that the plaintiff was entitled only to such costs as he would have obtained in the county court. *Simons v. McAdam* (6 L. R., Eq. 324) followed. *Crozier v. Dowsett*, 31 Ch. D. 67; 55 L. J., Ch. 210; 53 L. T. 592; 34 W. R. 267—V.-C. B.

Mortgage of Two Estates by same Mortgagor.]—

—When a mortgagee brings an action to foreclose two mortgages of two distinct estates, but which mortgages are by force of the statute or otherwise not liable to be consolidated, the costs of the action are not to be charged against each estate, but must be apportioned rateably between the two estates. *Clapham v. Andrews* (27 Ch. D. 679) overruled. *De Caux v. Skipper*, 31 Ch. D. 635; 54 L. T. 481; 34 W. R. 402—C. A.

Since the commencement of the Conveyancing Act, 1881, separate mortgages were made of distinct estates by the same mortgagor. The mortgagee having brought a foreclosure action:—Held, that the mortgagor could not redeem either estate without paying all the costs of the action. *Clapham v. Andrews*, 27 Ch. D. 679; 53 L. J., Ch. 792; 51 L. T. 86; 33 W. R. 395—Pearson, J.

Disclaimer by one Defendant—Notice of Motion—Costs of Defendant's Appearance.]—

A first mortgagee brought an action for foreclosure against the mortgagor and a number of subsequent incumbrancers of whom G. was one. G. put in a defence disclaiming all interest and consenting to be dismissed without costs. It was admitted that G. had had an interest, and was properly made a party to the action. The plaintiff, instead of obtaining the common order to dismiss, served G. with notice of motion for judgment for a foreclosure decree against him. G. appeared at the hearing:—Held, that it was unnecessary for him to appear, and he was not entitled to his costs. *Lewin v. Jones*, 53 L. J., Ch. 1011; 51 L. T. 59—North, J.

Of Mortgagee—By whom Payable.]—

Semble, in a foreclosure action the costs of the mortgagee, as between solicitor and client, are payable by the mortgagor. *Griffith, Jones & Co. In re*, 53 L. J., Ch. 303; 50 L. T. 434; 32 W. R. 350—C. A.

Order for Personal Payment.]—

In the order for personal payment the costs will be limited to such costs only as would have been incurred if the action had been brought for payment only of the debt. *Farrer v. Lacy*, 31 Ch. D. 42; 55 L. J., Ch. 149; 53 L. T. 515; 34 W. R. 22—C. A.

— Claim for Payment withdrawn.]—

A mortgagee issued a writ asking for the usual order for foreclosure, and moved for the appointment of a receiver, and on the motion being heard, a receiver was appointed. A statement of claim was delivered, but the mortgagor having become bankrupt, the plaintiff withdrew his claim for payment:—Held, that the plaintiff should have proceeded by originating summons. The court made the usual foreclosure order, but directed the taxing-master to allow such costs as the plaintiff would have been entitled to if he had proceeded by originating summons and no more. *Barr v. Harding*, 53 L. T. 74; 36 W. R. 216—Kay, J.

— Mortgagee in Possession—Accounts.]—

On a motion for judgment in default of defence in a foreclosure action, a mortgagee asked for an order for an account to be taken, and for payment, and the usual foreclosure judgment; the mortgagee, however, being in possession, and having therefore to account on the footing of wilful default, did not show what he might have received but for his wilful default. The court therefore gave him the order for an account to be taken, and the usual foreclosure judgment, but made no order for payment. The defendant then said that the plaintiff had abandoned his claim for payment, and therefore ought to have proceeded by summons, and not by action, and was entitled under the foreclosure order to no more costs than if he had applied by

summons :—Held, that as the plaintiff had not abandoned his claim for personal payment, but had pressed it, he was entitled to his costs. The court refused to allow the case to go into the general paper for argument as to the question of costs. *Brooking v. Skewis*, 58 L. T. 73; 36 W. R. 215—Kay, J.

Of Mortgagee—What allowed—Equitable Mortgage by Deposit.—In an action to foreclose a mortgage by deposit of title-deeds, accompanied by a memorandum by which the mortgagor agreed to execute a legal mortgage of his estate and interest at the request of the mortgagee, the taxing-master disallowed the following charges in the mortgagee's bill of costs :—(1) Costs of an action in the Queen's Bench Division for recovery of the debt; (2) Costs of correspondence with a surety who had given a promissory note for part of the debt; (3) Costs of investigating the mortgagor's title; (4) Costs of preparing a legal mortgage which the mortgagor refused to execute; (5) Costs of correspondence with the mortgagor as to the legal mortgage :—Held, that heads (1) and (2) must be allowed, but that the taxing-master was right in disallowing (3), (4), and (5). But held, on appeal, that a mortgagee is entitled to be allowed in account the costs of all proceedings reasonably taken by him to enforce his rights under the mortgage contract, including proceedings to obtain the mortgage money or any part thereof, either from the mortgagor, or from a surety, or out of the estate, and that therefore heads (2), (4), and (5) must be allowed. That (1) would ordinarily be a proper charge, but in the present case it could not be allowed, as it was excluded by the special terms of the order directing taxation, and that (3) could not be allowed, as an investigation of the title was not necessary for the purpose of preparing the legal mortgage, but that the mortgagees must be allowed all expenses properly incurred with reference to the preparation of the legal mortgage, which would include the expense of such inspection of the title-deeds as was necessary for preparing it. *Ellison v. Wright* (3 Russ. 458) preferred to *Lewis v. John* (9 Sim. 366). *National Provincial Bank of England v. Games*, 31 Ch. D. 582; 55 L. J., Ch. 576; 54 L. T. 696; 34 W. R. 600—C. A.

Of Accounts asked for Unreasonably.—*See Taylor v. Mostyn*, ante, col. 1269.

2. IN OTHER CASES.

Action for Recovery of Land—Special Indorsement—Landlord and Tenant—Attornment Clause.—A mortgage deed contained an attornment clause by which the mortgagor became tenant at will to the mortgagee of the land mortgaged, at a rent identical with the interest secured by the deed. The interest being in arrear, the mortgagee gave notice to quit, and, failing to obtain possession, brought an action against the mortgagor for the recovery of the land :—Held, that the action was one "for the recovery of land by a landlord against a tenant whose term has expired" within Ord. III. r. 6 (F), entitling the plaintiff to endorse the writ specially with a statement of his claim

under that rule, and consequently to apply for final judgment under Ord. XIV. *Daubuz v. Lavington*, 13 Q. B. D. 347; 53 L. J., Q. B. 283; 51 L. T. 206; 32 W. R. 772—D.

A mortgage deed contained a clause by which, for the purpose of securing the punctual payment of the interest, the mortgagor attorned tenant to the mortgagee, and the mortgagee had a power of re-entry for default in payment. Default having been made, the mortgagee commenced an action for the recovery of the premises, and applied for judgment under Ord. XIV. :—Held, that the mortgagor was a tenant whose term had expired or had been duly determined by notice to quit within the meaning of Ord. III. r. 6 (F), and the plaintiff was entitled to judgment. *Daubuz v. Lavington*, (13 Q. B. D. 347) approved and followed. *Hall v. Comfort*, 18 Q. B. D. 11; 56 L. J., Q. B. 185; 55 L. T. 550; 35 W. R. 48—D.

Concurrent Actions in Chancery and Common Law Divisions—Motion for Final Judgment—Costs.—A mortgagee by deed, of lands, after commencing an action in the Chancery division for an account of what was due on the mortgage, and for sale of the mortgaged premises, brought a personal action in a Common Law division on the covenant in the mortgage deed for payment of the principal debt and interest, and moved for final judgment. The defendant had not moved to stay the second action :—Held, that the plaintiffs were entitled to judgment, but without costs of the action or motion. *Bourke v. Donoghue*, 20 L. R., Ir. 324—Ex. D.

Action on Covenant—Assignment of Equity of Redemption—Right of Mortgagor to Reconveyance.—A mortgaged a house to B. for 12,000l., and covenanted to pay the principal and interest. He afterwards sold his equity of redemption to C., who covenanted to pay the 12,000l. and to indemnify A. in respect thereof. C. then made a further charge on the mortgaged property for 8,000l. in favour of B., and covenanted that the property should not be redeemable except on payment of both the 12,000l. and the 8,000l. C. having become insolvent, B. brought an action against A. on his covenant for the 12,000l. :—Held, that B. was only entitled to recover upon the terms of reconveying the mortgaged property to A. *Kinnaird v. Trollope*, 39 Ch. D. 636; 57 L. J., Ch. 905; 59 L. T. 433; 37 W. R. 234—Stirling, J.

—To Pay Principal and Interest—Judgment—Merger.—A mortgage deed contained a covenant by the mortgagor for payment of the principal sum on the expiration of six months next after a specified day, together with interest thereon at 5 per cent. per annum for the six months. And there was a further covenant by the mortgagor that, if the principal sum, or any part thereof, should remain unpaid after the expiration of the six months, the mortgagor would, so long as the same sum or any part thereof should remain unpaid, pay to the mortgagee interest for the principal sum, or for so much thereof as should for the time being remain unpaid, at 5 per cent. per annum. After the expiration of the six months, the mortgagee recovered judgment against the mortgagor on the covenant for the principal sum and interest in arrear :—Held, that the covenant being merged

in the judgment, the mortgagee was, as from the date of the judgment, entitled only to interest on the judgment debt at the rate of 4 per cent., and was not entitled under the covenant to interest at the rate of 5 per cent. on the principal sum. *Popple v. Sylvester* (22 Ch. D. 98) distinguished. *Fewings, Ex parte, Sneyd, In re*, 25 Ch. D. 338; 53 L. J., Ch. 545; 50 L. T. 109; 35 W. R. 352—C. A.

Claim against Residuary Legatees—Delay in following Assets—Acquiescence.—The right of mortgagees of real estate whose security proves insufficient, to come against the residuary legatees of the mortgagor, amongst whom his personal estate has been distributed, is a purely equitable right, and the court will not enforce it if there are circumstances which would make it inequitable to do so. *Blake v. Gale*, 32 Ch. D. 571; 55 L. J., Ch. 559; 55 L. T. 234; 34 W. R. 555—C. A.

Solicitor-mortgagee—Profit Costs.—Where one of a body of mortgagees is a solicitor and acts as such in enforcing the mortgage security, he is entitled to charge profit costs against the mortgagor, whether the mortgagees are trustees or not. If in such a case the mortgagor, in applying for an order to tax the bill of the solicitor-mortgagee, desires to raise the objection to profit costs, he should state his objection in his petition for taxation. *Donaldson, In re*, 27 Ch. D. 544; 54 L. J., Ch. 151; 51 L. T. 622—V.-C. B.

Action of Debt for Costs and Expenses.—Costs and expenses properly incurred by a mortgagee in relation to the mortgaged property, and which the mortgagor will be compelled to pay as a condition of being allowed to redeem the property, do not constitute a debt in respect of which an action can be maintained by the mortgagee against the mortgagor. *Fewings, Ex parte, Sneyd, In re*, 25 Ch. D. 338; 53 L. J., Ch. 545; 50 L. T. 109; 32 W. R. 352—C. A.

VIII. REDEMPTION.

Right to Redeem—Tenant for Years.—A tenant for years under an agreement for lease made subsequently to a mortgage on the demised property, and by which the mortgagee is not bound, is entitled to redeem the mortgage. The principle is the same whether the tenancy is beneficial or otherwise. *Tarn v. Turner*, 39 Ch. D. 456; 57 L. J., Ch. 1085; 59 L. T. 742; 37 W. R. 276—C. A.

Mortgage of Realty and Personalty—Redemption by Executor.—Real and personal estate were mortgaged together. The mortgagor died leaving a will of personalty, but intestate as to real estate. It was not known who was the heir-at-law, and the mortgagee entered into possession. The executrix of the mortgagor claimed to redeem the whole of the mortgaged property, which claim was resisted by the mortgagee, who insisted that her only right was to redeem the mortgaged personalty on payment of a proportionate part of the mortgage debt. The executrix brought an action for redemption, and the court made a decree for the usual

accounts as against a mortgagee in possession, directing that on payment of what was found due the mortgagee should convey and assign the mortgaged properties, real and personal, to the plaintiff, subject to such equity of redemption as might be subsisting therein in any other person or persons. The defendant appealed:—Held, that this decree was right, for that the owner of the equity of redemption of one of two estates comprised in the same mortgage cannot insist on redeeming that estate separately, and cannot be compelled to redeem it separately, his right being to redeem the whole, subject to the equities of the other persons interested; that although the heir-at-law, if known, ought to have been a party, the court would not delay making a decree until he was ascertained and made a party, and, that although a mortgagee in possession who voluntarily transfers his security is liable to account for the subsequent rents, he is subject to no such continuing liability when he transfers by the direction of the court in a redemption suit. *Hall v. Heward*, 32 Ch. D. 430; 55 L. J., Ch. 604; 54 L. T. 810; 34 W. R. 571—C. A.

Bankruptcy of Mortgagor—Purchase by Trustee—Right of Second Mortgagee.—A trustee in bankruptcy does not by purchasing from the first mortgagee of the bankrupt extinguish the first mortgage and make the second mortgagee the first incumbrancer on the estate. But such a purchase does not extinguish the right of the second mortgagee to redeem. *Bell v. Sunderland Building Society*, 24 Ch. D. 618; 53 L. J., Ch. 509; 49 L. T. 555—V.-C. B.

Right of Mortgagor to call for Assignment to a Third Person.—A tenant for life of mortgaged premises who has failed to keep down the interest, and who has obtained the usual order permitting him to redeem the mortgage, is not of right entitled under s. 15 of the Conveyancing and Law of Property Act, 1881, to require the mortgagee to transfer the mortgage debt and premises to a third person. *Alderson v. Elgey*, 26 Ch. D. 567; 50 L. T. 505; 32 W. R. 632—Chitty, J.

Accounts—Order for Preliminary Accounts.—The plaintiff, after issuing the writ in a redemption action, took out a summons for an account under Ord. XV. r. 1:—Held, that the order under the summons must be limited to preliminary accounts, and that the usual terms of a final judgment for redemption ought not to be added without the plaintiff's consent. *Clover v. Wilts and Western Benefit Building Society*, 53 L. J., Ch. 622; 50 L. T. 382; 32 W. R. 895—V.-C. B.

Mortgagee in Possession overpaid—Annual Rests—Costs.—In a redemption action against mortgagees in possession the plaintiffs, who claimed to represent the original mortgagor, alleged that the defendants had been overpaid. The defendants delivered a defence in which they denied the title of the plaintiffs to redeem; pleaded the Statute of Limitations; and asserted that a large amount was still due to them. At the trial the plaintiffs' title to redeem was not disputed, and the defence of the statute was overruled. The judgment directed the taking of the ordinary accounts in a re-

demption action against mortgagees in possession, including an account of what was due to the defendants for principal and interest, and their taxed costs of the action; and that, on payment by the plaintiffs within six months after the certificate of the balance (if any) which should be found due to the defendants, the defendants should re-convey the mortgaged property to the plaintiffs, and that, in default of payment, the action should be dismissed with costs. But, in case it should appear on taking the accounts that the defendants had been overpaid, the further consideration of the action was to be adjourned. The chief clerk found by his certificate that the mortgagees went into possession in May, 1857; that the mortgage debt was fully repaid in November, 1866; and that at the date of the certificate there was a balance of 618*l.* due from the defendants.—Held, that the account must be taken against the defendants with annual rests from the date at which the mortgage debt was fully paid, and that the defendants must pay the costs of the action. *Wilson v. Metcalfe* (1 Russ. 530) followed as to the annual rests, but distinguished as to the costs. *Ashworth v. Lord*, 36 Ch. D. 545; 57 L. J., Ch. 230; 58 L. T. 18; 36 W. R. 446—North, J.

Mortgagees in Possession—Account of Rents and Profits—Receipts by Agent—Liberty to Surcharge.—The defendants had by the judgment in an action been held to be mortgagees in possession of certain mortgaged estates, and the usual accounts and inquiries as against mortgagees in possession were directed. The defendants brought in an account purporting to show their receipts in respect of the rents and profits of the mortgaged estates, but which in fact only showed certain lump sums received by them from one J. H. Blood, then deceased, their agent. On motion by the plaintiff for a further and better account:—Held, that the defendants were bound to render the further account, for that the receipts of Blood were as between the plaintiff and the defendants the receipts of the defendants; the defendants were bound to deliver an account showing not only what they had received from Blood, but what he had received from the tenants, and that it was a question not of technicality but of substance, for without the knowledge derived from such an account the plaintiff would be unable to proceed on the inquiry as to wilful default, which was a matter of surcharge, and that the death of the defendants' agent could not excuse the defendants from this liability. *Noyes v. Pollock*, 30 Ch. D. 336; 55 L. J., Ch. 54; 53 L. T. 430; 33 W. R. 787—C. A.

Fiduciary Relation—Rate of Interest.—The plaintiff had mortgaged her life interest in certain leasehold property to various persons. In the year 1880, the defendant, who was then acting as her solicitor, in order to release her from embarrassment, bought up several of the incumbrances with his own money, and took a transfer of them to himself:—Held, in an action for redemption brought by the plaintiff against the defendant, that the defendant must be allowed interest at the rate of five per cent. on the moneys he had actually advanced. *MacLeod v. Jones*, 53 L. J., Ch. 534; 50 L. T. 358; 32 W. R. 660—Pearson, J.

Two Properties—Power of Consolidation.—A brewery company were first mortgagees for 1,000*l.*, and the plaintiff was third mortgagee of a public-house, A. The company afterwards took a mortgage of a public-house, B.; A. and B. both belonging to the same mortgagor. The lease of A. was nearly out, and by arrangement between all parties the company advanced 1,000*l.* for a new lease which was granted to the mortgagor, and was then mortgaged by him, first to the brewery company to secure 2,000*l.* and advances, and subject thereto to the plaintiff. By a memorandum given at the same time the plaintiff declared that the company was to have priority for their 2,000*l.* and advances, not to exceed in the whole 2,300*l.* The brewery company afterwards transferred both mortgages to the defendant. The plaintiff claimed to redeem A., to which the defendant objected unless the plaintiff also redeemed B.—Held, that though the new mortgage of A. to the plaintiff was in date subsequent to the mortgage of B., the intention of the parties was merely to give priority to the company for their 2,500*l.*, and not to give the company a right to consolidate the mortgage on A. and the mortgage on B.; and as the whole was equitable, the company could not be held to have obtained any such right; nor could their assignee be in any better position. *Bird v. Wenn*, 33 Ch. D. 215; 55 L. J., Ch. 722; 54 L. T. 933; 34 W. R. 652—Stirling, J.

Action for Redemption and Foreclosure—Form of Judgment.—See *Hallett v. Furze*, ante, col. 1270.

IX. PAYMENT OFF.

Interest in Lieu of Notice—Payment out of Fund in Court—Delay in Completion of Order.—One of the beneficiaries under a will mortgaged her interest in the testator's estate. She gave the mortgagees six months' notice to pay off the mortgage on the 1st of July, 1885, and on the 20th of May, 1885, an order was made in an action to administer the estate, on the application of the beneficiaries and in the presence of the mortgagees, which directed (inter alia) payment to the mortgagees, out of funds in court standing to the credit of the mortgagor, of the mortgage debt, with interest up to the 1st of July, 1885. Owing to delay in the completion of the order the payment could not be made on the 1st of July, and on the 2nd of July the mortgagees took out a summons, claiming six months' additional interest in lieu of a fresh six months' notice to pay off the mortgage. On the 20th of July the order was completed, and on the 21st of July the mortgagees took the sum mentioned in the order out of court:—Held, that the mortgagees were only entitled to additional interest from the 1st to the 21st of July, on the ground that, by accepting the order, they assented to payment out of the fund in court subject to all the contingencies to which the completion of the order might be subject. *Moss, In re, Levy v. Sewill*, 31 Ch. D. 90; 55 L. J., Ch. 87; 54 L. T. 49; 34 W. R. 59—Pearson, J.

Rights of one Mortgagor against Mortgagee on Payment of Money to other Mortgagor.—
T T

A married woman having a charge on settled estates for her jointure, joined with her husband in mortgaging them and another estate of which he was absolute owner. Afterwards the husband sold the unsettled estate, the mortgagees joining, and the purchase-money was paid partly in reduction of the mortgage debt and partly to the husband. The wife did not join in the conveyance, but consented to the transaction:—Held, that whatever equity the wife might have against her husband or the estate which had been sold, she had no equity to charge the mortgagees with the sum paid to her husband. *Noyes v. Pollock*, 32 Ch. D. 53; 55 L. J., Ch. 513; 54 L. T. 473; 34 W. R. 383—C. A.

Authority of Agent to receive Mortgage Money.—G. and H. were mortgagees for 1,000*l.* on property of S. Their solicitors, D. & P., who had the deeds in their custody, applied to the defendant, who was also a client of theirs, saying that they believed he had 1,000*l.* to invest on mortgage, and that G. and H. wanted 1,000*l.* on a transfer of S.'s mortgage. The defendant inspected the property, and being satisfied, he, on the 19th of June, 1878, sent the 1,000*l.* to D. & P., who gave him a receipt for it. In July D. & P. fraudulently induced G. and H. to execute a deed of transfer to the defendant with a receipt indorsed, which deed they stated to G. and H. to be a deed of reconveyance to S. on his paying off the mortgage. D. & P. shortly afterwards handed this deed with the title-deeds to the defendant, and went on paying him interest as if they had received it from S., who was in fact paying his interest to the agents of G. and H.; G. and H. made no inquiry as to the mortgage, and this went on till 1883, when D. & P. became bankrupts, and the 1,000*l.* received from the defendant, which had never been handed over to G. and H., was lost. G. and H. then brought their action against the defendant asserting a right against the property in the nature of an unpaid vendor's lien:—Held, that as the plaintiffs by the deed of transfer and receipt which they handed to D. & P. enabled them to represent to the defendant that the 1,000*l.* which he had previously handed to D. & P. had come to the hands of the plaintiffs, they had raised a counter equity which prevented their claiming a vendor's lien, though this would not have been the case if (D. & P. having no authority to receive money for the plaintiffs) the defendant had paid the 1,000*l.* to D. & P. at the time when the deeds were delivered to him, since he would then have known that the plaintiffs had not received the money. *Swinbanks, Ex parte* (11 Ch. D. 525), distinguished. *Gordon v. James*, 30 Ch. D. 249; 53 L. T. 641; 34 W. R. 217—C. A.

Quære, per Cotton, L.J., whether D. & P., assuming them to have authority to receive mortgage money on behalf of the plaintiffs, could be taken ever to have, in fact, received this 1,000*l.* on their behalf. *Id.*

Transfer by Three Persons to secure Loan—Authority to Sell—Transfer to Nominees of Customer.—G., a stockbroker, who was one of three trustees and acted as broker to the trust, proposed to his co-trustees to sell B. stock belonging to the trust and re-invest in N. E. stock. The three trustees then, on the 27th of January, 1882, executed a transfer of the B. stock for a nominal consideration to two persons

who were officers of a bank of which G. was a customer. G. gave the transfer to the bank as security for a loan by them to him, and the transfer was registered. G., in February, 1882, paid off the loan, and on the 15th of February the bank transferred the stock to purchasers from G., and, without giving any notice to G.'s co-trustees, allowed him to receive the purchase-money. He invested it in N. E. stock in his own name. In 1883 he sold the N. E. stock and misappropriated the proceeds. Shortly after the sale of the B. stock G. had given an account to his co-trustees showing the sale of B. stock and a re-investment in N. E. stock, and in 1884 he rendered another account in which he represented the N. E. stock as still forming part of the trust funds. In 1885 he absconded. The co-trustees remembered hardly anything about the transaction, but admitted the genuineness of their signatures to the deed of transfer:—Held, that the bank had occasioned the loss to the trust estate by allowing the purchase-money to come to the hands of G., who had no authority to receive it, and whom they had no sufficient reason for believing to have authority to receive it, and that the bank must therefore make it good at the suit of the co-trustees, although the co-trustees had been negligent in not seeing that the N. E. stock was registered in the joint names of the trustees. *Magnus v. Queensland National Bank*, 37 Ch. D. 466; 57 L. J., Ch. 413; 58 L. T. 248; 36 W. R. 577—C. A. Affirming 52 J. P. 246—Kay, J.

Set-off—Right to retain Surplus Moneys to discharge Unsecured Debt.—G. died insolvent, having mortgaged an estate for his own life to secure an annuity granted by himself, payable during his own life. He had also mortgaged a policy on his own life to the same mortgagees. After the death of G. the mortgagees received in respect of the policy a sum more than sufficient to satisfy the amount secured on the policy:—Held, that they had no right to set off the balance against the executor in respect of arrears of the annuity. *Gregson, In re, Christison v. Bolam*, 36 Ch. D. 223; 57 L. J., Ch. 221; 57 L. T. 250; 35 W. R. 803—North, J.

Mortgage by Married Woman—Restraint on Anticipation—Marshalling.—C., a widow, was entitled to the income of one-third of a fund in court for her life for her separate use without power of anticipation, and was also entitled to the income of the remaining two-thirds of the fund for her life, but subject to certain deductions. She mortgaged all her interest in the fund, and some policies of assurance on her life to F., and an order was made for payment of the income of the mortgaged property to him. C. then married M.; and after her marriage she charged all her interest in the fund in favour of P. After this T. obtained a judgment against her, and the appointment of a receiver of her separate estate. The income received by F. was more than sufficient for payment of the interest on his mortgage and the premiums on the policies, and he did not desire to reduce his principal:—Held, that as between F. and the subsequent incumbrancers of the fund, there ought to be a marshalling of securities, and that F. ought to pay the interest on his mortgage and the premiums on the policies out of the income of the one-third with respect to which

the restraint on anticipation existed, so as to leave the income of the remaining two-thirds to satisfy the subsequent incumbrances. *Loder's Trusts, In re*, 56 L. J., Ch. 230; 55 L. T. 582; 35 W. R. 58—North, J.

MORTMAIN.

See CHARITY.

MOTION.

See PRACTICE.

MUNICIPAL CORPORATION.

See CORPORATION.

MURDER.

See CRIMINAL LAW.

MUSIC.

See COPYRIGHT.

NAME.

Trade Name.—*See* TRADE.

Clause in Wills.—*See* WILL.

NATIONAL DEBT.

Petition for Re-transfer of Stock—Res Judicata—Fresh Evidence.—The jurisdiction given to the court by s. 55 of the National Debt Act, 1870, to decide upon petition as to the validity of a claim for the re-transfer of stock, which has been transferred to the National Debt Commissioners under the provisions of s. 51, is to be exercised in the mode in which the ordinary jurisdiction of the court is exercised. Therefore, if a petition for the re-transfer of stock is heard on the merits, and is dismissed on the ground that the petitioner has failed to make out his title, he cannot on the subsequent discovery of fresh evidence in support of his title present a fresh petition for the same object, at any rate without the leave of the court previously obtained. *House, Ex parte, May, In re*, 28 Ch. D. 516; 54 L. J., Ch. 338; 52 L. T. 78; 33 W. R. 917—C. A.

NATURALIZATION.

See INTERNATIONAL LAW.

NAVIGATION.

Of Ships.—*See* SHIPPING (COLLISION).

On Inland Waters.—*See* WATER, III.

NAVY.

See ARMY AND NAVY.

NECESSARIES.

In Shipping Cases.—*See* SHIPPING.

For Infants.—*See* INFANT.

NE EXEAT REGNO.

Debt payable in Futuro—Default by Trustee—Debtors Act, 1869.—An order was made that a trustee should within seven days after service of the order pay to his cestui que trust, the plaintiff, a sum found due to him by the chief clerk's certificate. The plaintiff could not find the trustee so as to serve the order, and applied for a writ of ne exeat on the ground that the trustee

was about to go out of the jurisdiction :—Held, that the case did not fall within the third exception in s. 4 of the Debtors Act, 1869, the trustee not being in default, as the order only directed payment after service and had not been served, and that as the debt was not now due and payable a writ of ne exeat could not be granted. *Colverson v. Bloomfield*, 29 Ch. D. 341; 54 L. J., Ch. 817; 52 L. T. 478; 33 W. R. 889—C. A.

NEGLIGENCE.

I. GENERAL PRINCIPLES.

1. *Identification with Wrongdoer*, 1287.
2. *Contributory Negligence*, 1288.

II. IN PARTICULAR CASES.

1. *Navigation of Steamships*, 1291.
2. *Railway Companies*, 1292.
3. *Innkeepers*, 1293.
4. *Dangerous Premises or Chattels*, 1294.
5. *Liability for Acts of Stranger*, 1295.
6. *Liability of Master for Acts of Servant*, 1296.
7. *Licensees*, 1298.
8. *Contractor and Employer*, 1298.
9. *Public Bodies*, 1299.
10. *In other Cases*, 1300.

III. ACTIONS FOR INJURIES.

1. *Lord Campbell's Act*, 1301.
2. *In other Cases*, 1303.

I. GENERAL PRINCIPLES.

1. IDENTIFICATION WITH WRONGDOER.

Joint Wrongful Act—Claim by Person not responsible for Negligence.—Where a person receives injuries in consequence of the joint act of two wrongdoers, it is no defence for one of the wrongdoers to say that the injuries were not received solely through his wrongful act. *Mathews v. London Street Tramways Company*, 58 L. J., Q. B. 12; 60 L. T. 47; 52 J. P. 774—D.

M. was a passenger on an omnibus which collided with a tramcar of the defendants :—Held, that if there was negligence on the part of the tramcar driver which caused the accident, it is no answer to say that there was negligence on the part of the omnibus driver. *Ib.*

A passenger on board the "Bushire" and one of the crew lost their lives by drowning in consequence of a collision with the "Bernina." Both vessels were to blame, but neither of the deceased had anything to do with the negligent navigation of the "Bushire" :—Held, that their representatives could maintain actions under Lord Campbell's Act, against the owners of the "Bernina," and could recover the whole of the damages : s. 25, sub-s. 9, of the Judicature Act, 1873, not being applicable to such actions. *Thorogood v. Bryan* (8 C. B. 115), and *Armstrong v. Lancashire and Yorkshire Railway* (10 L. R., Ex. 47), overruled. *Mills v. Armstrong, The Bernina*, 13 App. Cas. 1; 57 L. J., P. 65; 58 L. T. 423; 36 W. R. 870; 52 J. P. 212; 6 Asp. M. C. 257—H. L. (E.).

In an action under Lord Campbell's Act for loss of life occasioned by a collision :—Held, first, that s. 512 of the Merchant Shipping Act, 1854, does not apply to cases of loss of life caused by a foreign ship. Secondly, that the breach of the rules for preventing collisions, to which the deceased was privy, and for which the court would be bound to hold the ship to blame under the 17th section of the Merchant Shipping Act, 1873, constitutes legal contributory negligence on the part of the deceased, even where there is no reason to believe that such breach of the regulation actually contributed to the accident. Thirdly, that contributory negligence on the part of the deceased did not debar the plaintiff from recovering any damages; but that, according to the rule obtaining in cases of collision, the plaintiff was entitled to recover a moiety of the damage she had sustained. *The Vera Cruz*, 9 P. D. 88; 53 L. J., P. 33; 51 L. T. 104; 32 W. R. 783; 5 Asp. M. C. 254—Butt, J. See S. C. in H. L., post, col. 1301.

2. CONTRIBUTORY NEGLIGENCE.

When Case should be left to Jury.—To justify leaving a case to the jury, notwithstanding the voluntary act of the injured person contributing to the injury complained of, the circumstances must be such as either—1, to make the question, whether that act was negligent (either per se or having regard to the conduct of the defendants inducing or affecting it) a question of fact; or, 2, to render reasonable an inference of fact that the defendants, by using due care, could have obviated the consequence of the plaintiff's negligence. *Coyle v. Great Northern Railway*, infra.

In an action for damages for negligence it is not sufficient to entitle the plaintiff to have his case submitted to a jury that he has proved some negligence on the part of the defendants, if it also appears that the plaintiff was guilty of such contributory negligence that no reasonable jury could find a verdict in his favour. *Wright v. Midland Railway*, 51 L. T. 539—D.

In an action of negligence if the plaintiff gives evidence of negligence on the part of the defendant, and also gives evidence which may or may not be considered as amounting to contributory negligence on his own part, the case ought to be left to the jury. *Brown v. Great Western Railway*, 52 L. T. 622—D.

Where in an action for damages for personal injuries it appears from the plaintiff's own evidence that the injuries sustained were partially attributable to his omission to take ordinary precautions against a danger created by the defendant's breach of duty, there is no case to go to the jury. *Sayer v. Hutton*, 1 C. & E. 492—Huddleston, B.

— Connexion with Accident — Onus of Proof.—A railway line crossed a public footpath on the level, the approaches to the crossing being guarded by hand gates. A watchman who was employed by the railway company to take charge of the gates and crossing during the day was withdrawn at night. The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual head lights but did not

whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on to the line. An action on the ground of negligence having been brought by the administratrix of the deceased, the jury found a verdict for the plaintiff:—Held, that even assuming (but without deciding) that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident; that there was therefore no case to go to the jury, and that the railway company were not liable. Observations as to the onus of proof with regard to contributory negligence. *Wakelin v. London and South Western Railway*, 12 App. Cas. 41; 56 L. J., Q. B. 229; 55 L. T. 709; 35 W. R. 141; 51 J. P. 404—H. L. (E.)

— **Particular Instances.**—C. was, at the time of the accident which caused his death, and had been for some three weeks previously, employed by contractors in erecting a signal-box near a station on the defendants' line of railway, and it was necessary for C. and the other men employed in the work to cross the line to procure their tools, which were kept in a box at the other side of the railway. When C. was re-crossing on the morning of the accident, carriages were being shunted, as was done every morning at that hour, to make up a train, and some of these passed over C., who was killed. In an action by C.'s administratrix under Lord Campbell's Act against the railway company, it appeared from the evidence of the plaintiff's own witnesses, that the view from the tool-box, at which C. was standing, to the point from which the carriages began to retrograde was unobstructed; that they were visible during the whole of the shunting to any person at the tool-box; that they were retrograding in the direction of C. when he started to cross the line, and that he must have seen them moving had he looked towards them, and that there was nothing unusual in what took place that morning in the mode of shunting:—Held, that the judge at the trial ought to have directed a verdict for the defendants, as the undisputed facts showed affirmatively that C. in crossing the line acted negligently, and that his negligence, if not the sole, was at least a contributory cause of the accident. *Coyle v. Great Northern Railway*, 20 L. R., Ir. 409—Ex. D.

An action was brought under Lord Campbell's Act by a widow for the loss of her husband. The deceased took his ticket at the defendants' station, at 9.30 p.m., intending to travel by a train leaving at 9.50 p.m., from the up platform, which was opposite to that on which the booking office was situated. There was no sufficient accommodation for passengers waiting, except on the booking office side, where there was a waiting room. The deceased remained there until the train was heard approaching. On hearing the train approaching the deceased attempted to reach the up platform by a level crossing, at each end of which lamps were fixed. There was no bridge or subway across the line. The train was about twenty yards from the crossing when the deceased attempted to cross. He was struck by the engine of the train and killed. At the approach of the train it was usual for a porter to stand at the crossing and warn passengers. But on the night in question there was no porter at the crossing, and no notice was given

of the approach of the train; no whistle sounded, and no bell was rung. The judge at the trial left the question of the defendants' negligence to the jury, who found a verdict for the plaintiff:—Held, that the judge ought to have withdrawn the case from the jury, on the ground that the case upon the plaintiff's evidence disclosed such a want of care on the part of the deceased, as shewed that he had so far conduced by his negligence to the accident as to disentitle the plaintiff to recover. *Wright v. Midland Railway*, 51 L. T. 539—D.

The plaintiff was engaged in the loading of a cargo on board the defendant's steamer. His duty was to direct the management of the crane by which bales were slung into the hold, and to call out to the men working the crane "high enough" when the bale was hoisted sufficiently high to be lowered into the hold. For this purpose his proper place was to stand in a particular part of the deck; but at the time of the accident there was a quantity of coal on this spot, which prevented the plaintiff from standing there, and he accordingly stood under a plank, called a flap, working on hinges, and necessarily raised when cargo is being put into the hold, the flap being then secured by a rope passing through a block in the rigging and hooking on by an ordinary open hook to a ring in the flap. One of the bales was hoisted too high and struck the flap, causing the ring to slip out of the open hook, and the flap falling in horizontal position struck the plaintiff, who was severely injured. The plaintiff admitted that he knew that a short time previously the flap had slipped from the hook in a similar manner and been broken. There was also evidence that at the time of the accident the plaintiff was standing on some boards and tarpaulin, which might have been removed, and that if he had been standing on the clear deck there would have been sufficient space between the deck and the flap, even when it fell into the horizontal position, to save him from contact with it. The judge of assize found, and it was in fact admitted, that the defendants were guilty of negligence in not having the flap properly secured, and in permitting the place where the plaintiff ought properly to have stood to be obstructed with coal. He also found that there was contributory negligence on the part of the plaintiff in standing on the boards and tarpaulin, and in not removing them; and further, in not properly controlling the hoisting of the bale, as was his duty, and that he did not exercise reasonable care and caution, either as to his place or manner in which he stood, or the management of the hoisting of the bale. On a special case:—Held, that there was evidence of contributory negligence on the part of the plaintiff, and that the action should be dismissed. *McEvoy v. Waterford Steamship Company*, 18 L. R., Ir. 159—Ex. D.

— **Level Crossing—Accident caused by Plaintiff's own Negligence.**—The defendants' railway crossed a public footpath on the level. About half-past four o'clock in the afternoon of the 29th of March, the plaintiff, a foot passenger, while crossing from the down side to the up side of the railway, was knocked down and injured at the crossing by a train of the defendants on the up line. Owing to the position of certain buildings which stood by the line it was impossible for any one crossing from the down side

to see a train coming until he got within a step or two from the down line, but a person standing on the down line or the six-foot had a clear and uninterrupted view up and down the line for several hundred yards. The plaintiff, who lived near and was well acquainted with the crossing, stated that before crossing he looked to the right along the down line, but he admitted that he did not look to the left along the up line, and that if he had looked he must have seen the train coming. The engine-driver did not whistle. There was a servant of the defendants employed as a gate-keeper at the crossing, whose duty it was to open the carriage gates there when carriages could safely be admitted, and to close them at other times. He was standing at the time on the opposite side of the crossing talking to two boys, with a furled flag in his hand; but he gave no warning to the plaintiff that a train was coming. The plaintiff having brought an action against the defendants to recover compensation for his injuries, was nonsuited on the above facts being proved at the trial:—Held, by Brett, M.R., and Bowen, L. J. (*Baggallay, L. J.*, dissenting), that the nonsuit was right, as although there was evidence of negligence on the part of the defendants, yet according to the undisputed facts of the case the plaintiff had shown that the accident was solely caused by his omission to use the care which any reasonable man would have used. *Davey v. London and South Western Railway*, 12 Q. B. D. 70; 53 L. J., Q. B. 58; 49 L. T. 739; 48 J. P. 279—C. A.

Plaintiff, an intending passenger by the defendant's railway, having received his ticket, was obliged to cross the line by a level crossing in order to get from the booking-office to the platform from which his train would start. Whilst crossing he was knocked down and injured by a train which he was unable to see till it was about twenty yards from him, owing to a sharp curve on the line. The night was dark, and there was no one at the crossing to warn the plaintiff of the approaching train, which was a special train running through the station at a fast speed, and not mentioned in the time-tables. The learned judge at the trial directed a nonsuit on the authority of *Davey v. London and South-Western Railway* (12 Q. B. D. 70):—Held, that the case ought not to have been withdrawn from the jury, and that the nonsuit was wrong. *Brown v. Great Western Railway*, 52 L. T. 622—D.

II. IN PARTICULAR CASES.

1. NAVIGATION OF STEAMSHIPS.

Failure of Steam Steering Gear.—The steamship *E.* while proceeding down the river Thames came into collision with a brig which was moored alongside a wharf. The cause of the collision was the failure of the steam steering gear on board the *E.* The same steering gear had failed in an exactly similar manner a few days before, as the *E.* was on her inward voyage. It was then disconnected, and the hand gear used on the way up the river. On the ship's arrival the machinery was taken to pieces and examined, but nothing was found wrong with it, nor was the cause of the failure ascertained:—Held, that having regard to what had happened on the inward voyage, to trust the control of the

ship to the same steering gear in the crowded and intricate navigation of the Thames constituted negligence. *The European*, 10 P. D. 99; 54 L. J., P. 61; 52 L. T. 868; 33 W. R. 937; 5 Asp. M. C. 417—Butt, J.

Identification with Wrongdoer.—See *supra*.

2. RAILWAY COMPANIES.

Locomotive Engine at Station—Noise of Steam—Duty to Screen.—In an action against the defendants, a railway company, it appeared that the plaintiffs were leaving a station belonging to the defendants in a carriage, when the horse was frightened by the sight and sound of a locomotive engine at the station which was blowing off steam, and the carriage was upset and the plaintiffs injured. It did not appear that the engine was defective, or that it was used in an improper manner, or that the approach to the station was inconvenient, but the jury found that the defendants were guilty of negligence in not screening the railway from the roadway leading to the station, and that such negligence had caused the accident:—Held, that the defendants were not liable, as there was no evidence of any obligation on their part to screen the railway from the road. *Simkin v. London and North Western Railway*, 21 Q. B. D. 453; 59 L. T. 797; 53 J. P. 85—C. A.

Level Crossing—Foot-passenger—Evidence of Negligence.—A few minutes after three o'clock p.m. in clear daylight, C., who was a resident in the locality, had occasion to traverse a level crossing on the line of the defendant railway company, close to the L. station. There was a large swing-gate on each side of the line at the crossing for heavy traffic, besides a wicket for foot-passengers. An express train, which usually travelled at the rate of about thirty miles an hour, was timed to pass this point at 2.30 p.m., but was about forty minutes late on the day in question, and another train was due at 3.15. The large gates were closed, but no attempt was made by the company's servants to prevent C. from crossing, or to warn him of impending danger. Just after getting on the line, C. made an inquiry from a person who was standing on the platform of the station, and immediately afterwards another person on the platform shouted to C. to "look out for the train." C. was then on the "six-foot way," and the approaching express was about twelve yards distant on the rails towards which he was walking. C. became confused, and, instead of going back, ran forward, and was killed. There was evidence that the express train usually whistled about a mile before reaching the station; but a witness stated that, on this occasion, he heard it whistling while passing through the station. It was further proved that the line, in the direction from which the train came, was visible for at least 200 yards, and according to some of the witnesses, for half a mile from the crossing. The company, after the accident, took additional precautions, as to locking the wicket and otherwise, when trains were expected. In an action, under Lord Campbell's Act, by C.'s personal representative against the company:—Held, that there was no evidence of negligence on the part of the de-

endants, and that the jury had been rightly so directed. *Curtin v. Great Southern and Western Railway*, 22 L. R., 1r. 219—C. A.

— **Obligation to Fence-in Railway.**—At the point where a railway crossed a high road by a level crossing there were two large gates, which, when closed, covered the entire width of the metalled road and fenced-in the line therefrom. At the side of the large gates, and beyond the width of the metalled road, but communicating therewith by a short foot-path, there was a small gate for foot-passengers. A piece of fence, which stood immediately beyond the small gate, and against which it rested, was allowed by the railway company to get out of repair, and became rotten, in consequence whereof some horses belonging to the plaintiff, which were straying on the high road, were enabled, by passing along the short foot-path and pushing against the fence, to get on to the line, where they were killed by a passing train:—Held, that the company had failed to satisfy the obligation to fence their line imposed on them by s. 47 of the Railway Clauses Act, 1845, and were liable in an action for damages. *Charman v. South Eastern Railway*, 21 Q. B. D. 524; 57 L. J., Q. B. 597; 37 W. R. 8; 53 J. P. 86—C. A.

— **Contributory Negligence.**—See cases supra.

Insufficiency of Gate—Evidence of Negligence.—The fact of a railway company knowing that a gate erected under s. 8 of the Railway Clauses Act, 1845, is out of repair by a spring catch being ineffective, although the gate be also provided with a staple and hasp, and padlock and key, is some evidence for a jury that the company were guilty of negligence. *Brooks v. London and North Western Railway*, 33 W. R. 167—D.

3. INNKEEPERS.

Evidence.—A guest in an inn, the property of the respondent company, left his bedroom in the middle of the night to go to a water-closet. There were properly lighted and easily accessible closets in the same corridor, but he went into a dark "service" room, the door of which was shut but not locked, and fell down the unguarded well of a lift at the end of the room and was killed. The service room was not lighted or used at night, and visitors had no business there at any time. In an action brought by the personal representatives of the deceased:—Held, that there was no evidence of negligence on the part of the respondent company to go to the jury. *Walker v. Midland Railway*, 55 L. T. 489; 51 J. P. 116—H. L. (E.).

Liability for Property of Guest—Temporary Refreshment.—The plaintiff arrived at Carlisle with the intention of spending the night at the defendant's hotel, which adjoined the railway station. He delivered his luggage to one of the porters of the hotel, but, after reading a telegram which was waiting for him, decided not to spend the night at Carlisle, and went into the coffee-room to order some refreshments. He was not able to obtain in the coffee-room exactly what he required, and went into the station refreshment-

room, which was under the same management as the hotel, and connected with it by a covered passage. Shortly afterwards he went out, telling the porter to lock up his luggage, and it was locked up in a room near the refreshment-room. On his return he found that part of it was missing:—Held, that at the time of the loss of the plaintiff's goods there was no evidence of the relation of landlord and guest between him and the defendants, so as to make them responsible. *Strauss v. County Hotel and Wine Company*, 12 Q. B. D. 27; 53 L. J., Q. B. 25; 49 L. T. 601; 32 W. R. 170; 48 J. P. 69—D.

4. DANGEROUS PREMISES OR CHATTELS.

Duty to take Precautions—Workman compelled to work in dangerous Place—Knowledge of Danger.—The plaintiff was a workman, who was directed by his employer to work in a particular place. The defendants were contractors engaged in work above the place where the plaintiff was working. The defendants' work was of such a nature as to be dangerous to persons working below unless proper precautions were taken for their safety. The plaintiff was aware of the danger.—The plaintiff, while working where he was directed by his employer, was injured by a piece of iron dropped by the defendants' workmen, and brought an action to recover damages for the injury. The jury found that the defendants had been guilty of negligence in not taking proper precautions for those below, that there was no contributory negligence on the part of the plaintiff, and that the plaintiff did not voluntarily incur the risk:—Held, that the case was rightly left to the jury, that although the plaintiff was aware of the danger, yet, as he was compelled by the orders of his employer to work where he was working when the accident happened, the maxim "Volenti non fit injuria" did not apply, and he was entitled to recover. *Woodley v. Metropolitan District Railway* (2 Ex. D. 384) distinguished. *Thruswell v. Handyside*, 20 Q. B. D. 359; 57 L. J., Q. B. 347; 58 L. T. 344; 52 J. P. 279—D.

— **Knowledge of Nature and Extent of Danger.**—The plaintiff was injured by falling on steps leading to the defendants' railway station, which the defendants had allowed to be slippery and dangerous. There was no contributory negligence on the part of the plaintiff, but there were other steps which he might have used, and he admitted that he knew that the steps were dangerous, and went down carefully holding the handrail:—Held, that the defendants had not shown that the plaintiff, with a full knowledge of the nature and extent of the danger, had voluntarily agreed to incur it, so as to make the maxim "Volenti non fit injuria" applicable, and therefore he was entitled to recover. *Osborne v. London and North Western Railway*, 21 Q. B. D. 220; 57 L. J., Q. B. 618; 59 L. T. 227; 36 W. R. 809; 52 J. P. 806—D.

Liability of Landlord to Passer-by.—The plaintiff was injured through a defect in the condition of a coal-plate in the pavement in front of a house let by the defendant on a weekly tenancy, and such defect, though not shown to have been in existence at the commencement of the tenancy, had existed for

nearly two years before the accident:—Held, that, having regard to the nature of the tenancy, there had been a re-letting of the premises after the nuisance was created, and that the defendant, as reversioner, was liable. *Gandy v. Jubber* (5 B. & S. 78; 9 *Ib.* 15) discussed. *Sandford v. Clarke*, 21 Q. B. D. 398; 57 L. J., Q. B. 507; 59 L. T. 226; 37 W. R. 28; 52 J. P. 773—D.

Liability of Landlord to Sub-tenant.]—Where a landlord is under no liability to his tenant to repair the premises, and a sub-tenant as to part of the premises receives personal injuries owing to the defective state of the premises, the landlord is under no liability to such sub-tenant. *Norris v. Catmur*, 1 C. & E. 576—Huddleston, B.

Occupier of Premises—Persons not invited.]—There is no duty on the part of the occupier of premises to render them secure for persons using them without invitation for their own gratification. *Jewson v. Gatti*, 1 C. & E. 564—Day, J.

Duty to Fence—Diversion of Highway.]—A duty is cast upon those who, in the exercise of statutory powers, divert a public footpath, to protect, by fencing or otherwise, reasonably careful persons using the footpath from injury through going astray at the point of diversion. *Hurst v. Taylor*, 14 Q. B. D. 918; 54 L. J., Q. B. 310; 33 W. R. 582; 49 J. P. 359—D.

— Act of Stranger.]—See *Silverton v. Marriott*, *infra*.

— Quarry.]—The plaintiff was in the occupation of the surface of a field, and the defendants were in the occupation of a quarry in the same field. Both held under the same landlord. The quarry was entirely unfenced. One of the plaintiff's bullocks fell into the quarry and was killed:—Held, that the plaintiff was entitled to recover damages from the defendants for the loss of his bullock. *Hawken v. Shearer*, 56 L. J., Q. B. 284—D.

Articles sold consigned in Defective Truck to Vendee—Injury to Servant of Vendee.]—The defendant, a colliery owner, consigned coals sold by him to the buyers by rail in a truck rented by him from a waggon company for the purposes of the colliery. Through the negligence of the defendant's servants the truck was allowed to leave the colliery in a defective state. In consequence of the defect in the truck injury was occasioned to the plaintiff, one of the buyer's servants, who was employed in unloading the coals, and had got into the truck for that purpose:—Held, that there was a duty on the part of the defendant towards the plaintiff to exercise reasonable care with regard to the condition of the truck, and the defendant was therefore liable to the plaintiff in respect of the injuries sustained by him. *Elliott v. Hall*, or *Nailstone Colliery Company*, 15 Q. B. D. 315; 54 L. J., Q. B. 518; 34 W. R. 16—D.

5. LIABILITY FOR ACTS OF STRANGER.

Nuisance near Highway — Knowledge of Owner.]—Where property abutting on a high-

way becomes through the wrongful act of strangers a nuisance to the public lawfully using the highway, the owner of such property has a duty cast upon him from the moment he becomes aware of the danger to take steps to prevent his property becoming a source of injury to the public. *Silverton v. Marriott*, 59 L. T. 61; 52 J. P. 677—D.

Percolation of Water—Compensation—Company with Statutory Powers.]—A company with statutory powers suffered water to percolate from their canal into an adjoining mill and cause damage. Such percolation arose in the first instance from a subsidence of the land caused by the working of a mine-owner under both the canal and the mill, and could not have been foreseen or prevented by the company by any reasonable means at any reasonable cost:—Held, that the canal company were nevertheless guilty of negligence in not making good the damage when it occurred, and must pay compensation to be assessed as provided by the Canal Act, but that it was not a case for granting an injunction against the company to restrain the percolation of water. *Evans v. Manchester, Sheffield, and Lincolnshire Railway*, 36 Ch. D. 626; 57 L. J., Ch. 153; 57 L. T. 194; 36 W. R. 328—Kekewich, J.

6. LIABILITY OF MASTER FOR ACTS OF SERVANT.

Damage to Oyster Beds—Liability of Shipowner and Pilot.]—A ship in charge of a compulsory pilot was at high water brought into and anchored by the pilot in a river in which there were oyster beds, the existence of which was known to the pilot. The place where she was anchored was not the usual and customary place for vessels of her size and draught to anchor in. At low water she grounded, and thereby did damage to an oyster bed. On notice of the existence of the oyster bed being given to the master, he took all reasonable means to remove the ship as speedily as possible. In an action by the lessee of the oyster bed against the shipowner and the pilot:—Held, that the act of the pilot in anchoring the ship where he did was negligence which made him liable, but that the ship was not liable because the master's duty on receiving notice of the existence of the oyster bed was to take all reasonable measures—not extraordinary measures—to remove his ship, and this he had done. *The Octavia Stella*, 57 L. T. 632; 6 Asp. M. C. 182—Hannen, P.

Negligence of Servant hired to drive Cart—Liability of Hirer.]—D. contracted with the defendants, an urban authority, to supply by the day a driver and horse to drive and draw a watering-cart belonging to the defendants. The driver was employed and paid by D., and was not under the defendants' direction or control otherwise than that their inspector directed him what streets to water. In an action to recover damages for injuries caused by the negligent conduct of the driver whilst in charge of the cart:—Held, that the defendants were not liable. *Quarman v. Burnett* (6 M. & W. 499) followed. *Roverke v. White Moss Colliery Company* (2 C. P. D. 205) distinguished. *Jones v. Liverpool Corporation*, 14

Q. B. D. 890 ; 54 L. J., Q. B. 345 ; 33 W. R. 551 ; 49 J. P. 311—D.

Implied Authority—Scope of Employment.]—

In an action for injuries sustained through the negligent driving of one of defendant's servants, the only question being whether the defendant was responsible for such negligence, it appeared that the defendant was the proprietor of an hotel and shop in the town of C., and kept a pony and chaise for his own personal use. They were not used for the purpose of the defendant's business. The accident which occasioned the injuries occurred during the temporary absence of the defendant, who had left a servant, E., in charge of the shop only, with authority to sell goods, and generally to see that things went right in his absence. The defendant gave E. no authority to drive. Another servant, named M., was in charge of the yard, and it was his duty to drive when defendant required. A housekeeper had charge of the house. While the defendant was so absent, one of his relatives, Q., who admittedly had no authority to act as his agent, called at the house, and when leaving, E., at Q.'s request, drove Q. in the pony chaise to the neighbouring railway station. When E. was driving the pony and chaise back from the station the accident took place :—Held, that there was no evidence proper to be submitted to the jury that E. was at the time of the accident acting in the course of his employment as the defendant's servant. *Wilson v. Owens*, 16 L. R., Ir. 225—Ex. D. Affirmed in C. A.

The R., which was anchored in F. outer harbour, having to be beached in the inner harbour, S., the harbour-master, directed the master of the R. where to beach her. Before the R. left the outer harbour, S. came on board, although a Trinity-house pilot was on board, and when she had arrived near the place where she had to be beached, gave directions as to the lowering of her anchor. The R. overran her anchor and grounded on it, sustaining damage. In an action against the harbour commissioners and S., the court found as a fact that there was negligence on the part of S., and that the place where the R. grounded was outside the jurisdiction of the harbour commissioners :—Held, that the duties of the harbour-master comprised directions as to the mooring and beaching of vessels ; that by giving directions when he went on board, S. had resumed the functions as harbour-master, and that he and the commissioners were therefore liable for the damage done to the R. *The Rhosina*, 10 P. D. 131 ; 54 L. J., P. 72 ; 53 L. T. 30 ; 33 W. R. 794 ; 5 Asp. M. C. 460—C. A.

The plaintiff, after purchasing some felt from the defendants, went into a loft where the felt was stored, to inspect the article purchased. The loft was open at one end, and the plaintiff was acquainted with the construction of it. The plaintiff and C., a servant of the defendants, proceeded to unroll the felt, and the plaintiff, who, in the act of so doing, was walking backwards, fell from the loft, and sustained personal injuries. He brought an action against the defendants for damages for injuries caused by their negligence, and the jury by whom the case was tried, among other findings, found that, but for the plaintiff's own negligence, the accident would not have happened, and also that C. was not acting within the scope of his

employment in obtaining the plaintiff's assistance to unroll the felt :—Held, that the verdict should be entered for the defendants. *Sullivan v. O'Connor*, 22 L. R., Ir. 467—C. A.

7. LICENSEES.

Duty towards Licensee—Runaway Horse and Cart—Plaintiff injured while on Defendant's Premises.]—The defendant's horse, by the negligence of the defendant's servant, ran away with a cart, and turned from a highway into the yard of the defendant's house, which opened on to the highway. The plaintiff's wife, who happened to be paying a visit at the defendant's house, ran out into the yard to see what was the matter, when she was met and knocked down by the horse and cart, receiving serious injuries :—Held, that under the circumstances there was no duty on the part of the defendant to use ordinary care towards the plaintiff's wife, and that the action was, therefore, not maintainable. *Tolhausen v. Davies*, 57 L. J., Q. B. 392 ; 59 L. T. 436 ; 52 J. P. 804—D. Affirmed 58 L. J., Q. B. 98—C. A.

—Risks incident to Position.]—The deceased was employed by a builder to watch and protect certain unfinished buildings. Workmen were employed by the defendant, a contractor, on the land near to where the deceased was on duty, to excavate the earth for the foundations of other buildings. In the performance of this operation they employed a steam crane and winch to which were attached a chain and iron bucket, by means of which the earth was raised from the excavation and thence to the carts which were to carry it away. The deceased had nothing to do with the excavations, but was standing where he need not have been, watching the defendant's men at work, and allowing the bucket to pass some three feet over his head, when the chain broke and the bucket and its contents falling upon him, so injured him that he subsequently died :—Held, that there was no evidence of negligence in the defendant's workmen ; that the deceased was at the most a bare licensee ; and that he stood where he did subject to all the risks incident to the position in which he had placed himself. *Batchelor v. Fortescue*, 11 Q. B. D. 474 ; 49 L. T. 644—C. A.

8. CONTRACTOR AND EMPLOYER.

Liability.]—P., who was the owner of a plot of ground in Belfast, employed C., a contractor, to build a house thereon. The front of the house faced a street, but one side extended along vacant ground, and was not protected by any hoarding. A brick fell out from the wall on this side and struck the plaintiff's child, who died from the injuries so received. In an action by the plaintiff for negligence causing death :—Held, that P. was not liable for negligence by C. as contractor, and that therefore a verdict was properly directed for him. *Crawford v. Peel*, 20 L. R., Ir. 332—C. P. D.

The plaintiff, an owner in fee simple of a house in London, brought an action against builders claiming damages on the ground that they, in the course of rebuilding an hotel, had caused injury to the plaintiff's house by cracking and displacing

the wall, and also asking for an injunction. On the motion for injunction an inquiry as to damage was directed to be taken before a special referee, and the referee assessed the structural damage at 40*l.*, without prejudice to any question of liability. The defendants in their defence raised the contention that the works were executed under the provisions of the Metropolitan Building Act, and that the damage (if any) to the plaintiff's premises was "a necessary consequence of carrying out the said works," and that the plaintiff's remedy (if any) was only against the building owner by whom the defendants were employed:—Held, that the Metropolitan Building Act did not exonerate a builder from liability for damage which had arisen from his negligence and want of care and skill. The maxim "Respondent superior" does not absolve the inferior, if by his negligence a loss has been sustained. If, in doing the act, he is guilty of negligence whereby loss and damage are occasioned to another, he is personally liable. *White v. Peto*, 58 L. T. 710—Kay, J.

9. PUBLIC BODIES.

Corporation performing Public Duties—Trinity House.—By the Merchant Shipping Act, 1854, the superintendence and management of all lighthouses and beacons in England and the adjacent seas are vested in the Trinity House, subject to the existing jurisdiction of local lighthouse authorities; the Trinity House continuing to hold and maintain all property vested in them in the same manner and for the same purposes as they have hitherto held and maintained the same, and extensive powers are given to them, to be exercised with the consent of the Board of Trade, in respect of the management and control of lighthouses and beacons which are subject to the jurisdiction of local authorities, and in other respects. The act further provides that the light dues levied by the Trinity House shall be carried to the account of the Mercantile Marine Fund; that the expenses incurred in respect of the service of lighthouses and beacons shall be paid out of that fund; that the Trinity House shall account to the Board of Trade for their receipts and expenditure, and that their accounts shall be audited by the Commissioners of Audit:—Held, that the Corporation of Trinity House were not by virtue of the Merchant Shipping Act, 1854, constituted servants of the Crown so as to exempt them from liability to an action for negligence in the performance of their duties. A beacon vested in the Corporation of Trinity House having become partially destroyed, they licensed G. to remove it, and in so doing he negligently left an iron stump sticking up under water. In an action to recover damages caused thereby to the plaintiff's ship:—Held, that the defendants were liable for G.'s negligence. *Gilbert v. Trinity House Corporation*, 17 Q. B. D. 795; 56 L. J., Q. B. 85; 35 W. R. 30—D.

Executive Government of Colony—Control of Harbour.—In a proceeding under the Crown Suits Act, 1861, it appeared that a harbour was under the management of the executive government of the colony, which appointed the harbour officials and received rates for the use of staiths and wharves, but no harbour dues:—Held, that

such executive government was liable for negligence in permitting an obstruction to remain in the harbour by which the plaintiff's ship was injured. *Reg. v. Williams*, 9 App. Cas. 418; 53 L. J., P. C. 64; 51 L. T. 546—P. C. Cp. *The Rhosina*, ante, col. 1297.

Liability of Local Boards.—See HEALTH, VII.

Liability of Vestry.—See METROPOLIS, I. 2.

10. IN OTHER CASES.

Trespass—Injury caused by Dog—Liability of Owner or Person in charge of.—The plaintiff, a labourer, was digging a hole in the garden of a house adjoining that of the defendant, T. There was a small wall, only three feet high, between these gardens. This wall belonged to the defendant T. The plaintiff was engaged in doing some work at the bottom of the hole. Three dogs belonging to the defendant T. had been taken out for a walk by another defendant, S., and as he was returning, the dogs ran through a gate into a garden adjoining the one where the plaintiff was at work. As the dogs were running about in playfulness, one of them, a large Newfoundland, jumped over the wall, and jumped or fell into the hole where the plaintiff was working at the time in a stooping posture. The dog fell on the nape of the plaintiff's neck, causing injuries through which he was confined to bed for three weeks, and he was unable to work for some time after. In an action for these injuries against the defendant T. as the owner of the dog, and against the defendant S. as having the dogs in charge:—Held, that inasmuch as the dogs were not shown to be mischievous to the knowledge of the owner, the plaintiff had no cause of action against either of the defendants either as for a trespass or as for any breach of duty. *Sanders v. Teape*, 51 L. T. 263; 48 J. P. 757—D.

Valuer—Action by Mortgagee—Negligence and Misrepresentation.—An intending mortgagor, at the request of the solicitors of an intending mortgagee, applied to a firm of valuers for a valuation of the property proposed to be mortgaged. A valuation at the sum of 3,000*l.* was sent in by the valuers direct to the mortgagee's solicitors, and the mortgage was subsequently carried out. Default having been made in payment by the mortgagor, and a loss having resulted to the mortgagee, he commenced an action against the valuers for damages for the loss sustained through their negligence, misrepresentation, and breach of duty. The court being satisfied on the evidence that the defendants knew at the time the valuation was made that it was for the purpose of an advance, and that the valuation as made was in fact no valuation at all:—Held, that, under the circumstances, the defendants were liable on two grounds: (1), that they (independently of contract) owed a duty to the plaintiff which they had failed to discharge; (2), that they had made reckless statements on which the plaintiff had acted. *George v. Skivington* (5 L. R., Ex. 1), and *Heaven v. Pender* (11 Q. B. D. 503), followed. *Peck v. Derry* (37 Ch. D. 541) discussed. *Cann v. Willson*, 39 Ch. D. 39; 57 L. J., Ch. 1034; 59 L. T. 723; 37 W. R. 23—Chitty, J.

Harbour-Master — Volunteer.]—The R., which was anchored in F. outer harbour, having to be beached in the inner harbour, S., the harbour-master, directed the master of the R. where she was to be beached. Before the R. left the outer harbour S. came on board, and when she arrived near the place where she was to be beached, S. gave orders as to the lowering of her anchor. The R. overran her anchor and grounded on it sustaining damage :—Held, that S. was personally liable as a volunteer. *The Rhosina*, 10 P. D. 24 ; 54 L. J., P. 42 ; 52 L. T. 140 ; 33 W. R. 599 ; 5 Asp. M. C. 350—Hannen, P. See S. C. in C. A., ante, col. 1297.

Wharfinger—Jetty in Tidal River—Vessel of Necessity Grounding — Implied Representation.]—The defendants, who were wharfingers, agreed with the plaintiff for a consideration to allow his vessel to discharge and load her cargo at their wharf, which abutted upon the river Thames. It was necessary in order that the vessel might be unloaded that she should be moored alongside a jetty of the defendants which ran into the river, and that she should take the ground with her cargo at the ebb of the tide. The vessel at the ebb of the tide sustained injury from the uneven nature of the ground. The bed of the river at the point where she took ground was vested in the Conservators, and the defendants had no control over it, but it was admitted that they had taken no steps to ascertain whether it was suitable for the vessel to ground upon :—Held, that there was an implied undertaking by the defendants that they had taken reasonable care to ascertain that the bottom of the river at the jetty was not in a condition to cause danger to the vessel, and that they were liable for the damage sustained by her. *The Moorcock*, 14 P. D. 64 ; 60 L. T. 654 ; 37 W. R. 439—C. A. Affirming 58 L. J., P. 15—Butt, J.

Liability of Master to Servant.]—See MASTER AND SERVANT, I. 2.

Carriers of Passengers, Goods and Animals.]—See CARRIER.

Solicitor to Client.]—See SOLICITOR, V. 2.

III. ACTIONS FOR INJURIES.

1. LORD CAMPBELL'S ACT.

When Representatives can Recover.]—The personal representatives of a deceased person cannot maintain an action under Lord Campbell's Act (9 & 10 Vict. c. 93), where the deceased if he had survived would not have been entitled to recover. *Haigh v. Royal Mail Steam Packet Company*, 52 L. J., Q. B. 640 ; 49 L. T. 802 ; 48 J. P. 230 ; 5 Asp. M. C. 189—C. A. See also cases ante, cols. 1289, 1290.

Jurisdiction of Admiralty Division.]—An admiralty action in rem cannot be brought to recover damages under Lord Campbell's Act for loss of life caused by a collision at sea. *The Francovicia* (2 P. D. 163) overruled. *Seward v. The Vera Cruz*, 10 App. Cas. 59 ; 54 L. J., P. 9 ; 52 L. T. 474 ; 33 W. R. 477 ; 49 J. P. 324 ; 5 Asp. M. C. 386—H. L. (E.).

Pecuniary Benefit to Plaintiff.]—A husband and a wife quarrelled, separated, and lived apart without communication for eight years before the wife's death, who was killed at the age of fifty-six through the negligence of carriers. The wife, had she survived her mother, who was aged eighty at the time of the wife's death, would have been absolutely entitled to the sum of 7,000*l.* :—Held, in an action by the husband against the carriers for damages upon Lord Campbell's Act, that he had no reasonable prospect of pecuniary benefit if his wife's death had not occurred, and was not, therefore, entitled to damages for her death. *Harrison v. London and North-Western Railway*, 1 C. & E. 540—Lopes, J.

Widow guilty of Adultery during Husband's Lifetime—Forfeiture of Right to Support.]—At the trial of an action brought by the plaintiff, as the widow of the deceased, under the provisions of Lord Campbell's Act (9 & 10 Vict. c. 93), s. 2, against the defendants for negligence which caused the deceased's death, it appeared that the plaintiff was at the time of her husband's death, and had for many years previously been, living apart from him in adultery with another man. During the time they were so living apart the deceased did not support the plaintiff, though he occasionally gave her small sums of money :—Held, that the action was not maintainable, inasmuch as the plaintiff had lost her legal right to support by reason of her adultery, and had no reasonable expectation of pecuniary advantage by the deceased remaining alive which could be taken into account by a jury. *Stimpson v. Wood*, 57 L. J., Q. B. 484 ; 59 L. T. 218 ; 36 W. R. 734 ; 52 J. P. 822—D.

Measure of Damages—Policy of Insurance.]—The right conferred by Lord Campbell's Act, to recover damages in respect of death occasioned by a wrongful act, neglect, or default, is restricted to the actual pecuniary loss sustained by the plaintiff. Where the widow of deceased is plaintiff, and her husband had made provision for her by a policy on his own life in her favour, the amount of such policy is not to be deducted from the amount of damages previously assessed irrespective of such consideration. She is benefited only by the accelerated receipt of the amount of the policy, and that benefit being represented by the interest of the money during the period of acceleration, may be compensated by deducting future premiums from the estimated future earnings of the deceased. *Hicks v. Newport, &c., Railway* (4 B. & S. 403, n.) approved. *Grand Trunk Railway of Canada v. Jennings*, 13 App. Cas. 800 ; 58 L. J., P. C. 1 ; 59 L. T. 679 ; 37 W. R. 403—P. C.

Distribution of Compensation Money—Liberty to Persons interested to Appear.]—In an action under Lord Campbell's Act, brought by the widow and administratrix of the deceased, the defendants paid a sum of money into court with their defence. The plaintiff admitted the sufficiency of the amount, and joined issue for the purpose of closing the pleadings and to enable the rights of the plaintiff and all other persons (if any) to be determined pursuant to the statute. The father of the deceased applied to have his name added as a party to the action, for the purpose of establishing his claim to part

of the money brought in. The court declined to add his name as a party to the record, but gave him liberty to appear at the trial by counsel and solicitor, and to tender evidence as to the amount of his share in the money lodged. *Johnston v. Great Northern Railway*, 20 L. R., Ir. 4—Ex. D.

— **Compromise—No Action brought.**—A sum of money was received from a railway company by way of compensation by the executors of a person, whose death had resulted from injuries received in an accident on the railway, no action having been brought under Lord Campbell's Act (9 & 10 Vict. c. 93). The executors brought an action in the Chancery Division, to which all the relatives of the deceased referred to in s. 2 of 9 & 10 Vict. c. 93, were parties, asking for a declaration as to the persons entitled to the money:—Held, that the court could distribute the fund amongst such of the relatives of the deceased as suffered damage by reason of the death, in the same manner as a jury could have done in an action under the act. *Bulmer v. Bulmer*, 25 Ch. D. 409; 53 L. J., Ch. 402; 32 W. R. 380—Chitty, J.

2. IN OTHER CASES.

Two Causes of Action arising from same Act.—*See Brunsden v. Humphrey*, ante, col. 728.

Damages—Remoteness of—Mental Shock.—An action will not lie for negligence causing damage by terror and occasioning nervous or mental shock unaccompanied by "impact." The plaintiff, through the negligence of the defendants' servant in charge of a railway crossing, was placed in imminent peril, and sustained a mental shock causing personal injuries. There was no "impact":—Held, that the damage was too remote to sustain an action. *Victorian Railway Commissioners v. Coultas*, 13 App. Cas. 222; 57 L. J., P. C. 69; 58 L. T. 390; 37 W. R. 129; 52 J. P. 500—P. C.

NEGOTIABLE INSTRUMENTS.

Bills of Exchange, Cheques, and Promissory Notes.—*See* BILLS OF EXCHANGE.

Bills of Lading.—*See* SHIPPING.

Holder for Value.—Certain negotiable securities were stolen from the defendants by their manager, and came into the possession of the plaintiffs for value, and without notice of any fraud. Subsequently the manager obtained the securities from the plaintiffs by fraud, and restored them to the defendants, who did not know that the securities had been out of their possession. A portion of the restored securities were not the bonds actually stolen, but bonds of a like kind and value:—Held, that in the absence of evidence to the contrary, it should be presumed that the defendants accepted the securities in discharge of their manager's obli-

gation to restore them, and were therefore bona fide holders for value, and entitled to retain them. *London and County Banking Company v. London and River Plate Bank*, 21 Q. B. D. 535; 57 L. J., Q. B. 601; 37 W. R. 89—C. A. Affirming on other grounds, 20 Q. B. D. 232—Manisty, J.

Deposit by Money-Lender of Customers' Securities.—*See Sheffield (Earl) v. London Joint Stock Bank*, ante, col. 76.

Post-Office Order cashed through Bankers.—The plaintiffs banked with the defendants. It was the duty of the plaintiffs' secretary to pay all moneys received by him on behalf of the plaintiffs into the defendants' bank to the credit of the plaintiffs. The secretary without the knowledge of the plaintiffs kept an account at the defendants' bank. He paid into the defendants' bank to his own credit certain post-office orders belonging to the plaintiffs which the defendants subsequently cashed. The post-office regulations with regard to post-office orders provide that, when presented for payment by a banker, they shall be payable without the signature by the payee of the receipt contained in the order, provided the name of the banker presenting the order is written or stamped upon it:—Held, that there had been a wrongful conversion of the post-office orders above mentioned by the defendants; and that the regulations of the post-office with regard to the payment of post-office orders presented through bankers did not give to those instruments in the hands of bankers the character of instruments transferable to bearer by delivery so as to bring the case within the doctrine of *Goodwin v. Roberts* (1 App. Cas. 476), and thus give the defendants a good title to the post-office orders independently of the authority given to the plaintiffs' secretary. *Fine Art Society v. Union Bank*, 17 Q. B. D. 705; 56 L. J., Q. B. 70; 55 L. T. 536; 35 W. R. 114; 51 J. P. 69—C. A.

Foreign Bond—Conflict of Laws—Custom of Merchants—Bonâ fide Holder.—An instrument that is negotiable by the law of a foreign country is not a negotiable instrument by the law of England, so as to give a bonâ fide holder for value a good title against an owner of the instrument, from whom it has been stolen, in the absence of any evidence of a custom of merchants in this country to treat it as negotiable. *Pickier v. London and County Banking Company*, 18 Q. B. D. 515; 56 L. J., Q. B. 299; 35 W. R. 469—C. A.

The executors of a holder of shares in an American railway company signed blank transfers indorsed on the share certificates, and handed them to their brokers, in order that the shares might be registered in the names of the executors. The brokers fraudulently deposited the certificates with their bankers as security for advances, and afterwards became bankrupt. According to American law the holder of certificates with transfers properly indorsed has a good legal title to the shares; and according to mercantile usage in London, such certificates are treated as securities to bearer. In this case the indorsement was not attested in the manner required by the railway company for registration:—Held, that the plaintiffs were entitled to

a declaration that the shares in question formed part of the testator's estate, and to delivery of the certificates by the bankers. *Williams v. Colonial Bank*, 38 Ch. D. 388; 57 L. J., Ch. 826; 59 L. T. 643; 36 W. R. 625—C. A.

NEWFOUNDLAND.

See COLONY.

NEW SOUTH WALES.

See COLONY.

NEWSPAPER.

Injunction to Restrain Use of Name.]—*See* TRADE.

Liability of Newsvendor for Publication of Libel.]—*See* *Emmens v. Pottle*, ante, col. 636.

Criminal Proceedings for Libel.]—*See* DEFAMATION.

Advertisement for Evidence.]—*See* CONTEMPT OF COURT.

Comments on Pending Action.]—*See* CONTEMPT OF COURT.

NEW TRIAL.

In Interpleader.]—*See* INTERPLEADER.

In County Court.]—*See* COUNTY COURT.

In other Cases.]—*See* PRACTICE.

NEW ZEALAND.

See COLONY.

NEXT FRIEND.

See HUSBAND AND WIFE—INFANT—LUNATIC.

NOTE.

Bank Note.]—*See* BANKER.

Promissory Note.]—*See* BILLS OF EXCHANGE.

NOTICE.

Of Action.]—*See* ACTION.

To Quit.]—*See* LANDLORD AND TENANT.

Of Incumbrance.]—*See* MORTGAGE.

Of Trial.]—*See* PRACTICE.

To Treat.]—*See* LANDS CLAUSES ACT.

Purchaser for Value—Reasonable Inquiry.]—A purchaser or mortgagee who takes his purchase or security without investigation of title is affected with constructive notice of all that he would have discovered upon the usual investigation of title, although not of such matters as he would not have ascertained without going behind the documents of title themselves. *Gainsborough (Earl) v. Watcombe Terra Cotta Company*, or *Dunning v. Gainsborough (Earl)*, 54 L. J., Ch. 991; 53 L. T. 116—North, J.

Testatrix appointed D. and three others trustees and executors with directions that her residuary personalty should be converted, as soon as convenient, and invested, and after a life interest and legacies, bequeathed the same in trust for the maintenance, &c., of D.'s children, and declared that the same might be paid over to the parent or parents of such children. The ultimate residue consisted of a mortgage of leaseholds for 5,000*l.* of a character unfit for investment or retention by trustees. Testatrix died in 1874. In 1878 the mortgage was transferred to D. and W. (the remaining trustees) and R. D., a new trustee, the transfer not disclosing any trust. In 1881 D., W., and R. D. transferred the mortgage to D. alone, the transfer reciting, contrary to the fact, that D. had paid off the mortgage. By deed of even date, reciting the trust and that the mortgage had been transferred to D. as the residue bequeathed for his children, D. released his co-trustees. In 1882 D., "as beneficial owner," assigned the mortgage to the Earl of G. to secure 2,500*l.* The Earl of G. did not examine D.'s title, nor employ a solicitor:—Held, that under the Conveyancing Act, 1882, s. 3, the Earl of G. was entitled to priority over the children of D. as purchaser for value without notice, as, although bound to examine the title of D., or to take the consequences of not doing so, the transfer of 1881 being, on the face of it, regular, he was not bound to inquire whether the recital of the payment of 5,000*l.* by D. was true in fact. *Id.*

Constructive Notice of Provisions of Superior Grant.]—The principle of *Cosser v. Collinge* (3 M. & K. 283) applies to the purchase of a sub fee-farm grant; and the purchaser of such an estate, if he knows that he is not purchasing

the fee, is bound to inquire as to the provisions of the superior grant, and if he has had a fair opportunity of ascertaining them, will be affected with constructive notice. *Hyde v. Warden* (3 Ex. D. 72) distinguished. *Bank of Ireland v. Brookfield Linen Company*, 15 L. R., Ir. 37—V.-C.

Notice of Fraud—Recital—Control of operative part.]—The plaintiff, who had lately become entitled to a life interest, with an ultimate remainder in fee, in a certain landed estate, being about to return to Australia, where he had been residing, gave to his solicitors a power of attorney in which there was a recital of his having become entitled to the estate, and that “whereas I am about to return to Australia, and am desirous of appointing attorneys to act for me during my absence from England, in the care and management of the said estates, and of dealing therewith either by way of sale . . . mortgage or otherwise . . . and generally to act for me in the management of and dealings with any property belonging to me, during my absence from England.” The plaintiff went abroad, and during his absence the solicitors borrowed from the defendants a sum of money on his behalf, charging his property with the repayment of it. They also on two subsequent occasions purported to charge his property, under this power, with the repayment of advances made by the defendants. On these two last occasions the plaintiff was in England, but that was not known to the defendants. The loans were made without the knowledge of the plaintiff, and the proceeds were misappropriated by the solicitors, who absconded. While the plaintiff was in England, being about to return to Australia, he gave the solicitors a new power. This, after referring to the former power, and reciting that the plaintiff had been residing in England for a short time, appointed the solicitors his attorneys to carry out a contract for the sale of the plaintiff’s real estate, and to borrow certain sums of money for him upon mortgage. The solicitors, purporting to act under this power, borrowed further moneys from the defendants, charging the plaintiff’s property with the repayment. These loans were also made without the plaintiff’s knowledge, and the proceeds were misappropriated by the solicitors. The second power was not seen by any of the defendants, or by any of their agents acquainted with the previous transactions. Neither was the attention of any of these persons in any way called to it. Neither did they, or any of their clerks engaged in this business, know that the plaintiff had been in England. This power was produced to the defendants’ solicitors, but they had no knowledge of the previous transactions:—Held, that the defendants were not put upon such inquiry by the recital that the plaintiff had been residing in England as would make them liable for not having discovered the solicitors’ frauds, and consequently invalidate the charge made under the second power. *Danby v. Cuths*, 29 Ch. D. 500; 52 L. T. 401; 33 W. R. 559—Kay, J.

To Company—Secretary—At what Time given.]—In order that a notice to a company may be effectual, either it must be given to the company itself through its proper officers, or it must be received by the company in the course

of the transaction of its business; casual knowledge acquired by the secretary as an individual and not whilst he is engaged in transacting the business of the company, cannot be deemed notice to the company.—In March, 1881, M. deposited with S. the certificates and a blank transfer of 100 shares in a company as security for money advanced. In February, 1882, S. died, and the secretary of the company, who was a relative of S., attended his funeral, and during a discussion of the deceased’s affairs became acquainted with the existence of the charge on the shares. In December, 1882, M. was heavily in debt to the plaintiffs, and as they pressed him for payment, he fraudulently delivered to them another blank transfer of the same shares. Some days afterwards, the transfer to the plaintiffs was in the absence of M. filled up with the name of the plaintiff C. as transferee, and with the numbers of the shares. The company refused to register the transfer to the plaintiffs on the ground that the certificates were not produced, and thereupon M. offered to indemnify the company against any other claim, but shortly after the executors of S. gave notice to the company of the existence of the charge in favour of their testator. The company was registered under the Companies Act, 1862, and one of the articles of association provided that the shares should be transferred by deed, and another provided that the company should not be bound by or recognize any equitable interest. In an action by the plaintiffs against the executors of S. to obtain a declaration of their title to the 100 shares:—Held, that the knowledge acquired by the secretary of the company at the funeral of S. of the existence of the charge in his favour could not be deemed notice of its existence to the company itself. *Société Générale de Paris v. Tramways Union Company*, 14 Q. B. D. 424; 54 L. J., Q. B. 177; 52 L. T. 912—C.A. See S. C. in H. L., ante, col. 397.

—To Directors.]—Though notice to the directors of a company is *prima facie* notice to the company, it is otherwise in a case where it is certain that the directors would not communicate the information to the shareholders. *Fitzroy Bessemer Steel Company, In re*, 50 L. T. 144; 32 W. R. 475—Kay, J. Compromised on appeal, 33 W. R. 312.

Constructive Notice to Director.]—A director of a company is not bound to examine entries in any of the books of the company; and the doctrine of constructive notice is not to be so extended as to impute to him a knowledge of the contents of the books. *Denham, In re*, 25 Ch. D. 752; 50 L. T. 523; 32 W. R. 487—Chitty, J.

Unregistered Will—Principal and Agent.]—A testatrix, who died in 1871, by her will devised real estate in Middlesex to trustees upon trust for sale. The will was not registered in Middlesex. The heir-at-law of the testatrix having learned that the will had not been registered, mortgaged the property to different mortgagees, and registered the mortgages. The mortgage deeds were prepared and registered by the heir-at-law himself. The surviving trustee received the rents of the property down to 1878, when he died, and in 1879 a receiver was appointed in an

action to administer the estate of the testatrix. The property was sold in 1882 under an order of the court, and notice of the mortgages was then given by the mortgagees to the purchasers, and the purchase-moneys were paid into court subject to the claims of the mortgagees. The heir-at-law died in 1885. An application was made to transfer the purchase-moneys to the account of the devisees under the will. The mortgagees resisted the application on the ground that the act of 7 Anne, c. 20, gave them a title, because the will had not been registered. Neither of the securities was for moneys advanced, but both for old debts, and the heir-at-law acted in the mortgage transactions as agent of both the mortgagees:—Held, that, if persons claiming under the act had notice of the will, they could not set up the title of the heir-at-law; that in the present case the mortgagees were affected by the notice which their agent the heir-at-law possessed; and that consequently their claims failed. *Weir, In re, Hollingworth v. Willing*, 58 L. T. 792—Chitty, J.

When Notice to Solicitors is Notice to Principal.—A., who was entitled under a will to share in the proceeds of sale of real estate in Middlesex, devised on trust for sale, mortgaged his interest to several persons. One set of incumbrancers registered their charge in the Middlesex registry, and on that ground claimed priority over the other incumbrancers, who had either not registered their charges at all, or had registered them after the applicants had registered theirs:—Held, that an interest of this nature was not within the Middlesex Registration Act (7 Anne, c. 20), s. 1, which was intended to apply to dealings with the land itself, and consequently no priority could be obtained by prior registration of a charge upon it. The applicants also claimed priority for their charge on the ground of notice, the alleged notice consisting of a letter not from them or their solicitors, but from the solicitors of the plaintiff in the action to the solicitors of the trustees of the will under which A. took, in which the applicants were mentioned as incumbrancers, and also of a correspondence between their solicitors and one of the firm of solicitors acting for the trustees, in which their solicitors mentioned that they were instructed for mortgagees of A., but did not say who those mortgagees were, or give any further information. These statements appeared never to have come to the knowledge of the trustees themselves:—Held, that the solicitors of the trustees were not their agents for receiving notice of incumbrances, and neither of the so-called notices was such as would give priority to the applicants, or prevent a subsequent incumbrancer who gave direct notice to the trustees from obtaining priority over them. *Arden v. Arden*, 29 Ch. D. 702; 54 L. J., Ch. 655; 52 L. T. 610; 33 W. R. 593—Kay, J.

In 1881 N. acted as solicitor in the formation of a limited company founded for the purpose of purchasing the business of H., the price to be payable in fully paid-up shares, and he prepared the memorandum and articles. The shares were allotted to H., but the contract for the sale of the business was not registered. Three months later, upon the marriage of Dr. and Mrs. F., H. deposited with N. and two other persons, the trustees of the marriage settlement, the certificates for fully paid-up shares (being shares

received by H. for the sale of his business) to secure a debt due to Mrs. F. The certificates stated that the shares were fully paid up. In 1885 the shares were transferred into the names of the trustees. The trustees had no actual notice that the shares held by them were shares paid to H. in consideration of the sale of his business. Upon an application by the liquidator in the winding-up of the company to make the trustees liable for calls:—Held, that the onus of proving notice against the trustees was upon the liquidator; that N. had not been guilty of gross and culpable negligence in not ascertaining the truth of the representation contained in the certificates, and that the trustees were not liable. *Hall & Co., In re*, 37 Ch. D. 712; 57 L. J., Ch. 288; 58 L. T. 156—Stirling, J.

The plaintiffs effected with the defendant a policy of marine insurance on goods which included risk on craft and lighters, and was not with no recourse against lightermen. At the time of effecting such policy the plaintiffs had an arrangement with one H., by which he was to do all the plaintiffs' lighterage on the terms that he was only to be liable for negligence:—Held, that the non-communication of this term was the concealment of a material fact, and that the mere disclosure of the existence of such an arrangement to the defendant's solicitor was not notice of it to the defendant. *Tate v. Hyslop*, 15 Q. B. D. 368; 54 L. J., Q. B. 592; 53 L. T. 581; 5 Asp. M. C. 487—C. A.

— Effect of Conveyancing Act, 1882, s. 3.]

—The effect of s. 3 of the Conveyancing Act, 1882, which provides that a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless in the same transaction it has come to the knowledge of his counsel, solicitor, or agent "as such," is that a purchaser is only to be affected with notice of such instruments, &c., as have come to the knowledge of the agent as agent for the purchaser. *Cousins' Trusts, In re*, 31 Ch. D. 671; 55 L. J., Ch. 662; 54 L. T. 376; 34 W. R. 393—Chitty, J.

In 1871 C. mortgaged his share of a trust fund to B. In 1873 C. mortgaged the same share to R., repaying B. out of the sum advanced. In 1874 R. transferred the mortgage to D. In 1875 C. mortgaged the same share to P., who had no notice of the prior mortgage. In all the transactions B. who was solicitor to the trustees of the fund, acted as solicitor for all parties. The first notice to the trustees of any assignment by C. was of the assignment by C. to P.:—Held, that P. was entitled to priority over D. *Ib.*

NUISANCE.

Obstruction of Highway.—See **WAY**.

Injurious to Health.—See **HEALTH**.

Nuisance authorised by Statute—Power to purchase by Agreement additional Lands—Cattle Traffic.—A railway company were by their act authorised among other things to carry cattle, and also to purchase by agreement (in addition to the lands which they were empowered to pur-

chase compulsorily) any lands not exceeding in the whole fifty acres, in such places as should be deemed eligible, for the purpose of providing additional stations, yards, and other conveniences for receiving, loading, or keeping any cattle, goods, or things conveyed or intended to be conveyed by the railway, or for making convenient roads or ways thereto, or for any other purposes connected with the undertaking which the company should judge requisite. The company were also empowered to sell such additional lands and to purchase in lieu thereof other lands which they should deem more eligible for the aforesaid purposes, and so on from time to time. The act contained no provision for compensation in respect of lands so purchased by agreement. Under this power the company some years after the expiration of the compulsory powers bought land adjoining one of their stations and used it as a yard or dock for their cattle traffic. To the occupiers of houses near the station the noise of the cattle and drovers was a nuisance which, but for the act, would have been actionable. There was no negligence in the mode in which the company conducted the business:—Held, that the purpose for which the land was acquired being expressly authorised by the act, and being incidental and necessary to the authorised use of the railway for the cattle traffic, the company were authorised to do what they did, and were not bound to choose a site more convenient to other persons; and that the adjoining occupiers were not entitled to an injunction to restrain the company. *Metropolitan Asylum District v. Hill* (6 App. Cas. 193) distinguished. *London, Brighton and South Coast Railway v. Trumman*, 11 App. Cas. 45; 55 L. J., Ch. 354; 54 L. T. 250; 34 W. R. 657; 50 J. P. 388—H. L. (E.).

— **Sufficiency of Powers.**—A public body was authorised by act of Parliament to construct and maintain a system of sewers and drains, and was enabled by compulsory purchase to obtain the necessary lands for the erection of works in a specified spot for the purification of the sewage, and for the conveyance of the effluent sewage-water along a specified course terminating in a specified spot. The public body was also prohibited from allowing the sewage to be discharged into a river until after it had been subjected to a process of purification prescribed by the act:—Held, that so long as the public body complied with the requirements of the act, they were not liable to an action for a nuisance in discharging the effluent sewage-water into the river at the authorized place. *Lea Conservancy Board v. Hertford (Mayor)*, 48 J. P. 628; 1 C. & E. 299—Williams, J.

Small-pox Hospital—Interlocutory Injunction.—The defendants fitted up a cottage as a small-pox hospital. The grounds in which the cottage stood were bounded by a public road on one side, open fields on two other sides, and the plaintiff's property on the fourth side. The evidence being conflicting, a medical referee was appointed, who reported that there was appreciable danger to persons dwelling in the plaintiff's houses:—Held, that an injunction should be granted. *Bendelow v. Wortley Union*, 57 L. J., Ch. 762; 57 L. T. 849; 36 W. R. 168—Stirling, J.

Pollution of Well—Injunction.—No one has a right to use his own land in such a way as to

be a nuisance to his neighbour, and therefore if a man puts filth or poisonous matter on his land, he must take care that it does not escape so as to poison water which his neighbour has a right to use, although his neighbour may have no property in such water at the time it is fouled. The plaintiff and defendant were adjoining land-owners, and had each a deep well on his own land, the plaintiff's land being at a lower level than the defendant's. The defendant turned sewage from his house into his well, and thus polluted the water that percolated underground from the defendant's to the plaintiff's land, and consequently the water which came into the plaintiff's well from such percolating water, when he used his well by pumping, came adulterated with the sewage from the defendant's well:—Held, that the plaintiff had a right of action against the defendant for so polluting the source of supply, although until the plaintiff had appropriated it he had no property in the percolating water under his land, and although he appropriated such water by the artificial means of pumping. *Ballard v. Tomlinson*, 29 Ch. D. 115; 54 L. J., Ch. 454; 52 L. T. 942; 33 W. R. 533; 49 J. P. 692—C. A.

Pollution of Watercourse—Prescription—Variation of User.—From 1832 to 1877 the refuse of a fellmongery, and the washings of dyes used in a coloured rug manufactory, had been discharged into a watercourse, which was an arterial drainage work within the jurisdiction of drainage commissioners. In 1878 the fellmongery was abandoned, and the manufacture of leather boards substituted at the same factory. The pollution caused by the discharge of the refuse of the leather board manufactory was less in degree than that caused by the fellmongery. The drainage commissioners convicted the owners of the leather board factory under a section of a local act of polluting the stream, and this conviction was affirmed on appeal to the Quarter Sessions:—Held, that the conviction must be confirmed, for even if the factory-owners had a prescriptive right to foul the stream, it was as fellmongers, and not as leather board manufacturers; and that there was no authority for holding that the variation of the user, although it cast no increased, but even a less burden on the servient tenement, enabled the factory-owners to substitute a business of a totally different kind to that originally carried on by them, and at the same time claim to maintain their original prescriptive right to pollute the watercourse, even if such right did exist. *Clarke v. Somersetshire Drainage Commissioners*, 57 L. J., M. C. 96; 59 L. T. 670; 36 W. R. 890—D.

— **Arising from Acts of several Persons—Remedy against One.**—Where several manufacturers having their works upon a stream cause a nuisance to a riparian owner by discharging offensive matter into the stream, it is no answer to an action brought by the owner against one of those manufacturers for such manufacturer to say that the share he contributed to the nuisance is infinitesimal and unappreciable. The riparian owner is entitled to have the water in a pure condition, and has a right to take the manufacturers one by one and prevent each from discharging his contribution to that which becomes in the aggregate a nuisance. *Thorpe v.*

Brumfitt (8 L. R., Ch. 650), followed. *Blair v. Deakin*, 57 L. T. 522 ; 52 J. P. 327—Kay, J.

Where an injury has been done to the private rights of a person, whether tenant or landlord, that person is entitled to damages, although only nominal, and where in such a case an injury is apprehended, an injunction will be granted as against the party in default. In an action by N., tenant of a certain farm, for damages, and an injunction against T., a sanitary authority, for polluting the plaintiff's stream :—Held, that the plaintiff's private right having been injured, he was entitled to nominal damages, and an injunction against T., although T. had only polluted the stream in conjunction with others. *Nixon v. Tynemouth Rural Sanitary Authority*, 52 J. P. 504—D.

Injunction to Restrain — Quia timet Action.]—In order to maintain a quia timet action to restrain an apprehended injury the plaintiff must prove imminent danger of a substantial kind, or that the apprehended injury, if it does come, will be irreparable. *Fletcher v. Bealey*, 28 Ch. D. 688 ; 54 L. J., Ch. 424 ; 52 L. T. 541 ; 33 W. R. 745—Pearson, J.

The plaintiff was a manufacturer of paper, his mills being situate on the bank of a river, the water of which he used to a large extent in his process of manufacture, for which it was essential that the water should be very pure. The defendants, who were alkali manufacturers, were depositing on a piece of land close to the river, and about one mile and a half higher up than the plaintiff's mill, a large heap of refuse from their works. It was proved that in the course of a few years a liquid of a very noxious character would flow from the heap, and would continue flowing for forty years or more, and that if this liquid should find its way into the river to any appreciable extent the water would be rendered unfit for the plaintiff's manufacture, and his trade would be ruined. The plaintiff did not allege that he had as yet sustained any actual injury. The defendants said that they intended to use all proper precautions to prevent the noxious liquid from getting into the river :—Held, that it being quite possible by the use of due care to prevent the liquid from flowing into the river, it being also possible that, before it began to flow from the heap, some method of rendering it innocuous might have been discovered, the action could not be maintained, and must be dismissed with costs. But the dismissal was expressly declared to be without prejudice to the right of the plaintiff to bring another action hereafter, in case of actual injury or imminent danger. *Id.*

Erection of Urinal by Local Board.]—A local board is not entitled under the powers given it by s. 39 of the Public Health Act, 1875, to erect a public urinal on private property so as to be a nuisance to the owner. Such a proceeding is not a matter for compensation under s. 308, and will be restrained by injunction, nor need notice of the action for an injunction be given under s. 264. *Sellers v. Matlock Bath Local Board*, 14 Q. B. D. 928 ; 52 L. T. 762—Denman, J.

NULLITY.

See HUSBAND AND WIFE, I. 5.

OATH.

Parliamentary Oath.]—See PARLIAMENT.

Evidence.]—See EVIDENCE (AFFIDAVIT).

OBSCENITY.

See CRIMINAL LAW, II. 21.

OFFICE.

Compensation for Abolition of Office.]—The Metropolitan Bridges Act, 1877, provided that compensation should be paid to certain officers, including clerks, but not including solicitors, of the private companies or corporations whose bridges were taken over by the Metropolitan Board of Works under the act, upon a scale to be calculated on the basis of the emoluments actually received by them in the two years previous to the passing of the act. The Deptford Creek Bridge was taken over by the board, and thereby the plaintiff, who had been clerk to the Deptford Creek Bridge Company, lost his office. He had received a salary as clerk, and also payments for legal business done by him as solicitor for the company, and commission on the rents of the company's property which he received. The Deptford Creek Bridge Company had by their act power to appoint a solicitor and receiver as well as a clerk ; they had never appointed such officers, and the legal business of the company had always been done and the rents received by the clerk, who had always been a solicitor :—Held, that, by the practice of the company, these duties had been attached to the office of clerk, and that the plaintiff was entitled to compensation in respect of the payments received for discharging them as part of the emoluments of his office ; but, as to the payments for legal business done by him, only in respect of his proportion as partner in the firm of solicitors of the net profits after deducting all office expenses necessarily incurred in earning the money. *Drew v. Metropolitan Board of Works*, 50 L. T. 138—C. A.

— **Officer of Prison.]**—See PRISONS.

OFFICIAL REFEREE.

See ARBITRATION, II. 2.

Overstocking Land with Game.]—See GAME.

ORDERS.

See PRACTICE.

OVERSEER.

See POOR LAW.

PALATINE COURT.

See COURT.

PARLIAMENT.

1. *Privilege—Internal Regulation.*
2. *Promoting and Opposing Bills.*
3. *Parliamentary Deposits.*

1. PRIVILEGE—INTERNAL REGULATION.

Privilege — Disobedience to Order under Debtors Act.]—Parliamentary privilege has no application to a case in which a person is liable to imprisonment within s. 4 of the Debtors Act, 1869, as a person in a fiduciary capacity. *Gent. In re, Gent-Davis v. Harris*, 40 Ch. D. 190; 58 L. J., Ch. 162; 60 L. T. 355; 37 W. R. 151—North, J.

— **Action for Words spoken in Parliament.]**—See *Dillon v. Balfour*, ante, col. 633.

Divorce Bills—Practice on.]—See HUSBAND AND WIFE, III. 10.

House of Commons—Internal Regulation of its own Procedure—Jurisdiction of Courts of Law.]—The House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its internal procedure only. What is said or done within its walls cannot be inquired into in a court of law. *Bradlaugh v. Gossett*, 12 Q. B. D. 271; 53 L. J., Q. B. 209; 53 L. T. 620; 32 W. R. 552—D.

A resolution of the House of Commons cannot change the law of the land. But a court of law has no right to inquire into the propriety of a resolution of the House restraining a member from doing within the walls of the House itself something which, by the general law of the land, he had a right to do, viz., take the oath prescribed by the Parliamentary Oaths Act, 1869 (32 & 33 Vict. c. 68). *Ib.*

An action will not lie against the Serjeant-at-Arms of the House of Commons for excluding a

member from the House in obedience to a resolution of the House directing him to do so; nor will the court grant an injunction to restrain that officer from using necessary force to carry out the order of the House. The plaintiff, having been returned as member for the borough of N., required the Speaker of the House of Commons to call him to the table for the purpose of taking the oath required by 32 & 33 Vict. c. 68. In consequence of something which had transpired on a former occasion the Speaker declined to do so; and the House, upon motion, resolved "that the Serjeant-at-Arms do exclude Mr. B. (the plaintiff) from the House until he shall engage not further to disturb the proceedings of the House." In an action against the Serjeant-at-Arms praying for an injunction to restrain him from carrying out this resolution:—Held, that this being a matter relating to the internal management of the procedure of the House of Commons, the Court of Queen's Bench had no power to interfere. *Burdett v. Abbott* (14 East, 148), and *Stockdale v. Hansard* (9 Ad. & E. 1), commented upon and approved. *Ib.*

Oath—When and how to be taken—Person not believing in Supreme Being.]—A person who does not believe in a Supreme Being, and is one upon whose conscience an oath, as an oath, has no binding force, is wholly incapable of taking the oath prescribed by the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Act, 1868. The oath required to be taken by s. 1 of the act of 1866, as amended by the act of 1868, is to be taken by a member not once only in the same parliament, but every time a member after being elected and returned takes his seat. Under s. 3 of the act of 1866, the oath must be taken and subscribed by a member with all the due solemnities used in parliament, but so as no debate or business be interrupted by such member. Any member who takes his seat without taking the oath within the meaning of the act is liable to the penalties imposed by the act, even though the House of Commons itself were not only not to refuse him leave to be sworn, but were actually to pass a resolution permitting him to be sworn. *Attorney-General v. Bradlaugh*, 14 Q. B. D. 667; 54 L. J., Q. B. 205; 52 L. T. 589; 33 W. R. 673; 49 J. P. 500—C. A. Affirming 1 C. & E. 440—Coleridge, C. J., Grove, J., and Huddleston, B.

— **Information by Attorney-General for Penalties—Evidence.]**—Statements and avowals of a defendant as to his belief in a Supreme Being, and as to whether an oath has any binding effect upon his conscience, are admissible in the trial at bar of an action for penalties under the Parliamentary Oaths Act, 1866, even though such statements or avowals were made before he was elected a member of the parliament in which he sat and voted. Evidence of the usages and practice of the House is also admissible to explain the meaning of the act and standing orders of the House with regard to making and subscribing the oath. *Ib.*

— **New Trial—Appeal.]**—Where an information to recover penalties under the Parliamentary Oaths Act, 1866, has been tried at bar, a motion for a new trial must not be made *ex parte*, but upon notice of motion to the other side. Such a proceeding is not a criminal cause or matter

within s. 47 of the Judicature Act, 1873, so as to preclude a defendant from appealing to the Court of Appeal from the judgment of the High Court at bar. *Id.*

2. PROMOTING AND OPPOSING BILLS.

Sanction of Court—Committee of Bondholders—Leave to promote Bill on behalf of whole Body.]—In an action by some mortgage bondholders on behalf of the whole body, against a body of trustees, for the purpose of realising their security, a receiver was appointed and put in possession of the mortgaged property. The defendants promoted a bill in parliament, the effect of which, if it became law, would be to alter the contract between them and the bondholders. Leave was then obtained from the court for a committee appointed at a meeting of the bondholders to oppose the bill, the costs of the opposition to be paid out of the money in the hands of the receiver. It being found necessary to put the amendments proposed in the form of a bill, the court gave leave to a representative committee of the bondholders to promote a bill, and ordered the costs to be paid out of the property of the bondholders comprised in the mortgage. On appeal, the court expressed doubts as to the jurisdiction to make the order appealed from, but, by consent, made an order by which they discharged the order of the court below, and, without saying anything in sanction of the proposed bill, gave liberty to the representative committee to promote a bill carrying into effect certain terms, the costs of promoting the bill and of the application in both courts to be reserved. *Buckingham v. Whitehaven Trustees*, 55 L. T. 694—C. A.

Expenses of Promoting Bill—Rural Sanitary Authority.]—A rural sanitary authority has no power to charge the rates with the expenses of promoting a bill in Parliament. *Cleverton v. St. German's Union*, 56 L. J., Q. B. 83—Stephen, J.

Opposing Bill—Allowance by Auditor out of Poor Rate.]—The overseers of a parish are entitled to defray out of the poor rate such reasonable and moderate expenses as have been incurred by them at the request of the vestry in resisting an attempt by private individuals to impose an extra burden on the poor rate by means of a bill in Parliament proposing to give power to charge the poor rate with the payment of interest on the share capital of the undertaking. *Reg. v. Sibly, Reg. v. White*, 14 Q. B. D. 353; 54 L. J., M. C. 23; 52 L. T. 116; 33 W. R. 248; 49 J. P. 294—C. A.

Vexatious Opposition—Costs—Summary Procedure to enforce Payment.]—Under the provisions of the Act 28 & 29 Vict. c. 27, for the summary recovery by an action of debt of the costs of vexatious opposition to a bill in parliament, the plaintiff on filing the documents mentioned in s. 5 of the Act, is, unless the defendant has obtained leave from the court to deliver a defence to the action, entitled as a matter of right to sign judgment for the amount certified by the parliamentary taxing officer to be due to him, but the defendant can, after judgment is signed, move to set it aside, on the ground that the parliamentary committee, which reported

that the opposition to the bill was vexatious had no jurisdiction in the particular case. The defendant cannot deliver a defence to the action without the leave of the court. *Semble* (Lopes, L. J., doubting), that leave to deliver a defence on the ground that the committee had no jurisdiction may be given before judgment is signed. The defendants to such an action having, without first obtaining the leave of the court, delivered a defence denying the jurisdiction of the parliamentary committee:—Held, that judgment must be signed for the amount claimed, but that it would still be open to the defendants to move to set aside the judgment. *Mallet v. Hanley*, 18 Q. B. D. 303; 56 L. J., Q. B. 136; 57 L. T. 913; 35 W. R. 201; 51 J. P. 692—C. A.

Since the Judicature Act a statement of claim is to be used by the plaintiff in place of the declaration referred to in s. 5 of the act. *Id.*

—Petitioner to pay Costs—Against whom Order may be made.]—A bill, promoted by the plaintiff, being before a parliamentary committee, a petition was presented against it in the name and under the seal of a company of which the defendants were directors. The committee reported that the promoter had been vexatiously subjected to expense on the promotion of the bill by the opposition of the defendants, petitioners against the bill, and that the promoter was entitled to recover a portion of his costs from the defendants. The bill of costs was accordingly taxed, and a certificate obtained under 28 & 29 Vict. c. 27, and the plaintiff commenced an action and signed judgment for the certified amount. On an application to set aside the judgment and for leave to defend:—Held (Lord Esher, M.R., dissenting), that the defendants not being the actual petitioners, the order on them to pay costs was made without jurisdiction, and could not be enforced. *Mallet v. Hanley*, 18 Q. B. D. 787; 56 L. J., Q. B. 384; 57 L. T. 913; 35 W. R. 601—C. A.

3. PARLIAMENTARY DEPOSITS.

Application of — Abandonment — Diminution of Value of Land.]—A railway company being about to apply for an act of parliament for making an extension line, assented to F., an owner of land over which the line was intended to pass, commencing the line over his own land. F. accordingly made an embankment over his land, and was paid for the work by the company. After a considerable part of the work on F.'s land had been done, the company obtained their act giving power to construct the railway in the proposed line. The act contained a proviso that if the new line were not opened for traffic within five years the parliamentary deposit should be applied towards compensating landowners or other persons whose land had been interfered with or rendered less valuable "by the commencement, construction, or abandonment of the railway." The extension railway was not completed within five years, but no warrant of abandonment was obtained under the Railways Abandonment Act. A fresh Act was passed, authorising a petition for winding up the company and the sale of the undertaking by the official liquidator. A petition having

been presented by F.'s mortgagees and the trustee in his liquidation for the application of the parliamentary deposit in compensation for the injury done to his estate by the commencement, construction, or abandonment of the works:—Held, that the undertaking was abandoned within the meaning of the act; that the words "commencement, construction, or abandonment," must be read disjunctively; that F., having commenced the works on his own land before the company had obtained their act, on the speculation that they would obtain power to construct the railway, the petitioners had no claim for compensation for injury to the estate by the commencement or construction of the railway; but they had a claim for compensation for injury done by the abandonment of the railway. *Potteries, Shrewsbury, and North Wales Company, In re*, 25 Ch. D. 251; 53 L. J., Ch. 556; 50 L. T. 104; 32 W. R. 300—C. A.

Whether the words "commencement of the railway" must be confined to its commencement by the company under its parliamentary powers, or would include its commencement in anticipation of such powers, *quære. Ib.*

— **Collateral Obligation—Covenant to build Station—Covenant to put up Fences.**—Where the act incorporating a railway company contains a clause in the usual form, that in case of the abandonment of the railway the parliamentary deposit shall be applicable towards compensating any landowners whose property may have been interfered with or rendered less valuable by the commencement, construction, or abandonment of the railway, a landowner can, as a general rule, only claim compensation on account of acts done or omitted to be done by the company under their statutory powers, and not on account of any collateral obligation entered into by the company:—But held (dissentiente Lopes, L.J.), that where a company has entered into a collateral obligation of such a nature that the breach of the obligation is necessarily involved in the abandonment of the railway and undistinguishable from it, such as a covenant to build a station, the breach of such obligation may be taken into account in assessing the diminution of value of the land. A covenant to put up fences on the land taken by the company is not such an obligation as could form the subject of a claim for compensation out of the deposit. *Ruthin Railway, In re, Hughes' Trustees, Ex parte*, 32 Ch. D. 438; 56 L. J., Ch. 30; 55 L. T. 237; 34 W. R. 581—C. A.

Who entitled to Compensation—Measure of Damages.—Mortgagees of a landowner may be persons entitled to claim compensation under the Railways Abandonment Act:—The measure of injury must be determined by comparing the value of the estate immediately before with its value immediately after the abandonment. *Potteries, Shrewsbury, and North Wales Company, In re, supra.*

— **Claims of Promoters and Parliamentary Agents.**—Under the usual provision, in an act incorporating a railway company, that in the event of the undertaking being abortive the parliamentary deposit shall either be forfeited to the Crown, or, in the discretion of the court, be wholly or in part applied, as part of the assets of the company, for the benefit of the creditors

thereof, the court will not apply the deposit for the benefit of all the creditors without distinction as to the nature and merit of their claims; and accordingly the promoters and the parliamentary agents claiming in respect of costs incurred in obtaining the act, or in relation to the promotion of the company, not being meritorious creditors, will not be admitted to share in the distribution of the fund. *Birmingham and Lichfield Junction Railway, In re*, 28 Ch. D. 652; 54 L. J., Ch. 580; 52 L. T. 729; 33 W. R. 517—Chitty, J.

The promoter of a railway company raised the moneys requisite for the parliamentary deposit by obtaining an advance from a bank upon their personal security; and it was arranged by the promoters and the provisional committee of the company, as appeared by a minute, that the interest payable upon foot of the advance would be provided and paid by the company. The railway was afterwards abandoned, and an order to wind up the company having been made:—Held, that a claim by the promoters for interest paid on foot of the advance should be disallowed. *Ennis and West Clare Railway, In re*, 15 L. R., Ir. 180—V.-C.

PAROL EVIDENCE.

See EVIDENCE.

PARSON.

See ECCLESIASTICAL LAW.

PARTICULARS.

Of Sale.—*See VENDOR AND PURCHASER.*

In Patent Cases.—*See PATENT.*

In other Cases.—*See PRACTICE.*

PARTIES.

See PRACTICE.

PARTITION.

Sale instead of Partition—Jurisdiction—Discretion of Court.—The circumstances stated in s. 3 of the Partition Act, 1868, when they exist, give the court jurisdiction to direct a sale instead of partition; but even when the jurisdiction exists, the judge has a discretion with which the

Court of Appeal will not ordinarily interfere. Where it does not appear that a decision cannot reasonably be made, a sale should not be directed in the absence of other circumstances to give the jurisdiction. *Dyer, In re, Dyer v. Paynter*, 54 L. J., Ch. 1133; 53 L. T. 744; 33 W. R. 806—C. A.

The Partition Act, 1876 (39 & 40 Vict. c. 17), s. 6, allowing a sale to be ordered in lieu of partition on the request of infants, only applies to cases within the Partition Act, 1868, s. 3, which latter section confines the jurisdiction of the court to actions in which, before its passing, a decree for partition might have been made. No such decree could have been made where the real estate in question was liable to be divided in an unascertained number of shares; consequently no order for sale of real estate could be made under the act in a case in which it was decided that any children of a living person who might be born would be entitled to share equally with those born during the lifetime of a tenant for life. Where real estate consisted of agricultural property in Norfolk, the court refused to order the estate to be sold under Rules of Court, 1883, Ord. L.I. r. 1, for the purpose of paying the costs of the action, in which a declaration of the rights of the persons entitled had been obtained, and a receiver appointed against their father, who had previously been in possession and refused to account, but directed the receiver to apply any funds in his hands, after keeping down incumbrances, in payment of the costs. *Miles v. Jarvis*, 50 L. T. 48—Kay, J.

—“Good Reason to the Contrary”—Artificial Depreciation of Land.—[It is not “good reason to the contrary” against a sale instead of partition, under the 4th section of the Partition Act, 1868, that owing to agrarian agitation the value of land is depreciated, and that consequently the interest on the purchase-money of the lands proposed to be sold would be but fifty per cent. of the amount of the rents payable thereout, to the alleged injury of the parties showing cause. *Whitwell's Estate, In re*, 19 L. R., Ir. 45—Monroe, J.]

Application for Sale by Owner of less than half of Property.—Discretion.—[Upon an application for a sale of property held by tenants in common, made by the owner of less than a moiety under s. 5 of the Partition Act, 1868, the court has a discretion, and is not bound to order a sale, even if none of the other persons interested will undertake to purchase the applicant's share. The onus is on the applicant under s. 5 to show some good reason for ordering a sale of the property. *Richardson v. Feary*, 39 Ch. D. 45; 57 L. J., Ch. 1049; 59 L. T. 165; 36 W. R. 807—North, J.]

Parties—Person of Unsound Mind not so found—Next Friend.—[A partition action may be brought by a person of unsound mind, not so found, by a next friend. *Halfhide v. Robinson*, (9 L. R., Ch. 373) distinguished. Where, therefore, an action for sale under the Partition Acts was brought by two tenants in common, one of whom being stated to be of weak mind, sued by the other as his next friend, the court being of opinion that an action in this form being *prima facie* for his benefit could be maintained, re-

fused to strike out his name as co-plaintiff; but intimated an opinion that, at the trial, his request for sale by his next friend, assuming that the next friend could effectually make a request, could not be acted upon in the same way as a request by a person not under disability, without the court being satisfied that the sale would be for his benefit. *Porter v. Porter*, 37 Ch. D. 420; 58 L. T. 688; 36 W. R. 580—C. A.]

Sale out of Court—Form of Order.—[In a sale out of court three things are required—that the reserved bid should be fixed by the chief clerk, that the auctioneer's remuneration should be similarly fixed, and that the purchase-money should be paid directly into court. *Pitt v. White*, 57 L. T. 650—Kay, J. And see *Stedman, In re, infra*.

—Some Parties not sui juris.—[Where some of the parties beneficially interested are not sui juris, and the trustees have no power of sale under the trust deed, there is no jurisdiction under the Partition Act, 1868, s. 8, to order a sale out of court. *Strugnell v. Strugnell*, 27 Ch. D. 258; 53 L. J., Ch. 1167; 51 L. T. 512; 33 W. R. 30—Chitty, J.]

—Evidence—Persons interested.—[On an action for the partition or sale of real estate coming on for hearing as a short cause, counsel for the plaintiff asked for the usual judgment directing an inquiry as to the persons interested, and whether they were parties to the action, and if it should be certified that all persons interested were parties, then directing a sale.—Held, that in these cases the shortest and least expensive way was to prove the title in court in the first instance; strict evidence was not necessary, but it would be sufficient if there was an affidavit by a competent person. The case having stood over, such an affidavit was produced, and the court being satisfied that all persons interested were parties to the action, and desired a sale, an order was made for sale out of court, with the usual directions as to fixing the reserved price, and the auctioneer's remuneration, and as to payment of the deposit and the rest of the purchase-money into court. *Stedman, In re, Coombe v. Vincent*, 58 L. T. 709—Kay, J.]

Decree when granted—Power of Sale.—[A decree for the partition of property can be granted notwithstanding the existence of a power given to trustees to sell the property for the purpose of a division. *Boyd v. Allen*, 24 Ch. D. 622; 53 L. J., Ch. 701; 48 L. T. 628; 31 W. R. 544—Fry, J.]

Judgment, dispensing with Service of Notice of—Distribution of Fund.—Advertisements.—[Having regard to sub-s. 3 of s. 4 of the Partition Act, 1876 (b), the court has no jurisdiction under s. 35 of Ord. LV. of the Rules of Court, 1883, to dispense with service of notice of the judgment in a partition action except on the imperative terms of publishing advertisements. Where, therefore, service of notice of the judgment had been dispensed with, but no advertisements had been published, the court, upon the hearing of the action on further consideration, postponed distribution of the estate for six months, and directed proper advertisements to be published in the meantime. *Phillips v. Andrews*, 56 L. T. 108; 35 W. R. 266—Kay, J.]

Sale by Court—Order to Pay Over—Subsequent Lunacy of Beneficiary.—On the 21st May, 1879, P. N. died intestate, leaving M. H. P. one of four co-heiresses-at-law. On 18th February, 1880, an action was brought asking for sale of P. N.'s real estate in lieu of partition. On the 16th June, 1880, an order was made for sale. The sale took place on the 30th August, 1880, and the proceeds of sale were carried to the credit of the action, "proceeds of the sale of the testator's real estate." On the 22nd April, 1882, by the order on further consideration in the said action, one-fourth part of the money standing to that account was ordered to be paid to M. H. P., subject to duty. M. H. P. left the money in court, and took no steps concerning it. On the 14th January, 1884, by an order made on a petition presented in lunacy, T. was authorised to apply to the Chancery Division for a transfer of the said one-fourth amounting to 434*l.* 17*s.* 9*d.* to the account of M. H. P., a person of unsound mind, "proceeds of the sale of the real estate of P. N.," and the transfer was made accordingly. M. H. P. died on the 10th June, 1884:—Held, that there being no evidence that M. H. P. was of unsound mind at the date of the sale and the order for payment to her, the fund then ordered to be paid to her belonged to her absolutely without any trust or equity for re-conversion, and went on her death to her personal representatives. *Pickard, In re, Turner v. Nicholson*, 53 L. T. 293—Pearson. J.

PARTNERSHIP.

I. WHAT CONSTITUTES—BOVILL'S ACT, 1323.

II. RIGHTS AND LIABILITIES OF PARTNERS AND THIRD PARTIES.

1. *Generally*, 1325.
2. *Actions*, 1330.

III. RIGHTS AND LIABILITIES OF PARTNERS BETWEEN THEMSELVES.

1. *Generally*, 1332.
2. *Jurisdiction of Courts over*, 1337.

1. WHAT CONSTITUTES—BOVILL'S ACT.

Joint Adventure—Equitable Contribution in Respect of Default in Payment of a Loss by one of Contracting Parties.—By agreement between the plaintiffs, the defendants, and Messrs. L. B. & Co., a cargo of Californian wheat was to be shipped for their joint account by the correspondents of L. B. & Co., at San Francisco, consigned to the plaintiffs at Liverpool for sale upon certain special terms; the shippers to reimburse themselves for cost and insurance of the cargo by drafts on the plaintiffs at sixty days' sight to the extent of 45*s.* per quarter, less freight, and for the balance of invoice, amount by separate drafts at sixty days' sight upon each of the above parties for one-third of the excess. The cargo was shipped, and a bill was drawn by the San Francisco house for 29,353*l.* 18*s.* 1*d.*, on account of the invoice price of the wheat, less freight, upon the plaintiffs, and was duly accepted and paid by them, together with freight,

insurance, and other charges in respect of the cargo; and the wheat on arrival was sold by the plaintiffs at a loss. In December, 1883, L. B. & Co. became insolvent, and compounded with their creditors for 30 per cent. of their liabilities, which composition the plaintiffs received, leaving an unpaid balance of 1,760*l.* 10*s.* 9*d.* due from that firm for their share of the loss on the adventure:—Held, that the purchase and shipment of the wheat was a joint adventure, each of the three firms to participate equally in the profit or loss; and that the defendants, according to the rule of equity, which, since the Judicature Act, 1873, is to prevail, were liable to contribute equally with the plaintiffs to make good the default of L. B. & Co. *Lowe v. Diwon*, 16 Q. B. D. 455; 34 W. R. 441—Lopes, J.

Sharing Profits and Losses.—An agreement to share profits and losses is not, at any rate as between the parties to the agreement, conclusive as to their being partners; the question of partnership depends on the intention of the parties as shown by the agreement. *Pawsey v. Armstrong* (18 Ch. D. 690) observed upon. *Walkerv. Hirsch*, 27 Ch. D. 460; 54 L. J. Q. 315; 51 L. T. 581; 32 W. R. 992—C. A. See also *London Financial Association v. Kelk*, ante, col. 401.

Advance of Money—Share of Profits—Bovill's Act.—W., a licensed victualler, lent 500*l.* to B., a tailor, to set him up in business as a tailor, upon the terms that W. was to recall the 500*l.*, with interest at five per cent., at forty-eight hours' notice; that until the principal sum and interest were paid off, he was to receive half the net profits of the business, after allowing B. 4*l.* a week for his services; that B. should not dispose of the stock-in-trade, or engage in any other business, but should devote the whole of his time to this business, should render proper accounts at certain dates, and give W. every facility for examining them, and should pay the costs of any accountant paid by W. on that behalf:—Held, that the agreement which embodied these terms constituted a partnership between W. and B.; and that W. was not protected by Bovill's Act (28 & 29 Vict. c. 86) against liability for the debts incurred in the business. *Frowde v. Williams*, 56 L. J. Q. B. 62; 56 L. T. 441—D.

Participation in profits, although strong evidence, is not conclusive evidence of a partnership. The question of partnership must be decided by the intention of the parties to be ascertained from the contents of the written instruments, if any, and the conduct of the parties. The plaintiff advanced money to a contractor to enable him to carry out a contract with a railway company for the construction of a railway, and the parties executed a deed by which the contractor assigned to the plaintiff all his machinery, plant, &c., and all shares and debentures he might receive from the company to secure the repayment of the loan. The deed contained the following provisions:—(1) That the plaintiff should receive ten per cent. interest on the money advanced, and ten per cent. of the net profits of the contract; (2) that the contractor should apply all the moneys advanced in carrying on the works; (3) that if the contractor should become bankrupt the plaintiff might enter and complete the works; (4) that the plaintiff might sell the property in case of default, but that he should not sell the shares or

debentures within twelve months after the completion of the contract; (5) that in calculating the net profits the contractor should be allowed to draw out 1,000*l.* a year for his services. Letters passed between the plaintiff and the contractor in which the money advanced was spoken of as "capital" and "working capital" and expressions were used showing that both parties had a common interest in the works:—Held, that the stipulations in the deed and the expressions in the correspondence were all consistent with the object of securing repayment of the money advanced, and were not sufficient evidence of a partnership between the parties. *Badeley v. Consolidated Bank*, 38 Ch. D. 239; 57 L. J., Ch. 468; 59 L. T. 419; 36 W. R. 745—C. A.

Bovill's Act—Action to enforce Security.—An action to enforce a security given by a trader who has become bankrupt is not an action to recover principal, profits, or interest within the 5th section of Bovill's Act, and may, therefore, be maintained by a person entitled to receive a share of the profits of a trader, although the other creditors of the trader have not been satisfied. *Id.*

—**Substitution of New Agreement.**—In September, 1882, a loan was made to a trader on his bond, the agreement in writing being that the lender should receive interest at 5*l.* per cent. and one-half of the profits of the business of the trader for three years; he instructed in the business; and at the end of that time the lender had an option to be admitted a partner. In October, 1883, the agreement of 1882 was cancelled, and another entered into that the lender should receive 20*l.* a month as interest on the loan in lieu of the former interest and share of profits. The borrower became insolvent in 1886, and executed a deed of trust for the benefit of his creditors:—Held, that the claim of the lender came within the provisions of ss. 1 and 5 of the Partnership Law Amendment (Bovill's) Act, 28 & 29 Vict. c. 86, and must be postponed until the debts of the other creditors had been satisfied. *Stone's Trusts, In re*, 33 Ch. D. 541; 55 L. J., Ch. 795; 55 L. T. 256; 35 W. R. 54—Kay, J.

II. RIGHTS AND LIABILITIES OF PARTNERS AND THIRD PARTIES.

1. GENERALLY.

Rights on Bill endorsed by Partner.—No action will lie by a firm as indorsees of a bill of exchange against their indorsers if a member of the plaintiff firm be one of the indorsers. *Foster v. Ward*, 1 C. & E. 168—Williams, J.

Bill Drawn against Firm—Acceptance by one Partner—Joint or separate Liability.—A bill of exchange was drawn against a firm of B. & Co. B., one of the partners, accepted the bill, signing the name of the firm "B. & Co.," and adding his own underneath. B. died, and the holder of the bill took out an originating summons for the administration of B.'s estate, on which an order was made for the administration of the estate, distinguishing the separate from the partnership debts:—Held, that the acceptance of the bill was the acceptance of the firm, and that the

addition of B.'s name did not make him separately liable. And, it having been proved that B.'s estate was insufficient for the payment of his separate debts, and therefore that no part would be available for payment of the partnership debts, the summons was dismissed. Whether a joint creditor of a partnership firm can take out an originating summons for the administration of the estate of the deceased partner, *quære*. *Barnard, In re, Edwards v. Barnard*, 32 Ch. D. 447; 55 L. J., Ch. 935; 55 L. T. 40; 34 W. R. 782—C. A.

Partner Assigning "his Share"—Share of Firm passing.—Where by a memorandum of agreement between M., the plaintiffs, and three other firms, M. agreed to surrender to the plaintiffs "his share" in a certain mortgage held by him as trustee:—Held, that under the circumstances of the case the share of M.'s firm therein passed, and not merely his own individual share as between himself and his partner. *Marshall v. Maclure*, 10 App. Cas. 325—P. C.

Mortgage of Share—Right of Mortgagee to Account.—When a partner mortgages his share in the partnership and the mortgagee brings an action to realise his mortgage, the proper order is to direct an account of what the mortgagor's interest in the partnership was at the date when the mortgagee proceeded to take possession under his mortgage, i.e., at the date of the writ; but if a dissolution of the partnership has previously taken place, the date of the dissolution is the date at which the account is to be taken. *Whetham v. Davey*, 30 Ch. D. 574; 53 L. T. 501; 33 W. R. 925—North, J.

Power of Surviving Partner to Mortgage Assets to Secure prior Debt.—A firm consisting of two partners, had secured the balance of their current account with a bank by the deposit of certain deeds. One of the partners died, and the bank requiring further security from the surviving partner to secure the balance then due to them on the account, the surviving partner deposited with the bank a contract for the purchase of some lands as further security, the contract being part of the assets of the firm:—Held, that the surviving partner was entitled to mortgage the assets of the partnership for a past debt. *Clough, In re, Bradford Banking Company v. Cure*, 31 Ch. D. 324; 55 L. J., Ch. 77; 53 L. T. 716; 34 W. R. 96—North, J.

Negligence and Fraud of Partner—Liability of Firm.—In May, 1869, P., a member of a firm of solicitors, suggested to the plaintiff as an investment for a sum of 3,557*l.* in court to which he was entitled, a mortgage of a leasehold property at E., and made certain misrepresentations with respect to the property. In July the money was paid out of court to the firm on behalf of the plaintiff, and the balance, after certain deductions for the costs of payment out, was shortly afterwards paid away by two cheques signed by the firm for 33*l.* and 3,400*l.* respectively. P. sent the 33*l.* to the plaintiff, and informed him that the 3,400*l.* was invested upon the security at E. as arranged, and in August, 1869, he sent to the plaintiff a memorandum of deposit to the effect that he held the title-deeds as solicitor for and on behalf of the plaintiff to secure 3,400*l.* In 1875 P. executed a legal mort-

gage of the same property to H. without disclosing the plaintiff's equitable charge. The property was insufficient to satisfy both charges. P. continued to pay interest to the plaintiff on his investment until 1881, when his fraud was discovered and he absconded. The firm did not make any charge to the plaintiff for investment, but their bill of costs was limited to the costs incidental to the payment of the money out of court. In 1884 the plaintiff brought an action against the firm to recover from them the 3,400*l.* lost by P.'s fraud:—Held, first, that the firm was guilty of negligence, in the transactions of 1869, in not seeing that the plaintiff's money was invested upon a proper mortgage, but that that claim was barred by the statute; secondly, that they were not liable for P.'s misrepresentations, there being no sufficient proof that the plaintiff relied upon them; thirdly, that they were not liable for P.'s fraud in 1875, as it was not committed in the course of the firm's business. The fact that a representation is by its nature calculated to induce a person to enter into a contract does not raise a presumption of law that he relied upon such representation. *Hughes v. Twisden*, 55 L. J., Ch. 481; 54 L. T. 570; 34 W. R. 498—North, J.

Trustees under a will deposited certain bonds payable to bearer with P., a member of the firm of solicitors who were acting for the estate. His partners had no knowledge of this, but letters referring to the bonds were copied in the letter-book of the firm and were charged for in the bill of costs of the firm, and the bonds were included in a statement of account which the firm made out for the trustees. P. paid some of the interest of the bonds by cheques of the firm, but on each occasion recouped the firm by a cheque for the same amount on his private account. P. misappropriated the bonds:—Held, that the cheques, letters and entries were too ambiguous to affect the other partners with acquiescence in P. having custody of the bonds as part of the partnership business, and that they could not be held liable for their misappropriation. *Harman v. Johnson* (2 E. & B. 61) and *Dundonald (Earl of) v. Masterman* (7 L. R., Eq. 504) considered. *Cleather v. Twisden*, 28 Ch. D. 340; 54 L. J., Ch. 408; 52 L. T. 330; 33 W. R. 435—C. A.

Sale of Goodwill.—See GOODWILL.

Bankruptcy of one Partner—Right of others to give Discharge for Partnership Assets.—When one partner in a firm has become bankrupt, his solvent partner can give a good discharge for debts due to the firm, and has a right, as against the trustee of the insolvent partner, to get in the assets of the partnership, and even to use the name of the trustee for that purpose upon giving him an indemnity. *Owen, Ex parte, Owen, In re*, 13 Q. B. D. 113; 53 L. J., Q. B. 863; 32 W. R. 811—C. A.

Authority of Partner to enter into Partnership with other Persons.—One of three partners lent money on the terms that the borrower, besides paying interest, should make over one half of his profits to the firm to which the lender belonged:—Held, that this agreement did not constitute a partnership between the firm and the borrower, one partner having no authority from the other partners to enter into a partnership with other persons in another business.

Singleton v. Knight, 13 App. Cas. 788; 57 L. J., P. C. 106; 59 L. T. 738—P. C.

Liability of retired Partner—Bill of Exchange—Compromise of Actions.—The defendant was a partner in the firm of G. & Co. from 1st January to 30th June, 1885, and no notice was given to the plaintiff of his retirement. Between those dates the plaintiff discounted an acceptance indorsed by G. & Co., which was dishonoured. The plaintiff sued G. & Co. for the amount, and G. & Co. brought a cross-action against the plaintiff for recovery of the bill. Both actions were stayed by order of the court on G. & Co. giving to the plaintiff a second acceptance for the amount of the first and 10*l.* for costs, and the plaintiff giving up certain securities for the debt which were in his possession. The second acceptance was dishonoured, and the plaintiff sued the defendant upon it as a member of the firm of G. & Co.:—Held, that the defendant was not liable, as the bill of exchange was given in settlement of legal proceedings, which involved a give-and-take between the parties, and was made without his knowledge or consent. *Crane v. Lewis*, 36 W. R. 480—Denman, J.

Retired Partner acting as Partner—Fraud of Continuing Partners.—H. P., who had been a partner in a firm of solicitors, and had during that time attended to the management of a certain trust, continued to act in relation to a change of investment of part of the trust funds after he had retired from the firm, as if he were still a partner, and wrote to the trustees from the office of the firm saying that he had obtained a power of attorney authorising "our brokers" to sell the stock, and asking them to sign it, and send it to the office of the firm. The trustees did as requested, and the stock was sold, and the money received by H. P.'s late partners, who misapplied it, and it was lost to the trust. It appeared that the tenant for life was aware at this time that H. P. had retired from the firm, but the trustees were not:—Held, that H. P. was liable to make good to the trust the capital sum lost, and interest from the last day on which any was paid. *Slack v. Parker*, 54 L. T. 212—Kay, J.

Liability of Incoming Partner for Debts of Firm.—Where an individual has entered an appearance in an action against a firm, there must be a novation to render him liable for a debt contracted before he was a member. *Cripps v. Tappin*, 1 C. & E. 13—Cave, J.

Liability by Estoppel.—Goods had been supplied to the M. Mansions upon the order of the housekeeper. The vendor sued the owner and the secretary for payment. The secretary had previously paid for goods supplied by the plaintiff by cheques, signed "M. Mansions account":—Held, that the doctrine in *Scarfe v. Jardine* (7 App. Cas. 345) applied, and that the plaintiff could not sue the secretary, whose liability depended only on estoppel, at the same time as the real owner. *Jones v. Ashwin*, 1 C. & E. 159—Cave, J.

Right of Creditor against Estate of Deceased and of Surviving Partner.—The creditor of a partnership firm, although not strictly a joint and several creditor, has concurrent remedies against the estate of a deceased partner and

the surviving partner; and it makes no difference which remedy he pursues first. But it is necessary that the surviving partner should be present at taking the accounts of the estate of the deceased partner, and that the partnership creditor should not come into competition with the separate creditors of the deceased partner. *Hodgson, In re, Beckett v. Ramsdale*, 31 Ch. D. 177; 55 L. J., Ch. 241; 54 L. T. 222; 34 W. R. 127—C. A.

A father and son being in partnership, became indebted to the plaintiffs, who were bankers. The son died, and the father brought an action and obtained judgment for the administration of his son's estate. The plaintiffs carried in a claim for the debt against the separate estate, being at the time unable to prove the existence of a partnership, and were declared entitled to a dividend. Afterwards the father died, and the plaintiffs having obtained proof of the partnership, brought an action to make his estate liable for the partnership debt:—Held, that the proceedings in the previous action did not constitute a res judicata or estoppel so as to prevent the plaintiffs from recovering the debt; but they were put under an undertaking to postpone their dividend on the son's separate estate to the claims of his separate creditors. *Ib.*

Action by Joint Creditors for Administration of Separate Estate of Deceased Partner.]—A creditor of a partnership firm brought an administration action against the executor of a deceased partner. Afterwards a separate creditor of the same partner brought an administration action against the executor, and obtained judgment:—Held, on an application by the plaintiff in the first action for the conduct of the proceedings in the second action, that a joint creditor of the firm could not maintain a simple action for the administration of the estate of a deceased partner, and therefore that the first action was not properly constituted. Application of the plaintiff was consequently refused. *McRae, In re, Forster v. Davies, Norden v. McRae*, 25 Ch. D. 16; 53 L. J., Ch. 1132; 49 L. T. 544; 32 W. R. 304—C. A. See also *Bar-nard, In re*, ante, col. 1326.

Insolvent Estate of Deceased Partner—Joint and Separate Creditors—Surplus Interest—Priority.]—Prior to 1856 A. carried on a banking business in partnership with B. On the 13th March, 1856, A. died. Soon afterwards the bank stopped payment, and B. was adjudicated bankrupt. Several actions were commenced for the administration of the estate of A. By an order made in the year 1881 and in one of these actions, it was declared that A.'s separate creditors were entitled to be paid out of the estate in priority to his joint creditors, and also that A.'s separate creditors whose debts by law or special contract carried interest, were not entitled to interest in priority to the joint creditors in respect of the principal due to the joint creditors. The joint estate of the banking firm down to A.'s death, and the bank assets from that time until B.'s bankruptcy, and also B.'s separate estate, were administered in bankruptcy. The result of the actions to administer A.'s estate was that dividends amounting to 20s. in the pound were paid to both the separate and the joint creditors of A. on the principal sums due to them respectively, and that a surplus remained which was

sufficient to satisfy all the interest on the joint as well as the separate debts:—Held, that the separate creditors, whether their debts did or did not by law carry interest, were entitled to take their interest in priority to the joint creditors. Held, also, that the dividends received ought to be accounted for in ascertaining the amount of interest due, in manner following, viz., by treating the dividends as ordinary payments on account and applying each dividend and the surplus (if any) to the reduction of the principal. *Whittingstall v. Grover*, 55 L. T. 213; 35 W. R. 4—Chitty, J.

Embezzlement of Money of "Co-partnership."]
—See *Reg. v. Robson*, ante, col. 567.

2. ACTIONS.

For Administration of Estate.]—See supra.

Service of Writ on one Member—Appearance by him only "as a Partner of the Firm."]—A writ was issued against a trading partnership (unincorporated), and served upon a member of the firm, who entered an appearance, "W. N., a partner of the firm of W. T. & Co." There was no service upon or appearance by the other members of the firm:—Held, that leave to sign judgment against the firm for default of appearance could not be granted. *Jackson v. Litchfield* (8 Q. B. D. 474) followed. *Adam v. Townsend*, 14 Q. B. D. 103—D.

Member of Foreign Firm within Jurisdiction.]—The defendants, who were a foreign partnership carrying on business out of the jurisdiction, were sued in the name of their firm. One member of the firm happening to be within the jurisdiction was served with the writ, which was the ordinary eight day writ:—Held, that such service was good under Ord. IX. r. 6, which provides that, where persons are sued as partners in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there. *Pollackfen v. Sibson*, 16 Q. B. D. 792; 55 L. J., Q. B. 294; 54 L. T. 297; 34 W. R. 534—D.

Appearance—By one Partner—Amendment of Judgment so as to include other Partner.]—The appellant issued a writ against R. & Co. R. alone appeared, and all subsequent proceedings in the action were conducted under the title of *M. v. R.*, sued as R. & Co. When the action came on for trial the appellant had a verdict by consent, and judgment was signed against R. sued as R. & Co. The appellant afterwards discovered that the respondent was a member of the firm of R. & Co., and applied for an order to amend the judgment in accordance with the writ, making it a judgment against the firm of R. & Co.:—Held, that at the stage of the action the amendment should not be allowed. *Munster v. Cox*, 10 App. Cas. 680; 55 L. J., Q. B. 108; 53 L. T. 474; 34 W. R. 461—H. L. (E.).

Amending Defect in—Appearance of Partners in Name of Firm.]—A writ having

been issued against a firm and others, was served on one defendant, F., in his individual capacity as a defendant, and also as representing both a co-defendant, G., and the firm (of which he, F., was supposed to be a member). F. was not, in fact, a partner in the firm, nor did he in any way represent either it or G. for the purposes of service. The firm entered a conditional appearance and moved to discharge the service as against them:—Held, that the defect in the firm's appearance, by reason of their not having appeared individually in their own names, could be cured by an undertaking of the partners so to appear; that upon this being done the service must be discharged as against G., he being easily accessible, and there being no need for prompt service. *Nelson v. Pastorino*, 49 L. T. 564—Pearson, J.

Discovery—Sealing-up Entries in Books—Surviving Partner.]—The defendant and W. P. were partners. W. P. died and appointed the defendant his executor. In an action by a person interested under W. P.'s will against the defendant a decree was made for administration of W. P.'s estate, and for taking accounts of the partnership as between the defendant as surviving partner and W. P.'s estate. An order having been made for the production of the partnership books by the defendant, he claimed to seal up such entries as related to his own private affairs:—Held, that inasmuch as the plaintiff and defendant were both interested in the partnership property, the defendant was not entitled to the ordinary power to seal up such entries as he might swear to be irrelevant to the matters at issue in the action, but only to seal up entries which related to certain specified private matters mentioned in the order. *Pickering v. Pickering*, 25 Ch. D. 247; 53 L. J., Ch. 550; 50 L. T. 131; 32 W. R. 511—C. A.

Judgment against one Partner for Partnership Debt—Action against other Partners for Price barred.]—An unsatisfied judgment against one joint contractor on a bill of exchange, given by him alone for the joint debt, is a bar to an action against the other joint contractor on the original contract. The plaintiffs sold goods to a partnership consisting of the defendant and W. After the sale the partnership was dissolved. The plaintiffs, who were not aware of the dissolution, drew bills for the price of the goods, which were accepted by W. in the partnership name. The plaintiffs sued W. in the partnership name on the bills, and recovered judgment, which was not satisfied. The plaintiffs afterwards sued the defendant for the price of the goods:—Held, that the case was within the principle of *Kendall v. Hamilton* (4 App. Cas. 504), and the judgment against W. on the bills was an answer to the action. *Drake v. Mitchell* (3 East, 251) distinguished. *Cambeport v. Chapman*, 19 Q. B. D. 229; 56 L. J., Q. B. 639; 57 L. T. 625; 35 W. R. 838; 51 J. P. 455—D. Cp. *Hodgson*, *In re*, ante, col. 1329.

Effect of Execution for Separate Debt—Sale by Sheriff of Debtor's Interest to other Partner.]—During the temporary unsoundness of mind of the plaintiff, who was a partner with the defendant, the sheriff levied execution against his "chattel interest" in the partnership upon three judgments which had been obtained against him.

At a sale by auction by the sheriff, the defendant himself bought the interest for a sum very much below its actual value, and an assignment of the interest was executed by the sheriff to the defendant. The purchase-money was paid to the sheriff by a cheque drawn by the defendant on the partnership banking account, and the amount was debited to the plaintiff in the partnership books. The plaintiff on recovering his health brought an action to set aside the sale on the ground of undervalue and undue advantage, for a declaration that the partnership was still subsisting, for a dissolution, and for the usual accounts:—Held, that the purchase was void and must be set aside; and that under the circumstances of the present case there was no dissolution of the partnership by the seizure and sale. *Helmors v. Smith*, 35 Ch. D. 436; 56 L. T. 535; 36 W. R. 3—C. A.

Whether a sale by the sheriff of a partner's interest to his co-partner causes a dissolution, if the co-partner purchases with his own money, *quære. Ib.*

III. RIGHTS AND LIABILITIES OF PARTNERS BETWEEN THEMSELVES.

1. GENERALLY.

Contract induced by Misrepresentation—Rescission—Restitutio in Integrum.]—The respondent was induced by misrepresentations made without fraud by the appellants to become a partner in a business which either belonged to them or in which they were partners and which was in fact insolvent. The business having afterwards, owing to its own inherent vice, entirely failed with large liabilities:—Held, that the respondent was entitled to rescission of the contract and repayment of his capital, though the business which he restored to the appellants was worse than worthless, and that the contract being rescinded the appellants could not recover against him for money lent and goods sold by them to the partnership. *Adams v. Newbigging*, 13 App. Cas. 308; 57 L. J., Ch. 1066; 59 L. T. 267; 37 W. R. 97—H. L. (E.).

Continuance of Partnership after Expiration of Term—Stay of Proceedings.]—A partnership was continued after the expiration of the term specified in the articles of partnership. The articles contained an arbitration clause, providing, in effect, that all disputes or questions respecting the partnership affairs, or the construction of the articles, should be referred to arbitration. There were also clauses providing for the purchasing by the continuing partners of the share of a deceased partner. An action was brought by the executors of a deceased partner against the surviving partner for the winding-up of the partnership. The defendant moved for a stay of proceedings and a reference of the matters in difference between the parties to arbitration. One of the questions was whether it was for the court or for the arbitrators to determine which of the clauses in the articles, and in particular whether the purchasing clauses, applied to the partnership so carried on after the expiration of the term:—Held, that it was for the arbitrators, and not for the court,

to determine which of the articles applied ; and that a stay of proceedings must be directed, and a reference of all matters in difference to arbitration. *Cope v. Cope*, 52 L. T. 607—Kay, J.

Expiration of Term—Continuance without Fresh Articles—Operation of Old.—When the members of a mercantile firm continue to trade as partners after the expiration of the term limited by the partnership articles, without making any new agreement, the original contract is prolonged by tacit consent, and all its conditions remain in force, except in so far as they are inconsistent with any implied term of the renewed contract. An implied term of such a new contract is that each partner has the right, when acting *bonâ fide* and not for the purpose of obtaining an undue advantage, instantly to determine the partnership. *Neilson v. Mossend Iron Company*, 11 App. Cas. 298—H. L. (Sc.)

A clause of a contract of co-partnership provided that "If three months before the termination of this contract, the whole of the partners of the company shall not have agreed to carry on the business thereof, any one or more of them who may be desirous of retiring shall be entitled to do so, and shall immediately, on the completion of the balance after-mentioned, be paid out, by the partners electing to continue the business, his share in the concern, as the same shall be ascertained by a balance of the company's books, as at the termination of the contract to be completed, within not more than three months from said termination ; but if all the partners wish, the property and assets of the co-partnership shall be disposed of as follows :—It shall be competent for any one of the partners, for himself or for any one or more of them together, to give in offers for the same as a going concern, and the highest offerer is to be held to be the purchaser ; and in case only one offer was made, the party making it was to be the purchaser, at such a price as shall be mutually agreed, and in case no offer was made, then the said property and assets shall be realised in such manner as shall be mutually agreed upon, or as shall be fixed by the arbiter named." The business was carried on after the term limited by the contract of co-partnership had expired, without any new agreement :—Held, that this clause had no longer any application ; and that each partner was at liberty to determine the whole partnership whenever he thought proper. *Id.*

Death of Partner—Provision that Executors shall stand in his Place—Rights and Obligations of Executors and Surviving Partners.—Partnership articles provided that the partnership should last for a term of fifteen years, and that in case any of the partners should die during the continuance of the partnership, his executors or administrators should succeed to his share, and be and become partners in his place, and in respect of his share :—Held, that the court would not, on the death of a partner, force the executors to become partners against their will ; and, if they declined to come in, the partnership must be treated as dissolved from the death of the deceased partner, and wound up on that footing ; but the judgment must contain a provision, as in *Downs v. Collins* (6 Ha. 418), reserving to the surviving partners the right to prosecute against the estate of the deceased any remedy which they might have in respect of any alleged breach

of the covenant contained in the articles. *Lancaster v. Allsup*, 57 L. T. 53—Stirling, J.

—Covenant to pay Annuity for Benefit of Widow of Deceased Partner.—Articles of partnership between two solicitors provided that the partnership should be for the term of ten years from the 1st of May, 1875, if both the partners should so long live. The partnership was also made determinable by notice. There was a further provision that from the determination of the partnership the retiring partner, his executors or administrators, or the executors or administrators of the deceased partner, should be entitled to receive out of the net profits of the partnership business, during so much (if any) of the term of five years from the 1st of May, 1880, as should remain after the determination of the partnership, the yearly sum of 350*l.*, and during so much (if any) of the term of five years from the 1st of May, 1885, as either the retiring partner, or a widow of the retiring or deceased partner, should be living, the yearly sum of 250*l.*, any sum which might under this provision for the time being become payable to the executors or administrators of a deceased partner to be applied in such manner as such partner should by deed or will direct for the benefit of his widow and children, and in default of such direction to be paid to such widow, if living, for her own benefit. It was further provided that the annuity should, so far as legally might be, be constituted a charge on the net profits of the business. One of the partners died in 1883, leaving a widow, but without having given any direction as to the application of the annuity. By his will he appointed his widow his universal legatee and sole executrix. He died insolvent, and an action was brought by a creditor to administer his estate :—Held, that the annuity did not form part of the testator's estate, but that by the articles a trust of it was created in favour of the widow, and that she was entitled to it free from the claims of the testator's creditors. *Flavell, In re, Murray v. Flavell*, 25 Ch. D. 89 ; 53 L. J., Ch. 185 ; 49 L. T. 690 ; 32 W. R. 102—C. A.

Power of One Partner to Increase Capital.—In 1874 the plaintiff H. entered into partnership in a business, to be carried on at premises belonging to the defendant F. in K. Street, Dublin, with the defendants F., K. and M., who had previously carried on a similar business together as "F. & Co." in T. street, in the same city. The capital of the new partnership, which was to be managed by H., was to be 10,000*l.*, of which H. was to bring in 2,000*l.*, and the other partners the remaining 8,000*l.* out of the partnership assets of "F. & Co." H. only brought in 800*l.* at first, but with the consent of his co-partners, allowed his profits in the concern to accumulate to 1,200*l.*, and remain as capital therein. The partnership deed provided that the partners should advance the necessary capital in the proportion of their respective shares (as specified) of the profits, and that any partner advancing, with the consent of the others, more than his share, should be entitled to interest on such advance ; that each partner might from time to time withdraw the amount of surplus capital ; that F. might at any time introduce a new partner subject to relinquishing in his favour a proportionate part of the profits, and

that on a dissolution of the partnership its assets should, at F.'s election, become his property, on his paying for the same their value, with a sum equal to the profits gained during the year. The defendants throughout treated the K. street concern as a branch to T. street. At the close of the stock-taking period up to June, 1882, the plaintiff's capital in the K. street concern amounted to 5,600*l.*, and he called on the defendants to pay him the surplus of 3,600*l.* They paid him 1,000*l.*, and refused to allow him to withdraw any more, and H. then brought an action for dissolution of the partnership. The defendants alleged that F., in pursuance of his power in the deed, had in 1879 introduced a new partner into the K. street concern, who brought in 5,000*l.* capital, and that thereupon F. raised the capital of the firm from 10,000*l.* to 17,500*l.*, and the plaintiff's capital from 2,000*l.* to 3,500*l.* with his consent, and they offered to submit the matters in dispute to arbitration, pursuant to a clause in the partnership deed:—Held, that F. had no right to use his power of increasing the capital, as he had done, for the purpose of resisting the plaintiff's demand for a return of his surplus capital, and that the plaintiff was entitled to a dissolution, the accounts being taken between the parties on the basis of the clause in the partnership deed providing for the event of dissolution, although the dissolution was taking place under the order of the court, and not in pursuance of the provision of the deed. *Heslin v. Fay*, 15 L. R., Ir. 431—C. A.

Dissolution—No Arrangement as to Goodwill—Right to Firm Name.]—A firm of solicitors consisting of three partners, carried on business under the style of "Chappell, Son, & Griffith." The senior partner having died, the business was continued by the son and the junior partner under the same style for upwards of three years. The partnership was then dissolved, an agreement being executed providing for the dissolution, but containing no reference to the goodwill of the business or the sale or disposal thereof. After the dissolution, the business of a solicitor was carried on by Chappell, the Son, on the premises held by the original firm under the style of "Chappell & Son." Griffith, having taken offices a few doors off, also carried on the business of a solicitor, under the style of "Chappell & Griffith." To this Chappell objected, and having commenced an action to restrain Griffith from carrying on business under the style referred to, moved for an interim injunction. It was proved that immediately before the dissolution of the partnership, Griffith had written to Chappell, stating that he intended to carry on business under the style of "Chappell & Griffith," and making suggestions as to the style Chappell should adopt. Circulars were also forwarded by Griffith to all the clients of the old firm, informing them that he proposed to carry on the business of a solicitor by himself, and stating the style that he intended to adopt:—Held, that the *primâ facie* right of the defendant was to use the name of the old firm, no arrangement having been made as to the goodwill of the business; and from the nature of the business and from the fact that the style of the original firm had been used with a variation, there was practically no risk that the plaintiff would be exposed to injury by what the defend-

dant was doing; and that, therefore, no case had been made for the intermediate interference of the court. *Chappell v. Griffith*, 53 L. T. 459; 50 J. P. 86—Kay, J. See also *GOODWILL*.

— Joint and Several Agreement—Agreement not to carry on the Profession of a Surgeon.]—M. became assistant to H. and P., surgeons at N., and entered into a bond which recited that he was taken into their employment on the terms "that he should not at any time set up or carry on the business or profession of a surgeon" in N., or within ten miles thereof. The condition of the bond was that M. "shall not at any time hereafter directly or indirectly, and either alone or in partnership with or as assistant to any other person or persons, carry on the profession or business of a surgeon" in N., or within ten miles thereof. The partnership having been dissolved, both partners continued to practice in N., and H. engaged M. as his assistant at a salary. P. brought his action to restrain M. from acting as such:—Held, that as the agreement recited in a bond was for the protection of the business carried on by H. and P., and they had in the business a joint interest during the partnership, and several interests in the event of a dissolution, the agreement must be taken to be several as well as joint, and that P. could sue alone for a breach of it:—Held, also, that there had been a breach of it, for that a person acting as a surgeon was carrying on the profession of a surgeon, although he only acted as salaried assistant to a surgeon who carried it on for his own benefit. *Allen v. Taylor* (19 W. R. 556) distinguished. *Palmer v. Mallet*, 36 Ch. D. 411; 57 L. J., Ch. 226; 58 L. T. 64; 36 W. R. 440—C. A.

— Accretion to Capital—Distribution of Surplus Assets—Lien.]—Where in keeping their accounts partners had treated their respective shares of the declared or estimated profits of each year as accretions to their respective capitals:—Held, that the profits of the year ending with the dissolution of the firm could not be so treated; and further, that the surplus assets should be distributed by paying to each partner his claims in respect of capital standing to his credit at the dissolution. The residue or deficiency will be profits or losses, in either case divisible in the agreed proportions. The rateable application of the surplus assets in payment of capital claims must be subject to the liability to contribution to make up a deficiency, and to the claim of any of the partners against the entire assets to answer it. *Binney v. Mutrie*, 12 App. Cas. 160; 36 W. R. 129—P. C.

— Effect of Seizure and Sale.]—See *Helmore v. Smith*, ante, col. 1332.

Winding up—Receiver and Manager—Remuneration.]—A receiver and manager appointed by persons formerly partners to wind up their business, in the absence of express stipulation, entitled to a quantum meruit, and not to remuneration according to the scale laid down for official receivers, nor under the 5 per cent. rule mentioned in *Day v. Croft* (2 Beav. 488), which no longer exists. *Prior v. Bagster*, 57 L. T. 760—Stirling, J.

2. JURISDICTION OF COURTS OVER.

Refusal to Sign Notice for Insertion in the Gazette—Action to Compel.—The court has jurisdiction to compel a retiring partner to sign a notice of dissolution for the *Gazette* in an action in which no other specified relief is claimed. *Hendry v. Turner*, 32 Ch. D. 355; 55 L. J., Ch. 562; 54 L. T. 292; 34 W. R. 513—Kay, J.

Premium—Supplemental Relief—Adding Inquiry after Judgment.—Where a plaintiff, who entered into a partnership for a long term of years, and paid a premium, of which, in certain events, that did not happen, he was to have a proportion returned to him, obtained judgment for a dissolution and an order for accounts and inquiries, and after the accounts had been prosecuted, asked by summons for a direction that he was entitled to be credited with a sum as for return of premium. The court held, that though it had power to make an addition to the judgment, yet, as the plaintiff knew all the facts at the time when it was pronounced, had present to his mind the question whether he was or not entitled to any such return, and came to the conclusion that he was not, this was not a case in which the relief asked for should be granted, and dismissed the summons with costs. *Edmonds v. Robinson*, 29 Ch. D. 170; 54 L. J., Ch. 586; 52 L. T. 339; 33 W. R. 471—Kay, J.

In partnership cases relief is given by directing a return of premium as for partial failure of the consideration, but such relief ought not to be granted without the leave of the court, after decree made declaring the partnership dissolved, and directing the usual accounts to be taken; and leave ought not to be given unless the circumstances are such as would have authorised the court to give leave to bring a supplemental action. *Id.*

Form of Order—Sale of Assets.—In an action for the dissolution of a partnership an order by consent was asked for, including, amongst other inquiries, an inquiry "in what manner and upon what terms and conditions the partnership assets might be sold most beneficially for all parties interested therein."—Held, that the proper order was for sale of the assets with the judge's approbation. *Class v. Marshall*, 33 W. R. 409—North, J.

In an action for the dissolution of a partnership an order by consent was asked for, including, amongst other inquiries, an inquiry "in what manner and upon what terms and conditions the partnership assets might be sold most beneficially for all parties interested therein":—Held, that to sanction that form of inquiry might cause unnecessary expense, and that the proper form of order was a direction that the assets should be sold or otherwise disposed of with the approbation of the judge. *Page v. Slade*, 54 L. J., Ch. 1131; 52 L. T. 961; 33 W. R. 701—Chitty, J.

Receiver and Manager—Sale of Business.—The court has jurisdiction to appoint a receiver and manager of a partnership business with a view to selling the business as a going concern, notwithstanding that the partnership has expired in pursuance of the provisions to that effect contained in the partnership deed. *Taylor v. Neate*,

39 Ch. D. 538; 57 L. J., Ch. 1044; 60 L. T. 179; 37 W. R. 190—Chitty, J.

— **Interference with—Circular containing Libel on Business.**—A libel on the business carried on by a receiver and manager appointed by the court is a contempt of court, and may be punished by committal of the offender. After the court had made an order appointing a receiver and manager of a business, a former clerk of the firm sent round a circular to the customers of the firm containing an unfair statement of the effect of the order, and soliciting their custom for his own business. As he declined to give an undertaking not to repeat the offence, the judge committed him to prison for contempt of court, and the committal was upheld by the Court of Appeal. *Helmors v. Smith*, 35 Ch. D. 449; 56 L. J., Ch. 145; 56 L. T. 72; 35 W. R. 157—C. A.

PARTY-WALLS.

Damage to.—See *White v. Peto*, ante, col. 1299.

PASSENGER.

By Railway.—See CARRIER—NEGLIGENCE.

By Ships.—See SHIPPING.

PATENT.

I. FOR WHAT GRANTED, 1338.

II. SPECIFICATION, 1340.

III. INFRINGEMENT.

1. *What is*, 1343.
2. *Practice*, 1344.

IV. PETITION FOR REVOCATION, 1350.

V. RENEWAL AND PROLONGATION OF LETTERS PATENT, 1351.

VI. ASSIGNMENT AND LICENCES, 1351.

VII. PROCEEDINGS TO RESTRAIN THREATS.

1. *Generally*, 1352.
2. *Under s. 32 of the Patents Act*, 1883, 1352.

I. FOR WHAT GRANTED.

Prior Publication—Foreign Treatise—British Museum.—A French treatise was placed in the British Museum Library in 1863. The museum catalogue is kept with reference to authors' names; books are arranged according to subject matter; readers can, under guidance, search for

books on particular subjects :—Held, that there was no prior publication in England of matter contained in the treatise, so as to avoid a patent taken out in 1876. *Otto v. Steel*, 31 Ch. D. 241 ; 55 L. J., Ch. 196 ; 54 L. T. 157 ; 34 W. R. 289—Pearson, J.

— **Foreign Specification in Patent Office Library.**—In December, 1878, and February, 1880, the specifications, in the German language, with drawings, of two patents taken out in Germany, were deposited in the free public library of the Patent Office ; and the journal published periodically by the patent commissioners, amongst the list of patents granted in Germany, contained entries of the particular patents, with a note in each case that the specifications, as well as the list of applications, might be consulted in the free public library of the office. In April, 1880, a patent was obtained in this country for an invention similar to those for which the German patents had been granted : Held, that the fair and legitimate inference from the above facts was, that the public availed themselves of the facilities afforded to them for obtaining information as to the inventions, and accordingly that there was sufficient evidence of publication of the German specifications in this country prior to the date of the English patent of 1880 to avoid such patent, and that this inference was not affected by the fact that the prior specifications were in the German language. *Plimpton v. Spiller* (6 Ch. D. 412) and *Otto v. Steel* (31 Ch. D. 241) distinguished. *Harris v. Rothwell*, 35 Ch. D. 416 ; 56 L. J., Ch. 459 ; 56 L. T. 552 ; 35 W. R. 581—C. A.

Prima facie a patentee is not the first inventor, if before the date of his patent an intelligible description of his invention, either in English or in any other language commonly known in this country, was known to exist in this country, either in the Patent Office or in any other public library to which persons in search of information on the subject would naturally go for information. But if it be proved that the foreign publication, although in a public library, was not in fact known to be there, the existence of the publication in this country is not fatal to the patent. *Ib.* Per Cotton and Lindley, L.JJ.

The existence of the German specifications in the library of the Patent Office, where they were unreservedly accessible to every one, was in itself conclusive evidence of a prior publication. *Ib.* Per Lopes, L.J.

Anticipation.—The plaintiffs were the patentees of an improvement in hydraulic lifts, the novelty of their invention being the introduction of an annular area piston, by the use of which they alleged that only that portion of the water which was required for the purpose of raising the ram and cage ran to waste. The defendants had constructed hydraulic lifts which, according to the plaintiffs' allegation, were identical with those of the plaintiffs, except that the constant pressure was a weight which was applied at a different part of the machine. The defendants denied the infringement and the validity of the plaintiffs' patent, alleging that the plaintiffs' invention had been anticipated by an invention of B., the specification of which was filed a few days before that of the plaintiffs. The principal dissimilarity between the two lifts consisted in

this—that in the plaintiffs' the balancing was done by water pressure, and in the defendants' by weight applied to the plunger. The court held that the object of the plaintiffs' invention was the economy of water, which was not the object of B.'s invention ; and that, therefore, B.'s invention was not an anticipation of the plaintiffs' invention, the patent for which was valid ; also, that the patent of the plaintiffs, being for a combination, was infringed by the defendants having taken the essential part of it with a mere mechanical equivalent for the parts not taken ; and that the plaintiffs were entitled to an injunction ; but held, on appeal, without deciding the question of validity of the plaintiffs' patent on the ground of sufficiency or insufficiency of the specification, that either B. had anticipated everything used in the plaintiffs' patent, or, if there was anything in the plaintiffs' patent which was not in B.'s patent, there had been no infringement. *Ellington v. Clark*, 58 L. T. 818—C. A.

Validity—Chemical Process.—A patent for procuring colouring matters for dyeing and painting by a chemical process held valid. *Badische Anilin und Soda Fabrik v. Levinstein*, 12 App. Cas. 710 ; 57 L. T. 853—H. L. (E.).

II. SPECIFICATION.

Combination—Novelty of Parts.—Where a patent is taken out for a combination, it is not material to its validity that the specification should point out what parts are old and what are new ; though if an alleged infringement consists only in taking part of the combination, it is necessary that the patentee should in his specification have claimed the part so taken as new. Neither is it necessary that the patentee should explain the novelty and the merit of the invention. *Foxwell v. Bostock* (4 D. J. & S. 298) explained. *Proctor v. Bennis*, 36 Ch. D. 740 ; 57 L. J., Ch. 11 ; 57 L. T. 662 ; 36 W. R. 456—C. A.

Sufficiency—Disclosure.—A patent, dated as to its final specification, May, 1880, claimed an electric lamp with a carbon filament for its illuminating conductor. The patentee took out a subsequent patent, dated as to its provisional specification, December, 1879, for a method of making carbon filaments for electric lamps :—Held, that there had been no such want of disclosure as to avoid the first patent. *Edison Electric Light Company v. Woodhouse*, 32 Ch. D. 520 ; 55 L. J., Ch. 943 ; 55 L. T. 263 ; 34 W. R. 626—Butt, J.

— **"Distinct Statement of the Invention claimed."**—The enactment in s. 5, sub-s. 5, of the Patents, Designs, and Trade Marks Act, 1883, that a complete specification must end with a distinct statement of the invention claimed, is directory only, and when letters patent have been granted, they will not be invalid because it has not been complied with. *Siddell v. Vickers*, 39 Ch. D. 92 ; 59 L. T. 575—C. A.

Provisional differing from Complete.—A patent is not rendered invalid by the fact that the complete specification describes something

different from anything specifically referred to in the provisional specification, provided, that what is so described comes within the nature of the invention described in general terms in the provisional specification. *Id.*

All that a patentee need do in his provisional specification is to describe his invention. He need not go on therein to describe any method of carrying out the invention, but, whether he do so or not, if a different or further mode of carrying out the invention is described in his complete specification, that will not invalidate the patent so long as such new method of carrying out is fairly within the invention as described in the provisional specification. *Woodward v. Sansum*, 56 L. T. 347—C. A.

In an action as to the validity of a patent, the plaintiff's patent was impeached on the ground of differences between the provisional and the complete specification:—Held, that the object of the provisional specification was only to describe "the nature of the invention," pursuant to s. 8 of 15 & 16 Vict. c. 83; that it was the creature of statute, and the object of its introduction was to enable the inventor to obtain protection for his invention for six months, during which time he might use and publish his invention without prejudice to any letters patent to be granted for the same; and that its object was only to describe generally and fairly the nature of the invention, and not to enter into all the minute details of the complete specification. *Moseley v. Victoria Rubber Company*, 57 L. T. 142—Chitty, J.

If the patentee, between the time of filing the provisional and the complete specification, discovers any improvement in the manner in which the invention is to be performed, he is not merely at liberty, but is bound to give the public the benefit of his discovery. *Id.*

Amendment of—Jurisdiction of Master of the Rolls.]—The 18th section of the Patents, Designs, and Trade Marks Act, 1883, does not affect the jurisdiction of the Master of the Rolls to allow an amendment in a patent specification which has been filed under ss. 27 and 28 of the Patent Law Amendment Act, 1852, or has otherwise become a record. So long as it is in the Patent Office, and before the patent is sealed, any one applying for an amendment must proceed under s. 18 of the Act of 1883. *Garé's Patent, In re*, 26 Ch. D. 105—M. R.

—Pending Action.]—Sect. 19 of the Patents, Designs, and Trade Marks Act, 1883, applies to an action for infringement of a patent which was pending at the commencement of the act, namely, the 1st January, 1884, and the court in any such action has power under that section to give the plaintiff liberty to apply to the patent office for leave to amend his specification by way of disclaimer. *Singer v. Hasson*, 50 L. T. 326—D.

An action for infringement of a patent after judgment, although an appeal is pending, is not a pending action within s. 18, sub-s. 10, of the Patents, &c., Act, 1883, so as to exclude an application to the Comptroller under the preceding provisions of s. 18 for leave to amend the specification by way of disclaimer. Therefore an application to the court under s. 19 for leave to apply to the Comptroller was refused. *Crop-*

per v. Smith, 28 Ch. D. 148; 54 L. J., Ch. 287; 52 L. T. 94; 33 W. R. 338—Chitty, J.

The words "other legal proceedings" in s. 18, sub-s. 10, refer to a proceeding for the revocation of a patent. *Id.*

— "Pending Legal Proceeding"—Prohibition to Comptroller.]—By s. 18, sub-s. 1, of the Patents, Designs, and Trade Marks Act, 1883, "a patentee may, from time to time, by request in writing left at the Patent Office, seek leave to amend his specification . . . by way of disclaimer, correction or explanation . . ." By s. 18, sub-s. 10: "The foregoing provisions of this section do not apply when and so long as any action for infringement or other legal proceeding in relation to a patent is pending." By s. 19: "In an action for infringement of a patent and in a proceeding for revocation of a patent the court or a judge may order that a patentee shall . . . be at liberty to apply to the Patent Office for leave to amend his specification by way of disclaimer. . . ." An action having been commenced under s. 32 of the Patents, Designs, and Trade Marks Act, 1883, for an injunction to restrain patentees from issuing threats of legal proceedings and for damages, the patentees brought a cross-action for infringement of their patent. The patentees then applied in the cross-action and obtained a judge's order under s. 19 giving them liberty to apply to the Comptroller-General of Patents for leave to amend their specification by way of disclaimer. Upon an application for a writ of prohibition to the Comptroller-General to prevent him from hearing the application upon the order:—Held, that the judge had jurisdiction to make the order notwithstanding that the action under s. 32 had not been concluded, and that the application for a prohibition must be refused. *Hall, In re*, 21 Q. B. D. 137; 57 L. J., Q. B. 494; 59 L. T. 37; 36 W. R. 892—D.

— Terms on which Leave Granted.]—On a motion, under s. 19 of the Patents, Designs, and Trade Marks Act, 1883, by the plaintiffs in an action for infringement of their patent dated in 1885, for liberty to apply at the Patent Office for leave to amend their specification by disclaimer, an order was made granting the leave asked for on the following terms, no statement of claim or defence having yet been delivered; no further proceedings to be taken in the action until the disclaimer had been properly made, and, if so made, the plaintiffs to pay the defendants' party and party costs of the action up to disclaimer; the plaintiffs to undertake forthwith to take proceedings for disclaimer and then to amend their action by stating the disclaimer, founding the action simply upon the specification as amended. *Fusee Vesta Company v. Bryant and May*, 34 Ch. D. 458; 56 L. J., Ch. 187; 56 L. T. 110; 35 W. R. 267—Kay, J.

Where the plaintiff in an action for infringement of a patent asks for leave to apply at the Patent Office to amend his specification by way of disclaimer, the court will as a general rule impose the condition that the amended specification shall not be receivable in evidence in the action, though in particular cases less stringent terms may be imposed. *Bray v. Gardiner*, 34 Ch. D. 668; 56 L. J., Ch. 497; 56 L. T. 292; 35 W. R. 341—C. A.

In a patent action for infringement, after all

the pleadings had been delivered, so that nothing remained to be done but to prepare the evidence for trial, the plaintiffs asked, under s. 19 of the Patents, Designs, and Trade Marks Act, 1883, for liberty to apply for leave to disclaim one of the claims of their specification. The application was granted on the following terms:—The plaintiffs to pay in any event the costs of the application, and the costs of action up to and occasioned by the disclaimer, except only so far as the proceedings in the action might be utilised for the purposes of the amended action. The plaintiffs and the defendants to be allowed to make all necessary amendments in their pleadings after disclaimer. The plaintiffs to undertake forthwith to amend their pleadings, confining the action to the specification as amended by the disclaimer, or to consent to the action being dismissed with costs. In the event of trial all other questions of costs reserved. *Fusee Vesta Company v. Bryant* (34 Ch. D. 558) distinguished. *Haslam Foundry and Engineering Company v. Goodfellow*, 37 Ch. D. 118; 57 L. J., Ch. 245; 57 L. T. 788; 36 W. R. 391—Kay, J.

Pending an action for infringement of several patents, leave was given to the plaintiffs to apply at the Patent Office to amend one of the specifications by way of disclaimer, and to give the amended specification in evidence at the trial, on the terms of the plaintiffs paying all the costs of the action up to the time of leave being given, and waiving all claim to recover damages for infringements prior to the amendment. *Gaulard v. Lindsay*, 38 Ch. D. 38; 57 L. J., Ch. 687; 52 L. T. 44—C. A.

A petition for revocation of a patent which was presented in December, 1886, was set down for hearing as an action with witnesses, and the hearing being imminent in November, 1887, the patentees applied for liberty to apply to amend their specification and a postponement of the hearing. The application was granted upon terms of the applicants prosecuting with diligence their proposed application for leave, and paying all costs of the petition up to and including the application itself. *Gaulard & Gibbs' Patent In re*, 57 L. J., Ch. 209—Kekewich, J.

III. INFRINGEMENT.

1. WHAT IS.

Importation and User of Apparatus made Abroad.—User for Experiment.—User of a pirated article for the purpose of experiment and instruction is user for advantage, and an infringement of the patent. The defendant, an English electrician, purchased and imported from foreign manufacturers apparatus which if made here would have infringed the plaintiff's patent. The defendant maintained that he had only purchased the apparatus for examination and experiment by himself and his pupils, as certain royalty-paid instruments in his possession were too expensive to be taken to pieces; and he insisted that he had never sold, and had never otherwise used the apparatus:—Held, that such user of the pirated apparatus by the defendant was a user for advantage and an infringement of the patent. *United Telephone Company v. Sharples*, 29 Ch. D. 164; 54 L. J., Ch. 633; 52 L. T. 384; 33 W. R. 444—Kay, J.

Combination.—A patent for a combination of known mechanical contrivances producing a new result:—Held, to be infringed by a machine producing the same result by a combination of mechanical equivalents of the above contrivances, with some alterations and omissions, which did not prevent the new machine from being one which took the substance and essence of the patented invention. *Curtis v. Platt* (35 L. J., Ch. 852) distinguished. *Proctor v. Bennis*, *infra*.

Possession of Infringing Machines.—Defendants, a telephone company, contracted with an American agent for the purchase of a number of telephones. These machines, known as Blake transmitters, having been accordingly made in America, were sent to this country, and came into the possession of the defendants, who kept them unused in a warehouse. The Blake transmitters were protected by English and American patents. The plaintiffs, another telephone company, having in the meantime obtained an assignment of Blake's English patent, brought an action for infringement, claiming an injunction and delivery up of the machines. Defendants dismantled the machines by taking out the Blake elements, and kept the separate parts stored in a warehouse:—Held, that the possession of the machines by the defendants was an infringement of the plaintiffs' patent rights, and injunction granted; the court refusing to order the destruction or the delivery up of the infringing machines. *United Telephone Company v. London and Globe Telephone and Maintenance Company*, 26 Ch. D. 766; 53 L. J., Ch. 1158; 51 L. T. 187; 32 W. R. 870—V.-C. B.

Sale of Component Parts of Infringing Machine.—Semble, that an injunction granted to restrain the sale of a complete machine, the subject of a patent, will be violated by a sale of the component parts of the machine in such a way that they can easily be put together by anyone. *United Telephone Company v. Dale*, 25 Ch. D. 778; 53 L. J., Ch. 295—Pearson, J.

2. PRACTICE.

Acquiescence.—Estoppel.—In an action by P., a patentee for infringement against persons who had bought machines from B., it was proved that P. had asked the purchasers to try his machine, saying that it was a better machine than B.'s, but gave no intimation that he considered B.'s machine an infringement of his patent, though he admitted that at the time he did consider it to be so:—Held, that as the purchasers did not depose that when they bought B.'s machines they were ignorant of P.'s patent, nor was there any reason to believe that they were ignorant of it, or that P. supposed them to be so; P. had not on the ground of acquiescence, or estoppel, lost his right to sue them for an infringement in using B.'s machines, it not being the duty of a patentee to warn persons that what they are doing is an infringement, and P.'s conduct not amounting to a representation that it was not an infringement. *Proctor v. Bennis*, 36 Ch. D. 740; 57 L. J., Ch. 11; 57 L. T. 662; 37 W. R. 456—C. A.

Inspection of Process carried on under

Patent.—The plaintiffs, assignees of a patent for an invention in grinding meal and flour, by their specification claimed the discovery of a new process or product, but not any novelty in machinery. They obtained an order for inspection of the process of the defendants, in pursuance whereof they had taken ninety-three samples. The defendants applied for an order giving them a like liberty to inspect the process of the plaintiffs and to take samples:—Held, that both the court and the defendants would be at a disadvantage if the latter were not in a position at the hearing to describe the process which the plaintiffs actually carried on under their patent, and that therefore the defendants ought to be allowed to have the inspection for which they asked and to take samples. *Germ. Milling Company v. Robinson*, 55 L. J., Ch. 287; 53 L. T. 696; 34 W. R. 194—Kay, J.

Particulars of Breaches and Objections—Sufficiency.—The sole subject of Indian Act XV. of 1859, s. 34, corresponding with s. 41 of the English Patent Law Amendment Act, 1852, is to give the defendant fair notice of the case which he has to meet; and it is quite immaterial whether the requisite information be given in the plaint itself or in a separate paper. Particulars of breaches must be distinguished from particulars of objection for want of novelty. In the latter case the particular instances may not be within the knowledge of the patentee and must be specified; in the former the defendant must know whether and in what respect he has been guilty of infringement. Where three patents of the plaintiff all related to one article, a kiln for burning bricks, and the second and third in date were for improvement upon the invention specified in the first, and the plaintiff alleged a particular kiln constructed and used by the defendant, and in his plaint not only referred to his patents, but indicated in the case of each of them the infringement which he complained of:—Held, that this was a sufficient compliance with the act. *Talbot v. La Roche* (15 C. B. 310) and *Needham v. Oxley* (1 H. & M. 248), approved. Appeal and suit, however, dismissed for want of jurisdiction to try it. *Ledgard v. Bull*, 11 App. Cas. 648—P. C.

—**Infringement of Two Patents—Discontinuance as to one.**—An action was brought by the registered owner of two letters patent, for similar inventions dated in 1883 and 1884, against the defendants for the infringement of both such patents. One of the defendants was the registered owner of letters patent for a similar invention. Particulars of breaches were delivered by the plaintiff complaining generally of infringement of both patents, without in any way distinguishing between them. The defendants delivered particulars of objection, and also their answers to interrogatories which had been delivered by the plaintiff. The plaintiff then discontinued the action so far as related to the patent of 1884. Subsequently, the defendants delivered interrogatories as to the alleged infringements, and as to documents in his possession relating to the preparation of the specifications of both patents:—Held, that the plaintiff need give no further answer as to the particulars of breaches, but that the plaintiff's answer as to documents was insufficient, inasmuch as it did not distinguish communications between himself

and his solicitor as such, and communications between himself and his solicitor in his character of patent agent, communications of the former class alone being privileged. *Moseley v. Victoria Rubber Company*, 55 L. T. 482—Chitty, J.

Held, also, that the defendants had the right to inspect communications between the plaintiff and his patent agent which related to the preparation of the specification of 1884, both the inventions patented being so connected that evidence material to the issue might be disclosed by such inspection. *Id.*

Particulars of Objections—Several Defendants.—A patentee having gone into liquidation his trustee in liquidation assigned the patent. The patentee afterwards went into a trade partnership with S. The assignees of the patent brought an action against the patentee and S. for an injunction and damages for infringements of the patent alleged to have been committed in partnership. The defence alleged the invalidity of the patent, and the defendants delivered particulars of objections, viz., that the defendants would deny the infringement, and that the defendant S. would rely on their objections to the validity of the letters patent on the ground of want of novelty and insufficiency of the specification:—Held, that under 15 & 16 Vict. c. 83, s. 41, it was not necessary for every one of two or more defendants defending in the same interest to deliver particulars of objections, and that the patentee was not precluded from setting up at the trial the invalidity of the patent on the ground of want of novelty and insufficiency of the specification. *Smith v. Cropper*, 10 App. Cas. 249; 55 L. J., Ch. 12; 53 L. T. 330; 33 W. R. 753—H. L. (E.).

—**Anticipations.**—In an action for infringement of a patent for complicated machinery where the specification contained seventeen separate claims, the defendant delivered particulars of objections, under s. 29 of the Patents, &c., Act, 1883, alleging (1) prior publication by articles made according to the supposed invention being publicly exhibited in use by H. & Son; and (2) prior publication in certain specifications which were enumerated and identified with references to pages and lines. The plaintiff applied for further and better particulars:—Held, (1) that the defendant ought to specify the particular machines or articles which were alleged to be anticipations of the plaintiff's patent; but that he need not state the parts of the plaintiff's invention which were anticipated thereby, as the plaintiff must be taken to know his own invention:—Held, (2) that the defendant must state which of the plaintiff's claims he alleged to be anticipated by the respective specifications mentioned; and that, therefore, the particulars required must be given. *Boyd v. Farrar*, 57 L. T. 866—Kay, J.

—**Specification not Sufficient.**—The defendant in an action for the infringement of a patent denied the validity of the patent, and stated the objection that the specification did not sufficiently describe the nature of the invention and how it was to be performed. In compliance with an order for further particulars he repeated the above objection, with the addition that the specification did not contain a sufficient

direction to enable skilled workmen to make a machine having the advantages alleged by the inventor. The court ordered further particulars and the defendant appealed:—Held, that this order ought to be affirmed, for that, if the defendant knew of a particular defect in the specification, he ought to point it out, that the plaintiff might not be taken by surprise. *Crompton v. Anglo-American Brush Electric Light Corporation*, 35 Ch. D. 283; 56 L. J., Ch. 802; 57 L. T. 291; 35 W. R. 789—C. A.

— **Non-conformity between Provisional and Complete Specifications.**—Where the defendant in a patent action objects to the validity of the plaintiff's patent on the ground that there is want of conformity between the provisional and complete specifications, it is not sufficient for him to state in his particulars of objection that the invention described in the complete specification is not the same as the invention described in the provisional specification; he must state in what the difference consists. *Anglo-American Brush Electric Light Corporation v. Crompton*, 34 Ch. D. 152; 56 L. J., Ch. 167; 55 L. T. 722; 35 W. R. 125—C. A.

— **Amendment of—Costs.**—In granting the defendants in a patent action leave to amend the particulars of objection, the court, even where the plaintiff, the patentee, has been aware of the existence of the alleged anticipation before the commencement of the action, will impose terms upon the defendants which will place the plaintiff in the same position as if the amended particulars had been those originally delivered with the defence. *Ehrlich v. Ihlee*, 56 L. T. 819—Chitty, J.

— **Application at Trial for Amendment of.]**—During the trial of a patent action, after the examination and cross-examination of the plaintiff had been concluded, the defendant asked for leave to apply for the postponement of the trial and to amend the particulars of objection, alleging that since the conclusion of the cross-examination he had discovered new facts showing that the alleged invention was not new at the date of the patent. No affidavit was tendered in support of the application, but the defendant asked to be allowed to recall the plaintiff, or to go into the box himself to prove the new facts:—Held, that the application must be refused. *Renard v. Levinstein* (13 W. R. 229), distinguished. *Moss v. Malings*, 33 Ch. D. 603; 56 L. J., Ch. 126; 35 W. R. 165—North, J.

— **Costs in Palatine Court—Nonsuit.**—In an action in the Court of the County Palatine to restrain infringement of a patent, the defendants delivered particulars of objection. At the trial the judge held the patent invalid for an objection appearing on the face of it, and dismissed the action with costs, stating his opinion that the defendants ought to have the costs of the witnesses brought up to support their particulars of objection, though they had not been called, as the plaintiffs virtually had been non-suited. On taxation the registrar disallowed these costs, but the Vice-Chancellor held that they must be allowed. On appeal:—Held, that neither Lord Cairns' Act, nor Sir J. Rolt's Act made it obliga-

tory on a court of equity to follow the rule as to costs of particulars of objections laid down by the Patent Laws Amendment Act, 1852, s. 43, and that the rule which applied to courts having no discretion as to costs ought not to be followed by analogy by a court which had discretion as to costs; that therefore the Vice-Chancellor had power to give these costs, and that they must be allowed. *Parnell v. Mort*, 29 Ch. D. 325; 53 L. T. 186; 33 W. R. 481—C. A.

— **Grant of Certificate—Jurisdiction of Court of Appeal.**—In an action for infringement of a patent, the defendant disputed its validity, delivered particulars of objections, stating the grounds, and adduced evidence in support thereof. At the trial judgment was given in favour of the plaintiff, and the validity of the patent was upheld. On appeal this judgment was reversed and the patent was declared invalid. The defendant, the successful appellant, applied to the Court of Appeal for a certificate under s. 29, sub-s. 6 of the Patents Act, 1883, that the particulars of objection delivered by him were reasonable and proper:—Held, that the Court of Appeal, having power to make such order as ought to have been made in the first instance, had power to grant—and under the circumstances of the case, would grant—such certificate. *Cole v. Saqui*, 40 Ch. D. 132; 58 L. J., Ch. 237; 59 L. T. 877; 37 W. R. 109—C. A.

— **Grant of Certificate—In what Cases—Evidence.**—On an application for a certificate that particulars are reasonable and proper under s. 29, sub-s. 6 of the Patents, Designs, and Trade Marks Act, 1883, it is not enough that such particulars do not appear to the court to be otherwise than reasonable and proper, but the court must be satisfied that they are reasonable and proper; and, for the purpose of determining this question, the court will rely solely upon knowledge derived from the trial of the action, and where an action comes to an end without both sides being heard, will not allow additional evidence to be adduced. The court will not grant a certificate to a party who is not entitled to any costs of the action. *Germ Milling Company v. Robinson*, 55 L. T. 282—Stirling, J.

Certificate of Validity of Patent—Appeal.—By s. 31 of the Patents, Designs, and Trade Marks Act, 1883, in an action for infringement of a patent, the court or a judge may certify that the validity of the patent came in question:—Held that, such a certificate is not a judgment or order against which an appeal lies to the Court of Appeal under s. 19 of the Judicature Act, 1873. *Haslam Engineering Company v. Hall*, 20 Q. B. D. 491; 57 L. J., Q. B. 352; 59 L. T. 102; 36 W. R. 407—C. A.

— **Defendant cannot obtain.**—A certificate under 15 & 16 Vict. c. 83, s. 43, that the validity of a patent came in question in the action, cannot be obtained by the defendant in an action for infringement. *Badische Anilin und Soda Fabrik v. Levinstein*, 29 Ch. D. 366; 53 L. T. 750—C. A. See S. C. in H. L. ante, col. 1340.

Measure of Damages.—In an action by the

pursuers, who were assignees of a patent for the manufacture of horse-shoe nails, for damages caused by the infringement of the patent, it appeared that the pursuers did not grant licences, but themselves manufactured and sold the nails made by their patented machinery, and it was admitted that a number of boxes of nails manufactured in such a manner as to infringe the patent had been sold by the defenders:—Held, that to the extent by which their trade was injured by the defenders' sales the pursuers were entitled to substantial damages; that the measure of damages was the amount of profit which they would have made if they had themselves effected such sales, deducting a fair percentage in respect of sales due to the particular exertions of the defenders, and that the mere possibility that the defenders might have manufactured and sold an equal quantity of similar nails without infringing the patent was no ground for reducing the damages to a nominal sum; and further, that the fact that the pursuers had in consequence of the unlawful competition of the defenders reduced the price of nails which they had themselves sold did not entitle them to recover additional damages in respect of the reduction in the profits of such sales. *United Horse-Shoe and Nail Company v. Stewart*, 13 App. Cas. 401; 59 L. T. 561—H. L. (Sc.).

— **Royalty—Set-off—Delivery up of Instruments.**—Judgment having been recovered for the infringement of a patent, an inquiry as to damages was directed. It appeared that the plaintiffs' usual practice was not to sell, but to let out the patented article at a rental or royalty:—Held, that the measure of damages was the profit rental of the article during the entire period from the time when it came into the possession of the infringer until the assessment of the damages or the date of its delivery up; and that it was immaterial, for the purposes of assessment, whether the article had or had not been in actual use during any portion of that period; and, also, that the defendants were not entitled to set off against the damages, the value of any infringing article delivered up under the judgment of the court, nor to set off any portion of an agreed sum for damages for infringement recovered by the plaintiffs in a previous action against the manufacturer from whom the defendants bought the article, although the period in respect of the rental payable by the defendants as damages commenced at a date antecedent to the commencement of the action against the manufacturer; but, that if the damages recovered by the plaintiffs from the manufacturer, instead of being an agreed sum, had been a sum representing the full rental, or royalty, the defendants would have been entitled to a set-off. *United Telephone Company v. Walker*, 56 L. T. 508—Chitty, J.

Costs—Plaintiff partially successful.—A patentee failed in establishing the validity of a patent, but succeeded on the issue of infringement:—Held, that the plaintiff must pay the general costs of the action, but that the defendant must pay the costs occasioned by the issue of infringement, the one set of costs to be set off against the other. *Badische Anilin und Soda Fabrik v. Levinstein*, 29 Ch. D. 366; 53 L. T. 750—C. A. See S. C. in H. L. ante, col. 1340.

IV. PETITION FOR REVOCATION.

Alleged Fraud on Rights of Petitioner—Non-Disclosure in Specification of Fact of Communication from Abroad.—Sect. 26, sub-s. 4 (c), of the Patents, Designs, and Trade Marks Act, 1883, applies only to cases of fraud, and will not be extended to cases of mistake, though the consequences may be to deprive the inventor of his patent rights. *Avery's Patent, In re*, 36 Ch. D. 307; 56 L. J., Ch. 1007; 57 L. T. 506; 36 W. R. 249—C. A.

A., a subject of the United States of America and resident there, gave a power of attorney to W., his agent in England, with instructions to obtain a patent in this country. W. employed L. as his substitute under the power of attorney to obtain the patent, and L. took out a patent in his own name for the invention, together with some improvements which he had made himself, without stating in the specification that it or any part of it was a communication from abroad, and made a statutory declaration that he was himself the first and true inventor. L. had no fraudulent intention in taking out the patent in this form, and acted under the advice of a competent patent agent. A petition was presented under the Patents, Designs, and Trade Marks Act, 1883, s. 26, sub-s. 4 (c), by K. an attorney appointed by A., alleging that the patent was granted "in fraud of the rights of A.," and asking for the revocation of the patent, and a declaration that A. was the first and true inventor. The petition contained no distinct allegation that A. was the first and true inventor. The petition was ordered to be amended by making A. sole petitioner, and all persons beneficially interested in the patent respondents:—Held, that even if the patent was void by reason of the non-disclosure in the specification of the communication from abroad, as there was no proof of any intention on the part of the patentee to deprive A. of his rights, the petition could not be sustained under section 26, sub-s. 4, clause (c), of the Patents Act, 1883, and it was dismissed without prejudice to any petition which A. might be advised to present under clause (d), as a person claiming to be the first and true inventor. *Id.*

Person entitled to Present.—A petition was presented under sub-s. 4 (e) of s. 26 of the Patents, &c., Act, 1883, for the revocation of a patent for an invention of improvements in carriages. The petitioner alleged that he had, many years prior to the date of the patent, publicly made and sold carriages made according to the alleged invention; and that, by reason of the matters set forth in the petition, and of the other matters appearing in the particulars of objections delivered therewith, the letters patent were invalid. The preliminary objection was taken that the petitioner, by referring to "other matters appearing in the particulars of objections," which related to alleged acts of prior user by other persons than himself, had failed to bring himself within the strict definition of the persons authorised by s. 26, sub-s. 4 to present a petition for revocation, and that therefore the authority of the Attorney-General was required before the petition could be presented:—Held, that s. 26, sub-s. 4 merely contained a description of the various classes of persons who might apply

to the court for revocation; that any person having any of the qualifications therein mentioned might apply; and that the fact that the petitioner had further objections to the validity of this patent was no ground for regarding him as having failed to bring himself within the strict definition of the section. *Morgan's Patent, In re*, 58 L. T. 713—Chitty, J.

Discovery — Practice as to.—The ordinary practice as to discovery is applicable to a petition for the revocation of a patent under the Patents, Designs, and Trade Marks Act, 1883, s. 26. *Hadden's Patent, In re*, 54 L. J., Ch. 126; 51 L. T. 190; 33 W. R. 96—Kay, J.

Trial with vivâ voce Evidence.—A petition for the revocation of a patent having been presented under s. 26 of the Patents Act, 1883:—Held, that the respondents were entitled as they desired it, to have the petition tried with vivâ voce evidence. *Gaulard & Gibbs' Patent, In re*, 34 Ch. D. 396; 56 L. J., Ch. 606; 56 L. T. 284; 35 W. R. 301—North, J.

V. RENEWAL AND PROLONGATION OF LETTERS PATENT.

Effect of Patent Act, 1883.—The enactments of 46 & 47 Vict. c. 57, do not affect any patent granted before the commencement of the act, nor any right or privilege which had accrued to the patentee before or at the commencement of the said act, including the privilege of applying for a renewal. *Brandon's Patent, In re*, 9 App. Cas. 589; 53 L. J., P. C. 84—P. C.

Accounts of Foreign Profits.—The Patent Act, 1883 (46 & 47 Vict. c. 57), s. 25, cl. 4, does not alter the rules adopted by the judicial committee. It is the duty of a patentee applying for a prolongation to produce accounts of all the profits received under foreign patents in respect of his invention. *Newton's Patents, In re*, 9 App. Cas. 592; 52 L. T. 329—P. C.

Account of Receipts not Filed.—A petition for prolongation was dismissed on the ground that proper accounts had not been produced to show the remuneration of the patentee. Rule 9 not having been complied with, a postponement to amend the accounts filed was refused. *Yates & Kellett's Patent, In re*, 12 App. Cas. 147; 57 L. J., P. C. 1—P. C.

VI. ASSIGNMENT AND LICENCES.

Assignment—Estoppel of Patentee.—If a patentee becomes bankrupt, and his trustee in bankruptcy assigns the patent, the patentee is not estopped from afterwards denying the validity of the patent, as against the assignee. *Smith v. Cropper*, 10 App. Cas. 249; 55 L. J., Ch. 12; 53 L. T. 330; 33 W. R. 753—H. L. (E.)

Licence to Manufacture in one Country—Right to Sell in another.—The defendants, an English company, who were owners of patents in England and Belgium for an invention for ornamenting glass, granted to the plaintiffs, a company incorporated and carrying on business in Belgium, a licence to employ the invention for

making glass at their factory in Belgium and not elsewhere. By the terms of the licence, all points in difference were to be submitted to arbitration in Belgium. The plaintiffs, assuming their right to do so, sold in England goods manufactured by them under the licence, whereupon the defendants issued circulars warning persons in the trade that the sale in England of glass articles made abroad by employing their inventions, was a violation of their English patent. On application for an injunction to restrain the issue of such circulars:—Held, that the licence did not imply a right to sell goods made by the plaintiffs under the licence in any country where the sale would be a violation of the patent law of the country. *Société Anonyme des Manufactures de Glaces v. Tilghman's Patent Sand Blast Company*, 25 Ch. D. 1; 53 L. J., Ch. 1; 49 L. T. 451; 32 W. R. 71; 48 J. P. 68—C. A.

Quære, whether the plaintiffs, if assignees of the Belgian patent, would have had the right to sell in England goods manufactured under that patent in Belgium. *Id.*

VII. PROCEEDINGS TO RESTRAIN THREATS.

1. GENERALLY.

Issue of Warning Circular by Patentees—Action to restrain.—The plaintiffs were the makers of "Rainbow Water Raisers or Elevators," and they commenced an action for an injunction to restrain the defendants from issuing a circular cautioning the public against the use of such elevators as being direct infringements of certain patents of the defendants. The plaintiffs subsequently gave notice of a motion to restrain the issue of this circular until the trial of the action. The defendants then commenced a cross action, claiming an injunction to restrain the plaintiffs from infringing their patents:—Held, that as there was no evidence of mala fides on the part of the defendants, they ought not to be restrained from issuing the circular until their action had been disposed of, but that they must undertake to prosecute their action without delay. *Household v. Fairburn*, 51 L. T. 498—Kay, J.

2. UNDER S. 32 OF THE PATENTS ACT, 1883.

Threats by "Circulars, Advertisements, or otherwise"—Private Letter.—Threats "by circulars, advertisements, or otherwise" (Patents, Designs, and Trade Marks Act, 1883, s. 32), include threats by private letter to the person charged with infringement, the words "or otherwise" not being restricted, on the ejusdem generis principle, to "or other means such as circulars or advertisements." The solicitors to the defendants, a company, sent a letter to the plaintiffs, another company, alleging an infringement of patents claimed by the defendants, and stating that unless the plaintiffs forthwith discontinued the infringement legal proceedings would be taken. The defendants not having followed up the letter by legal proceedings, the plaintiffs brought an action for an injunction, under s. 32 of the Patents, Designs, and Trade

Marks Act, 1883, to restrain them from making or continuing threats of legal proceedings. The defendants delivered a defence alleging that the plaintiffs had infringed the patents, but afterwards, by amendment, struck out the allegation:—Held, that the plaintiffs were entitled to a perpetual injunction, with costs. *Driffield Linseed Cake Company v. Waterloo Mills Company*, 31 Ch. D. 638; 55 L. J., Ch. 391; 54 L. T. 210; 34 W. R. 360—V.-C. B.

Threats, what are—"Without Prejudice."]

Although a threat, to come within s. 32 of the Patents Act, 1883, must not be merely a warning about something that is going to be done, it need not be limited to what has passed. There must be, at the time the threat is made, something in respect of which an action could be brought by the person threatening. A letter written "without prejudice," alleging infringement and threatening proceedings if infringement is continued, is a threat within the Act. Or, if the parties arrange a meeting "without prejudice," and similar words are spoken, this also is such a threat. *Kurtz v. Spence*, 57 L. J., Ch. 238; 58 L. T. 438—Kekewich, J.

Issue of Advertisements pending Trial of Action stating that Defendants had Infringed.]

Pending the trial of an action for the infringement of certain patents the plaintiffs in the action issued advertisements stating that, in consequence of the continued infringement of their patents by the defendants, they had commenced an action against them to restrain them from infringing such patents; and that actions would be commenced against all persons employing or using apparatus which was not according to the letters patent without the leave of the patentees:—Held, that the plaintiffs were not justified in issuing such advertisements, notwithstanding s. 32 of the Patents, Designs, and Trade Marks Act, 1883. *Goulard v. Lindsay*, 56 L. T. 506—Kay, J.

Disclaimer after Commencement of Action.]

—An action having been commenced by patentees in respect of an alleged infringement of their patent, they subsequently applied to the court, under s. 19 of the Patents, Designs, and Trade Marks Act, 1883, before any defence to the action had been delivered, that they might be at liberty to apply at the Patent Office for leave to amend their specification by disclaiming a portion thereof, and that pending the decision of such application all further proceedings in the action might be stayed. The court granted the liberty asked for, but imposed the following terms: That no further proceedings should be taken in the action until the disclaimer had been properly made; that if the disclaimer were made the plaintiffs must pay all the defendants' costs of the action up to the disclaimer, as between party and party; that the plaintiffs must undertake forthwith to take proceedings to amend their specification by disclaimer, founding their action simply upon the specification as amended; and that, if that course were not adopted, the action must stand dismissed. Shortly after such order was made the plaintiffs sent circulars to customers of the defendants threatening legal proceedings. The defendants then moved, under s. 32 of the Patents, &c., Act, 1883, that notwithstanding the stay of proceed-

ings under the previous order, the plaintiffs might be restrained from threatening by circulars, advertisements, or otherwise, any other person with legal proceedings in respect of the manufacture or sale of the fuseses, vestas, or other articles made under the patent. The plaintiffs contended that the defendants could not move for an injunction unless they brought a cross-action or put in a counterclaim. The answer to that was, that in the present state of the proceedings the defendants could not bring in a counterclaim; but they undertook to deliver one as soon as they were in a position to do so:—Held, that there had been a threat of legal proceedings; and that the court had jurisdiction to grant the injunction asked for. *Fussee Vesta Company v. Bryant and May*, 56 L. T. 136—Kay, J.

Proof of Validity of Patent.]

—In an action under section 32 of the Patents Act, 1883, the mere production by the patentee of his letters patent does not prove his "legal right;" he must support their validity. The grant of letters patent to two persons for similar inventions does not decide how far the inventions are identical. A. files his provisional specification. B., having at that time made independently a similar discovery, comes the next day with his provisional specification. Subsequently B. obtains letters patent. Afterwards A. applies for letters patent. A. can obtain letters patent only so far as not to cover B.'s invention. In case of two grants to different persons for the same invention, the court is not bound by the dates of the patents, or by the fact that the rival patentees had contested their claims to priority of grant before the law officer of the Crown. *Kurtz v. Spence*, 58 L. T. 438—Kekewich, J.

In an action commenced under s. 32 of the Patents, Designs, and Trade Marks Act, 1883, for an injunction to restrain a patentee from issuing threats of legal proceedings, the validity of the patent cannot be tried, the only issue in such an action being infringement or no infringement. So, where in an action commenced under the above section, the plaintiffs in their statement of claim alleged that the defendants' patent was invalid, such allegation was ordered to be struck out. *Kurtz v. Spence*, 33 Ch. D. 579; 55 L. J., Ch. 919; 55 L. T. 317; 35 W. R. 26—Chitty, J.

An applicant moved for an injunction to restrain the publication of advertisements, which alleged that an invention claimed by him was an infringement of patent rights belonging to the advertisers, and which threatened legal proceedings against purchasers from the applicant. The respondents, who were the advertisers, raised a case of alleged infringement by their affidavits, but declined to institute legal proceedings against the applicant in respect of such alleged infringement:—Held, that the applicant, as a condition precedent to obtaining the injunction, must show that there had been no infringement on his part; and that, as the respondents had raised a case of alleged infringement by their affidavits in opposition to the motion, the injunction would not be granted, even though the respondents declined to take legal proceedings against the applicant. *Barney v. United Telephone Company*, 28 Ch. D. 394; 52 L. T. 573; 33 W. R. 576—Chitty, J.

Semble. in an action under s. 32 of the

Patents Act, 1883, to restrain a patentee from issuing threats, the validity of the defendant's patent may be called in question. *Kurtz v. Spence* (33 Ch. D. 579) disapproved. *Challender v. Royle*, infra.

Validity of Defendants' Patent—Amendment—Delay.—An action was brought under s. 32 of the Patents, Designs, and Trade Marks Act, 1883, to restrain a patentee from issuing threats, and in their statement of claim the plaintiffs alleged that the defendants' patent was invalid. This allegation was struck out, the judge being of opinion that the validity of the defendants' patent could not be tried in such an action. Nearly a year afterwards, and after the time for appealing had expired, in consequence of an opinion expressed by the Court of Appeal in another case, the plaintiffs applied for an extension of time for appealing from this order, and also for liberty to amend the statement of claim by inserting the allegation that the defendants' patent was invalid:—Held, that the time for appealing ought to be extended, but the plaintiffs should have the option of having the action dismissed without prejudice to any new action for the same purpose:—Held also, that liberty to amend ought to be given upon special terms so as to prevent the defendants from suffering any loss from the plaintiffs not having appealed within the proper time. *Kurtz v. Spence*, 36 Ch. D. 770; 58 L. T. 320; 36 W. R. 438—C. A.

Objections to Patent—Particulars of Objection.—The plaintiffs brought an action to restrain the defendants, who were holders of various patents for electric accumulators, from threatening the plaintiffs' customers with legal proceedings for infringement, and by their statement of claim alleged that the defendants' patents were invalid. No specific statement had been made by the defendants which patents they alleged to be infringed. The defendants, who had not delivered a defence, applied for particulars of objections, and the plaintiffs were ordered to deliver particulars of objections within a limited time after the defendants had given to the plaintiffs a list of the patents on which the defendants intended to rely. The defendants appealed, asking for an unconditional order on the plaintiffs to deliver objections:—Held, that the order under appeal was right, but that the defendants ought also to state that they relied on no other patents than those in the list, and that the plaintiffs ought to undertake, when the list had been delivered, to amend their statement of claim so as to define the patents the validity of which they disputed. *Union Electrical Power and Light Company v. Electrical Storage Company*, 38 Ch. D. 325; 59 L. T. 427; 36 W. R. 913—C. A.

Injunction to restrain—Due Diligence.—C., a patentee, brought an action under s. 32 of the Patents Act of 1883 against R., a prior patentee of a similar invention, to restrain R. from issuing threats of legal proceedings against persons selling C.'s patent articles. Shortly after C. had sued out his writ, but before it had been served, R. had commenced an action for infringement against the P. Co., who were selling C.'s articles:—Held, that the action mentioned in the proviso to s. 32 as taking a

case out of the section need not be an action against the person who is suing to restrain the threats, but that an action for infringement honestly brought with reasonable diligence against any of the persons who have been threatened, will, if duly prosecuted, satisfy the proviso. That in considering whether such an action is brought with due diligence, the time of issuing the threats, and not the time when the party bringing the action first knew of the acts which he alleges to be infringements, is the period to be looked to. *Challender v. Royle*, 36 Ch. D. 425; 56 L. J., Ch. 995; 57 L. T. 734; 36 W. R. 357—C. A.

Balance of Convenience and Inconvenience.]

—In order to obtain an interlocutory injunction the plaintiff must make out a *prima facie* case, i.e., a case such that if the evidence remains the same at the hearing it is probable that he will obtain a decree, and unless he makes out such a case an injunction will not be granted on the mere consideration of the balance of convenience and inconvenience. *Id.*

In a motion by a plaintiff under s. 32 of the Patents Act, 1883, for an interim injunction to restrain the defendant from issuing threats of legal proceedings for an alleged infringement of the defendant's patent, it is not necessary for the plaintiff to prove that he has not infringed the defendant's patent, but the question is one of the balance of convenience and inconvenience, and the court will decide according to its opinion whether more harm will be done by granting or refusing an injunction. *Walker v. Clarke*, 56 L. J., Ch. 239; 56 L. T. 111; 35 W. R. 245—Kay, J.

PAUPER.

Suing in Formâ Pauperis.—See PRACTICE (PARTIES).

Settlement of.]—See POOR LAW.

PAVING.

In Metropolis.]—See METROPOLIS.

In other Places.]—See HEALTH.

PAWNBROKER AND PLEDGES.

Detention of Person offering Article to pawn—Reasonable Suspicion that Article was stolen.]—By the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 34, in any case where, on an article being offered in pawn to a pawnbroker he reasonably suspects that it has been stolen or otherwise illegally or clandestinely obtained, he

may seize and detain the person so offering the article and the article, or either of them, and shall deliver the person and the article, or either of them (as the case may be) as soon as may be into the custody of a constable. The plaintiff offered in pawn to the defendant, a pawnbroker, a gold horseshoe pin, set with seven diamonds, and a ring. The defendant, having previously received from the police a notice of articles recently stolen, amongst which was "a gold horseshoe pin, set with seven diamonds," and a ring, asked the plaintiff if he was a dealer. He replied that he was not. The defendant also asked the plaintiff where he obtained the articles. The plaintiff said that he got them from a publican, whose name and address he stated. The defendant gave the plaintiff into the custody of a constable. It was afterwards proved that the articles in the possession of the plaintiff had not been stolen, and that his statements were true. In an action by him for false imprisonment the judge left the question whether the defendant had a reasonable suspicion to the jury, who found their verdict for the plaintiff:—Held, that the question arising under the act whether the defendant reasonably suspected that the pin had been stolen or otherwise illegally or clandestinely obtained was for the judge; that, on the facts, there was no evidence of absence of reasonable suspicion in the mind of the defendant, and therefore judgment should be entered for him. *Howard v. Clarke*, 20 Q. B. D. 558; 58 L. T. 401; 52 J. P. 310—D.

Pledge—Delivery not contemporaneous with Advance.—In a pledge of goods it is not essential that the advance and delivery of possession should be contemporaneous. It is sufficient if possession be delivered within a reasonable time of the advance in pursuance of the contract to pledge. *Hilton v. Tucker*, 39 Ch. D. 669; 57 L. J., Ch. 973; 59 L. T. 172; 36 W. R. 762—Kekewich, J.

—Chattels stored in a Room as Security for Loan—Delivery of Key.—In November, 1883, A. agreed to lend B. 2,500l. on the security of a valuable collection of prints and engravings. On the 19th of November, 1883, A. advanced B. 1,250l. on account of the loan, and it was arranged between them that the collection should be stored in a certain room, and on the 21st of December, 1883, B. wrote to A., "the collection was moved in to-day. L. has the key, which I place entirely at your disposal." On the 24th of December, 1883, A. advanced to B. the balance of the loan, and on the 11th of January, 1884, B. wrote to A.: "You having advanced to me the sum of 2,500l., I hereby authorise you to retain possession of my collection of engraved prints, now deposited by me in a certain room . . . the key of which room is at present in your possession or power; and I hereby acknowledge that you are to retain possession of such prints, &c., until the whole of the said sum of 2,500l., with interest at 5 per cent., has been repaid to you." B. died insolvent, and his administratrix disputed the validity of A.'s security on the ground that the letter of the 11th of January constituted a bill of sale, which was void under ss. 8 and 9 of the Bills of Sale Act, 1882:—Held (1), that the transaction was one of pledge, independent of the letters, and that the Bills of Sale Act did not apply; and

(2) that the pledge was perfected by delivery of the key to L., which amounted to constructive delivery of the goods to A. *Id.*

Redeemable Pledges — Taking Interest in Execution.—A pawnbroker's interest in redeemable pledges may be taken in execution under a *fi. fa.* *Rollason, In re, Rollason v. Rollason*, 34 Ch. D. 495; 56 L. J., Ch. 768; 56 L. T. 303; 35 W. R. 607—North, J.

PAYMENT.

Of Purchase-money out of Court.—See LANDS CLAUSES ACT.

Into or out of Court in Actions.—See PRACTICE (PAYMENT INTO COURT).

Other Funds in Court.—See *Id.*

By Cheque—Effect of—Extinction of Debt.—When a debtor draws a cheque in payment of a debt, which cheque is duly honoured and paid, there is no debt owing or accruing due from debtor to creditor between the giving of the cheque and payment thereof. *Elwell v. Jackson*, 1 C. & E. 362—Denman, J.

By Promissory Note — Payment till Dishonour.—Within seven days after the service of a bankruptcy notice the debtor gave to the creditor a promissory note, payable two months after date, for the amount of the debt, which note the creditor accepted:—Held, that, the note being a conditional payment of the debt, the creditor could not, during the currency of the note, avail himself of the bankruptcy notice to obtain a receiving order against the debtor. *Matthew, Ex parte, Matthew, In re*, 12 Q. B. D. 506; 51 L. T. 179; 32 W. R. 813; 1 M. B. R. 47—C. A.

Of part of Account — Cheque to Balance Account—Cheque retained "on Account."—A. sent B. a "cheque to balance account as per enclosed statement." The enclosed statement debited B. with a sum claimed on account of defects in work done. B. replied, acknowledging the receipt of the cheque "on account," and shortly afterwards sent A. a statement of account, omitting the sum claimed by A. for defective work, and debiting A. with a small sum for discount not allowed in his account, and, in the accompanying memorandum, said: "We would thank you for a remittance of the balance, or we shall be obliged to take proceedings to recover same." A. replied, sending a cheque for the discount claimed. B. kept and cashed the cheques. In an action for the balance, B. was nonsuited by a county court judge on the ground that having taken and cashed the first cheque, he was bound to apply it according to A.'s intention:—Held, that the nonsuit was wrong. *Ackroyd v. Smithies*, 54 L. T. 130; 50 J. P. 358—D.

Time for.—A. contracted with B. to supply him with the whole of the Sevenoaks stone, re-

quired at the Pembury reservoir, the same to be delivered into trucks of the railway company at Sevenoaks at 5s. 3d. per ton:—Held, that A. was entitled to payment on delivery for the quantities delivered from time to time. *Lockwood v. Tunbridge Wells Local Board*, 1 C. & E. 289—Huddleston, B.

By Third Party—Adoption—Evidence.—H. was tenant to P. of lands under a lease which expired on the 29th September, 1880. P. brought ejectment to recover possession of the land, and for mesne profits, and after he was in a position to sign judgment, an agreement was entered into in the month of November, 1884, between H. and P., by which P. agreed to grant a lease to H. for thirty-one years from the 29th of September, 1884, H. paying 860l. on or before the 15th of December, as and for mesne profits up to that date and for costs, and that H. should be at liberty to sell subject to the landlord's approval. H. not having such sum of 860l., judgment for possession was entered on the 16th December. After the entry of the judgment negotiations took place between P. and D., who had taken the land temporarily for grazing from H., for a lease of the said lands to D., and on the 2nd of January, 1885, D. paid P. 860l., and the following day signed a proposal for a lease for thirty-five years from the 29th September, 1884, at a yearly rent of 200l. P. was only tenant for life of the lands, and could not take a fine, and there was no mention in the agreement with D. of the payment by him of 860l. On the 6th of January, 1885, the writ in the present action was issued by P. against H., claiming 1,000l. damages for mesne profits from the expiration of the lease on the 29th September, 1880, and in the alternative 1,000l. for use and occupation. H., by his defence, claimed the benefit of the payment by D. of the 860l., and paid 6d. into court, on the count in trespass. At the trial P.'s agent deposed that he told D. that whoever gave him 860l. would get the land. D., who was examined for H., deposed that he knew 860l. was claimed from H., for arrears of rent and costs, and that he was willing to pay that sum on getting a good lease. The question left to the jury was "whether the 860l. was paid by D. and received by P. as for the rent of the farm due by H." They found that it was, and that the 6d. lodged in court was sufficient. Upon a motion by P. for a new trial:—Held, that there was evidence proper to be submitted to the jury that the 860l. was paid by D. and received by P., as and for the arrears of rent and costs, and that it was competent for H. to adopt and claim the benefit of the payment as a defence to the present action. *Purcell v. Henderson*, 16 L. R., Ir. 213—Q. B. D. Affirmed 16 L. R., Ir. 466—C. A.

Appropriation—Guarantee of Current Account at Bank—Death of Surety.—S. guaranteed the account of T. at a bank by two guarantees, one for 150l., the other for 400l. By the terms of the guarantees the surety guaranteed to the bank "the repayment of all moneys which shall at any time be due from" the customer "to you on the general balance of his account with you;" the guarantee was moreover to be "a continuing guarantee to the extent at any one time of" the sums respectively named, and was not to be considered as wholly or partially satisfied by the payment at any time of any sums due

on such general balance; and any indulgence granted by the bank was not to prejudice the guarantee. S. having died, leaving T. and another executors, the bank on receiving notice of his death, without any communication with the executors beyond what would appear in T.'s pass-book, closed T.'s account, which was overdrawn, and opened a new account with him, in which they did not debit him with the amount of the overdraft, but debited him with interest on the same, and continued the account until he went into liquidation, when it also was overdrawn:—Held, by Bacon, V.-C., that payments in after the death of the surety went in discharge of the overdraft, alike on the terms of the guarantee, and on the principle of *Clayton's case* (1 Mer. 572, 605), and that, as the amount of such payments exceeded the overdraft, the bank were not entitled to prove against the estate of the father-in-law. But held, on appeal, that there was no contract, express or implied, which obliged the debtor and creditor to appropriate to the old overdraft the payments made by the debtor after the determination of the guarantee, and that the bank were entitled to prove against the estate of S. for the amount of the old overdraft less the amount of the dividend which they had received on it in the liquidation. *Sherry, In re, London and County Banking Company v. Terry*, 25 Ch. D. 692; 53 L. J., Ch. 404; 50 L. T. 227; 32 W. R. 394—C. A.

—Receipt of Premiums—Contract of Insurance.—Where the plaintiffs being agents for an insurance office, remitted to it 100l. "for premiums," and it appeared that the 100l. was to the knowledge of the office in excess of what they owed as agents, and that the terms on which certain lapsed policies should be renewed by the office for their benefit had been ascertained by consent:—Held, that although there was not in the office any specific appropriation of any part of the 100l. to the payment of the premiums on the lapsed policies, yet that it must be taken to have been received on account thereof, and that from the date of receipt there was a good contract for the renewal of the old insurances. *Kirkpatrick v. South Australian Insurance Company*, 11 App. Cas 177—P. C.

—Bank Account.—M., being entitled to the lessee's interest in lands at C., in 1868, deposited, inter alia, the title-deeds with a bank, to secure any balance due or to become due, accompanied by a letter of deposit. On the 21st November, 1870, he wrote to the manager of the bank O., asking for the title-deeds of C. in exchange for other securities, and stating that he had agreed to put C. in settlement on his marriage; and at the same time he deposited other securities with O. on behalf of the bank. O. thereupon drew two lines through the memorandum of 1868, in the deposit book, and wrote at the foot of the entry "annexed list cancelled and new ones substituted." The bank, however, refused to give up the deeds of C. On the occasion of his marriage, M. executed a settlement, dated the 24th November, 1870, and registered on the 8th February, 1871, charging C. with a sum of 3,000l., which, subject to life interests for himself and wife, was settled in trust for the children of the marriage. M., who was a solicitor, drew the settlement and was the only solicitor engaged in the transaction. Subsequently, in 1871, M. gave

the bank a further letter of deposit, in which the title-deeds of C. were included. None of the letters of deposit were registered. After the settlement M. paid in to the credit of his current account at the bank, sums of money exceeding the amount due from him at the date of the settlement. In a paper attached to the letter of deposit of 1870, O. made a memorandum, stating that it was cancelled by the letter of deposit of 1871, which was taken in case of any irregularity in the former transaction. O. deposed that he did not intend to give up the security of the deposit of 1868, that he had a general authority to substitute one security for another, but not to give up a security altogether.—Held, that the money paid in by M. to his current account with the bank after the 24th November, 1870, must in the absence of express appropriation, be deemed to be appropriated to the debt due by him previously to that date, which was therefore discharged by such payments. *Macnamara's Estate, In re*, 13 L. R., Ir. 158—Land Judges.

PENALTY.

Officer interested in Contract with Local Authority.]—*See ante, HEALTH, VI. 2.*

Voting in Parliament without having taken the Oath.]—*See Attorney-General v. Bradlaugh, ante, col. 1316.*

Acting as Member of Vestry, when interested in Contract.]—*See METROPOLIS, I. 1.*

Action for—Discovery of Documents.]—*See DISCOVERY, I. 2.*

—Administering Interrogatories.]—*See DISCOVERY, II. 2.*

Enforcing Statutory Duty—Right of Action.]—The Merchant Shipping Act, 1854, ss. 172 and 524, imposes a penalty, not exceeding 10*l.*, upon any master of a ship who fails to sign and give a certificate of discharge to a seaman, specifying the period of his service and the time and place of his discharge, such penalty to be applied, if the justices think fit, in compensating any person for any wrong or damage which he may have sustained by the act or default, in respect of which such penalty is imposed. The plaintiff, a seaman, brought an action against the defendant, a master of a ship, for damages sustained through the defendant withholding a certificate of discharge.—Held, that the action was not maintainable, inasmuch as the duty was created for the first time by 17 & 18 Vict. c. 104, s. 172, and a particular remedy was conferred by that statute. *Vallance v. Phille*, 13 Q. B. D. 109; 53 L. J., Q. B. 469; 51 L. T. 158; 32 W. R. 769; 48 J. P. 519; 5 Asp. M. C. 280—D.

Remission of—Officer interested in Contract with Local Authority.]—Under 22 Vict. c. 32—which enables the crown to remit penalties imposed by statute on convicted offenders—there is no power to remit the penalty to which the officers of local authorities are liable under s. 193

of the Local Government Act, 1875, for being interested in any contract made with such local authorities. *Todd v. Robinson*, 12 Q. B. D. 530; 53 L. J., Q. B. 251; 50 L. T. 298; 32 W. R. 858; 48 J. P. 694—D. *See* 47 & 48 Vict. c. 74.

Penalty or Liquidated Damages.]—An agreement for sale contained the two following provisions: (9) As an earnest hereof the purchaser has this day paid into the hands of S. the sum of 500*l.* as a deposit, the deposit to form part of the purchase-money to be paid on the day of possession; and (10) Should either vendor or purchaser refuse or neglect to carry out the above arrangement on her or his part, the one so refusing or neglecting shall pay to the other the sum of 500*l.* as or in the nature of liquidated damages. The purchaser was unable to carry out his part of the agreement. The vendor brought this action for specific performance of the agreement, or, in the alternative, payment of the 500*l.* as liquidated damages. It was contended that this 500*l.* was a penalty, and was therefore not recoverable.—Held, that the meaning of the agreement was that the 500*l.* should be recoverable, not if some minute provision were not carried out, but if, owing to the fault of either party, the agreement were not carried out at all, and that that sum could be recovered in this case as liquidated damages. *Catton v. Bennett*, 51 L. T. 70—Kay, J.

Held, that it could also be recovered if the action were looked upon as an action to enforce the forfeiture of the deposit. *Ib.*

When one lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification; but where the payments stipulated are made proportionate to the extent to which the contractors may fail to fulfil their obligations, and they are to bear interest from the date of the failure, payments so adjusted with reference to the actual damage are liquidated damages. *Elphinstone v. Monkland Iron and Coal Company*, 11 App. Cas. 332; 35 W. R. 17—H. L. (Sc.)

—Lease—Covenant—Penal Rent.]—By lease, made in 1857, for a term of thirty-one years, the lessee, amongst other things, covenanted that he would cultivate and manage the lands in a good and husbandlike manner, and would, during the last four years of the term, keep the lands in a due course of husbandry as follows:—Two-thirds thereof to be kept in grass, and one-third under proper husbandlike cultivation. Provided that, if the lessee should fail to do so, he the said lessee would pay yearly, and every year from and after such default should be made, unto the lessor, a penalty of double the said yearly rent, the same to be reserved in like manner as the yearly rent thereinbefore reserved was recoverable.—Held, that the double rent was a penalty. *Dickson v. Lough*, 18 L. R., Ir. 518—Q. B. D. Affirmed in C. A.

PENSION.

Execution Creditor—Appointment of Receiver—Indian Officer's Pension.—The pension of an officer of Her Majesty's forces, being by s. 141 of the Army Act, 1881, made inalienable by the voluntary act of the person entitled to it, cannot be taken in execution, even though such pension be given solely in respect of past services, and the officer cannot again be called upon to serve:—Held, that an order appointing a receiver of such pension was bad. *Birch v. Birch* (8 P. D. 163) approved; *Dent v. Dent* (1 L. R., P. 366) distinguished. *Lucas v. Harris*, 18 Q. B. D. 127; 56 L. J., Q. B. 15; 55 L. T. 658; 35 W. R. 112; 51 J. P. 261—C. A.

PERJURY.

See CRIMINAL LAW, II. 22.

PERSONATION.

See ELECTION LAW, I. 2, f.

PETITION OF RIGHT.

See CROWN.

PERPETUITIES.

Covenant in Mining Lease.—See *Morgan v. Davey*, ante, col. 1224.

Reservation in Sale of Land.—See VENDOR AND PURCHASER.

Under Wills.—See WILL.

PHARMACY ACT.

See MEDICINE.

PHYSIC AND PHYSICIAN.

See MEDICINE.

PICTURES.

See COPYRIGHT.

PIER.

See SHIPPING.

PILOTS AND PILOTAGE.

See SHIPPING.

PLEADING.

See PRACTICE.

PLEDGE.

See PAWNBROKER.

PLENE ADMINISTRATIVIT.

See EXECUTOR AND ADMINISTRATOR, V.

POLICE.

County—Violation of Duty—Receiving Gratuity—Rules.—C., a constable appointed under 2 & 3 Vict. c. 93, received a book of rules and regulations purporting to be made and signed by the chief constable. One rule forbade a constable to receive a gratuity from any person for anything relating to his duty, without the chief constable's permission in writing. C. one day called for the licensing fees at a publican's, and received the fees and a gratuity:—Held, that C. was rightly convicted, under 2 & 3 Vict. c. 93, s. 12, of violation of duty, and that the rules made by the chief constable were good evidence of the nature of his duties. *Chisholm v. Holland*, 50 J. P. 197—D.

Prosecution by Individual—Independent Prosecution by Police.—Where the principal person interested in prosecuting a prisoner is

desirous of conducting the prosecution, he is entitled to do so, and to be allowed the costs of the prosecution. In a case of aggravated assault by a prisoner on his wife, the wife retained a solicitor to prosecute her husband. In pursuance of this retainer, the solicitor prepared and delivered a brief to counsel at the assizes with instructions to conduct the prosecution. A constable of the county had been bound over by recognizances to prosecute, and the clerk to the magistrates, as was the usual custom, prepared and delivered a brief to counsel to prosecute:—Held, that the conduct of the prosecution should not be taken out of the hands of the person principally interested, if that person wished to undertake it. *Reg. v. Yates* (7 Cox, C. C. 361) distinguished. *Reg. v. Bushell*, 52 J. P. 136; 16 Cox, C. C. 367—Coleridge, C. J.

Power of Local Authority to Delegate Prosecution to Police.]—A local board acting under an act which embodied the provisions of s. 259 of the Public Health Act, 1875, passed a resolution that “in pursuance of the power vested in the board by s. 259 of the Public Health Act, 1875, the superintendent and the sergeants of the county police, for the time being acting within the district, be authorised as officers of the board to institute and prosecute all such proceedings as may be necessary under the specified clauses of the local act. In an information preferred by the superintendent of police against the appellant for an offence under the act:—Held, that the local board had no power under s. 259 of the Public Health Act, 1875, to delegate the prosecution to the police, who are not officers of the board, nor under their control. *Kyle v. Barbor*, 58 L. T. 229; 52 J. P. 501, 725; 16 Cox, C. C. 378—D.

Money found on Prisoner not a Debt due from Police.]—Money in the possession of a prisoner which is taken possession of by the police upon his apprehension, and retained by them after his conviction, does not render the police debtors to the prisoner, and is not a debt which can be attached under garnishee proceedings. *Bice v. Jarvis*, 49 J. P. 264—D.

Taking Possession of Goods—Effect of Warrant.]—The police have power under a warrant for the arrest of a person charged with stealing goods to take possession of the goods for the purposes of the prosecution. A person therefore is justified in refusing to hand over goods to one claiming to be the owner, if such person has been entrusted with them by the police, who have taken possession of them under such circumstances. *Tyler v. London and South Western Railway*, 1 C. & E. 285—Huddleston, B.

Powers—Arrest under Warrant—Taking and Detention of Chattels—Misdemeanour.]—In an action for trover and detinue of chattels of the plaintiff, and for taking the same forcibly from the plaintiff under circumstances constituting an assault, the defendants O. and D., who were peace officers, pleaded that before and at the time of the acts complained of, the plaintiffs and others had conspired and combined to do certain acts, amounting to an indictable conspiracy at common law, and did certain acts in furtherance of and as part of the conspiracy; that the de-

fendant D., being such peace officer, appeared before a justice of the peace of the county in which such acts were committed, and made complaint to him on oath in writing of such conspiracy, and of the overt acts committed within the county, and that the justice, by warrant, commanded the defendant O., being such peace officer, and his assistants, as one of whom D. justified, to arrest the plaintiff, and bring him before the justice to answer the complaint; that the defendants, in execution of the warrant, arrested the plaintiff, who was then, with others of the parties to the said conspiracy, engaged in certain acts in furtherance of and as part of the said conspiracy, and in possession of the chattels, all of which were being used for the purpose of such combination and conspiracy; and at the time of the arrest the defendants necessarily seized, took, and detained the chattels for the purpose of producing the same as evidence in the prosecution of the plaintiff and others for so combining and conspiring, and the same were material and necessary in the said prosecution which had been since the arrest, and was at the delivery of the defence, still pending:—Held, on demurrer, a good defence. The right of peace officers, under such circumstances, to take and detain evidence of crime, is not restricted to cases of treason and felony, but extends to cases of misdemeanour. *Dillon v. O'Brien*, 20 L. R., Ir. 300; 16 Cox, C. C. 245—Ex. D.

Notice of Action—Special Venue.]—S. 19 of 1 & 2 Will. 4, c. 41, by which, in all actions for anything done in pursuance of that act, the venue is to be local, and the defendant is to receive notice of action, applies only to such acts as a constable might at the date of the statute have been called upon to perform; therefore the section does not apply in the case of a constable acting under the Contagious Diseases (Animals) Act, 1878. *Bryson v. Russell*, 14 Q. B. D. 720; 54 L. J., Q. B. 144; 52 L. T. 208; 33 W. R. 34; 49 J. P. 293—C. A.

POLICY (LIFE, FIRE, AND MARINE).

See INSURANCE.

POLL.

At Parliamentary Elections.]—See ELECTION LAW.

At Shareholders' Meetings.]—See COMPANY, IX.

POOR LAW.

I. AUTHORITIES, 1367.

II. POOR RATES.

1. *Persons and Property Liable*, 1369.
2. *Proceedings.*
 - a. Payment and Recovery, 1377.
 - b. Valuation List and Appeal, 1380.

III. SETTLEMENT AND REMOVAL OF PAUPERS, 1381.

IV. MAINTENANCE AND RELIEF OF PAUPERS, 1386.

V. WORKHOUSES, 1388.

I. AUTHORITIES.

Guardians—Disqualification of—Payment out of Funds raised in a Poor-rate.—The act 5 & 6 Vict. c. 57, s. 14, which enacts that “no person receiving any fixed salary . . . from the poor-rates in any parish or union shall be capable of serving as a guardian in such parish or union,” does not apply to the clerk of a highway board or of a school board whose salary is paid out of the highway or school board fund collected as a poor-rate by the overseers in pursuance of precepts issued to them under the Highway Act, 1864 (27 & 28 Vict. c. 101) or the Elementary Education Act, 1870 (33 & 34 Vict. c. 75) respectively. *Reg. v. Rawlins*, *Reg. v. Dibbin*, 15 Q. B. D. 382; 54 L. J., Q. B. 557; 50 J. P. 5—C. A. Affirming 52 L. T. 436—D.

Contracts—Employment of Roman Catholic Priest for Workhouse.—By a general order of the Poor Law Board, dated the 19th of August, 1867, it was provided that the guardians might employ such persons as they should deem requisite in or about the workhouse or workhouse premises, or on the land occupied for the employment of the pauper inmates of the workhouse, or otherwise in or about the relief of the indoor poor, upon such terms and conditions as should appear to them to be suitable:—Held, that under this order, it was competent to the guardians to appoint and pay a Roman Catholic clergyman to minister to the religious wants of the Roman Catholic inmates of the workhouse. *Reg. v. Haslehurst*, 13 Q. B. D. 253; 53 L. J., M. C. 127; 51 L. T. 95; 32 W. R. 877; 48 J. P. 774—D.

Contracts—Commission paid for obtaining Loan.—The guardians of a union being authorised to raise 4,000*l.* by loan, advertised for tenders, received six, and accepted one, which was from an agent, offering the sum at a certain rate of interest, and charge for commission. The guardians accepted this offer, and paid by cheque 50*l.* for commission. The auditor disallowed 38*l.* 10*s.*, part of the commission, and surcharged one of the guardians with that sum as having been illegally paid:—Held, that the auditor was wrong, as there was no rule against paying commission for getting a loan if in the circumstances the terms were the

most advantageous to the ratepayers. *Reg. v. Haslehurst*, 51 J. P. 645—D.

Solicitor to—Taxation of Costs by Clerk of the Peace—Taxation between Solicitor and Client.—A solicitor employed by guardians of the poor is entitled, notwithstanding that his bill of costs has been taxed by the clerk of the peace under the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 39, to an order for taxation as between solicitor and client under the Attorneys and Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37. *Southampton Guardians v. Bell*, 21 Q. B. D. 297; 59 L. T. 181; 36 W. R. 924; 52 J. P. 567—D.

Acting as Rural Sanitary Authority—Limitation of Actions.—Section 1 of the act 22 & 23 Vict. c. 49, enacts that any debt, claim, or demand which may be lawfully incurred by or become due from the guardians of any union or parish shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards. By s. 9 of the Public Health Act, 1875, the guardians of a rural union shall form the rural sanitary authority of that district, and “all statutes, orders, and legal provisions applicable to any board of guardians shall apply to them in their capacity of rural authority under this act for the purposes of this act”:—Held, that s. 9 of the Public Health Act, 1875, does not extend the limitation of time imposed by s. 1 of the previous act to debts contracted by guardians in their capacity of rural authority, but that that limitation still remains applicable only to debts contracted by guardians as such. *Dearle v. Petersfield Union*, 21 Q. B. D. 447; 57 L. J., Q. B. 640; 60 L. T. 85; 37 W. R. 113; 53 J. P. 102—C. A.

Recovery of Expenses of Maintenance of Paupers.—*See post*, col. 1387.

Auditors—Churchwarden not Attending Audit of Accounts—Conviction.—The mere absence of a churchwarden from the audit of the poor law accounts of his parish, due notice having been given, is not sufficient in itself to support a conviction for wilful disobedience of the rules of the Poor Law Commissioners under the 98th section of 4 & 5 Will. 4, c. 76. A churchwarden who failed to attend the audit of the poor law accounts of his parish, was convicted of a wilful neglect, or disobedience of the rules, orders, and regulations of the Poor Law Commissioners under the 98th section of 4 & 5 Will. 4, c. 76:—Held, that, as he had taken no part in the poor law administration of the parish; as the churchwardens had not usually attended the audit, and no intimation had been given that their absence had interfered with the transaction of the business; and as the notice of audit, under 7 & 8 Vict. c. 101, s. 33, contained an intimation that it was “requisite that one at least of the overseers” should personally attend the audit, as well as the assistant overseer, he might reasonably have supposed that his attendance was not necessary; and that the conviction must be quashed. *Holgate v. Brett*, 58 L. T. 452; 36 W. R. 471; 52 J. P. 661—D.

Overseers—Opposing Bill in Parliament—Al-

lowance of Expenses by Auditor.—The overseers of a parish are entitled to defray out of the poor-rate such reasonable and moderate expenses as have been incurred by them at the request of the vestry in resisting an attempt by private individuals to impose an extra burden on the poor-rate by means of a bill in Parliament proposing to give power to charge the poor-rate with the payment of interest on the share capital of the undertaking. *Reg. v. Sibly, Reg. v. White*, 14 Q. B. D. 358; 54 L. J., M. C. 23; 52 L. T. 116; 33 W. R. 248; 49 J. P. 294—C. A.

Assistant Overseer—Election—Warrant of Justices—Jurisdiction.—After an election of an assistant overseer by the vestry, the two justices who are empowered by 59 Geo. 3, c. 12, s. 7, to appoint the officer by warrant have no power to inquire into the validity of such election. *Reg. v. Shepley*, 22 Q. B. D. 96; 58 L. J., M. C. 6; 59 L. T. 696; 37 W. R. 27; 53 J. P. 261—D.

II. POOR RATES.

1. PERSONS AND PROPERTY LIABLE.

"Occupier"—Possession by Caretaker.—H. was owner of a house of seventeen rooms and premises usually of 83*l.* rateable value, but the house being advertised to be let for two years, he put into it G., as a caretaker, giving him 2*s.* 6*d.* per week, and the rooms, which G. and his family occupied rent free. G. was to show the house and was bound to leave at a week's notice:—Held, that H. was the occupier of the house by means of G. as servant, and was properly rated to the poor as such occupier. *Hicks v. Dunstable Overseers*, 48 J. P. 326—D.

Advertising Hoardings—Agreement creating Tenancy.—By an agreement between an owner of land and an advertising agent the owner agreed to let and the agent to take an advertising station at a yearly rent, the tenancy to commence from completion of erection and continue seven years, and the agent agreed to pay rates and taxes. By another agreement an owner agreed to allow the advertising agent the privilege of erecting an advertising hoarding, the agent to pay a yearly rent, and the owner agreed to allow the agent the further privilege of removing a wall, the agreement to remain in force for three years, and be afterwards terminable by twelve months' notice, but if the owner should be obliged to give less than twelve months' notice he agreed to refund 20*l.* In both agreements the dimensions of the hoardings to be erected were specified. Advertising hoardings supported on posts fixed into the ground were erected. In the first case the structure was used partly by the owner as a shed, and partly by the advertising agent as a hoarding; in the second case exclusively by the agent as a hoarding:—Held, that each of the agreements created a tenancy, and conferred an exclusive occupation, and not merely a licence, and therefore the advertising agent was liable to be rated to the relief of the poor in respect of both hoardings as occupier of advertising stations. *Taylor v. Pendleton Overseers*, 19 Q. B. D. 288; 56 L. J., M. C. 146; 57 L. T. 530; 35 W. R. 762; 51 J. P. 613—D.

Ambassador—Attaché—Liability for Rates on Private Residence.—An attaché to an ambassador of a foreign state residing in this country is not liable for rates assessed on his private residence. *Parkinson v. Potter*, 16 Q. B. D. 152; 55 L. J., Q. B. 153; 53 L. T. 818; 34 W. R. 215; 50 J. P. 470—D.

Charity—Railway Servants' Orphanage—Local Act.—By a Local Improvement Act, 6 Geo. 4, c. cxxxii., s. 103, the commissioners of a town were authorised to make district rates for defraying the expenses of the act, provided that none of the rates or assessments which should be made by virtue of the act should be laid upon or in respect of any houses or buildings used and occupied exclusively for the purposes of public charity:—Held, that an orphanage founded and used for the purpose of boarding, lodging, clothing, and educating the children of deceased railway servants, and supported partly by subscriptions from railway servants, but mainly by donations from the public, was open to such an extensive class of the community of the kingdom, that the premises were used and occupied exclusively for the purposes of "public charity," within the proviso of the act, and therefore exempt from rateability under it. *Hall v. Derby Sanitary Authority*, 16 Q. B. D. 163; 55 L. J., M. C. 21; 54 L. T. 175; 50 J. P. 278—D.

Fishery—"Expenses necessary to command Rent."—By a Local Fishery Act, passed for the preservation and increase of salmon, commissioners were empowered to raise a rate from every owner of a fishery in a large district for the purposes of the act. The appellant was tenant of a fishery, for which he paid a rent of 305*l.*, and a rate of 61*l.* to the commissioners:—Held, that in ascertaining the rateable value of his property, the amount of the rate should be deducted, for that it was an "expense necessary to maintain the property in a state to command such rent," and so allowed to be deducted under s. 1 of the Parochial Assessment Act, 1834. *Reg. v. Smith*, 55 L. J., M. C. 49; 54 L. T. 431; 50 J. P. 215—D.

Harbour Dues—Additional Duty for use of Wet Dock.—Commissioners were appointed by a local Act of Parliament for the improvement of a harbour, with power to impose tonnage dues upon all ships using the harbour, and other dues called shore dues on goods shipped from or landed on the quays. The soil of the harbour did not belong to the commissioners, but that of the quays was vested in them, and they were accordingly rated to the poor-rate in respect of the shore dues, but not in respect of the tonnage dues. By a subsequent act the commissioners were empowered to construct a wet dock, and fresh dues were substituted for those previously authorised, the shore dues on goods being much the same as those which previously existed, except that additional dues were payable on completion of the wet dock on goods loaded or discharged in the dock, or exported or imported in vessels of a tonnage of 100 tons or upwards, and new tonnage dues for vessels entering or leaving the harbour; those for vessels under 100 tons being practically the same as those previously imposed, and those for vessels above 100 tons being higher, and it was also provided that

for every vessel entering the wet dock there should be an additional tonnage duty :—Held, that in assessing the commissioners to the poor-rate in respect of the dock, the additional dues paid by ships entering the dock ought only to be taken into account, and not the harbour-duty payable by such vessels exclusive of the additional dues. *Reg. v. Kingston-upon-Hull Docks* (7 Q. B. 2), distinguished. *Reg. v. Berwick Assessment Committee*, 16 Q. B. D. 493; 55 L. J., M. C. 84; 54 L. T. 159; 50 J. P. 71; 5 Asp. M. C. 532—D.

Lighthouses—Occupation of Public Trustees—Merchant Shipping Act, 1854, s. 430.]—The appellants appealed against a poor-rate made by the respondents in respect of a lighthouse, telegraph station, houses, buildings, and land in the parish of Llanellian. The appellants were incorporated as a body of public trustees by the Mersey Docks and Harbour Act, 1857, and the property, powers, rights, and privileges of the Liverpool Dock Trustees, including the right to levy certain harbour and light dues on vessels entering the port of Liverpool, were vested in the appellants. The tolls were so fixed that, with the other receipts of the appellants applicable to conservancy purposes, they should not be higher than necessary for conservancy expenditure, and therefore no profits were receivable by the appellants from the occupation of any of the property. The lighthouse consisted of a tower and a dwelling-house adjoining. In the tower there was the light-room, and also a room used for working a telegraph wire from Birkenhead to Holyhead, maintained by the Postmaster-General for the exclusive use of the appellants under an agreement. The dwelling-house and other premises were occupied by servants of the appellants. The tower of the lighthouse had no occupation value except as a lighthouse and a telegraph station :—Held, that the tower was incapable of profitable occupation as a lighthouse, and was not rateable to the relief of the poor, but that, with respect to the adjoining houses, it having been found as a fact that their value was enhanced from being used in connexion with the tower, the assessment on that footing was correct. *Mersey Docks and Harbour Board v. Llanellian Overseers*, 14 Q. B. D. 770; 54 L. J., Q. B. 49; 52 L. T. 118; 33 W. R. 97; 49 J. P. 164; 5 Asp. M. C. 358—C. A.

The 430th section of the Merchant Shipping Act is only applicable to lighthouses under the control of the general lighthouse authorities. *Ib.*, 51 L. T. 62; 48 J. P. 391; 5 Asp. M. C. 248—D.

Machinery—Machines used in connexion with Hereditament, but remaining Personal Property.]—In estimating the rateable value of premises used as a manufactory, machinery and plant placed thereon, for the purpose of making them fit as premises for such a manufactory, are to be taken into account as enhancing the value of the hereditament, although such machinery and plant remain personal property, and are not physically attached to the premises. *Tyne Boiler Works Co. v. Longbenton Overseers or Tynemouth Union*, 18 Q. B. D. 81; 56 L. J., M. C. 8; 55 L. T. 825; 35 W. R. 110; 51 J. P. 420—C. A.

Police—House occupied by Officer.]—M., a sergeant of county police, with his wife, were

obliged to occupy a cottage distant two miles from the nearest county police-station, and another constable also occupied part of the same house, the chief constable paying the rent out of the county rate. There were no cells attached, nor was any room set apart for county police business to be done there, but sometimes complaints were made there, and summonses signed by magistrates. M. was assessed to the poor-rate :—Held, that M. was not exempt, on the ground that the house was occupied by him in the discharge of his duties as constable or otherwise. *Macharg v. Stoke-upon-Trent Assessment Committee*, 48 J. P. 775—D.

Public Purposes connected with Government—Middlesex Sessions House.]—By an act passed in 1777 justices were empowered to buy land and build a sessions house, which was not to be rated at a higher figure than the assessment of the site at the date of the act. In 1879 the justices, acting under further statutory powers, bought additional land, and built additions and enlargements to the sessions house. The sessions house with the additions was used solely for the administration of justice, the performance of the Queen's service, and the discharge of the public business of the county. An officer employed in the business of the sessions resided on the premises with his family. From 1777 to 1879 the sessions house was rated at the assessment of 1777. Afterwards the assessment was raised and the justices appealed :—Held, that the buildings being used for public purposes connected with the government of the country were not liable to be rated to the poor-rate, for the case came within the principle of *Coomber v. Berkshire JJ.* (9 App. Cas. 61), and neither the provisions of the act of 1777, nor the fact that a rate at the valuation named in that act had been acquiesced in and paid, deprived the justices of their right to contest the rateability of the premises. *Nicholson v. Holborn Union*, 18 Q. B. D. 161; 56 L. J., M. C. 54; 55 L. T. 775; 35 W. R. 230; 51 J. P. 341—D.

Railway—Leased Line when not to be treated as integral Part of leasing Company's System, but as independent Line.]—A railway company constructed under the powers of their act a line which formed a connecting link between the lines of three other companies, and for some time retained possession of such line, taking tolls for the use of it by such other companies. Subsequently, by an agreement between the first-mentioned company, therein called "the lessors," and the three other companies, therein called "the lessees," which agreement was confirmed by and was to have the same effect as if its provisions had been enacted in an Act of Parliament, the line was leased to the lessees in perpetuity at an annual rent, and the lessees were by such act empowered to use, and they did use, such line in connexion with their respective systems without payment of tolls. The existence of the said first-mentioned company was continued by the confirming act for certain purposes, such as the receipt of the yearly rent and its distribution among the shareholders, and there was a provision in the agreement which by necessary implication gave power to the lessees to let the line with the consent of the lessors under seal :—Held, that, having regard to the provisions of the agreement and of the act con-

firming it, the rateable value of the line for the purposes of the poor-rate was not to be ascertained as if it were an integral portion of the lines of the three companies using it, but was to be based upon the rent which a tenant from year to year might reasonably be expected to give for it as an independent line. *North and South Western Junction Railway v. Brentford Union*, 18 Q. B. D. 740; 56 L. J., M. C. 101; 57 L. T. 429; 35 W. R. 640; 51 J. P. 772—C. A. Referred back to arbitrator, *see post*, col. 1381.

— **Fixed Rent—Running Powers.**—The special act which authorised the making of a railway by the C. company, provided that the L. company should have the right to run their traffic over a part of the line, on payment of a fixed annual rent to the C. company. The rent was much less than the actual value of the traffic passed over that part of the line by the L. company:—Held, that the C. company could not be rated for poor-rate in respect of that traffic at a higher sum than the fixed rent. *Altrincham Union v. Cheshire Lines Committee*, 15 Q. B. D. 597; 50 J. P. 85—C. A.

Rector's Rate—Payment in Lieu of Tithes.—By a local act the parish of F. was constituted a separate parish, and it was provided that the parson should receive the tithes within the limit of the parish. It was further provided that the corporation of the town of F., which was in the parish, should levy a rate called "the rector's rate" on all houses, shops, warehouses, cellars, and outhouses, with the appurtenances, then being, or which should at any time thereafter be built in the town, after the rate of sixteenpence in the pound, and pay the same to the parson of the parish. When houses, shops, warehouses, cellars, and outhouses, with the appurtenances, had been built on land liable to tithe, tithe had not been collected in respect thereof. The defendant, the parson of the parish, was rated to the relief of the poor in respect of the rector's rate:—Held, that although under 43 Eliz. c. 2, a parson is rateable as an inhabitant in respect of tithes and money payments in lieu of tithes, yet the defendant was not liable in respect of the rector's rate, which was not a payment in lieu of tithes, inasmuch as it was levied on land which would not, on default of payment of the rector's rate, be liable to tithes. *Reg. v. Christopherson*, 16 Q. B. D. 7; 55 L. J., M. C. 1; 53 L. T. 804; 34 W. R. 86; 50 J. P. 212—C. A.

Reformatory School.—A reformatory school, which has been certified under the Reformatory Schools Act, 1866, is rateable to the poor-rate. *Sheppard v. Bradford* (16 C. B., N. S. 369), overruled. *Tunncliffe v. Birkdale Overseers*, 20 Q. B. D. 450; 59 L. T. 190; 36 W. R. 360; 52 J. P. 452—C. A.

School Board—Hypothetical Tenant.—In assessing to the poor-rate schools occupied by a school board, which can make no profit in a commercial sense as tenants of the schools, the school board itself ought to be considered as a possible tenant, and the gross and rateable values calculated by the rent which the board might reasonably be expected to pay for the premises for use as schools. *Reg. v. London School Board or London School Board v. St. Leonards, Shore-*

ditch, 17 Q. B. D. 738; 55 L. J., M. C. 169; 55 L. T. 384; 34 W. R. 583; 50 J. P. 419—C. A.

— **Land Owned and Land Rented by.**—A school board formed under the Elementary Education Act, 1870, is liable to be assessed to the poor-rate, both in respect of schools built upon land belonging to the board, and in respect of schools rented by the board as tenants, even though the board make no profit out of such schools. *Reg. v. West Bromwich School Board, or West Bromwich School Board v. West Bromwich Overseers*, 13 Q. B. D. 929; 53 L. J., M. C. 153; 52 L. T. 164; 32 W. R. 866; 48 J. P. 808—C. A.

Telephone Company's Wires—Occupation of Land by Company.—A telephone company were possessed of an exchange by means of which subscribers could communicate by telephone with each other, and also of wires and telephone apparatus unconnected with the exchange for the use of persons renting them. For the purpose of this business they laid wires from their office to the business premises of their subscribers, and also erected wires for the use of those who rented them. All these wires were overhead wires and were carried from the office of the company to the different premises, being supported and steadied either by poles fixed in the ground, or by being attached to the roofs, chimneys, or walls of some of the buildings over which they passed. The attachments were made in the case of a single wire by an iron spike driven into the building, or by a bolt screwed into the ridge, or by an iron bracket nailed to the corner of the chimney to which the wire was attached, or in the case of a number of wires by means of standards or ridge-saddles attached to the roofs of the buildings and fastened by iron bolts or stays. The consent of the owners or occupiers of the land or buildings was given by agreements in which the company undertook to pay an annual rent and remove the wires and attachments, upon a certain notice. The company had no key of the outside doors, and could only obtain access to the roofs by the permission of the occupiers:—Held, that upon these facts there was proof of an occupation of land by the wires of the company, and that they were rateable. *Lancashire Telephone Company v. Manchester Overseers*, 14 Q. B. D. 267; 54 L. J., M. C. 63; 52 L. T. 793; 33 W. R. 203; 49 J. P. 724—C. A.

Telegraph Wires—Exclusive Occupation—Licence of Exclusive Use.—By agreement between a telegraph company and the Postmaster-General, the latter covenanted with the company that he would provide, and thenceforth during the continuance of the agreement keep appropriated and maintain for the exclusive use of the company certain telegraph wires, called in the agreement "special wires," between the landing-place of a foreign telegraphic cable near the Land's End and an office of the company at Penzance, and thence to their office in London, with the necessary translators for working them, and a pneumatic tube; such wires, &c., to remain the property of the Postmaster-General—the Postmaster-General to repair all accidental defects or interruptions to the working of the wires, &c., but to be paid for making good any damage to the wires occasioned by the neglect or default of the company or their

servants; the company not to use the wires for the transmission of any except certain specified messages. And, in consideration of the appropriation and maintenance by the Postmaster-General of the wires, translators, batteries, and pneumatic tube, the company covenanted to pay him certain rents; and they also covenanted not to part with the possession of the special wires or any of them, or underlet or assign the benefit of the agreement, without the consent of the Postmaster-General; and that, in the event of their doing so, the Postmaster-General was to be at liberty to determine the contract by notice; and it was further provided that, upon the expiration or determination of the agreement, it should be lawful for the Postmaster-General to resume the possession of the special wires, &c. The telegraph posts remained the property of the Postmaster-General, and carried between Penzance and London several wires beyond those appropriated to the use of the company:—Held (Lord Coleridge, C. J., doubting), that this agreement did not give the company such an exclusive occupation of the special wires as to make them rateable to the relief of the poor in respect thereof, even in the parish where the special wires were the only wires affixed to the posts. *Paris and New York Telegraph Company v. Penzance Union*, 12 Q. B. D. 552; 53 L. J., M. C. 189; 50 L. T. 790; 32 W. R. 859; 48 J. P. 693—D.

Telegraph Act—Purchase of Premises by Postmaster-General—Rateable Value at Date of Purchase.—The Telegraph Act, 1868, empowers the Postmaster-General to purchase, for the purposes of the act, the undertaking (including land and property) of any telegraph company, and s. 22 provides that all land, property and undertakings so purchased shall be assessable and rateable to parochial rates at sums not exceeding the rateable value at which such land, property and undertakings were properly assessed at the time of such purchase. In 1870 the Postmaster-General purchased the undertaking of a telegraph company, including a house held by the company under a lease for twenty-one years from September, 1867. At the time of the purchase a portion of the house was subject to an underlease granted by the company to H. for the remainder of the term less one day, and containing a covenant by the company to pay all parochial rates. The Postmaster-General occupied and used, for telegraphic purposes only, the portion of the house not comprised in the underlease until the year 1878, when he demised that portion to others, and thenceforth no part of the house was occupied or used for telegraphic purposes. The rateable annual value at which the portion comprised in the underlease could properly have been assessed, as a separate tenement at the time of the purchase, was 108*l*. In 1880 the assessment committee of the district separately assessed that portion in respect of parochial rates at the rateable annual value of 334*l*. :—Held, that s. 22 applied notwithstanding that all use of the house for telegraphic purposes had ceased, and therefore that the occupier of the premises comprised in the underlease was not liable to be assessed in any sum exceeding the rateable value at which these premises could have been properly assessed at the time of the purchase. *St. Gabriel, Fenchurch v. Williams*, 16 Q. B. D.

649; 55 L. J., M. C. 14; 54 L. T. 270; 34 W. R. 256; 50 J. P. 533—D.

Tithes in London—Rate on House Property—Commutation for fixed annual Payment—Payment in Lieu of Tithes.—By 37 Hen. 8, c. 12, provision was made for payment to the clergy of the city of London and their successors of a rate made upon the inhabitants and calculated upon the rent of the houses in the city. In this and several subsequent statutes these payments were described as tithes. A special act passed in 1881 provided that all tithes and sums of money in lieu of tithes arising or growing due in a parish in London should cease and be extinguished, and the tithe-owner should receive in lieu and satisfaction thereof a fixed annual sum, to be levied and collected in the same manner as the poor-rates. Neither the above-mentioned tithes nor the fixed annual sum in lieu thereof, had ever been assessed for the relief of the poor:—Held, that the owner was not rateable to the poor-rate in respect of this fixed annual sum, as such sum was a personal payment, and was not a payment in lieu of tithes rateable under 43 Eliz. c. 2. *Esdaile v. City of London Union*, 19 Q. B. D. 431; 56 L. J., M. C. 149; 57 L. T. 749; 35 W. R. 722; 51 J. P. 564—C. A.

Trustees for Statutory Purposes—Estimate of Rental—Possible Tenant—Statutory Disability to rent Premises.—Trustees were incorporated under an Act of Parliament for the purpose of establishing and for ever maintaining a college for educational purposes. They were by the act empowered to acquire and hold land as a site, and to erect buildings thereon for the college; and they had no power to sell or let the land so acquired. In pursuance of the act they purchased land in fee simple and erected buildings upon it, which they used for the purposes of such college. Such an institution as the college could not be carried on at a profit in the locality, as the expenses would always exceed the amount to be derived from students' fees. The college premises having been rated to the poor-rate on a gross estimated rental of 3,833*l*., it was found, in a case stated on appeal against the rate, that, if let for any purposes to which (without considerable structural alterations) they were capable of being applied, they would not let for more than 1,300*l*. per annum, which would make the rateable value 1,083*l*. 6*s*. 8*d*. The trustees were willing to be rated on that rateable value, but contended that they were not liable to be rated on any larger amount. In arriving at this amount the trustees themselves were not taken into consideration as possible tenants of the premises:—Held, that (assuming the trustees to be rateable upon more than a nominal amount) in estimating the rental the trustees, being unable themselves to rent the premises by virtue of the statutory provisions, must be excluded from consideration as possible tenants, and therefore the rateable value must be reduced to 1,083*l*. 6*s*. 8*d*. *Reg. v. School Board for London* (17 Q. B. D. 738) explained and distinguished. *Owens College v. Chorlton-upon-Medlock Overseers*, 18 Q. B. D. 403; 56 L. J., M. C. 29; 56 L. T. 373; 35 W. R. 236; 51 J. P. 356—C. A.

Water Company—Works in Excess of existing Requirements.—A waterworks company had works extending over many parishes. All

the works were in use for the supply of their customers, but they were in excess of the existing requirements of the company, and were created for and adapted to an increased supply in future years. In the calculation by which the rateable value of the mains and service pipes in one of the parishes supplied was to be arrived at:—Held, that the whole of the works, being used for the purpose of distributing water as a source of profit, the whole of the capital expenditure must be taken into account, and not merely so much as would have sufficed to provide the existing supply:—Held, also, that the deduction to be made in respect of the rates which the hypothetical tenant would have to pay is the amount of the rates that would be payable on the sum at which the works ought to be assessed, and not necessarily the rates based on the existing valuation list. *Reg. v. South Staffordshire Waterworks Company*, 16 Q. B. D. 359; 55 L. J., M. C. 88; 54 L. T. 782; 34 W. R. 242; 50 J. P. 20—C. A.

Water-Rates in aid of Water-Rents—Deduction for Repairs—Remuneration to Contractor.]

—By their special act, 39 & 40 Vict. c. clxxv., the appellants, a local board, were empowered to make a public water-rate, but s. 106 provided that they should not levy any higher public water-rate than might be required to discharge so much of the expenses of maintaining the waterworks as the amount of water-rents and other payments for a supply of water should not be sufficient to discharge:—Held, that in assessing the appellants to the poor-rate in respect of their reservoirs, pipes, and works, the amount collected by means of a water-rate ought to be taken into account; that a certain percentage on the total cost of the property might be allowed for wear and tear as the “probable average annual cost of repairs” within the Parochial Assessment Act (6 & 7 Wm. 4, c. 96), s. 1; and that the adequate remuneration to a contractor for erecting the works was not the true measure of the net rateable value of the premises. *Dewsbury Waterworks Board v. Penistone Union Assessment Committee*, 17 Q. B. D. 384; 55 L. J., M. C. 121; 54 L. T. 592; 34 W. R. 622; 50 J. P. 644—C. A.

2. PROCEEDINGS.

a. Payment and Recovery.

Payment to Collector—Acceptance of Bill in Satisfaction.]—At the hearing of a summons for non-payment of poor-rate against B., he set up the defence of payment to the assistant overseer by accepting bills of exchange, and on an account stated, though the assistant overseer had never paid over the proceeds to the overseers:—Held, that this was not a legal payment of poor-rates. *Smith v. Barham*, 51 J. P. 581—D.

Recovery of Rates from Company—Restrain- ing Proceedings for.]—See COMPANY, XI. 4, 6.

Mandamus—Enforcing Retrospective Rate.]—At the time when the parish of B. was by a provisional order separated from the local government district of M., the special district rates of that district were mortgaged for the

unexpired period of twenty-three years to secure the repayment of a debt which had previously been incurred by the local board of the district of M. The statute 24 & 25 Vict. c. 39, which confirmed the provisional order, apportioned the amount which the parish of B. should contribute towards the payment of such debt, and provided that the overseers of that parish should raise the annual instalments required to pay off the sum the parish of B. was to contribute in the name and as part of the rates levied within such parish for the relief of the poor. In July, 1883, the local board of M. paid off the last instalment of principal and interest due under the mortgage, and on the 25th of March demanded from the overseers of the parish of B. payment of the amount due from the parish since the 13th January, 1879, up to which date the parish had duly contributed in accordance with 24 & 25 Vict. c. 39. The demand not having been complied with, an application was made for a mandamus to compel the overseers to levy a rate in order to pay the amount in arrear:—Held, that the obligation imposed by the statute on the parish of B. was that they should pay their proportion of the debt annually, and that the effect of granting the mandamus would be to enforce the levy of retrospective rates, and the court therefore discharged the rule. *Reg. v. Beddington Overseers*, 48 J. P. 486—D.

— Payment of Debts Act, 1859 — Prosecution of Action with due Diligence.]—An action was brought by an engineer, within the time limited by s. 1 of the Payment of Debts Act, 1859, for services rendered to the defendants, who were a rural sanitary authority acting under the Public Health Act, 1875. After issue joined the plaintiff took out a summons to refer the matter to arbitration; this summons was opposed by the defendants, and was dismissed. The plaintiff then allowed two assizes at Leeds (where the action was to be tried) to pass without giving notice of trial; the defendants then took out a summons to dismiss the action for want of prosecution, after which the plaintiff gave notice of trial for the assizes then coming on. At the trial, the learned judge, with the consent of the parties, ordered the matter to be referred to an arbitrator, who found for the plaintiff for a certain sum. In an action for a mandamus to the defendants to levy a rate to satisfy the award:—Held, granting the mandamus, that, as the action was a proper one to be referred to arbitration, and as the plaintiff had taken out a summons to refer, which the defendants opposed, the plaintiff had not, under the circumstances, failed to prosecute the proceedings in the action “with due diligence” within the meaning of s. 4 of the Poor Law Boards (Payment of Debts) Act, 1859. *Rhodes v. Pateley Bridge Union*, 51 L. T. 235; 48 J. P. 168—D.

Distress Warrant—Property claimed to be in two Parishes—Rate not Appealed against.]

—J. was rated as occupier of premises in the D. parish, and also in G. Parish, and paid the rates to D. He did not appeal against the rate made by G. parish, and on an application by the G. overseers for a distress warrant, the justices having declined, and a rule being moved by way of mandamus under 11 & 12 Vict. c. 44, s. 5:—Held, that the rule must be made absolute, but with-

out costs, and that J.'s proper course was to appeal against the next rate to quarter sessions, when the question of boundary could be decided conclusively. *Reg. v. Jefferson*, 48 J. P. 393—D.

— Lands not in Occupation of Person assessed.]—Upon a summons before justices to enforce a poor-rate against a railway company, it appeared that property occupied by the company had been assessed by the description "offices and land with rails," but that in estimating the amount of the rate the overseers had treated certain buildings as being in the occupation of the company which were not in fact in their occupation. The company had not appealed against the rate:—Held, that the objection being matter of appeal and the rate good on the face of it, the justices were bound to issue a distress warrant. *Crease v. Sawle* (2 Q. B. 862) followed. *Reg. or Manchester Overseers v. Headlam*, 21 Q. B. D. 96; 57 L. J., M. C. 89; 52 J. P. 517—D.

— Contribution to Rural Sanitary Authority—Precept of Guardians to Overseers.]—The guardians of a union claimed and received sums from the overseers of a township under precepts based upon the then existing valuation list. It was subsequently decided, on an appeal against a rate by colliery owners, who represented two-thirds of the township, that the valuation list was too high. The overseers did not appeal against the valuation list under the 32nd section of the Parochial Assessment Act, 1862, but having refunded the amount overpaid by the colliery owners, claimed credit for the excess paid by them to the guardians:—Held, that the guardians might give credit for the sums overpaid by the overseers, even though the latter had not appealed against the valuation list; and that justices might refuse to enforce by distress warrant the guardians' precept for a general rate based on the old valuation list when it appeared that such sums had already been paid in excess by the overseers. *Tymemouth Union v. Backworth Overseers*, 57 L. J., M. C. 63; 59 L. T. 178; 52 J. P. 357—D.

Tithe Rent-Charge—How Recoverable.]—Where the owner of a tithe rent-charge does not pay the rates to which he is assessed in respect thereof, the amount is recovered from one or more of the occupiers of the land out of which such rent-charge issues, and not from the owner of such rent-charge. *Lamplugh v. Yalding Overseers*, 52 J. P. 505—Wills, J. Affirmed 22 Q. B. D. 452; 58 L. J., Q. B. 279; 37 W. R. 422; 53 J. P. 389—C. A.

Deficiency in Assessment—Liability of Promoters of Undertaking.]—By s. 133 of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), the promoters of the undertaking are to make good the deficiency in the assessment for poor-rate arising from their being in possession of lands liable to be assessed thereto:—Held, that the borough rate (under 45 and 46 Vict. c. 50, s. 145) and the county-rate (under 15 & 16 Vict. c. 81, s. 26) being respectively made chargeable on the poor-rate, the deficiency in the assessment for the poor-rate, which the promoters of the undertaking are liable to make good, includes any deficiency in respect of amounts

raised for borough-rate and county-rate, as well as any deficiency in the assessment for poor-law purposes properly so called. *Farmer v. London and North Western Railway*, 20 Q. B. D. 788; 59 L. T. 542; 36 W. R. 590—D.

— Completion of Works.]—By the Lands Clauses Consolidation Act, 1845, s. 133, the promoters of undertakings who become possessed under statutory authority of lands liable to be assessed to the poor-rate, are liable to make good the deficiency caused thereby "until the works shall be completed and assessed to the poor-rate." An urban sanitary authority, acting under statutory authority, took for the purposes of improvements lands situate in a number of parishes and liable to be assessed to the poor-rate. In some cases all the land so taken was used in the construction of the roadways of new streets; but in some cases more land was taken than was required for that purpose, so that the sanitary authority became possessed of surplus land which was vacant, unoccupied, and unassessed. Such land was to be disposed of either by sale in fee simple or by the creation of rent-charges which were to be sold within a specified time which had not expired when the rating authority brought an action to recover from the sanitary authority the amount of the deficiency in the assessment to the poor-rate caused by the lands having been taken:—Held, that the works were completed within the Lands Clauses Consolidation Act, 1845, s. 133, so as to relieve the undertakers from the liability to make good the deficiency so caused, when the streets were fully made, and such of the lands taken as might be liable to assessment had become assessable; and that the deficiency was to be computed from time to time by comparing the assessed value at the time of the special act of the lands taken with the assessed value at the time of computation of such of the lands taken as might have again become assessable. *Bristol (Guardians) v. Bristol (Mayor)*, 18 Q. B. D. 549; 56 L. J., Q. B. 320; 56 L. T. 641; 35 W. R. 619; 51 J. P. 676—C. A.

— Various Improvement Schemes—Separate Undertakings.]—The authority to put in force the compulsory powers of the Lands Clauses Consolidation Acts was conferred by a provisional order confirmed by a statute which described in one schedule, but under headings separately numbered, the several improvement schemes promoted by the sanitary authority:—Held, that each scheme described in the schedule constituted a separate undertaking, and that the deficiency in the assessment ought to be calculated on each separate undertaking within the rating area affected by it. *Id.*

b. Valuation List and Appeal.

Power to Amend—Notice of Objection.]—Under the Union Assessment Committee Amendment Act, 1864, 27 & 28 Vict. c. 39, s. 1,—which enables the assessment committee to hear objections against a valuation list approved by the committee, and to amend such list, "after notice given at any time in the manner prescribed by 25 and 26 Vict. c. 103, with respect to objections,"—an amendment of the list is valid, although no notice of the meeting of the committee was given to the overseers of the parish to which the list relates as required by

25 and 26 Vict. c. 103, s. 19. *Reg. v. Langrville Overseers, or Coppington Syke Overseers*, 14 Q. B. D. 83; 54 L. J., Q. B. 124; 52 L. T. 253; 33 W. R. 213; 49 J. P. 54—D.

Objection made before Rate—Second Objection unnecessary—Appeal against second Rate.]

—A person who has once given to the assessment committee notice of objection against a valuation list and failed to obtain such relief as he deems just, may appeal to quarter sessions against any subsequent poor-rate made in conformity with the list, and 27 and 28 Vict. c. 39, s. 1, does not make it a condition precedent of such appeal that previously thereto he should repeat his application to the committee for relief. *Reg. v. Denbighshire Justices*, 15 Q. B. D. 451; 54 L. J., M. C. 142; 53 L. T. 389; 33 W. R. 784—D.

Metropolis Valuation Act, 1869—Supplemental List.]—See METROPOLIS, II. 2.

Appeal — Arbitration — Special Case.]—A special case stated by an arbitrator upon an appeal against an assessment to poor-rates set out two alternative modes, neither contrary to law, for ascertaining the value of the tenements assessed:—Held, that the arbitrator must find the facts affirmatively, and not in the alternative. Case remitted to be re-stated. *North and South Western Junction Railway v. Brentford Union*, 13 App. Cas. 592; 58 L. J., M. C. 95; 60 L. T. 274—H. L. (E.).

III. SETTLEMENT AND REMOVAL OF PAUPERS.

Derivative Settlement—Illegitimate Child under Sixteen.]—Under the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), an illegitimate child under sixteen does not take the settlement of its mother, where such settlement has been derived from the mother's father, but such child is remitted to its birth settlement. *Reg. or Wycombe Union v. Marylebone Guardians*, 13 Q. B. D. 15; 53 L. J., M. C. 38; 50 L. T. 442; 48 J. P. 566—C. A. Affirming 31 W. R. 916—D.

—**No Settlement acquired by Father or Mother.]**—Where neither the father nor mother of a pauper child has acquired a settlement in his or her own right, and after the father has died the widowed mother has deserted such child, who is under the age of sixteen, and has not acquired a settlement for itself, such child is, by 39 & 40 Vict. c. 61, s. 35, to be deemed to be settled in the parish in which it was born, and an order for its removal to a parish in which it was not born, but in which its father was born, was quashed, because, in that case, it could not be shown what settlement such child derived from its father or mother without inquiring into the derivative settlement of such parent, which was prohibited by that section. *Reg. or Headington Union v. St. Olave's Union*, 13 Q. B. D. 293; 53 L. J., M. C. 91; 50 L. T. 444; 32 W. R. 738; 48 J. P. 647—C. A.

Widow and Children—Birth Settlement of Father.]—Upon appeal against an order for the removal of a widow and her three children, it appeared that the widow had acquired no settle-

ment since her husband's death. Her husband, the father of her three children, was born in the appellant parish, but never acquired a settlement for himself, and there was no evidence as to the settlement of his parents:—Held, that under 39 & 40 Vict. c. 61, s. 35, the children took a settlement from their father in the appellant parish, and that the order for their removal was right. *Liverpool Guardians v. Portsea Overseers*, 12 Q. B. D. 303; 53 L. J., M. C. 58; 50 L. T. 296; 32 W. R. 494; 48 J. P. 406—D.

—**From Father—Child over Sixteen at Date of Inquiry.]**—A legitimate child left the parish of his birth, and went with his father into another parish, where the father resided and acquired a settlement while the child was under sixteen, and where the child resided with his father until he was over sixteen. Afterwards they left that parish, and the child became chargeable as a pauper. On appeal against an order adjudging the pauper to be settled in the parish of his birth:—Held, that the pauper while under the age of sixteen had acquired a derivative settlement from his father in the parish in which they had resided, and that, not having afterwards acquired any other settlement, he retained such derivative settlement, and therefore the order must be quashed. *St. Pancras Guardians v. Norwich Guardians*, 18 Q. B. D. 521; 56 L. J., M. C. 37; 56 L. T. 311; 35 W. R. 547; 51 J. P. 343—D.

On an inquiry into the settlement of a pauper it appeared that she resided with her father till his death, and then, in the same parish, with her mother, who married again before the pauper arrived at the age of sixteen. After she attained that age the pauper continued to reside in the same parish with her mother and stepfather for two years and eight months, when she became chargeable. She was at that time and always had been physically incapable of work:—Held, that the effect of s. 35 of the Divided Parishes Act, 1876, is that every child on attaining the age of sixteen is for the purposes of settlement emancipated, and capable of acquiring a settlement, but that the pauper could not while under sixteen "reside" for any part of the period required for a settlement by residence under s. 34, and that as any settlement acquired by the mother on re-marriage was not communicated to the pauper, and she had not resided after attaining sixteen for three years, so as to acquire a settlement by residence under s. 34, she still retained the derivative settlement she had taken from her father while under that age. *Highworth and Swindon Union v. Westbury-on-Severn Union*, 20 Q. B. D. 597; 57 L. J., M. C. 33; 58 L. T. 839; 36 W. R. 422; 52 J. P. 325—C. A. Reversed W. N., 1889, p. 167—H. L. (E.).

Since 39 & 40 Vict. c. 61 (Divided Parishes Act, 1876), s. 35, enacting that "no person shall be deemed to have derived a settlement from any other person. . . . except . . . in the case of a child under the age of sixteen, which child shall take the settlement of its father . . . up to that age and shall retain the settlement so taken until it shall acquire another," paupers who are above the age of sixteen at the time of the inquiry as to their settlement cannot take the settlement of their father. *Reg. or Edmonton Guardians v. St. Mary, Islington, Guardians*, 15 Q. B. D. 339; 54 L. J., M. C. 146—C. A. Affirm-

ing 15 Q. B. D. 95; 54 L. J., M. C. 110; 53 L. T. 327; 49 J. P. 804—D.

A female pauper had married when above the age of sixteen, and had been deserted by her husband, who never had a settlement: she had never acquired a settlement of her own:—Held, that the pauper retained the derivative settlement which she had taken from her father while under the age of sixteen. *Guardians of Edmonton v. Guardians of St. Mary, Islington* (15 Q. B. D. 95, 339), overruled. *Dorchester Union v. Poplar Union*, 21 Q. B. D. 88; 57 L. J., M. C. 78; 59 L. T. 687; 36 W. R. 706; 52 J. P. 435; —C. A.

—“**Widowed Mother.**”—A pauper under the age of sixteen, whose father was dead and whose mother had married again without having acquired a settlement for herself during her widowhood, became chargeable to the respondent union, and an order was made for her removal into the appellant union, in which her mother had been born:—Held, that the order was bad; that at the time of the making of the order of removal the pauper had no “widowed mother” within the meaning of s. 35 of the Divided Parishes Act, 1876, whose settlement she could take, and that the pauper took her own birth settlement. *Amersham Union v. City of London Union*, 20 Q. B. D. 103; 57 L. J., M. C. 6; 58 L. T. 83; 36 W. R. 141; 52 J. P. 404—D.

“**Wife**” not including **Widow.**—Upon appeal against an order for the removal of a widow, it appeared that her husband was settled in a parish in the appellant union at the time of his death, and that she had acquired no settlement since his death:—Held, that the term “wife” in 39 & 40 Vict. c. 61, s. 35, did not include a widow; that the pauper did not therefore take the settlement of her deceased husband, and that the order for removal must be quashed. *Maidstone Union v. Holborn Union*, 17 Q. B. D. 817; 56 L. J., M. C. 91; 51 J. P. 54—D.

A widow and her legitimate children, under the age of sixteen, became chargeable to the respondent parish, and an order was made for their removal into the appellant union, where the deceased husband and father had been settled:—Held, that the word “wife” in s. 35 of the Divided Parishes Act, 1876, does not include a widow, and, therefore, as the widow’s settlement became the subject of inquiry after her husband’s death, she did not take his settlement, and that under the words “shall take the settlement of its father, or of its widowed mother, as the case may be,” the children took their mother’s birth settlement, and, therefore, the order must be quashed. *Maidstone Union v. Holborn Union* (supra), approved and followed. *Kingsbridge Union v. East Stonehouse Guardians*, 18 Q. B. D. 528; 56 L. J., M. C. 83; 56 L. T. 333; 35 W. R. 580; 51 J. P. 470—D.

A pauper under the age of sixteen, whose father was dead, and whose mother resided abroad, having become chargeable to a parish in the respondent union, an order was made for her removal into the appellant union, where her deceased father had during his lifetime acquired a settlement:—Held, that the order was bad; that the language of s. 35 of the Divided Parishes Act, 1876, is to be interpreted with reference to the moment of adjudication upon the application for an order of removal; that the word “wife”

in that section therefore does not include a widow, and that under the words “shall take the settlement of its father, or of its widowed mother, as the case may be,” the pauper took her mother’s birth settlement, as being the settlement of her surviving parent at the moment of adjudication. *Maidstone Union v. Holborn Union* (supra), and *Kingsbridge Union v. East Stonehouse Guardians* (supra), discussed and approved. *Croydon Union v. Reigate Union*, 19 Q. B. D. 385; 56 L. J., M. C. 93; 57 L. T. 917; 35 W. R. 824; 51 J. P. 724—C. A. Reversed W. N., 1889, p. 167—H. L. (E.).

Residence as Wife and Widow.—A pauper had resided with her husband in a parish continuously for upwards of three years, and continued after her husband’s death to reside as a widow in the same parish for three months:—Held, that the pauper had by such residence gained a settlement in the parish under s. 34 of the Divided Parishes Act, 1876. *Medway Union v. Bedminster Union*, 21 Q. B. D. 278; 57 L. J., M. C. 129; 36 W. R. 851; 52 J. P. 788—C. A. Affirming 58 L. T. 414—D. Affirmed W. N., 1889, p. 167—H. L. (E.). S. P. *Barton Regis Guardians v. St. Pancras*, 57 L. J., M. C. 6, n.—D.

“**Residence**” — **Pauper a Sailor** — **Constant Absence** — **Birth Settlement.**—A pauper, who was born in the appellant union, from 1876 up to the time of his application for relief was a sailor in the merchant navy, serving on board different ships and on different voyages. Between the different voyages he always returned to his mother’s house in the respondent union, remaining there on an average for four or five weeks in each year. In 1881 he also obtained jobs on shore, which lasted about three months, during which time he came to his mother’s house in the respondent union from Saturday to Monday in each week. When away he invariably left some of his effects at her house, and also brought to her a portion of his earnings as a contribution towards the expenses of the house, but he had no separate room there. In 1883 the pauper became blind, returned to his mother’s house, and sought parish relief. The justices made an order that he was settled in the appellant union, and directed that he should be removed there:—Held, that the facts disclosed did not establish that the pauper had ever resided in the Merthyr Tydvil union, within the meaning of 39 & 40 Vict. c. 61, s. 34, or that he had ever been there otherwise than as a visitor. *Reg. or Merthyr Union v. Stepney Union*, 54 L. J., M. C. 12; 52 L. T. 959; 49 J. P. 164—C. A.

— **Children under Seven** — **Residing away from Father.**—Upon appeal from an order of removal it appeared that seven years before the order the pauper children, then under seven years of age, were, on the death of their mother, placed by their father in the care of K., who resided at Chertsey, Surrey, and lived with him from that time continuously until they became chargeable. There was no evidence as to their residence before they went to Chertsey. The children were visited by their father on three occasions only after they went to Chertsey, and then only for a few hours at a time, but he made a weekly payment for their maintenance, which was continued till his death, six years after—

wards. The children never visited their father :—Held, that there was evidence on which the justices might find, as they must be taken to have done, that the father had never given up the intention that his children should return to him when he was in a position to receive them. *Holborn Union v. Chertsey Union*, 15 Q. B. D. 76 ; 54 L. J., M. C. 137 ; 53 L. T. 656 ; 33 W. R. 698 ; 50 J. P. 36—C. A.

— **Term of Three Years—Iremovability.**]—In order that a settlement by residence may be acquired under s. 34 of the Divided Parishes Act, 1876, there must have been a residence of three consecutive years under such conditions in each of such years as would have created a status of iremovability. *Dorchester Union v. Weymouth Union*, 16 Q. B. D. 31 ; 55 L. J., M. C. 44 ; 54 L. T. 52 ; 50 J. P. 310—D.

— **Break of Residence.**]—The pauper was employed from November, 1873, to July, 1878, as an indoor resident nurse at an infirmary in M. She was under the authority of the lady superintendent of nurses in the infirmary, and was bound by the terms of her agreement to undertake any duties that might be assigned to her either as an hospital or a private nurse. For five months in 1876, and for three months in 1877, she acted, under the orders of the lady superintendent, as a nurse at a branch establishment out of M., returning to the infirmary as soon as her duties ceased at the branch establishment. During this absence her wages were paid from the head institution at M., and the greater part of her effects during the first period of absence was left behind her in her box in the dormitory at the infirmary, to which place she went from time to time for change of clothing as required :—Held, that the absence of the pauper for the two periods did not amount to a break of residence, and that she had gained a settlement in M. by three years' residence within the meaning of 39 & 40 Vict. c. 61, s. 34. *Manchester Overseers v. Ormskirk Guardians*, 16 Q. B. D. 723 ; 54 L. T. 573 ; 34 W. R. 533 ; 50 J. P. 518—D.

B., father of paupers, had resided more than three years in S. parish, and then leaving his wife and children at S., started for the Cape of Good Hope in search of work. He sent his family a pound a week all the time he was abroad, and returned after a year to S., where the family still lived, but he deserted them, and the children being under sixteen, were sought to be removed, on the ground that B.'s settlement in S. was lost by break of residence :—Held, that the absence for a year was a break of B.'s residence in S. *Totness Union v. Cardiff Union*, 51 J. P. 133—D.

— **Receipt of Relief—Break of Residence.**]—The husband of the pauper had resided in the respondent union continuously for upwards of three years. During part of this time the pauper was in lunatic asylums, where she was maintained as a pauper lunatic, but in lucid intervals, the aggregate of which amounted to more than a year, she lived with her husband in the respondent union. The husband did not during his residence receive parish relief otherwise than in respect of the maintenance of his wife as a pauper lunatic :—Held, that the husband was irremovable, for the periods during which he did not receive parish relief could be put together in order to

constitute a year's residence by him under 9 & 10 Vict. c. 66, s. 1, and 28 & 29 Vict. c. 79, s. 8, and that the pauper took her husband's status of iremovability. *Ipswich Union v. West Ham Union*, 20 Q. B. D. 407 ; 53 L. T. 419 ; 36 W. R. 473 ; 52 J. P. 469—D.

Removal of Lunatic Wife—Consent of Husband—Separation of Husband and Wife.]—A wife, having become insane and chargeable to the union in which her husband dwelt, was taken from his house to the workhouse of the union, and the medical officer thereof certified, under 25 & 26 Vict. c. 111, s. 20, that the lunatic was a proper person to be kept in a workhouse. An order was then made by justices for her removal alone to another union containing her husband's last place of settlement. The husband consented to the removal order ; the wife was mentally incapable of consent :—Held, that the order of removal made under these circumstances did not contravene the policy of the law with regard to the separation of husband and wife, and was good. *Reg. v. Preston Guardians or Garstang Union*, 11 Q. B. D. 113 ; 52 L. J., M. C. 97 ; 49 L. T. 104 ; 48 J. P. 69—D.

Pauper of Weak Intellect—Casual Poor—Status of Ireinovability.]—A pauper of weak intellect, whose place of settlement was in the W. union, and who had acquired a status of iremovability in the D. union, was found wandering in the B. union, where he became chargeable. At the time of his leaving the D. union he had not formed any intention of abandoning his residence in the union, and owing to his mental incapacity he was incapable of exercising any independent choice as to his place of residence, but his mental condition was not such as would justify his detention in a lunatic asylum :—Held, that he was not a casual pauper in the B. union, and was removable therefrom, under 14 Car. 2, c. 12, to the W. union, notwithstanding the status of iremovability acquired in the D. union. *Reg. v. Wakefield Guardians*, 48 J. P. 326—D.

IV. MAINTENANCE AND RELIEF OF PAUPERS.

Liability of Children of first Marriage, where Mother living with second Husband.]—A woman and her second husband became chargeable to a parish, and received from it a weekly sum as outdoor relief, which was paid to the husband :—Held, that the children of the woman by a former husband were liable under 43 Eliz. c. 2, s. 7, to relieve and maintain her, and therefore to contribute towards such relief for her maintenance, and that their liability was not affected by 4 & 5 Will. 4, c. 76, s. 56, enacting that all relief to a wife shall be considered as given to her husband. *Arrowsmith v. Dickenson*, 20 Q. B. D. 252 ; 58 L. T. 632 ; 36 W. R. 507 ; 52 J. P. 308—D.

Maintenance of Married Woman—Order upon Husband towards Cost of Relief.]—It is not a condition precedent to the power of justices under 31 & 32 Vict. c. 122, s. 33, to order the husband to pay for the maintenance of his pauper wife, that the guardians should have fixed the sum for her relief. Therefore, although the guardians

have not fixed any sum for her future relief, but have given her a small weekly sum, the justices may, under the 33rd section, order the husband to pay for her maintenance such weekly sum as, considering the condition of the husband and all the circumstances, may be proper, although it may exceed the amount of the relief previously given to her by the guardians. *Dinning v. South Shields Union*, 13 Q. B. D. 25; 53 L. J., M. C. 90; 50 L. T. 446; 48 J. P. 708—C. A. Reversing, 32 W. R. 317—D.

Grant of Letters of Administration to Nominees of Guardians.—B., a pauper lunatic chargeable to the guardians of the Kingston Union, died, a spinster and without parents, leaving three brothers and one sister her surviving, all of whom renounced their right to administration. One other brother, who had gone to America in 1871, but who had not been heard of since 1883, was cited by advertisement, under order of the court. The court, upon the application of the guardians, made a grant of administration to the clerk to the board as their nominee. *Byrne, In Goods of*, 52 J. P. 281—Butt, J.

Recovery of Arrears.—Under s. 104 of the Lunatic Asylums Act, 1853, the guardians of the poor of a parish to which a pauper lunatic is chargeable are entitled in the event of his becoming entitled to property to recover only six years' arrears in respect of the sums paid by them for his maintenance in an asylum. *Newbegin, In re, Eggleton v. Newbegin*, 36 Ch. D. 477; 56 L. J., Ch. 907; 57 L. T. 390; 36 W. R. 69—Chitty, J.

The deceased had, for over six years prior to her death, been supported as a pauper lunatic at the county lunatic asylum. During the whole of this period she was, in fact, entitled to an annuity of 24l. 16s. 6d., payable by the Commissioners for the Reduction of the National Debt. This fact only came to the knowledge of the guardians at the time of her death, or shortly thereafter:—Held, that the claim of the guardians was not limited to the period of twelve months prescribed by s. 16 of that statute, but that, in respect of such period, they were entitled absolutely to repayment, under the statute, and, as to a further period not exceeding five years (making six years in all), they were entitled to come in and claim as ordinary creditors, notwithstanding the fact of their having taken no steps to recover payment for such expenditure during the lifetime of the deceased pauper lunatic. *Lambeth Guardians v. Bradshaw*, 57 L. T. 86; 50 J. P. 472—Butt, J.

Power to Recover Expenses at Death.—Where A. was maintained as a pauper lunatic, though the guardians knew that he had some property, which was just sufficient to support his wife, on summons under Ord. XLV. r. 1, of the Rules of Court, 1883, for payment of a sum of 56l. 6s. in respect of such maintenance:—Held, that, though the guardians had not obtained an order from justices during the lifetime of the deceased, they were entitled to payment. *Webster, In re, Derby Union v. Sharratt*, 27 Ch. D. 710; 54 L. J., Ch. 276; 51 L. T. 319—V.-C. B.

Right to Reimbursement—“Person entitled to receive any Payment as Member of Benefit or Friendly Society.”—A member of

a trade union is not “a member of a benefit or friendly society, and as such entitled to receive any payment,” within the meaning of the 23rd section of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), inasmuch as the Trade Unions Act, 1871 (34 & 35 Vict. c. 31) expressly declines to enable any court to entertain proceedings to enforce an agreement to apply the funds of a trade union to provide benefits for members; and therefore the guardians cannot under that section obtain from a trade union the repayment of expenses incurred in the relief of a pauper lunatic member. *Winder v. Kingston-upon-Hull*, 20 Q. B. D. 412; 58 L. T. 583; 52 J. P. 535—D.

V. WORKHOUSES.

Lease of Site—“Charitable Use”—**Non-enrolment**—**Reservation to Grantor**—**Rent**, **non-payment of**.—By a lease dated in 1747—after reciting that the inhabitants of the parish of G. had resolved to build a workhouse for the better reception and employment of the poor of the parish, and had applied to the lessor for a lease of the land demised, and that the lessor, “in order to encourage so good a work,” had consented to grant the lease—a piece of land was demised for a term of 150 years to commence from a day fifteen days later than the date of the lease, at the yearly rent of 1s., to several persons, one of whom was the vicar of G., in trust that the lessees might build a workhouse upon the land “for the better reception and employment and for the lodging and entertainment only of all the poor people of the parish of G. for the time being during the said term, in such manner as they, or the major part of them, shall think fit, at the proper costs and charges of the inhabitants of the said parish of G., or otherwise, and not to be let, mortgaged for money, or assigned, to any other use, intent or purpose whatsoever.” And it was agreed that, if the inhabitants should discontinue the prescribed use of the building so to be erected, and should be willing to deliver it to the landlord, it should be lawful for them to do so, he paying to the churchwardens or overseers of the parish the then value of the building. The deed was not enrolled under the Mortmain Act, 1736 (9 Geo. 2, c. 36). A workhouse was duly erected on the demised land pursuant to the lease. In 1862, the workhouse, being no longer required, was pulled down, and no rent having been paid under the lease since 1776, the site was conveyed to a purchaser in fee under the Act 5 & 6 Will. 4, c. 69, enabling the parish authorities to sell the sites of disused workhouses. An action having been brought by a person claiming to be the reversioner against persons—as alleged assigns of the lease—claiming under the purchase of 1862, to recover the arrears of rent:—Held, that the lease was a lease for “charitable uses:” that it failed to comply with the requirements of the Mortmain Act in that, besides non-enrolment, it did not take effect in possession and contained reservations in favour of the grantor in the shape of rent and something in the nature of a right of pre-emption; that these defects were not cured by s. 73 of the Poor Law Act, 1844 (7 & 8 Vict. c. 101), that act curing only one defect, namely, want of enrolment; and

that the lease was accordingly void ab initio, and that the Statute of Limitations began to run against the grantor, if not from the execution of the lease, at all events from the time the rent ceased to be paid. *Webster v. Southey*, 36 Ch. D. 9; 56 L. J., Ch. 785; 56 L. T. 879; 35 W. R. 622; 52 J. P. 36—Kay, J.

Semble, land acquired by parish officers to enable them to perform their statutory obligations, as, for instance, by providing a workhouse, is land acquired for a "charitable use." *Burnaby v. Barsby* (4 H. & N. 690) questioned. *Ib.*

Employment of Roman Catholic Priest.]—*See Reg. v. Haslehurst*, ante, col. 1367.

POST OFFICE.

Post Office Order cashed through Bankers—Negotiable Instrument.]—The plaintiffs banked with the defendants. It was the duty of the plaintiffs' secretary to pay all moneys received by him on behalf of the plaintiffs into the defendants' bank to the credit of the plaintiffs. The secretary without the knowledge of the plaintiffs kept an account at the defendants' bank. He paid into the defendants' bank to his own credit certain post-office orders belonging to the plaintiffs which the defendants subsequently cashed. The post-office regulations with regard to post-office orders provide that, when presented for payment by a banker, they shall be payable without the signature of the payee of the receipt contained in the order, provided the name of the banker presenting the order is written or stamped upon it:—Held, that there had been a wrongful conversion of the post-office orders above mentioned by the defendants; and that the regulations of the post-office with regard to the payment of post-office orders presented through bankers did not give to those instruments in the hands of bankers the character of instruments transferable to bearer by delivery so as to bring the case within the doctrine of *Goodwin v. Roberts* (1 App. Cas. 476), and thus give the defendants a good title to the post-office orders independently of the authority given to the plaintiffs' secretary. *Fine Art Society v. Union Bank*, 17 Q. B. D. 705; 56 L. J., Q. B. 70; 55 L. T. 536; 35 W. R. 114; 51 J. P. 69—C. A.

Telegrams—Subsequently increased Charge—Authority of Clerk—Estoppel.]—Where a certain sum is charged for a telegram and the sender is afterwards called upon to pay an increased sum:—Held, that he is bound to pay the amount so claimed, as the Postmaster-General is in no way estopped from suing, and is not bound by inaccurate representations made by a clerk in his employ. *Postmaster-General v. Green*, 51 J. P. 582—D.

Liability of Postmaster-General to pay Tolls.]—The proprietor of a certain bridge and roads had been empowered to construct the same by 36 Geo. 3, c. 94; and it was thereby enacted that all persons, horses, cattle, and carriages, should have free liberty, upon payment of the tolls prescribed

by the act, to pass over such bridge and roads without hindrance. For a period of between eighty and ninety years before Feb., 1885, the persons in the employ of the Postmaster-General duly paid the tolls, but since that date exemption for such persons has been claimed, and the tolls not paid. The proprietors then presented a petition of right, the object of which was to show that the persons in the employment of the Postmaster-General were liable to pay the tolls in question. The Crown demurred to the petition of right. The alleged liability depended upon whether there was an express enactment still subsisting and exempting the mails from the tolls imposed by 36 Geo. 3, c. 24:—Held, upon the construction of 25 Geo. 3, c. 57; 36 Geo. 3, c. 94; 3 Geo. 4, c. 126; 4 Geo. 4, c. 95; and 1 Vict. c. 32, that the express exemption of the mails from tolls contained in 25 Geo. 3, c. 57, was made applicable by the 53rd section of 36 Geo. 3, c. 94, to the bridge and roads in question. Held, also, that 25 Geo. 3, c. 57, although partially, and to a limited extent, repealed by 3 Geo. 4, c. 126, and 4 Geo. 4, c. 95, was not by the two last-mentioned acts repealed as to such bridge and roads. Held, also, that the mails were specially exempted from the payment of tolls to the proprietors of the bridge and roads by s. 19 of 1 Vict. c. 32, and that the supplicants were not entitled to any relief under their petition of right. Held, further, that neither usage nor long-continued practice could have any effect upon the facts in question. *Northam Bridge Company v. Reg.*, 55 L. T. 759—Chitty, J.

Rating Property of Postmaster-General under Telegraph Act.]—*See St. Gabriel, Fenchurch v. Williams*, ante, col. 1375.

Injunction to compel Withdrawal of Notice to Postmaster.]—B. was employed to manage one of L.'s branch offices for the sale of goods, and resided on the premises; he was dismissed by L., and on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at L.'s branch office:—Held, that B. had no right to give a notice to the post office, the effect of which would be to hand over to him letters of which it was probable that the greater part related only to L.'s business; and that the case was one in which a mandatory injunction compelling the defendant to withdraw his notice could properly be made, the plaintiff being put under an undertaking only to open the letters at certain specified times, with liberty for the defendant to be present at the opening. *Hermann Loog v. Bean*, 26 Ch. D. 306; 53 L. J., Ch. 1128; 51 L. T. 442; 32 W. R. 994; 48 J. P. 708—C. A.

POWER OF ATTORNEY.

Construction—Operative part controlled by Recital.]—A power of attorney contained a recital that the donor was about to return to South Australia, and was "desirous of appointing an attorney or attorneys to act for him during his absence from England." The operative part of the deed, which gave the attorney large powers of mortgaging the donor's

property, contained no mention of the duration of those powers:—Held, that the operative part of the deed was controlled by the recital, and consequently that charges effected by the attorney upon the property of the donor while he was in England were invalid as against him. *Danby v. Courts*, 29 Ch. D. 500; 54 L. J., Ch. 577; 52 L. T. 401; 33 W. R. 559—Kay, J.

—**General Words—Authority to Mortgage.**—A. gave a power of attorney to B. to manage real estate, recover debts, settle actions, also to “sell and convert into money” personal property, and to execute and perform any contract, agreement, deed, writing, or thing that might in B.’s opinion be necessary or proper for effectuating the purposes aforesaid, or any of them, and “for all or any of the purposes” of those presents to use A.’s name, and generally to do any other act whatsoever which in B.’s opinion ought to be done in or about A.’s concerns as fully as if A. were present and did the same, his desire being that all matters respecting the same should be under the full management and direction of B.:—Held, that the general words were limited by the special purpose of the power of attorney, and did not authorise a mortgage of his personal property. *Lewis v. Ramsdale*, 55 L. T. 179; 35 W. R. 8—Stirling, J.

—**Power to Pledge.**—A power of attorney authorised the holder “from time to time to negotiate, make sale, dispose of, assign, and transfer” a promissory note:—Held, that the holder had no authority to pledge the note. *Jonmenjoy Coondoo v. Watson*, 9 App. Cas. 561; 53 L. J., P. C. 80; 50 L. T. 411—P. C.

—**Signature of Bankruptcy Petition on behalf of Principal.**—A bankruptcy petition signed by an attorney on behalf of his principal, is sufficiently signed, provided that the power under which the attorney acts is wide enough to confer upon him the necessary authority. *Richards, Ex parte, Wallace, In re, or Wallace, Ex parte, Wallace, In re*, 14 Q. B. D. 22; 54 L. J., Q. B. 293; 51 L. T. 551; 33 W. R. 66; 1 M. B. R. 246—C. A.

A power “to commence and carry on, or to defend, at law or in equity, all actions, suits or other proceedings in which I or my property may be in anywise concerned,” was held to confer such authority. *Ib.*

POWERS.

Of Appointment under Wills.—See WILL.

Of Appointment under Settlements.—See HUSBAND AND WIFE—SETTLEMENT.

Of Trustees.—See TRUST AND TRUSTEE.

Of Executors.—See EXECUTOR AND ADMINISTRATOR.

PRACTICE AND PLEADING.

I. IN THE HOUSE OF LORDS—See APPEAL.

II. IN THE COURT OF APPEAL—See APPEAL.

III. IN THE HIGH COURT OF JUSTICE.

(A) Practice and Procedure.

1. *Rules of Court*, 1395.
2. *Jurisdiction—Rehearing*, 1395.
3. *Parties to Actions and Proceedings by and against Particular Parties*, 1397.
 - a. Married Women—See HUSBAND AND WIFE.
 - b. Companies—See COMPANY.
 - c. Executors and Administrators—See EXECUTOR AND ADMINISTRATOR.
 - d. Infants—See INFANT.
 - e. Lunatics—See LUNATIC.
 - f. Partners—See PARTNERSHIP.
 - g. Third Parties, 1397.
 - h. Suing in Formâ Pauperis, 1397.
 - i. Representative Parties, 1398.
 - j. Service of Notice of Judgment on Person not a Party, 1399.
 - k. Change of Parties.
 - i. On Death.
 - u. When Cause of Action Survives, 1400.
 - β. Practice, 1401.
 - ii. On Bankruptcy, 1403.
 - iii. On Birth of Parties, 1404.
 - iv. Devolution of Interest, 1404.
 - l. Adding and striking out Parties.
 - i. Plaintiffs, 1404.
 - ii. Defendants, 1406.
4. *Writ of Summons*.
 - a. Form and Contents of, 1408.
 - b. Special Indorsement under Ord. III., r. 6, 1408.
 - c. Service of Writ, 1409.
 - d. Other Points, 1411.
 - e. Service out of the Jurisdiction.
 - i. Practice as to, 1411.
 - ii. In what Cases allowed, 1414.
5. *Appearance and Proceedings in Default of*, 1419.
6. *Judgment on specially-indorsed Writ under Ord. XIV.*, 1421.
7. *Joinder of Causes of Action*, 1423.
8. *Intermediate Proceedings*.
 - a. Payment into and out of Court—Funds in Court.
 - i. Order on Accounting Parties, 1425.
 - ii. Payment into Court with Defence, 1426.
 - iii. Funds in Court, 1428.
 - b. Staying Proceedings.
 - i. Lis alibi pendens, 1430.
 - ii. Non-payment of Costs, 1433.
 - iii. Frivolous and Vexatious Actions, 1434.
 - iv. Abuse of Process, 1436.
 - v. In other Cases, 1436.
 - c. Particulars.
 - i. In what Cases, 1436.
 - ii. Practice, 1439.

- d. Security for Costs.
 - i. Persons resident abroad, 1440.
 - ii. Plaintiff a Trustee in Bankruptcy, 1442.
 - iii. Action not for Plaintiff's Benefit, 1442.
 - iv. Insolvency of Plaintiff, 1443.
 - v. Married Women, 1443.
 - vi. Fund in Court, 1443.
 - vii. Of Appeals to Court of Appeal—*See* APPEAL.
 - viii. Of Appeals from County Courts — *See* COUNTY COURT.
 - ix. Remitting Action to County Court in Default — *See* COUNTY COURT.
 - a. On Winding-up of Company — *See* COMPANY.
 - xi. In Interpleader—*See* INTERPLEADER.
 - c. Consolidation of Actions, 1444.
 - f. Transfer of Actions, 1444.
 - g. Discontinuance, 1446.
 - h. Confession of Defence, 1447.
 - i. Dismissal for want of Prosecution, 1448.
 - j. Inspection of Property, 1449.
 - k. Accounts and Inquiries, 1449.
 - l. Mandamus, Injunction, Receiver.
 - i. Effect of Judicature Act, 1873, s. 25, sub-s. 8...1453.
 - ii. Prerogative Mandamus—*See* MANDAMUS.
 - iii. Injunction — *See* INJUNCTION.
 - iv. Receiver.
 - a. In what Cases, 1454.
 - b. The Application, 1455.
 - c. Practice, 1456.
 9. Pleadings.—*See* infra (B).
 10. Third Parties — Notice claiming Contribution or Indemnity.
 - a. In what Cases, 1457.
 - b. Practice, 1461.
 11. Demurrer, Proceedings in lieu of, 1463.
 12. Discovery, Inspection and Interrogatories—*See* DISCOVERY.
 13. Reference to Arbitration — *See* ARBITRATION.
 14. Trial.
 - a. Place of Trial, 1466.
 - b. Mode of Trial, 1467.
 - c. Notice of Trial, 1471.
 - d. Proceedings at Trial, 1472.
 15. New Trial, 1474.
 16. Judgment.
 - a. Practice, 1476.
 - b. Motion for Judgment, 1477.
 - c. Setting Aside, Varying or Impugning, 1478.
 - d. Effect of Judgments, &c.—*See* ESTOPPEL—JUDGMENT.
 - e. In default of Appearance—*See* supra, 5.
 - f. In default of Pleading — *See* infra, B. 7.
 - g. Ordering on Motion for New Trial—*See* supra, 15.
 - h. Under Ord. XIV.—*See* supra, 6.
 17. Execution—*See* EXECUTION.
 18. Attachment—*See* ATTACHMENT.
 19. Motions, Summonses, Petitions, and Orders.
 - a. Motions, 1481.
 - b. Summonses.
 - i. Service of, 1483.
 - ii. Originating Summonses.
 - a. Service of, 1484.
 - b. Jurisdiction, 1484.
 - c. Petitions, 1487.
 - d. Orders, 1488.
 20. Proceedings in Chambers.
 - a. Judge at Chambers, 1492.
 - b. Master at Chambers, 1492.
 - c. Chief Clerk, 1492.
 21. Court Fees, 1493.
 22. Vacations, 1494.
 23. District Registry—*See* DISTRICT REGISTRY.
 24. Special Case, 1495.
 25. Stop Order, 1495.
 26. Time—Notice to Proceed, 1496.
 27. Interpleader — *See* INTERPLEADER.
 28. Affidavit—*See* EVIDENCE.
 29. Evidence—*See* EVIDENCE.
 30. Costs—*See* COSTS.
 31. Proceedings in particular Actions.
 - a. Actions for Recovery of Land—Ejectment, 1496.
 - b. Administration Actions — *See* EXECUTOR AND ADMINISTRATOR.
 - c. Partition Actions—*See* PARTITION.
 - d. Partnership Actions—*See* PARTNERSHIP.
- (B) Pleadings.
1. Generally, 1497.
 2. Statement of Claim, 1498.
 3. Defence, 1499.
 4. Set-off and Counterclaim, 1500.
 5. Amendment of, 1501.
 6. Striking out, 1504.
 7. Default in Pleading and Proceedings thereon, 1506.
- IV. IN THE PROBATE, ADMIRALTY AND DIVORCE DIVISION — *See* HUSBAND AND WIFE—SHIPPING—WILL.
- V. IN THE COURT OF BANKRUPTCY—*See* BANKRUPTCY.
- VI. IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL—*See* COLONY.
- VII. IN THE COUNTY COURT—*See* COUNTY COURT.
- VIII. IN ECCLESIASTICAL COURT—*See* ECCLESIASTICAL LAW.
- IX. ON APPEAL FROM SUPERIOR COURT—*See* APPEAL.
- X. ON WINDING-UP COMPANIES—*See* COMPANY.
- XI. IN ADMINISTRATION ACTIONS — *See* EXECUTOR AND ADMINISTRATOR.
- XII. UNDER TRUSTEE ACTS—*See* TRUST AND TRUSTEE.
- XIII. UNDER LANDS CLAUSES ACT — *See* LANDS CLAUSES ACT.

III. IN THE HIGH COURT OF JUSTICE.

(A) Practice and Procedure.

1. RULES OF COURT.

"Cause then pending."]—A judgment was delivered before the Rules of 1883 came into operation, by which the action was dismissed and the plaintiff was ordered to pay the costs. The taxing-master's certificate was made after the Rules of 1883 had come into operation:—Held, that the latter rules applied as the action was a "cause then pending" within the meaning of the preface of the latter rules. *Boswell v. Coaks*, 57 L. J., Ch. 101; 57 L. T. 742; 36 W. R. 65—C. A.

"Forms shall be used."]—"The forms used in the appendix shall be followed with such variations as circumstances may require," means that those forms can only be varied for the purpose of making them to be in accordance with the terms of the order. *Id.*

2. JURISDICTION—REHEARING.

Rehearing—Power of Court or Judge.]—If a petition is heard on its merits, and is dismissed on the ground that the petitioner has failed to make out his case, he cannot on the subsequent discovery of fresh evidence in support of his case present a fresh petition for the same object, without leave of the court previously obtained. *House, Ex parte, May, In re*, 28 Ch. D. 516; 54 L. J., Ch. 338; 52 L. T. 78; 33 W. R. 917—C. A.

The shareholders in a company passed an extraordinary resolution to wind up the company voluntarily, but the resolution was void, the majority of members who voted not being entitled to vote. A creditor filed a petition in the Chancery Court of the Duchy of Lancaster for a supervision order or for a compulsory winding-up order, and as the court and the petitioner were ignorant of the fact that the resolution was invalid, a supervision order was made. Five months afterwards the petitioner discovered the invalidity of the resolution, and then moved before the Vice-Chancellor that the supervision order might be discharged, and a compulsory winding-up order made. This motion having been refused by the Vice-Chancellor on the ground of want of jurisdiction to rehear the petition, the petitioner appealed from the refusal of the motion, and also applied to the Court of Appeal for leave to appeal against the original order notwithstanding the lapse of time. *Semble*, the Vice-Chancellor had no power to rehear the petition himself. *Manchester Economic Building Society, In re*, 24 Ch. D. 488; 53 L. J., Ch. 115; 49 L. T. 703; 32 W. R. 325—C. A.

— **Order made but not drawn up.**]—Whether a judge can rehear in chambers an order which he has previously made in chambers, but which has not been drawn up. *Quære. Adam Eytton, In re, Charlesworth, Ex parte*, 36 Ch. D. 299; 57 L. J., Ch. 127—C. A.

— **Order made and drawn up.**]—A charging order under the Solicitors Act, made by a judge

of the High Court, sitting in bankruptcy is not an order made by him under his bankruptcy jurisdiction, within s. 104 of the Bankruptcy Act, 1883, and therefore cannot be reviewed, rescinded or varied by him after it has been drawn up. *Brown, Ex parte, Suffield & Watts, In re*, 20 Q. B. D. 693; 58 L. T. 911; 36 W. R. 584; 5 M. B. R. 83—C. A.

Though an *ex parte* order has been drawn up and entered, the party affected thereby is at liberty to apply for the discharge to the judge who made the order; the order being *ex parte*, such an application does not involve a rehearing. *Boyle v. Sacher*, 39 Ch. D. 249; 58 L. T. 822; 37 W. R. 68—C. A.

Re-argument, when allowed.]—The court declined to allow a case to be re-argued on the ground that an enactment in the Conveyancing and Law of Property Act, 1881, had been overlooked. *Birmingham Land Company v. London and North-Western Railway*, 34 Ch. D. 261; 56 L. J., Ch. 956; 55 L. T. 699; 35 W. R. 173—C. A.

Bill of Review—Summons for leave to bring Action in the Nature of—High Court or Court of Appeal.]—A defendant took out a summons asking that, notwithstanding the order made in the action, he might be at liberty to commence an action against the plaintiff in the nature of a bill of review grounded upon new matter, discovered after the making of the orders:—Held, that the old jurisdiction of the Court of Chancery to entertain an action in the nature of a bill of review was unaffected by the Judicature Act, though the leave to bring such an action was more usually obtained now by summons than by petition. The grounds for obtaining the leave were precisely the same as existed before the acts; namely, the evidence discovered must be shown to be material, and must have been discovered since the decision, and it must be shown that it could not with reasonable diligence have been discovered before:—Held also, that an application to institute an action in the nature of a bill of review is part of the original jurisdiction of the High Court, and such an application should be made to the High Court, and not to the Court of Appeal, which has no original jurisdiction of that kind. *Falcke v. Scottish Imperial Insurance Company*, 57 L. T. 39; 35 W. R. 794—Kay, J.

Retrial after Juror withdrawn.]—*See Thomas v. Exeter Flying Post*, post, col. 1474.

Striking out Scandalous and Impertinent Matter.]—An application was made that certain parts of a bill of costs delivered might be expunged for scandal and impertinency. It was contended, in opposition, that the jurisdiction of the court was confined to scandalous and impertinent matter in pleadings and affidavits, and that, therefore, the application could not be entertained:—Held, that every proceeding, of whatever nature, in the Court of Chancery, which was made the vehicle for the introduction of scandalous or irrelevant matter, could be amended or otherwise dealt with under the general jurisdiction of the court. *Miller, In re, French, In re, Love v. Hills*, 54 L. J., Ch. 205; 51 L. T. 853; 33 W. R. 210—Kay, J.

Of Court to Amend.]—See *Cropper v. Smith*, post, col. 1501.

Judge in Chambers.]—See *infra*, 20, a.

Chancery Division—Action for less than £10.]—An action in respect of a sum of less than 10*l.* cannot be maintained in the Chancery Division. *Westbury-on-Severn Sanitary Authority v. Meredith*, 30 Ch. D. 387; 55 L. J., Ch. 744; 52 L. T. 839; 34 W. R. 217—C. A. [By Rules of Supreme Court, 1883, the Chancery Consolidated General Orders of 1860 are repealed.]

3. PARTIES TO ACTIONS AND PROCEEDINGS BY AND AGAINST PARTICULAR PARTIES.

a. **MARRIED WOMEN**—See **HUSBAND AND WIFE.**

b. **COMPANIES**—See **COMPANY.**

c. **EXECUTORS AND ADMINISTRATORS**—See **EXECUTOR AND ADMINISTRATOR.**

d. **INFANTS**—See **INFANT.**

e. **LUNATICS**—See **LUNATIC.**

f. **PARTNERS**—See **PARTNERSHIP.**

g. **THIRD PARTIES.**

Intervention by.]—A stranger to an action injuriously affected through any judgment suffered by default may intervene in one of two ways. He may either obtain the defendant's leave to use the defendant's name, if the defendant has not already bound himself to allow such use of his name to be made; and he may thereupon, in the defendant's name, apply to have the judgment set aside on terms. Or he may take out a summons in his own name at chambers, to be served on both the defendant and plaintiff, asking leave to have the judgment set aside, and to be at liberty to defend the action on terms. Per cur. *Jacques v. Harrison*, 12 Q. B. D. 165; 53 L. J., Q. B. 137; 50 L. T. 246; 32 W. R. 471—C. A.

Notice claiming Contribution or Indemnity.]—See *infra*, 10.

h. **SUING IN FORMÂ PAUPERIS.**

Leave, how granted.]—Leave to present a petition in formâ pauperis will be granted on motion; but such leave may also be obtained by summons in chambers. *Lewin, In re*, 33 W. R. 128—Kay, J.

Proceedings on Crown Side.]—A party to proceedings on the Crown side of the Queen's Bench Division cannot be admitted to proceed as a pauper. *Mullenetsen v. Coulson*, 21 Q. B.

D. 3; 57 L. J., Q. B. 464; 58 L. T. 562; 36 W. R. 811—D.

Right to be heard in Person.]—A person who has been admitted to sue as a pauper, but to whom no counsel has been assigned, is entitled to be heard in person. *Tucker v. Collinson* or *Cotterell*, 16 Q. B. D. 562; 55 L. J., Q. B. 224; 54 L. T. 263; 34 W. R. 354—C. A.

Appeal—Affidavits.]—Where a party who has not sued or defended as a pauper in the court below applies for leave to appeal in formâ pauperis, the court will follow by analogy Ord. XVI. rr. 22, 23, and 24, and not the old practice as to such appeals. A married woman suing without a next friend, her husband not being a party, applied for leave to appeal in formâ pauperis:—Held, that her husband as well as herself must make the affidavit required by rule 22. *Roberts, In re, Kiff v. Roberts*, 33 Ch. D. 265; 35 W. R. 176—C. A.

Taxation of Plaintiff's Costs—Remuneration for Solicitor and Counsel.]—Under the Rules of the Supreme Court, 1883, Ord. XVI. rr. 24, 25, 26, 27, 31, a successful plaintiff in an action in formâ pauperis tried before a judge and jury is entitled upon taxation as against the defendant to costs out of pocket only, and cannot be allowed anything for remuneration to his solicitor or fees to counsel. *Carson v. Pickersgill*, 14 Q. B. D. 859; 54 L. J., Q. B. 484; 52 L. T. 950; 33 W. R. 589; 49 J. P. 612—C. A.

i. **REPRESENTATIVE PARTIES.**

Fund raised by Voluntary Subscriptions—Action by some Members of Committee on behalf of all against former Member.]—An action was brought by five of the members of a church building committee, on behalf of themselves and the other members of the committee, against a former member, claiming an account of all moneys received and paid by him in respect of the church building fund during the period of his membership. The fund was raised by voluntary subscriptions; seventeen persons having constituted themselves into a committee to receive subscriptions for the purpose of improving the church of the parish, and to apply the moneys thus collected:—Held, that, the members of the committee being mere agents of the subscribers, the action could not be maintained by some of the agents against others. *Strickland v. Weldon*, 28 Ch. D. 426; 54 L. J., Ch. 452; 52 L. T. 247; 33 W. R. 545—Pearson, J.

Cestui que Trust—Interest entitling Party to bring Action.]—To entitle a third person not named as a party to a contract, to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of cestui que trust under the contract. By a deed of separation between husband and wife, the husband covenanted with the trustees to pay them an annuity for the use of the wife and two eldest daughters, and also to pay to the trustees all the expenses of the maintenance and education of the two youngest daughters. On one of the two youngest daughters subsequently attaining sixteen the husband re-

fused any longer to maintain her, whereupon she brought an action by her next friend against the husband and the trustees of the separation deed to enforce the husband's covenant, the trustees having refused to allow their names to be used as plaintiffs:—Held, that upon the construction of the deed the plaintiff was not in the position of *cestui que trust* under the covenant so as to entitle her to maintain the action, but liberty was given to her to amend by adding the trustees, the wife, and the other daughters, or any of them, as plaintiffs. The trustees refused to be joined as plaintiffs, and the statement of claim was amended by making the wife a co-plaintiff:—Held, that she had such an interest as entitled her to sue, the deed being an arrangement between the husband and wife, and the trustees being introduced on her behalf in order to get over the difficulty that the husband and wife could not at law sue each other, so that the trustees were to be considered trustees for the wife, and if they refused to sue, she could sue in equity. *Gandy v. Gandy*, 30 Ch. D. 57; 54 L. J., Ch. 1154; 53 L. T. 306; 33 W. R. 803—C. A.

— **Refusal of Trustee to sue—Special Circumstances.**—By his will a testator appointed executors, and bequeathed, amongst other legacies, the sum of 10,000*l.* to J. M. J. M. settled 8,000*l.*, part of such legacy, upon his children, and E. B. and J. H. were appointed trustees of the settlement. The 8,000*l.* was paid by the executors of the testator's will to E. B., one of the trustees of the settlement, upon his sole receipt, and the same was subsequently converted by him to his own use. He absconded and was made bankrupt, and a trustee in bankruptcy was appointed. An action was then commenced by C. M., one of the children of J. M., against the executors of the testator's will, and also against the trustee in bankruptcy of E. B. and J. H., to recover the 8,000*l.* The plaintiff by his statement of claim alleged that, although he had requested the defendant J. H. so to do, such defendant had refused to take or concur in any proceedings for the recovery of the 8,000*l.* from the estate of the testator, or from his executors. A summons was taken out on behalf of the defendants, the executors of the testator, asking that the action might be dismissed with costs as against them, on the ground that the statement of claim disclosed no reasonable cause of action against them:—Held, that, although a mere refusal to sue on the part of a trustee did not entitle a *cestui que trust* to sue in his own name, yet the circumstances of this case were special enough to render it proper that he should so sue. But held that, in order to guard against a multitude of actions, all the other *cestui que trust* must be made defendants to this action. *Meldrum v. Scorer*, 56 L. T. 471—Kay, J.

j. SERVICE OF NOTICE OF JUDGMENT ON A PERSON NOT A PARTY.

On Purchaser—Appearance—Setting aside Order for Service.—In an action for administration, judgment for administration was delivered on the 2nd June, 1883, and in November, 1884, notice of the judgment was served by the plaintiffs, under an order of the

court on P., a purchaser of part of the testator's estate in which the plaintiffs were not interested. He was not a party to the action, and it did not appear from the judgment how he was affected. In order to ascertain his position, he entered an appearance on the 22nd November, 1884, under Ord. XVI. r. 41. On finding that he was not affected by the judgment, he served notice of motion on the plaintiffs that the order directing service might be discharged for irregularity, that the service might be declared irregular and set aside, that the appearance entered by him thereupon might be vacated, and that the costs of the application and consequent on the service might be paid by the plaintiffs. The motion was ordered to stand over, and P. was kept in the proceedings till the hearing on further consideration, when Bacon, V.-C., refused to give him any costs:—Held, on appeal, that P. was not a person who ought to have been served under Ord. XVI. r. 40, and that the service was irregular; that P. was right in appearing to the notice, that his appearance must be vacated, and that the plaintiffs must pay the costs in both courts, including the costs of appearance and all costs consequent on the service. *Symons, In re, Betts v. Betts*, 54 L. T. 501—C. A.

k. CHANGE OF PARTIES.

i. On Death.

a. When Cause of Action Survives.

Breach of Promise of Marriage—Special Damage.—No action lies for damages for breach of promise of marriage against the personal representatives of the promisor, unless in respect of special damage—that is, actual loss to the temporal estate of the promisee, flowing directly from the breach, or which may reasonably be supposed to have been in the contemplation of both parties at the time of the promise as the probable result of the breach of it. *Finlay v. Chirney*, 20 Q. B. D. 494; 57 L. J., Q. B. 247; 58 L. T. 664; 36 W. R. 534; 52 J. P. 324—C. A.

Libel—Publication injurious to Property—

Slander of Title.—An action for defamation, either of private character or of a person in relation to his trade, comes to an end on the death of the plaintiff, but an action for the publication of a false and malicious statement, causing damage to the plaintiff's personal estate, survives:—Held, therefore, that a claim for falsely and maliciously publishing a statement calculated to injure the plaintiff's right of property in a trade-mark was put an end to by the death of the plaintiff after the commencement of the action only so far as it was a claim for libel, but that so far as the claim was in the nature of slander of title the action survived, and could be continued by his personal representative, who would be entitled to recover on proof of special damage. *Hatchard v. Mege*, 18 Q. B. D. 771; 56 L. J., Q. B. 397; 56 L. T. 662; 35 W. R. 576; 51 J. P. 277—D.

Liability ex Contractu implied by Foreign Law—Waste.—A testator, domiciled in England, died leaving considerable property in that country. He was also entitled as "possessor"

to the usufruct of three estates in Austria, Hungary and Croatia, held under three family settlements or fidei commissae. Every fidei-commiss was subject to the jurisdiction of the land court of the district in which the property was situate, and on every change of possession (which could take place only on succession) the successor made a declaration to the court that he took possession. It was a fundamental principle of Austrian, Hungarian, and Croatian law that the "possessor" was bound to maintain the subject-matter of the fidei-commiss, and transmit it to his successor in the state in which he received it; and upon his death his allodial estate was liable for dilapidations. A creditor's action was brought in England by the successor under the fidei-commissae, against the executrix and trustees of the testator for administration of his real and personal estate, the plaintiff claiming damages for dilapidations. The executrix objected that no claim could be maintained in England in respect of any act or default committed abroad, unless such act or default showed a good cause of action both in the foreign country and in England, and that, the claim being in the nature of a claim for waste no action would lie in England:—Held, that the action rested on an implied contract or obligation and not on tort, and that the maxim *Actio personalis moritur cum persona* did not apply. *Batthyany v. Walford*, 36 Ch. D. 269; 56 L. J., Ch. 881; 57 L. T. 206; 35 W. R. 814—C. A.

Infringement of Trade Mark.—[An action by the registered owner of a trade mark claiming an injunction restraining infringement and fraudulent imitation, and the usual consequential relief, is not extinguished by the death of the plaintiff, but survives to his personal representatives. *Oakey v. Dalton*, 35 Ch. D. 700; 56 L. J., Ch. 823; 57 L. T. 18; 35 W. R. 709—Chitty, J.]

Action by Director against Co-directors for Contribution.—Death of one Defendant.—[L. and two others were directors of a company, and on various occasions authorised loans to be made out of the funds of the company. The company afterwards brought an action against another director for such unauthorised loans, and recovered judgment against him, which he discharged. He then brought an action for contribution against the three directors, of whom L. died after the commencement of the action, and his administrator was made a defendant:—Held, that the action survived against L.'s estate. *Ramskill v. Edwards*, 31 Ch. D. 100; 55 L. J., Ch. 81; 53 L. T. 949; 34 W. R. 96—Pearson, J.]

β. Practice.

Reference to Arbitration purporting to bind Representatives.—[Where an action of tort dying with the person is referred to arbitration by an order made by consent, and with a stipulation that the award shall bind the representatives in the case of the death of either party, and the plaintiff dies before the award, the action abates, and the plaintiff's executors cannot be substituted. *Bowker v. Evans*, 15 Q. B. D. 565; 54 L. J., Q. B. 421; 53 L. T. 801; 33 W. R. 695—C. A.]

Co-plaintiff after Judgment—Execution.]—

Where judgment is obtained by several executors, and one of them dies after the entering of judgment, the survivors may issue execution in the name of all the plaintiffs, and it is unnecessary to have any order for leave to do so. *Baird v. Thompson*, 14 L. R., Ir. 497—Q. B. D.]

Order to continue Proceedings before Probate.]—

Where, after an order directing the trial of issues of fact before a jury, one of the plaintiffs died within fourteen days of the date fixed for the trial, the court, on the application of his executors, made an order continuing the proceedings, the executors undertaking to apply forthwith for probate, and to produce the same at the trial of the action if obtained. *Hughes v. West*, 13 L. R., Ir. 224—V. C.]

One of several Defendants in same Interest—Absence of Personal Representative.]—

Pending an action to make several defendants liable for a breach of trust, H. S., one of the defendants, died before decree, having made his will appointing executors, who had not proved the will. It appearing that the liability of the surviving defendants was the same as that of H. S., the court made an order that the suit should proceed in the absence of a personal representative of H. S. *Hibernian Joint Stock Company v. Fottrell*, 13 L. R., Ir. 335—M. R.]

Amending Order—Death of Sole Trustee Intestate.]—

Upon the death of a sole surviving trustee intestate, the court made an order for the appointment of new trustees, and ordered certain lands forming part of the estate to vest in the new trustees "for the estate therein now vested in the heir-at-law of the deceased trustee." After the order had been passed and entered administration was taken out to the estate of the deceased trustee. Upon motion that the order of the court might be altered by substituting the legal personal representative for the heir-at-law of the intestate trustee in accordance with s. 30 of the Conveyancing and Law of Property Act, 1881, the court made a new order, that, notwithstanding the previous order, the land should vest in the new trustees "for all the estate therein now vested in the legal personal representative" of the deceased trustee. *Pilling's Trusts, In re*, 26 Ch. D. 432; 32 W. R. 853—Pearson, J.]

Revivor—Person attending Proceedings.]—

A person served with notice of an administration judgment, and having obtained liberty to attend the proceedings under it, is in the same position as a party to the action, and is entitled to obtain an order of course to revive the action on the death of the sole plaintiff. *Burstall v. Fearon*, 24 Ch. D. 126; 53 L. J., Ch. 144; 31 W. R. 581—Pearson, J.]

Revivor for purposes of Appeal.]—

By a marriage settlement the property of the wife was vested in trustees upon trust for the wife, for her separate use, and in case there should be no issue (which event happened) for the wife, her executors, administrators, and assigns, if she survived her husband, but if she died in his lifetime then for the husband for his life, and subject thereto for such persons as should be of the

wife's own kindred as she should by will appoint, and in default of appointment, for such persons as would be entitled under the Statutes of Distribution, in case she had died intestate and unmarried. The marriage was dissolved in 1871, and in 1872, the wife, in a suit instituted by her against her late husband and the trustees of the settlement, obtained a decree that she was absolutely entitled to the property comprised in the settlement. By her will, dated in 1877, the wife disposed of the property as if it were her own absolutely, and died in 1881, in the lifetime of her late husband. —Held, in the absence of special circumstances, that the next of kin of the wife were not now entitled to an order to revive the suit or to carry on proceedings therein for the mere purpose of appealing against the decree of 1872. *Fussell v. Dowding*, 27 Ch. D. 237; 53 L. J., Ch. 924; 51 L. T. 332; 32 W. R. 790—Chitty, J.

Where, after his action had been dismissed, the plaintiff died, the court in which the suit had been pending, notwithstanding that the time for appealing had then expired, made an order giving liberty to the plaintiff's personal representative to carry on proceedings, in order that he might be in a position to apply to the Court of Appeal to entertain an appeal. *Leahy v. Tobin*, 19 L. R., Ir. 433—V.-C.

Death of sole Defendant after Notice of Trial—Trustee in Bankruptcy—Proceedings to bind Official Receiver.]—The sole defendant to an action who was a trustee in bankruptcy died after the action was set down for trial. The plaintiff amended the writ and statement of claim by making the defendant's executors and the official receiver in bankruptcy parties. All the new defendants appeared and the executors put in a defence, the official receiver took no steps beyond appearance. The plaintiff then gave the official receiver and the executors notice that the action had been restored to the paper for trial, but did not give fresh notice of trial nor serve the official receiver with notice of motion for judgment. At the hearing the executors appeared, but the official receiver did not. —Held, on the merits, that the plaintiff was entitled to the relief sought, but the official receiver having been made a party, a motion for judgment against him must be made upon notice served upon him in the usual way. *Johnston v. English*, 55 L. J., Ch. 910; 55 L. T. 55; 35 W. R. 29—North, J.

ii. On Bankruptcy.

Adoption of Action by Trustee.]—Where a trustee in bankruptcy had been substituted for the bankrupt as a defendant in an action against the bankrupt, and had asked for a statement of claim. —Held, that by so doing he had adopted the action as it stood, and must personally pay the costs of an appeal from an interlocutory order which had been made against the defendant before his bankruptcy, although he had given notice to the plaintiff that he did not intend to proceed with the appeal. *Borneman v. Wilson*, 28 Ch. D. 53; 54 L. J., Ch. 631; 51 L. T. 728; 33 W. R. 141—C. A.

Security for Costs.]—See cases, post, col. 1443.

iii. On Birth of Parties.

Supplemental Action.]—Where an infant, who is a necessary party to an action, has come into existence after the date of the judgment, and proceedings have been taken under the judgment since the birth of the infant, but before an order under Ord. XVII. r. 4, adding the infant as party, has been applied for, the proper course is to obtain an order prefaced with a direction that the action be continued against him, and that an inquiry be made whether it is for his benefit that he should be bound by such proceedings, and that if it be so certified he is to be bound thereby. If it should not be so certified, it is open for the plaintiff to proceed by supplemental action. *Peter v. Thomas-Peter*, 26 Ch. D. 181; 53 L. J., Ch. 514; 50 L. T. 176; 32 W. R. 409, 515—Chitty, J.

iv. Devolution of Interest.

Pendente lite.]—Where a testator appointed his two infant sons trustees on their attaining the age of twenty-one, and an administration action was commenced on the elder son attaining twenty-one, in which the infant son was made a plaintiff, and the elder son was made defendant; on the younger son attaining twenty-one, and becoming a trustee, and thus changing his interest and liability, the court, on an ex parte application under Ord. XVII. r. 4, of the Rules of Court, 1883, made him a co-defendant. *Gould, In re, Gould v. Gould*, 51 L. T. 417—V.-C. B.

Assignment of Contract—Action for Specific Performance.]—A local authority, having compulsory powers of purchase, gave notice to a landowner to treat, and the amount of compensation was assessed by a jury. Before completion the landowner conveyed the land to the plaintiffs, subject to the claim of the local authority. —Held, that the plaintiffs could maintain an action against the local authority for the specific performance of the contract arising out of the notice to treat and subsequent assessment of value, without joining as plaintiff the landowner to whom the notice was given. *Burr v. Wimbledon Local Board*, 56 L. T. 329; 35 W. R. 404—Kekewich, J.

L. ADDING AND STRIKING OUT PARTIES.

i. Plaintiffs.

Consent.]—A person cannot be added as plaintiff without his consent in writing, even although he be indemnified against costs. *Tryon v. National Provident Institution*, 16 Q. B. D. 678; 55 L. J., Q. B. 236; 54 L. T. 167; 34 W. R. 398—D.

The case of trustee and cestui que trust is not excepted from the general rule of Ord. XVI. r. 11, so as to enable the court or a judge to dispense with the consent in writing of the trustee, upon the application of a cestui que trust to amend by adding his trustee as co-plaintiff in an action in respect of the trust property. *Besley v. Besley*, 37 Ch. D. 648; 57 L. J., Ch. 464; 58 L. T. 510; 36 W. R. 604—Chitty, J.

— **Objection on Ground of—Stay of Proceedings.**—Under Ord. XVI. r. 11 of the Rules of Court, 1883, no person can be added as a plaintiff to an action without his written consent. The plaintiff brought an action upon a contract against the defendant, who insisted that one L. should be joined as a co-plaintiff as being a party to the contract, or, in the alternative, that all proceedings in the action should be stayed until he was so joined.—Held, that inasmuch as L. had not consented to have his name added as a co-plaintiff, the court had no right by a roundabout process to make an order which would practically override the provisions of Ord. XVI. r. 11. *Jackson v. Krüger*, 54 L. J., Q. B. 446; 52 L. T. 962—D.

Adding two new Plaintiffs at Trial.—In an action by a company, lessees for a long term of eleven houses, of which ten were unlet and in their possession when the writ was issued, and by their tenant of the remaining house as co-plaintiff, for an injunction and damages in respect of an alleged nuisance from noise; the tenant, after delivery of the statement of claim and notice of trial, refused to go on with the action as co-plaintiff. The other ten houses having in the meantime been let, the plaintiff company applied at the trial for leave to amend by adding as co-plaintiffs two of the new tenants, who consented to be added. The application was granted as being within the discretion given by Rules of the Supreme Court, 1883, Order XVI. r. 11, of allowing the names of any parties, whether plaintiffs or defendants—"whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter"—to be added. *House Property and Investment Company v. Horse Nail Company*, 29 Ch. D. 190; 54 L. J., Ch. 715; 52 L. T. 507; 33 W. R. 562—Chitty, J.

Adding Co-plaintiff—Original Plaintiff having no Right to Sue.—The tenant for life of a trust fund brought an action against the trustees to make them liable for an improper investment. The trustees by their defence alleged that they had made the investment in question at the request of the plaintiff. The plaintiff thereupon applied for leave to amend by adding as co-plaintiff his son, who had a reversionary interest in the fund.—Held, that Ord. XVI. r. 11, does not authorise the allowing a plaintiff who has no right to sue, to amend by joining as co-plaintiff a person who has such a right. *Walcott v. Lyons*, 29 Ch. D. 584; 54 L. J., Ch. 847; 52 L. T. 399—C. A.

Incapacity of Plaintiff pending Action—Adding Next Friend.—The plaintiff, subsequently to the commencement of the action, became incapable from infirmity of transacting business. The defendants obtained orders that the plaintiff should make an affidavit of documents, and that the defendants should be at liberty to administer interrogatories. The plaintiff's brother, who for many years had managed the plaintiff's business affairs, made an affidavit of documents and answered the interrogatories. The defendants took out a summons under Ord. XXXI. r. 21, that the action might be dismissed with costs on the ground of non-compliance with the orders. The plaintiff's brother

also took out on behalf of the plaintiff a summons for leave to amend by adding himself as next friend, and that the two affidavits which he had made might be accepted as compliance with the said orders of the court.—Held, that in the absence of evidence that the action was commenced without the plaintiff's sanction, no order could be made on the defendants' summons, and the plaintiff's summons must be allowed. But as this was by way of indulgence to the plaintiff, costs of both summonses to be paid by the plaintiff. *Cardwell (Lord) v. Tomlinson*, 54 L. J., Ch. 957; 52 L. T. 746; 33 W. R. 814—V.-C. B.

Necessary Parties—Covenant with Separate Covenantees.—The plaintiff and two other persons conveyed to the defendants certain pieces of land, and by the deed of conveyance the defendants entered into a separate covenant with each of the vendors, his heirs and assigns, to make a road over the property conveyed, and to allow the vendors, their respective heirs, tenants, and assigns, to use the road. In an action, by the plaintiff alone for specific performance of the covenant.—Held, that the other two covenantees ought to be added as parties. *Dix v. Great Western Railway*, 55 L. J., Ch. 797; 54 L. T. 830; 34 W. R. 712—Kay, J.

ii. Defendants.

Application not Ex parte.—An application to add a defendant to an action must not be made ex parte. *Colbeck, In re, Hall v. Colbeck*, 36 W. R. 259—Kay, J.

Adding Joint Contractors at Defendant's instance.—Where an action is brought against one only of several joint contractors the defendant is entitled as of right, under Ord. XVI. r. 11, to have his co-contractors joined as defendants, on the authority of *Kendall v. Hamilton* (4 App. Cas. 504). *Pilley v. Robinson*, 20 Q. B. D. 155; 57 L. J., Q. B. 54; 58 L. T. 110; 36 W. R. 269—D.

Since the abolition of pleas in abatement, the proper course for a defendant desirous of raising the objection of the non-joinder as a defendant of some one jointly liable with him, is to apply by summons at chambers, supported by an affidavit stating the facts, and showing that the person alleged to be jointly liable is within the jurisdiction, to have the action stayed. *MacArthur v. Hood*, 1 C. & E. 550—Day, J.

Non-joinder—Discretion of Court.—Upon an application under Ord. XVI. r. 11, by the defendant or defendants on the record, that other defendants be added, the court or judge may exercise a discretion, and the order will not be made unless it is shown that the non-joinder complained of will prejudice the parties to the action, or that "the presence before the court of additional parties is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." *Ledue v. Ward*, 54 L. T. 214; 5 Asp., M. C. 571—D.

Adding, In what cases—Practice of Queen's Bench Division.—M. and R. entered into certain

contracts with P. to build a mansion, and subsequently assigned to S. & Co. all their share, right, and interest in all moneys then or thereafter to become due and owing under, or which should be or become payable by P. in respect of any matters connected with or arising out of the said contracts. In an action by S. & Co. against P. for an account, and for payment of what was due to them under the said contracts, P. moved, under Ord. XVI. r. 11, that M. and R. should be added as parties to the action:—Held, that, although the Queen's Bench Division had the same jurisdiction as that exercised by the Chancery Division in actions taking the shape of a general dealing with the subject-matter, yet it was not within the simplicity aimed at in the Queen's Bench Division to join the parties as defendants, no relief being sought against them by the plaintiffs, and that the court would not join them as plaintiffs without notice to them, and hearing them as to their interest and the terms on which the order should be made. *Sanders v. Peek*, 50 L. T. 630; 32 W. R. 462—D.

Action by one Executor—Absconding Executor.—One of two executors having absconded, the other executor sued a mortgagor. The court refused on the application of the defendant to add the absconding executor as defendant. *Drage v. Hartopp*, 28 Ch. D. 414; 54 L. J., Ch. 434; 51 L. T. 902; 33 W. R. 410—Pearson, J.

Adding Puisne Mortgagees after Judgment of Foreclosure.—Where judgment in a foreclosure action has been pronounced, but has not been drawn up and entered, and it was discovered that there were puisne mortgagees, leave was given under Rules of Supreme Court, 1883, Ord. XVI. r. 11, to amend the writ and statement of claim by making the puisne mortgagees defendants. *Keith v. Butcher*, 25 Ch. D. 750; 53 L. J., Ch. 640; 50 L. T. 203; 32 W. R. 378—Kay, J.

Joining Bankrupt Mortgagor in Possession—Foreclosure Action against Trustee.—See *Sutcliffe v. Wood*, post, col. 1424.

Necessary Parties—Mining Lease—Lessor.—In an action by a copyholder to restrain the working of coal under his land by A., who claimed to be entitled to do the acts complained of by virtue of a lease from B., the lord of the manor, B. was by amendment added as a defendant, on the allegation that he claimed the right by himself and his lessees to work the coal; that he justified the acts of A., and that he had received and claimed to be entitled to receive from A. rents and royalties in respect of such wrongful working. On summons by B. under Rules of Supreme Court, 1883, Ord. XXV. r. 4, that the amended statement of claim might be struck out as against him on the ground that it disclosed no reasonable cause of action against him, and that the action might be dismissed as against him:—Held, that the lessor had been properly added as a defendant. *Shafto v. Bolckow, Vaughan, and Co.*, 34 Ch. D. 725; 56 L. J., Ch. 735; 56 L. T. 608; 35 W. R. 562—Chitty, J.

Misjoinder—Adding Solicitors, where no Relief claimed against them.—Where the cause of action against one defendant is totally discon-

nected with that against the other defendants, except so far as it arises out of an incident in the same transaction, there is a misjoinder, and it is not the case contemplated by Ord. XVIII. r. 1. Solicitors who were made parties with other defendants to an action, the statement of claim in which showed no reasonable cause of action as against them:—Held, entitled under Ord. XXV. r. 4, to an order dismissing the action as against them with costs, and striking their names out of the proceedings. *Burstall v. Beyfus*, 26 Ch. D. 35; 53 L. J., Ch. 565; 50 L. T. 542; 32 W. R. 418—C. A.

To make solicitors or others parties to an action without seeking any relief against them, except payment of costs or discovery, is vexatious. *Id.*

— Architect a Defendant—No Cause of Action shown.—The architect of the defendant company was made a party to the action, but the statement of claim showed no cause of action as against him:—Held, that his name must be struck out of the proceedings, and the costs paid by the plaintiffs, including the costs of an affidavit made by the architect upon the application for such an order. *Amos v. Herne Bay Pavilion Company*, 54 L. T. 264—Kay, J.

— Contractor a Defendant.—Contractors should not usually be joined as defendants in an action against their employers for damages done in carrying out their contract. *Serff v. Acton Local Board*, 55 L. J., Ch. 569; 54 L. T. 379—Pearson, J.

Adding Parties in personam in Action in rem.—See *The Bowesfield*, post, SHIPPING (PRACTICE).

4. WRIT OF SUMMONS.

a. FORM AND CONTENTS OF.

Against Foreign Company.—A writ issued against a foreign company having no office within the United Kingdom must be in the Form No. 5 or No. 6 of Part I of the Appendix to the Rules of 1883. A writ in Form No. 2 issued against a foreign company having no offices in the United Kingdom will be set aside. *Sedgwick v. Yedras Mining Co.*, 35 W. R. 780—D.

Special Indorsement—Delivery.—A writ specially indorsed with a statement of claim need not have the word "delivered" nor the date of delivery at the end of such statement of claim. *Veale v. Automatic Boiler Feeder Co.*, 18 Q. B. D. 631; 56 L. J., Q. B. 307; 35 W. R. 454—D.

Indorsement of Costs.—It is irregular to indorse a writ of summons with an excessive amount for costs, and such a writ will be set aside. *Jacobs v. Monk*, 12 L. R., Ir. 373—Q. B. D.

b. SPECIAL INDORSEMENT UNDER ORDER III. R. 6.

Action for Recovery of Land—Landlord and Tenant.—In an action for the recovery of land

by a landlord against a tenant, the writ of summons can be specially indorsed under Ord. III. r. 6 (f), only when the plaintiff was party to the lease or agreement under which the hereditaments have been held, or when the defendant has paid rent to the plaintiff, thereby acknowledging his title, or when the defendant is otherwise estopped from denying the plaintiff's title. *Casey v. Hellyer*, 17 Q. B. D. 97; 55 L. J., Q. B. 207; 54 L. T. 103; 34 W. R. 337—C. A.

Assignment of Debt.—A writ of summons was indorsed with a claim for a sum of money due from the defendant to the plaintiff under an assignment; this assignment, the terms of which were set out, was a request to the defendant to pay to the plaintiff a sum due from the defendant to the assignor under an I. O. U. of a certain date, signed by the defendant. The indorsement did not give any particulars of the circumstances under which the I. O. U. was originally given:—Held, that the indorsement was a sufficient special indorsement under Ord. III. r. 6. *Bickers v. Speight*, 22 Q. B. D. 7; 58 L. J., Q. B. 42; 37 W. R. 139—D.

Bond—Penalty.—See *Tutcher v. Caralampi*, post, col. 1422.

Part of Claim unliquidated.—A writ which claims payment of a sum which is in dispute, besides payment of a liquidated demand, is not specially indorsed so as to entitle the plaintiff to judgment under Ord. XIV. for the liquidated demand. *Clarke v. Berger*, 36 W. R. 809—D.

Defence, Time for Delivery of.—The service of a writ specially indorsed under Ord. III. r. 6, is delivery of a statement of claim to the defendant within the meaning of Ord. XXI. r. 6; so that the defendant has ten days from the time limited for appearance within which to deliver his defence. *Anlaby v. Prætorius*, 20 Q. B. D. 764; 57 L. J., Q. B. 287; 58 L. T. 671; 36 W. R. 487—C. A. See further, post, col. 1508.

c. SERVICE OF WRIT.

Time for — Specially indorsed Writ.—A specially indorsed writ is not a pleading within the meaning of Ord. LXIV. r. 11, and service thereof may therefore be effected at any hour of the day. *Murray v. Stephenson*, 19 Q. B. D. 60; 56 L. J., Q. B. 647; 56 L. T. 720; 35 W. R. 666—D.

Non-production of Original Writ on Demand.—Where a person serving a writ did not, though requested so to do, show the original writ to the defendant, and the plaintiff signed judgment thereon:—Held, that all the proceedings taken under the writ should be set aside, whether such proceedings were to be considered as irregular, or absolutely void. *Phillipson v. Emanuel*, 56 L. T. 858—D.

Substituted Service—Domicil out of the Jurisdiction.—Where effectual personal service cannot be made upon a person "domiciled or ordinarily resident in Ireland" owing to Ord. XI. r. 1 (e), the court will not allow substituted service to be made. *Hillyard v. Smyth*, 36 W. R. 7—D.

There can be no substituted service of a writ in an action where there cannot in law be personal service of such writ. Rule 6 of Ord. LXVII. is limited in terms to cases where the writ itself can be served as a matter of law, but where it cannot, from circumstances, be promptly served personally in matter of fact. *Field v. Bennett*, 56 L. J., Q. B. 89—D.

Substituted Service within, of Writ issued for Service out of Jurisdiction.—Where a writ has been issued for service out of the jurisdiction, and the defendant is abroad, a judge, if the attendant circumstances warrant substitution, may properly order a copy of such writ to be served within the jurisdiction, although it is not in the form used for service within the jurisdiction. *Ford v. Shephard*, 53 L. T. 564; 34 W. R. 63—D.

On Company out of the Jurisdiction — "Officer"—"Clerk."—The defendant company having head offices in Paris, Bordeaux, and Marseilles, had agents and correspondents, among other places, in London. Service of a writ of summons on an agent in London was set aside on the ground that it was not service on the "head officer, clerk, treasurer, or secretary of such corporation," within Ord. IX. r. 8. *Nutter v. Messageries Maritimes de France*, 54 L. J., Q. B. 527—D.

Branch Works within.—A company had their registered office in Scotland, but carried on branch works in England. The writ in the action had been served on the manager of the branch works, and a copy had also been sent by post to the registered office:—Held, that the service was bad and must be set aside. *Wood v. Anderson Foundry Company*, 36 W. R. 918—Stirling, J.

Director within Jurisdiction Temporarily.—A writ in form 1, Appendix A, part 1 to the Rules of 1883, with the exception that no address was inserted as that of the defendants, was issued against a foreign company having no place of business in this country, and was served at Dover on one of the managing directors of the company, who was temporarily there on business connected with the company:—Held, that the writ must be set aside. *The W. A. Scholten*, 13 P. D. 8; 57 L. J., P. 4; 58 L. T. 91; 36 W. R. 559; 6 Asp. M. C. 244—Butt, J.

Place of Business of Firm—Agent.—Defendants were a Scotch firm, having an agent within the jurisdiction, whose authority did not extend to taking orders; the name of the firm was affixed to the agent's offices:—Held, that the offices of the agent were not a place of business of the firm for the purpose of serving the writ. *Baillie v. Goodwin*, 33 Ch. D. 604; 55 L. J., Ch. 849; 55 L. T. 56; 34 W. R. 787—North, J.

London Agency.—In an action against a foreign bank, service of the writ of summons on the head manager of the London "Agency" of the bank—the agency being ostensibly and in fact a bank with the usual offices, manager, and staff of clerks:—Held, to be good service on the defendants. *Lhoneau v. Hong Kong and Shanghai Banking Corporation*, 33 Ch. D. 446; Z Z

55 L. J., Ch. 758; 54 L. T. 863; 34 W. R. 753—*V.-C. B.*

Waiver of Objection to Service.—An application made by the defendants for security for costs constitutes a waiver of any objection as to service. *Id.*

On Member of Foreign Partnership.—*See Polleawen v. Sibson*, ante, col. 1330.

Service on Wrong Person—Amendment or Discharge.—Where a writ has been served on a wrong person, and service is possible on the right person, leave will not be given under Ord. LXX. r. 1, to amend the irregularity, but the faulty service will be discharged with costs upon the application of the person intended to be served. *Nelson v. Pastorino*, 49 L. T. 564—*Pearson, J.*

Defendant Resident out of Jurisdiction—Leave to Issue Writ for Substituted Service.—A writ which is intended to be served by substituted service on a person residing within the jurisdiction may be issued without leave of the court, though the defendant be resident out of the jurisdiction. *Lewis v. Herbert*, 16 L. R., Ir. 340—*C. A.*

d. OTHER POINTS.

Amending after Judgment.—*See Keith v. Butcher*, ante, col. 1407.

Re-service after Amendment.—A writ of summons amended under an order of court made in presence of both parties, the order being silent as to service, must be re-served on defendant, and a judgment marked without such re-service, and without any previous intimation to defendant of plaintiff's intention to amend, or to abstain from amending, under the order, was set aside. *Bryans v. Hughes*, 14 L. R., Ir. 62—*Ex. D.*

Waiver of Defect in.—*See Mulckern v. Doercks*, post, col. 1419.

c. SERVICE OUT OF THE JURISDICTION.

i. Practice as to.

Discretion—Evidence as to Merits.—The court will exercise discretion in allowing or disallowing service out of the jurisdiction, and in so doing will consider evidence as to the merits. *Société Générale de Paris v. Dreyfus*, 29 Ch. D. 239; 54 L. J., Ch. 893; 53 L. T. 463; 33 W. R. 623—*Pearson, J.* Reversed on the facts, see next case.

On an application for leave to serve a writ out of the jurisdiction it is not sufficient that the form of the action and the nature of the relief sought bring the case within Ord. XI. The plaintiff must show to the satisfaction of the court that he has a probable cause of action; and the court in exercising its discretion will consider the facts of the case appearing on the affidavits, so far as may be necessary for that purpose. *Société Générale de Paris v. Dreyfus*, 37 Ch. D. 215; 57 L. J., Ch. 276; 58 L. T. 573; 36 W. R. 609—*C. A.*

A sum of money was paid into court in an

action in this country in which D. was the plaintiff. D. was resident in France. This fund was the subject of litigation between D. and the present plaintiffs in France, and judgment was given in the French courts that D. was entitled to the control of the fund in court subject to the liability to account to the plaintiffs. The plaintiffs brought an action in this country asking for an injunction to restrain D. from receiving or dealing with the fund in court, and applied for leave to serve the writ on D. in France:—Held, that the French court having decided that D. was entitled to the control of the fund, leave to serve the writ ought not to be given. *Id.*

Application for Leave—Affidavit in Support—Uberrima Fides.—Where an ex parte application is made to the court, the person making it must observe uberrima fides; otherwise he is liable to have the order discharged at the instance of the person against whom it has been obtained. Where an ex parte order had been made, under r. 4 of Ord. XI., for service of the writ of summons in an action upon the defendants, who were resident out of the jurisdiction, but the affidavit upon which the order was obtained contained misstatements of fact, which had the effect of showing that the plaintiffs had *prima facie* an overwhelmingly good cause of action, the court held that r. 4 of Ord. XI. must be strictly enforced, and that therefore the order for service out of the jurisdiction must be discharged. *Republic of Peru v. Dreyfus*, 55 L. T. 802—*Kay, J.*

— **Not necessary when Substituted Service intended.**—*See Lewis v. Herbert*, supra.

Defendant not a British Subject.—The court has jurisdiction to order the service of a writ of summons, or of a notice in lieu of a writ of summons, on a defendant resident out of the jurisdiction, who is not a British subject. *James v. Despott*, 14 L. R., Ir. 71—*Q. B. D.*

Concurrent Writ for Service out of the Jurisdiction—Original Writ renewed—Enlargement of Time.—Under the Rules of Court, 1883, Ord. VI. rr. 1, 2, the court has power to give leave for the issue of a concurrent writ for service out of the jurisdiction, although the original writ was issued for service within the jurisdiction and has been renewed, and although there is only one defendant to the action. And where the writ has been renewed such leave may be given, notwithstanding that the enlargement of time for issuing a concurrent writ may affect the operation of the Statute of Limitations. *Smalpage v. Tonge*, 17 Q. B. D. 644; 55 L. J., Q. B. 518; 55 L. T. 44; 34 W. R. 768—*C. A.*

Foreigner bringing Action here.—Semble, that where a person resident out of the jurisdiction has brought an action in this country, he has made himself amenable to the jurisdiction with respect to matters connected with his action. *Yorkshire Tannery v. Eglington Chemical Company*, 54 L. J., Ch. 81; 33 W. R. 162—*Pearson, J.*

Service of Writ instead of Notice on Foreigner residing Abroad—Nullity.—By Order XI. r. 6, "when the defendant is neither

a British subject nor in British dominions, notice of the writ and not the writ itself is to be served upon him." The plaintiffs sued the defendant, who was a foreigner residing in France, for goods sold and delivered to him in England, and obtained a judge's order for the service upon him of the writ out of the jurisdiction, the order being obtained upon an affidavit which stated erroneously that the defendant was a British subject. The writ was served upon the defendant in France, and judgment signed against him in default of appearance:—Held, that the service of the writ instead of a notice was a nullity, and not a mere irregularity, and that the order for service of the writ and all subsequent proceedings must be set aside. *Hewitson v. Fabre*, 21 Q. B. D. 6; 57 L. J., Q. B. 449; 58 L. T. 856; 36 W. R. 717—D.

Order limiting Plaintiff's Right to Recover at Trial.—An order having been obtained under Ord. XI. r. 1 (e), for service of notice of a writ out of the jurisdiction in an action for the price of goods supplied, and service having been effected accordingly, the defendant applied to a judge at chambers to rescind the order and to set aside the subsequent proceedings under it. The judge, being doubtful on the affidavits used whether there had been any breach of the contract within the jurisdiction, refused the application, but ordered that the plaintiff's claim should be limited to the recovery of the price of goods in respect of which it might appear at the trial that the writ could have been properly served out of the jurisdiction:—Held, that the order of the judge at chambers was rightly made. *Thomas v. Hamilton (Duchess Dowager)*, 17 Q. B. D. 592; 55 L. J., Q. B. 555; 55 L. T. 385; 35 W. R. 22—C. A.

Certificate in lieu of Affidavit of Service.—Under Ord. XIII. r. 2—which requires that before taking proceedings upon default of appearance to a writ of summons, the plaintiff shall file an affidavit of service or of notice in lieu of service, as the case may be—the court, where notice of a writ is served out of the jurisdiction, has no power to allow a certificate of service to be filed in lieu of an affidavit, even where it appears that by the foreign law the process-server cannot make an affidavit as prescribed by r. 2. *Ford v. Miesche*, 16 Q. B. D. 57; 55 L. J., Q. B. 79; 53 L. T. 535; 34 W. R. 74—D.

Notice—Omission in.—The omission to copy in the notice the order giving leave to issue the writ and serve notice of it, is not such an informality as to make the service invalid. *Reynolds v. Coleman*, post, col. 1416.

Objection to Contents of Affidavit.—After the lapse of a year the defendant is too late to raise any objection to the order on the ground that the affidavit on which it was obtained did not fairly state the facts. *Id.* See also *Republic of Peru v. Dreyfus*, ante, col. 1412.

Application to Discharge—Time for.—Where a defendant who had been served out of the jurisdiction with a writ appeared and objected to the power of the court to issue it under the circumstances:—Held, that the application was too late under Ord. LXX. r. 2. *Tozier v. Haw-*

kins, 15 Q. B. D. 650—D. See *S. C.* in *C. A.*, infra.

An order was made by the vacation judge, on the ex parte application of the plaintiffs, for service of the writ and notice of motion on the solicitors and at the place of business in England of a foreigner residing out of the jurisdiction. Without formally entering an appearance the defendant filed affidavits in opposition to the motion, and instructed counsel, who opposed the motion on the merits:—Held, that the defendant had thereby waived the right to raise any objection as to the irregularity of the order, and must be treated as if he had been properly served and had formally appeared; that the fact that the ex parte order had been passed and entered did not prevent the right of the defendant to move to discharge it; but that r. 12 of Ord. LXIII. did not apply to such a case, and that the proper mode of proceeding (if there had been no such order as aforesaid) would have been to apply, not to the Court of Appeal or the vacation judge, but to the judge to whose court the action was assigned, to discharge the order of the vacation judge. *Boyle v. Sacher*, 39 Ch. D. 249; 58 L. J., Ch. 141; 58 L. T. 822; 37 W. R. 68—C. A.

ii. In what Cases allowed.

Injunction—Breach within Jurisdiction of Contract made outside.—The defendant, who was resident in Scotland, entered into a contract with an English mining company, whereby he was to perform certain services for them in the Transvaal at a salary. The contract was executed by the defendant in Scotland, but was in English form. The defendant proceeded to the Transvaal, but returned therefrom before he had fully performed the services. He claimed a half-year's salary, which he alleged was due to him. This the company declined to pay on the ground that the defendant had broken his contract with them, and he thereupon threatened to present a petition for the winding up of the company. The company brought this action claiming (1) rescission of the contract; (2) return of certain sums paid by them in pursuance of it, after setting off such salary, if any, as might be due to the defendant; and (3) an injunction to restrain the defendant from presenting or advertising any petition for the winding-up of the company. An order having been made for service of the writ on the defendant in Scotland, he moved to discharge such order. He contended that the case was not within Ord. XI. r. 1, of the Rules of Court, 1883; that the action was not for a breach "within the jurisdiction" of a contract made without the jurisdiction; and that the company could not, merely by inserting in their writ a claim for an injunction, bring the case within the rule:—Held, that r. 1 of Ord. XI. applied to the case; that it was not necessary that an injunction should be the only relief sought in order to bring the case within the rule; and that the motion must therefore be refused. *Lisbon-Berlyn Gold Fields v. Heddle*, 52 L. T. 796—Kay, J.

—**Infringement of Trade Mark—Defendant's Agents only within Jurisdiction.**—A summons by T. A. M., a manufacturer, resident
z z 2

in Scotland, for leave to register a trade-mark, was pending before the High Court, and was opposed by J. M., also resident and carrying on a similar manufacture in Scotland, on the ground that the mark was similar to one belonging to J. M. J. M. applied for leave to issue a writ against T. A. M. for an injunction and damages, on the ground that T. A. M. was selling his goods in England in such a way as to lead the public to believe that they were J. M.'s goods. J. M. deposed that the same witnesses would be required on the summonses and in the action, and that it would be most convenient and would save great expense if the action was brought in England, or that the summons and action could be tried together:—Held, that as an injunction in England could only be enforced against agents of T. A. M., and not against himself, leave ought not to be given to issue the writ, the matter being one which was better left to the courts of Scotland. *Marshall v. Marshall*, 38 Ch. D. 330; 59 L. T. 484—C. A.

— **Restraining Defamatory Post-cards.**—A writ of summons claiming an injunction to restrain the defendant (resident in Dublin) from sending to the plaintiffs, or either of them, in London, through the post-office or otherwise, libellous, defamatory, or obscene post-cards, &c., and also claiming damages, may by leave of the court be issued and served upon a defendant residing in Dublin, under Ord. XI. r. 1 (f), notwithstanding the obstacles to making the injunction available. *Tozier v. Hawkins*, 15 Q. B. D. 680; 55 L. J., Q. B. 152; 34 W. R. 223—C. A.

Contract—Commission Agent—Wrongful Dismissal.—A. verbally agreed in Glasgow with B., a Scotch coal merchant, to act for B. as commission agent in Ireland. After A.'s return to Dublin some correspondence passed between the parties as to terms, but which, in the opinion of the court, was merely referential to the antecedent complete verbal contract. B. being dissatisfied with A., wrote and posted in Scotland a letter addressed to A. in Ireland, terminating the employment:—Held, that A. was not entitled to an order for liberty to serve B. out of the jurisdiction with a writ of summons, claiming commission and damages for wrongful dismissal. *Hamilton v. Barr*, 18 L. R., Ir. 297—C. A.

— **To be performed within the Jurisdiction—Transfer of Shares.**—R., an American, residing in England for the purposes of his business, brought an action against C., an American resident in America, to enforce a contract by C., made in England, to transfer to R. shares in an English company. Leave was given to issue the writ, and serve notice of it in America. More than a year afterwards the defendant applied to discharge the order for service on the ground that there was no jurisdiction to order service abroad, as the contract was not one which, according to its terms, ought to be performed within the jurisdiction:—Held, that Ord. XI. r. 1, sub-s. (e), does not require that a contract should state in terms that it is to be performed within the jurisdiction, but that it is enough if it appears, from a consideration of the terms of the contract and the facts existing when the contract was made, that it was intended to be performed within the jurisdiction; that a contract made in England to transfer shares

in an English Company to a person resident in England was a contract which, according to its terms, ought to be performed within the jurisdiction. *Reynolds v. Coleman*, 36 Ch. D. 453; 56 L. J., Ch. 903; 57 L. T. 588; 35 W. R. 813—C. A.

— **Work done in Isle of Man—Place of Payment.**—In an application for service out of the jurisdiction it appeared that the action was brought by the plaintiffs, engine-makers in England, for the price of machinery erected by them in the Isle of Man for the defendants, a company carrying on business in the island. There was no agreement as to the place of payment:—Held, that it must be taken to be part of the contract that the plaintiffs should receive payment in England, that the action was therefore founded on a breach within the jurisdiction, according to Ord. XI. r. 1 (e), and that service out of the jurisdiction might be allowed. *Robey v. Snafell Mining Company*, 20 Q. B. D. 152; 57 L. J., Q. B. 134; 36 W. R. 224—D.

— **Delivery of Goods in London.**—M., a merchant at New York, contracted to supply certain goods to B., a merchant in London, on certain terms. On arrival of the goods in London they were found to be defective and not according to contract, and the defects in them were not due to the sea voyage:—Held, that inasmuch as the breach was continuing, the English courts had jurisdiction, and therefore that the defendant might be served with notice of a writ of summons under Ord. XI. r. 1, sub-r. (e). *Barrow v. Myers*, 52 J. P. 345—D.

— **Charging Order.**—This was a motion for leave to issue for service out of the jurisdiction a writ in an action seeking to enforce a charging order obtained by the plaintiff, a judgment creditor, upon certain shares belonging to the defendant, the judgment debtor. The Judgment Act (1 & 2 Vict. c. 110), s. 14, which, by virtue of Ord. XLVI. r. 1, regulates the effect of a charging order, provides that "such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." Ord. XI. r. 1, provides that service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the court or a judge whenever (e) "the action is founded on any breach, or alleged breach, within the jurisdiction, of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction":—Held, that, assuming that the case could be treated as one of contract at all, it would only be a contract that the shares should be charged, and of such a contract there had not been any breach within the jurisdiction. *Moritz v. Stephan*, 58 L. T. 850; 36 W. R. 779—North, J.

— **To Supply News—Transmission through Postal Telegraph Office—Balance of Convenience.**—A company, whose office was in London, contracted with G., the proprietor of a Dublin newspaper, for the transmission to him of news. The contract contained a condition that the company was not to be responsible for non-delivery or for delay or errors which might

occur in the collection or transmission of its news supplies:—Held, that the contract was not fulfilled by the delivery of the news at the postal telegraph office in London for transmission to Dublin, and that, in an action by G. for breach of the contract in negligently and carelessly supplying him with false news, he was entitled to an order for leave to serve the writ of summons out of the jurisdiction, on the grounds that the breach of the contract occurred in Dublin, and that, having regard to the necessary witnesses, as disclosed by the affidavits on both sides, the preponderance of convenience was not against a trial in Ireland. *Gray v. Press Association*, 22 L. R., Ir. 1—C. A.

— **Defendant ordinarily Resident in Scotland or Ireland.**—There is no power to allow service of a writ out of the jurisdiction in actions for breach of contract under Ord. XI., r. 1 (e), where the defendant is domiciled or ordinarily resident in Scotland or Ireland. *Lenders or Sanders v. Anderson*, 12 Q. B. D. 50; 53 L. J., Q. B. 104; 49 L. T. 537; 32 W. R. 230; 48 J. P. 136—D.

An insurance company, whose registered office was in Scotland, and whose secretary resided there, but which also had agencies and a chief office within the jurisdiction of the High Court, issued a policy through an agent within the jurisdiction, to whom the premiums were paid. The company having refused to pay a claim on the policy:—Held, that it was not domiciled or ordinarily resident within the jurisdiction, and that leave to issue a writ for service out of the jurisdiction could not be granted. *Jones v. Scottish Accident Insurance Company*, 17 Q. B. D. 421; 55 L. J., Q. B. 415; 55 L. T. 218—D.

Action for Rent of Land in England.—Ord. XI., r. 1, does not enable the court or a judge to allow service out of the jurisdiction of a writ in an action for non-payment of rent due under a lease of land in England against defendants who are domiciled or ordinarily resident in Scotland. *Agnew v. Usher*, 14 Q. B. D. 78; 54 L. J., Q. B. 371; 51 L. T. 576—D.

On appeal, the court held that the plaintiffs, having failed to show that the defendants were assignees of the lease, had not shown reason for the leave to be granted. *Agnew v. Usher*, 51 L. T. 576; 33 W. R. 126—C. A.

Contract affecting Land—Compensation for Tenant-right—Custom.—In an action by the outgoing tenant of a farm in Yorkshire to recover from his landlord, who was ordinarily resident in Scotland, compensation for tenant-right according to the custom of the country:—Held, that a "contract, obligation, or liability affecting land" was sought to be enforced in the action, and therefore that the court had power, under Ord. XI., r. 1 (b), to allow service of the writ of summons out of the jurisdiction. *Agnew v. Usher* (14 Q. B. D. 78) distinguished. *Kaye v. Sutherland*, 20 Q. B. D. 147; 57 L. J., Q. B. 68; 53 L. T. 56; 36 W. R. 508—D.

Co-defendants served within the Jurisdiction.—In an action to enforce against real estate in Trinidad the trusts of a creditor's deed (which had been established by a former suit in the Court of Chancery), the defendants were persons in whom the legal estate was outstanding, one

of them being a British subject resident in Trinidad. The other defendants resided in England. An opinion was given by a barrister practising in Trinidad that the beneficial interest in the real estate there was bound by the deed. The writ had been served on those defendants who were in England:—Held, that leave could be given to serve the writ on the defendant who was in Trinidad. *Jenney v. MacIntosh*, 33 Ch. D. 595; 55 L. T. 733; 35 W. R. 181—North, J.

— **Discretion.**—Where a testatrix resided and was domiciled in Ireland, and died in Ireland, and her will was made and proved in Ireland, and she appointed three executors, two residing in Ireland and one residing and domiciled in England, and the executors sold some consols and invested the proceeds in the purchase of some Irish land, a beneficiary brought an action against the English executor in England, claiming that the investment was improper, and the executors were liable to replace the money. Leave having been given to serve the writ on the two executors in Ireland; on motion to discharge the order giving such leave:—Held, that it was a matter of discretion for the judge, and the action having been properly brought against a man within the jurisdiction, the case fell within Ord. XI. r. 1 (c), and the motion must be refused. *Harvey v. Dougherty*, 56 L. T. 322—Kay, J.

— **"Proper" Parties.**—By Ord. XI. r. 1, service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever (g) "Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." In an action against defendants in London for breach of warranty of authority it appeared that they had assumed as agents for foreign principals to enter into a contract to be performed out of the jurisdiction, and that there had been a breach out of the jurisdiction, the supposed principals having repudiated the contract as being made without their authority:—Held, that the foreign principals were "proper" parties to the action within Ord. XI. r. 1 (g), and that service on them out of the jurisdiction of notice of the writ might be allowed. *Massey v. Heynes*, 21 Q. B. D. 330; 57 L. J., Q. B. 521; 36 W. R. 834—C. A. Affirming 59 L. T. 470—D.

The plaintiff brought his action in England on a policy of marine insurance against several underwriters. He served his writ of summons on two of the underwriters who were within the jurisdiction, and applied for leave under Ord. XI. r. 1 (g), to serve his writ on the other defendants, who were residing out of the jurisdiction in Scotland, as being necessary parties to the action:—Held, that the plaintiff ought to be allowed to serve his writ out of the jurisdiction; and that Ord. XI. r. 1 (g) was framed to meet such a case. *Thanemore Steamship v. Thompson*, 52 L. T. 552; 5 Asp. M. C. 398—D.

— **Substantial Defendant.**—On an application to serve a person out of the jurisdiction under Ord. XI. r. 1 (g), it must be shown that there is within the jurisdiction a defendant against whom substantial relief is claimed, and

it must also be shown that the defendant within the jurisdiction has been previously duly served. *Yorkshire Tannery v. Eglinton Chemical Company*, 54 L. J., Ch. 81; 33 W. R. 162—Pearson, J.

5. APPEARANCE AND PROCEEDINGS IN DEFAULT OF.

At Trial.—See post, col. 1472.

Setting aside—Illusory Address for Service.]

—A defendant appeared in person to a writ, and gave an address for service in the memorandum of appearance. On inquiry, it was found that though the defendant had once carried on business at the address given, he had ceased to do so, and had left no instructions as to the forwarding to him of letters or documents. A letter forwarded by the plaintiff to his private address was returned through the Dead Letter Office. The plaintiff subsequently received a letter from the defendant from abroad. On an ex parte application the court made an order declaring the address for service illusory or fictitious under Ord. XII. r. 12. *E. v. C. or Edell v. Cave*, 54 L. J., Ch. 308; 51 L. T. 621; 33 W. R. 208—V.-C. B.

By Partner.—See *Adam v. Townend*, ante, col. 1330.

—**Amending Defect in.**—A writ having been issued against a firm and others, was served on one defendant, F., in his individual capacity as a defendant, and also as representing both a co-defendant, G., and the firm (of which he, F., was supposed to be a member). F. was not, in fact, a partner in the firm, nor did he in any way represent either it or G. for the purposes of service. The firm entered a conditional appearance and moved to discharge the service as against them:—Held, that the defect in the firm's appearance, by reason of their not having appeared individually in their own names, could be cured by an undertaking of the partners so to appear; that upon this being done the service must be discharged as against G., he being easily accessible, and there being no need for prompt service. *Nelson v. Pastorino*, 49 L. T. 564—Pearson, J.

Effect of, on Defective Writ.—Appearance to a writ is a "fresh step" taken within the meaning of Ord. LXX. r. 2, and a writ which is irregular to the knowledge of the defendant cannot be set aside on his application after appearance. *Mulckern v. Doerks*, 53 L. J., Q. B. 526; 51 L. T. 429—D. But see *Willmott v. Freehold House Property Co.*, 51 L. T. 552—C. A.

Judgment in Default of — Application by Person not a Party.—If a person who is not a party to the record, seeks to set aside a judgment by which he is injuriously affected, which the defendant in the action has allowed to go by default, he ought by summons, taken out in the name of the defendant, or if not entitled to use the defendant's name, then taken out in his own name, but in that case served on both the plaintiff and the defendant, apply for leave to have the

judgment set aside, and to be allowed either to defend the action on such terms of indemnifying the defendant as the judge may consider right, or to intervene in the action in the manner pointed out by the Judicature Act, 1873, s. 24, sub-s. 5. Ord. XXVII. r. 15, is designed to enable judgments by default to be set aside by those who have or who can acquire a locus standi, and does not give a locus standi to those who have none. *Jacques v. Harrison*, 12 Q. B. D. 165; 53 L. J., Q. B. 137; 50 L. T. 246; 32 W. R. 471—C. A.

— Liquidated Demand — Claims for Foreclosure and on Covenant.]

—The writ in an action to enforce a mortgage security claimed an account of principal, interest, and costs on the mortgage and foreclosure or sale, and also the sum of 225*l.* 10*s.* for principal and interest under the covenant contained in the mortgage deed. The defendant did not appear, and no statement of claim was delivered. Upon motion by the plaintiff for the usual foreclosure judgment nisi, and for liberty to sign final judgment for the amount indorsed upon the writ:—Held, that the plaintiff was entitled under Ord. XIII. r. 3, to sign judgment for the liquidated demand, notwithstanding that the claim was joined with a claim for foreclosure, but that he was not entitled to the foreclosure judgment. *Bissett v. Jones*, 32 Ch. D. 635; 55 L. J., Ch. 648; 54 L. T. 603; 34 W. R. 591—Chitty, J.

—**Extent of Relief.**—Notwithstanding the provision of r. 4 of Ord. XX. that, whenever a statement of claim is delivered the plaintiff may therein extend his claim without any amendment of the indorsement of the writ—the plaintiff cannot, when the defendant does not appear to the writ and a statement of claim is delivered by filing it with the proper officer, obtain judgment in default of appearance for more than he has claimed by his writ. *Gee v. Bell*, 35 Ch. D. 160; 56 L. J., Ch. 718; 56 L. T. 305; 35 W. R. 805—North, J.

In a foreclosure action, where a mortgagee applies, on motion for judgment, not only for foreclosure but also for a personal order for payment of the mortgage debt and interest against a mortgagor who has made default in entering appearance and in delivering a defence, the statement of claim ought, however shortly, to contain an express statement of the covenant upon which the personal order for payment is claimed. *Law v. Philby*, 56 L. T. 230; 35 W. R. 401—Chitty, J.

Where no appearance has been entered by the defendant in an action, the plaintiff cannot, by his statement of claim, enlarge the scope of the claim indorsed on his writ. Where, therefore, a defendant did not enter an appearance to the writ issued in a foreclosure action, and the writ was not indorsed for payment, the court held that the plaintiff was only entitled to the usual order for foreclosure, although, on his statement of claim, he was also entitled to an order for payment against the defendant. *Law v. Philby*, 56 L. T. 522; 35 W. R. 450—Chitty, J.

—**Parties joined as Defendants to Counter-claim.**—A plaintiff by counter-claim can proceed against defendants by counter-claim who do not appear in the same way as a plaintiff in

an original action. A defendant to an action by which rights of common were claimed, counter-claimed against the plaintiffs, and several others whom he added as defendants, and asked for an injunction on the ground of trespass. The added defendants did not appear or defend. The plaintiff by counter-claim moved for judgment in default of appearance, and upon admissions:—Held, that the motion must stand till the trial, as, if the question raised by the counter-claim was not connected with the original subject of the action, the added defendants were improperly brought before the court; and if it was connected, then no relief should be given until trial. *Verney v. Thomas*, 58 L. T. 20; 36 W. R. 398—*Kekewich, J.*

6. JUDGMENT ON SPECIALLY INDORSED WRIT UNDER ORD. XIV.

In what Cases—Foreign Judgment.]—In an action upon a foreign judgment in which the writ of summons has been specially indorsed under Ord. XIV., the plaintiff may obtain an order empowering him to sign final judgment. *Hodson v. Baxter* (E. B. & E. 884) followed. *Grant v. Easton*, 13 Q. B. D. 302; 53 L. J., Q. B. 68; 49 L. T. 645; 32 W. R. 239—C. A.

— Action for Recovery of Land.]—The relationship of landlord and tenant may be created by a mortgage deed, and therefore, in an action for recovery of land by mortgagees from a mortgagor in possession under a mortgage deed creating a tenancy between them, the writ may be specially indorsed under Ord. III. r. 6 (F.) so that Ord. XIV. will apply, and final judgment may be ordered. *Daubuz v. Lavington*, 13 Q. B. D. 347; 53 L. J., Q. B. 283; 51 L. T. 206; 32 W. R. 772—D.

A mortgage deed contained a clause by which, for the purpose of securing the punctual payment of the interest, the mortgagor attorned tenant to the mortgagee, and the mortgagee had a power of re-entry for default in payment. Default having been made, the mortgagee commenced an action for the recovery of the premises, and applied for judgment under Ord. XIV. :—Held, that the mortgagor was a tenant whose term had expired or had been duly determined by notice to quit within the meaning of Ord. III. r. 6 (F.), and the plaintiff was entitled to judgment. *Daubuz v. Lavington* (13 Q. B. D. 347) approved and followed. *Hall v. Comfort*, 18 Q. B. D. 11; 56 L. J., Q. B. 185; 55 L. T. 550; 35 W. R. 48—D.

— Claim for Foreclosure and Debt.]—A writ which claims foreclosure or sale and a receiver, besides payment of the debt and interest, is not specially indorsed so as to entitle the plaintiff to summary judgment on the claim for debt and interest. *Imbert-Terry v. Carver*, 34 Ch. D. 506; 56 L. J., Ch. 716; 56 L. T. 91; 35 W. R. 328—North, J.

— Judgment against future Assets, quando acciderint.]—In an action against an administratrix, commenced by a specially indorsed writ, the defendant showed that she was entitled to plead plene administravit, but did not dispute

that there were outstanding assets of the deceased. Leave was given to mark judgment of assets quando acciderint. Form of order. *Findlater v. Tuohy*, 16 L. R., Ir. 474—Ex. D.

— Arrears of Alimony pendente Lite.]—A claim for arrears of alimony pendente lite, is not a claim for a “debt or liquidated demand in money” within the meaning of Ord. III. r. 6, so as to entitle the plaintiff to apply for judgment under Ord. XIV. s. 1. *Bailey v. Bailey*, 13 Q. B. D. 855—C. A. Affirming 53 L. J., Q. B. 583; 50 L. T. 722; 32 W. R. 856—D.

— Action on Solicitor's Bill—Taxation.]—Where an action is brought on a solicitor's bill of costs, and the defendant admits his liability, but desires that the bill should be taxed, the proper order to be made on an application for liberty to sign judgment under Ord. XIV. r. 1, is as follows:—“It is ordered that the bill of costs on which the action is brought be referred to the taxing-master, pursuant to the statute 6 & 7 Vict. c. 73, and that the plaintiff give credit at the time of taxation for all sums of money received by him from or on account of the defendant, and let the plaintiff be at liberty to sign judgment for the amount of the master's allocatur in the said taxation, and costs to be taxed. *Smith v. Edwards*, 22 Q. B. D. 10; 58 L. J., Q. B. 227; 60 L. T. 10; 37 W. R. 112—C. A.

In an action by solicitors upon an untaxed bill of costs, the court, on an application for judgment under Ord. XIII. r. 2, referred the costs for taxation subject to credits, and ordered judgment to be entered for the amount certified to be due. *Larkin v. M'Inerney*, 16 L. R., Ir. 246—Ex. D.

— Excessive Sum inadvertently Claimed.]—On a motion for judgment, the plaintiff's affidavit verified the whole of the debt claimed in the writ of summons; but the defendant having filed an affidavit disputing a part of the demand, the plaintiff by an affidavit in reply and by his counsel, admitted that this part of the claim could not be sustained, and had been included in the writ by mistake :—Held, that the plaintiff was entitled to judgment for the residue. *Rye v. Hawkes*, 16 L. R., Ir. 12—Ex. D.

— Bond—Penalty.]—The indorsement on a writ claimed 500*l.*, as the principal sum due on a bond conditioned for the payment by the obligor to the plaintiff of an annuity of 26*l.* during the life of a child, and until she should attain the age of sixteen years, by specified quarterly payments, and alleged that two of such payments were due and unpaid :—Held, that the plaintiff was not entitled to proceed under Ord. XIV. r. 1, to obtain final judgment, but was limited to the procedure specified in 8 & 9 Will. 3, c. 11, s. 8, and Ord. XIII. s. 14. *Tutcher v. Caralampi*, 21 Q. B. D. 414; 59 L. T. 141; 37 W. R. 94; 52 J. P. 616—D.

— Part of Claim unliquidated.]—See *Clarke v. Berger*, ante, col. 1409.

Form of Order against Married Woman.]—An order giving leave to enter final judgment against a married woman in respect of her separate estate by virtue of the Married Women's Pro-

perty Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 19, should state that execution is to be limited to such separate estate as the defendant is not restrained from anticipating unless such restraint exists under any settlement or agreement for a settlement of her own property made or entered into by herself. *Bursill v. Tanner*, 13 Q. B. D. 691; 50 L. T. 589; 32 W. R. 827—D.

— **Evidence of Separate Estate.**—In an action against husband and wife to recover a debt of the wife contracted before marriage, where the marriage has taken place after the coming into operation of the Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, but before the coming into operation of the Married Women's Property Act, 1882, judgment may be entered against the wife under Ord. XIV. r. 1, making the debt and costs payable out of her separate property, with a limitation as regards execution similar to that in the form settled in *Scott v. Morley* (20 Q. B. D. 120), without proof of the existence of separate estate at the date of the judgment. *Dovne v. Fletcher*, 21 Q. B. D. 11; 59 L. T. 180; 36 W. R. 694; 52 J. P. 375—D.

When Application to be made.—If a plaintiff, after appearance by the defendant, takes a deliberate step to have an action tried by a jury, by serving a statement of claim, or notice in lieu of statement of claim, he cannot then move for final judgment under Ord. XIII. r. 1. *Stewartstown Loan Company v. Daly*, 12 L. R., Ir. 418—Ex. D.

Affidavit—Sufficiency of.—In an application for final judgment under Ord. XIII. r. 1, the affidavit of the plaintiff, after verifying the cause of action, stated that the plaintiff was "advised and believed that the defendant had no defence on the merits to the action":—Held, that the affidavit was sufficient. *Manning v. Moriarty*, 12 L. R., Ir. 372—Q. B. D.

Upon an application to sign final judgment on a writ, which was admittedly a specially indorsed one, for goods sold and delivered, the verification of the cause of action was a paragraph in the plaintiff's affidavit in the following words:—"The defendant herein is indebted to me in the sum of 24*l.* 16*s.*" (being the amount indorsed), "as per particulars specially indorsed on the writ of summons herein":—Held, that the paragraph, coupled with the indorsement, was sufficient to entitle the plaintiff to judgment. *Murphy v. Nolan*, 18 L. R., Ir. 468—C. A.

7. JOINDER OF CAUSES OF ACTION.

Action for Recovery of Land—Amount of Valuation.—Where an agreement for a tenancy had failed and the plaintiff brought an action for recovery of the land, and the defendant, who had entered into possession of the land, set up the agreement as a defence; on summons brought by the plaintiff for leave to amend the indorsement on the writ by claiming a valuation which he alleged that the defendant had agreed to pay on entering into possession of the land, but had not paid:—Held, that the plaintiff had a right to claim the valuation under the agree-

ment as an alternative, in case he failed in recovering the land, and that the amendment should be allowed. *Rushbrooke v. Farley*, 54 L. J., Ch. 1079; 52 L. T. 572; 33 W. R. 557—V.-C. B. See also *Clark v. Wray*, post, col. 1503.

— **Foreclosure.**—A mortgage was created of certain land by A., who subsequently went into liquidation. The trustee in the liquidation sold the equity of redemption to B. An action was brought by the mortgagee against B. for foreclosure. The security was insufficient, and it was necessary to obtain possession as soon as possible. On demanding possession, however, the mortgagee found that A. was in possession and refused to go out. The mortgagee asked for leave to amend the writ in the action by adding the name of A. as a defendant, and by including, as part of the relief sought, a claim for recovery of possession of the mortgaged property:—Held, that the leave could not be granted. *Stutchiffe v. Wood*, 53 L. J., Ch. 970; 50 L. T. 705—Kay, J.

Irregularity—Objection by Defence.—The plaintiff, without obtaining leave of the court, joined a claim for recovery of land with other claims. By his statement of claim he altered his claim for relief by omitting the claim for recovery of land. The defendant by his defence raised the objection that the writ of summons was issued without leave of the court:—Held, that the defence ought not to be struck out as embarrassing. *Wilmott v. Freehold House Property Company*, 51 L. T. 552—C. A.

Seem, that such an objection is properly pleaded in the defence, that the plaintiff cannot cure the irregularity in his writ by omitting his claim for recovery of land from his statement of claim, that to cure the irregularity the writ of summons must be amended, and that such amendment cannot be made without the consent of the defendant. *Id.*

— **Time for taking Objection.**—An action was commenced against a trustee and the executors of his deceased co-trustee for the administration of the estate of a testatrix. The plaintiffs subsequently amended their statement of claim without the leave of the court, and asked that one of the executors of the deceased trustee might be ordered to give up possession of a certain inn belonging to the trust estate. It was pleaded by the defence and urged at the trial that this pleading was irregular, as joining two causes of action without leave:—Held, that the defendant should have applied at once to have the pleadings set right, and the objection was now untenable. *Derbon, In re, Derbon v. Collis*, 58 L. T. 519; 36 W. R. 667—Keke-wich, J.

Unconnected Claims against several Defendants.—To bring into one claim distinct causes of action against different persons, neither of them having anything to do with the other (except as far as it is historically connected with it as one matter in the transaction) is not contemplated by Ord. XVIII. r. 1, which authorises the joinder not of several actions against distinct persons, but of several causes of action. *Bur-stall v. Beyfus*, 26 Ch. D. 35; 53 L. J., Ch. 565; 50 L. T. 542; 32 W. R. 418—C. A.

8. INTERMEDIATE PROCEEDINGS.

a. PAYMENT INTO AND OUT OF COURT—FUNDS IN COURT.

i. Order on Accounting Parties.

In what Cases.—Upon an interlocutory application for the payment of money into court made before the trial of an action for the taking of an account, where an account has been rendered, and the court has before it the parties to the account and evidence as to the items in dispute between them, the court will look into the facts of the case, and if in the fair exercise of its judicial discretion it can arrive at a conclusion that a sum will be due to the plaintiff on the taking of the account, and what the amount of that sum will be, the court will order the defendant to pay that amount into court. *Wanklyn v. Wilson*, 35 Ch. D. 180 ; 56 L. J., Ch. 209 ; 56 L. T. 52 ; 35 W. R. 332—Stirling, J.

— Agreement for Mining Lease—Lessee in Possession—Payment of Royalties into Court.]—

The plaintiffs commenced an action against the defendant for specific performance of an agreement for a lease of a coal mine by the plaintiffs to the defendant at a royalty, as the plaintiffs alleged, of 10*d.* per ton. The defendant counter-claimed to have specific performance with a royalty of less amount. The defendant was in possession, and raising and selling large quantities of coal, but he alleged that he had expended on the mine more than the value of the coal raised. He also brought an action against the plaintiffs in the Queen's Bench Division to obtain damages for misrepresentation, alleged to have been made to him for the purpose of inducing him to enter into the agreement, which action was still pending. The plaintiffs moved for an interlocutory order that the defendant might be ordered to pay into court the amount of royalties at 10*d.* per ton on the coal he had raised, but the court refused the motion:—Held, on appeal, that although it would not be right, while the rate of royalty was in dispute, to order the defendant to pay into court the amount of royalties at the rate claimed by the plaintiffs, he ought to be ordered to pay in the amount of royalties at the rate which he himself alleged to be the one agreed upon, and that as his carrying away coal diminished the value of the property, he would not have the usual option of giving up possession instead of paying money into court. *Lewis v. James*, 32 Ch. D. 326 ; 56 L. J., Ch. 163 ; 54 L. T. 260 ; 34 W. R. 619 ; 50 J. P. 423—C. A.

Admission of Defendant—Sufficiency of.]—

The defendant, one of the trustees of a settlement, in letters written to the plaintiff, his co-trustee, before the commencement of this action for the administration of the trusts, admitted having received 300*l.*, part of the trust funds, and invested it in an unauthorised way. The plaintiff, after the defendant had appeared in the action, took out a summons to have the 300*l.* brought into court, and made an affidavit deposing that he had paid the money to the defendant, and stating the admissions contained in the defendant's letters as to its application. The defendant did not answer this affidavit or adduce any evidence, and the money

was ordered into court on the ground that the letters were a sufficient admission within Ord. XXXII. r. 6. The defendant appealed:—Held, that as the defendant had not met the affidavit, there was a sufficient admission that the money was in his hands, and that the appeal must be dismissed. *Freeman v. Cow* (8 Ch. D. 148) approved and followed. Per Fry, L.J., whether the letters were not a sufficient admission within Ord. XXXII. r. 6, *quære*. *Porrett v. White*, 31 Ch. D. 52 ; 55 L. J., Ch. 79 ; 53 L. T. 514 ; 34 W. R. 65—C. A.

— **In Affidavit in another Action.**—An order will not be made, under r. 6 of Ord. XXXII. in an action for money lent, unless there is a clear admission that the debt is due and recoverable in the action in which the admission is made:—*Quære*, whether the words "or otherwise" in r. 6 refer only to cases in which notice has been given under r. 1 or r. 4 of Ord. XXXII. *Landergan v. Feast*, 55 L. T. 42 ; 34 W. R. 691—C. A. Reversing 55 L. J., Ch. 505—V.-C. B.

— **Letters.**—Trust funds may be ordered to be brought into court by the trustee, an accounting party, upon admissions contained in letters written before action brought that he has received the money, and a recital to that effect contained in the settlement, his execution of which as trustee has been proved, although there is no formal admission in his pleadings or affidavits that he has received and holds the money. *Hampden v. Wallis*, 27 Ch. D. 251 ; 54 L. J., Ch. 1175 ; 51 L. T. 357 ; 32 W. R. 977—Chitty, J. See also *Porrett v. White*, *supra*.

Enforcement of Order for Payment into Court.]

—See *Coney, In re*, and *Whiteley, In re*, post, cols. 1453, 1454.

ii. Payment into Court with Defence.

Particulars of Items.—The court has a discretion to order a defendant to give particulars of the items of claim in respect of which he pays money into court, but it can only make such an order when the trial of the action will be facilitated and neither party embarrassed by it. *Orient Steam Navigation Company v. Ocean Marine Insurance Company*, 34 W. R. 442—D.

An action was brought by the plaintiff as lessor, against the defendants, as lessees, of certain premises for—(1) possession ; (2) mesne profits ; (3) damages for dilapidations and non-repair. The defence was a general denial of all liability, and a payment of 30*l.* into court, as sufficient to satisfy the plaintiff's claim in the action. A judge at chambers having made an order that the defendants should give to the plaintiff particulars in writing, stating in respect of which of the two heads of claim (mesne profits and damages for dilapidations) the payment into court was made, and if in respect of both, how much for each head:—Held, that the order was right, as the defendants ought to give the particulars asked for, apportioning the sum paid into the different heads of claim. *Rowe v. Kelly*, 59 L. T. 139—D.

Defence setting up Tender—Denial of Liability—Payment out of Court—Liability of Solicitor

to refund.]—In an action for wrongful dismissal, claiming a year's salary in lieu of notice, the defendant pleaded that the plaintiff was only entitled to one month's notice; or, in the alternative, three months; that before action the defendant made tender of three months' salary, which the plaintiff refused; that the defendant had paid the amount into court, and that it was enough to satisfy the plaintiff's claim. The request for lodgment in court contained a statement that the money was paid in with a defence setting up tender. The plaintiff's solicitor, without obtaining an order, but on the written authority of the plaintiff, took the money out of court, and the plaintiff proceeded with the action. At the trial judgment was given for the defendant on the ground that the plaintiff was only entitled to one month's salary. The defendant applied for an order against the solicitor to refund so much of the money taken out of court as represented the difference between one month's and three months' salary. The solicitor had acted bona fide in taking the money out of court, and had paid it over to the plaintiff before the application to make him refund it was made:—Held, that although the plaintiff ought not to have had the money out of court, because a defence of tender of the sum paid in could not be pleaded to a claim for unliquidated damages, yet under the circumstances the solicitor ought not to be ordered to refund it. *Davys v. Richardson*, 21 Q. B. D. 202; 57 L. J., Q. B. 409; 59 L. T. 765; 36 W. R. 728—C. A.

Denial of Liability—Order for Payment out.]

—Where money is paid into court with a defence denying liability, and the plaintiff does not accept it in satisfaction, an order for payment of such money out of court cannot be made until after the trial or other determination of the action. *Maple v. Shrewsbury (Earl)*, 19 Q. B. D. 463; 56 L. J., Q. B. 601; 57 L. T. 443; 35 W. R. 819—C. A.

— Payment in, by Mistake—Taking out.]

—In an action for 1,349*l.*, the defendants paid 167*l.* into court without regard to the regulations prescribed by the Rules of Court, 1883, and the Supreme Court Funds Rules, 1884. On the day of payment into court the defendants' solicitors wrote to the plaintiff's solicitor stating that they had that day paid 167*l.* into court to the credit of the action, "in discharge of the plaintiff's claim in this action." On the same day the defendant delivered a defence, which contained a denial of liability to the plaintiff, and stated that the sum paid into court was sufficient to satisfy the plaintiff's claim if any should be established. The plaintiff took the money out of court and then continued the proceedings in the action:—Held, that in the circumstances the plaintiff must either keep the money and let all further proceedings except as to costs be stayed, or pay the money into court again, and go on with the action. *Stamford (Earl), In re, Savage v. Payne*, 53 L. T. 512; 33 W. R. 909—C. A.

Alternative Payment—Defendant Succeeding at Trial—Right to Judgment.]—Where the defendant succeeds at the trial on an issue on money paid into court under Ord. XXX. r. 1, of the Rules of 1875, with a defence stating such payment as an alternative defence to the

action, he is entitled to have judgment entered for him in the action. In an action for trespass in breaking and entering the plaintiff's land, the defendants paid money into court under Ord. XXX. r. 1, of the Rules of 1875, and in their defence denied the plaintiff's possession of the land, and also stated that, without admitting any kind of liability, the sum paid into court was sufficient to satisfy any damage which the plaintiff might have sustained in consequence of any acts of theirs. The plaintiff joined issue upon these defences, but failed at the trial to establish any damages exceeding the sum paid into court, though he succeeded on the other issue. The Court of Appeal treated such defence of payment into court as an alternative payment, and as it went to the whole cause of action:—Held, that the defendants were entitled to judgment. *Wheeler v. United Telephone Company*, 13 Q. B. D. 597; 53 L. J., Q. B. 466; 50 L. T. 749; 33 W. R. 295—C. A. *S. P. Goutard v. Carr*, 13 Q. B. D. 598, n.; 53 L. J., Q. B. 467, n.; 53 W. R. 295, n.—C. A.

Costs—Several Breaches of Contract—Payment into Court in respect of one Breach—Acceptance in Satisfaction.]

—In an action for breach of contract assigning two distinct breaches, the defendants pleaded denying the breaches, and alternatively paid money into court with regard to one of the breaches. The plaintiffs gave notice under Ord. XXII. r. 7, that they accepted the money paid into court in full satisfaction of the causes of action in the statement of claim:—Held, that plaintiffs were entitled, without proceeding to judgment, to their costs of the action; or by accepting the money paid into court in satisfaction of all their alleged causes of action they had in effect discontinued or withdrawn the action as to the breach, in respect of which the money was not paid in. *McIlwraith v. Green*, 14 Q. B. D. 766; 54 L. J., Q. B. 41; 52 L. T. 81—C. A.

— Payment into Court for Debt and Costs.]

—In an action for a money demand, the defendant pleaded an agreement, after action brought, by the plaintiffs to take a certain sum for debt and costs, and brought that amount into court on foot of debt and costs. The plaintiffs' solicitor served notice on the defendant's accepting the sum so paid into court "in satisfaction of the plaintiffs' claim in respect of which it was paid in."—Held, that the plaintiffs were not entitled to any costs beyond the sum lodged in court. *Goodbody v. Gallaher*, 16 L. R., Ir. 336—Q. B. D.

iii. Funds in Court.

Under the Lands Clauses Acts.]—See LANDS CLAUSES ACT.

Under Trustee Relief Act.]—See TRUST AND TRUSTEE.

Payment out of small Sum—Married Woman.]

—Where a married woman had been for many years deserted by her husband, and no settlement had been made upon her marriage, the court made an order for payment to her by way of provisional advance of a small portion of the share of a capital fund in court, to which she

had been declared entitled. *Barker v. Togan*, 17 L. R., Jr. 447—V.-C.

— **Infants.**—Small sums of money representing shares of infants in a fund in court may be directed to be paid out by the Paymaster-General into the Post-office Savings Bank to accounts in the names of the infants. *Elliott v. Elliott*, 54 L. J., Ch. 1142—Chitty, J.

Payment out—Carrying over to separate Account—Title of Account.—Where it is proposed upon a petition for payment out of part of a fund in court to carry over a share in such fund to the separate account of the person entitled, the account should be in the name of such person, and not in the name of such person or his incumbrancer—i.e., “the account of A. B.” not “the account of A. B. or his incumbrancers.” *Hargrave v. Kettlewell*, 55 L. T. 674; 35 W. R. 136—Chitty, J.

— **Contingent Interests—Stop-order—Mortgagees.**—Where a contingent interest in a fund in court has been mortgaged, and the mortgagee places a stop-order on the fund, but the mortgagor dies before his interest vests, the persons ultimately entitled to the fund upon applying for payment out, need not serve such mortgagee. *Vernon v. Croft*, 58 L. T. 919; 36 W. R. 778—Chitty, J.

— **Money representing Real Estate—Affidavit of No Incumbrances.**—Applications by persons claiming to be absolutely entitled for payment out of money in court representing real estate, should be supported by an affidavit of no incumbrances, and *prima facie*, the applicant is the proper person to make the affidavit. *Williams v. Ware*, 57 L. J., Ch. 497; 58 L. T. 876—Chitty, J.

— **To Infant.**—See INFANT; III.

— **Person of Unsound Mind not so found.**—See LUNATIC, I.

— **Forged Affidavit—Order on Solicitor to Repay.**—Where money was paid out of court upon a forged affidavit, the solicitor to the proceedings taking no steps in the matter himself, but allowing the matter to be attended to by a managing clerk of another firm, the solicitor was held liable to replace the money and pay all necessary costs incurred. *Slater v. Slater*, 58 L. T. 149—Kay, J.

— **Money paid in as Security for Costs.**—See post, col. 1443.

Assignment of Trust Fund—Duty of Assignee as to Notice.—When an assignment is made of an interest in trust funds, part of which is in court and part in the hands of trustees, the assignee in order to complete his title must, as regards the funds in the hands of the trustees, give notice to the trustees. Notice to the trustees will be ineffectual as regards the fund in court, and as to that fund the priorities of different assignees will be determined by the dates at which they have obtained stop-orders. An assignee who has obtained a stop-order is entitled (as regards the fund in court) to priority over a prior assignee (of whose assignment he

had no notice) who had given notice to the trustees before the date of the stop-order, but who had not himself obtained a stop-order. *Mutual Life Assurance Society v. Langley*, 32 Ch. D. 460; 54 L. T. 326—C. A.

Petition or Summons—Payment out of Court.—Money had been paid into court by executors under the Trustee Relief Act to the credit of an account entitled, “In the matter of the trusts of the sale moneys of certain real estate formerly belonging to E., deceased, and subject to the trusts of a certain Royal warrant dated the 6th August, 1861.” The fund had originally been about 1,500*l.* On an application by summons under Ord. LV., 600*l.*, part of the fund, was ordered to be paid out, but as to the remainder the summons stood over for further evidence as to the death of an annuitant. The further evidence having been obtained the application was renewed, the summons asking for payment out of the balance to the applicant:—Held, that the case was not within Ord. LV. at all, and the application ought to be made by petition and not by summons. *Evans, In re*, 54 L. T. 527—Kay, J.

A sum of more than 1,000*l.* had been paid into court in 1883, under the Trustee Relief Act, representing the share under a will of J. R., who could not be found. The administrator of J. R. now took out a summons for payment out of this sum upon evidence that J. R. had attained twenty-one and died intestate:—Held, that the court would not make the order without a petition. *Rhodes' Will, In re*, 31 Ch. D. 499; 55 L. J., Ch. 477; 54 L. T. 294; 34 W. R. 270, 501—Pearson, J.

The generality of sub-s. 1 of Ord. LV., r. 2, of Rules of Court, 1883, is not cut down by sub-s. 5 of the same rule; and consequently, an application under the Trustee Relief Acts, for the payment out of court of a fund, even though it exceeds 1,000*l.*, where the title of the applicant merely depends upon proof of his birth, should be made by summons and not by petition. *Broadwood's Trusts, In re*, 55 L. J., Ch. 646; 55 L. T. 312—Chitty, J.

Where the title to a fund in court depends only upon proof of the identity of the birth, marriage, or death of any person, the mere fact that the fund exceeds 1,000*l.* will not justify the making of an application for the payment or transfer of the fund out of court by petition instead of by summons in chambers. *Rhodes, In re* (31 Ch. D. 499), commented on. *Bates v. Moore*, 38 Ch. D. 381; 57 L. J., Ch. 789; 58 L. T. 513; 36 W. R. 586—North, J.

See also LANDS CLAUSES ACT, III. 3.

— **Stop-order.**—Where a fund in court, paid in under the Trustee Relief Act, 1847, exceeds 1,000*l.*, and there has been no prior application in the matter of the fund, a petition and not a summons is the proper mode of applying, under rr. 12 and 13 of Ord. XLVI. of the Rules of Court, 1883, for a stop-order on the fund so paid in. *Toogood's Trusts, In re*, 56 L. T. 703—Chitty, J.

b. STAYING PROCEEDINGS.

i. *Lis Alibi pendens.*

Breach of Faith.—A collision occurred on the

high seas between the C. and the J., two foreign vessels. The C. was arrested in Holland in an action brought by the owners of the J. and her cargo, but was released with the consent of the agent of the J. on the guarantee of a firm of underwriters interested in the C. to answer judgment in the action. Cross proceedings were instituted in the Dutch court by the owners of the C. and the J. An action was subsequently commenced in this country against the owners of the C. by the owners of the J. and her cargo, and the C. arrested in respect of the same collision. The plaintiffs expressed their willingness to abandon the action in Holland:—Held (dissentiente Brett, M.R.), that the proceedings in this country must be stayed and the ship released. *The Christiansborg*, 10 P. D. 141; 54 L. J., P. 84; 53 L. T. 612; 5 Asp. M. C. 491—C. A.

Petition for Divorce in India—Petition for Restitution in England.—A husband who had been residing with his wife in India presented a petition in India for a divorce from her on the ground of her adultery with the co-respondent, who also resided in India. Before the presentation of the petition the husband sent his wife home to her relations in England, and whilst the petition was pending he came over for a short time for the purpose of making arrangements for his children. The wife then served him with a petition for the restitution of conjugal rights. The court refused an application made by the husband for a stay of proceedings on his wife's petition until the suit in India had been determined. *Thornton v. Thornton*, 11 P. D. 176; 55 L. J., P. 40; 54 L. T. 774; 34 W. R. 509—C. A.

Cross Action by Defendant in Foreign Country.]

—In an action of damage in personam by the owners of the ship G. against the owners of the ship P., it appeared that a cause of damage in rem relating to the same collision had, prior to the proceedings in this court, been instituted by the owners of the P. against the G. in a Vice-Admiralty Court abroad, and was then pending. The court, on the application of the owners of the ship P., stayed the proceedings in this court until after the hearing of the cause in the Vice-Admiralty Court abroad. *The Peshawur*, 8 P. D. 32; 52 L. J., P. 30; 48 L. T. 796; 31 W. R. 660; 5 Asp. M. C. 89—Sir R. Phillimore.

B., resident in San Francisco, brought an action against C. in England alleging that C. had been B.'s agent to purchase for him goods in England; that B. had recently discovered that C. had in the accounts rendered charged more for the goods than he had paid for them, and asking for an account against C. as agent. C., delivered a defence in which he denied agency, alleged that he had as principal sold the goods to B., insisted on the accounts rendered as settled accounts, and alleged that a large balance was due. C. then commenced an action in San Francisco against B. to recover the amount which he so alleged to be due. B. moved to restrain this action:—Held, that the action ought not to be restrained, for that there was no *prima facie* inference that the bringing the action abroad, during the pendency of an action in England in which the matters in dispute could be determined, was vexatious, since the course of procedure in San Francisco might be such as to give advantages

to C. of which he was entitled to avail himself, and that the burden lay on B. to prove that C.'s action was vexatious, which he had failed to do. *Hyman v. Helm*, 24 Ch. D. 531; 49 L. T. 376; 32 W. R. 258—C. A.

Action in Colony and in England—Counter-claim.—B., of London, and M. and C., of Honduras, carried on business in partnership at Honduras as G. & Co. B. and N. carried on business in partnership in London under the same name. The Honduras firm employed the London firm as their agents under an agreement by which B.'s share in the profits of the Honduras firm was to be brought into account as between the two firms to the credit of the English firm. The Honduras partnership was dissolved, and B. obtained a decree in Honduras for taking the partnership accounts. Before those accounts had been fully taken, M. and C. brought this action in England against the London firm for an account of the dealings between the two firms, alleging the defendants to have made improper profits in their agency. The defendants denied having made improper profits, and by counter-claim claimed to have the accounts of the Honduras firm taken. The counter-claim was ordered to be struck out:—Held, that though if M. and C. had not brought this action, B. would not, after obtaining a decree in Honduras, have been allowed to carry on another action here for the same purpose, still as the two actions were so closely connected that neither of them could be finally wound up independently of the other, B. ought not to be prevented from proceeding with his counter-claim so as to be in a position to ask at the trial of this action for such a decree as might be right, having regard to the then position of the Honduras action; and that on N.'s undertaking to be bound by the proceedings in the Honduras action, the order must be discharged. *Mutrie v. Binney*, 35 Ch. D. 614; 56 L. T. 455; 36 W. R. 131—C. A.

Power of Court to look at Proceedings in Action Abroad.—H., a lessee of estates in Ireland, claimed the exclusive right of shooting. S., the lessor, claimed that on the true construction of the lease such right was reserved to him. On the 19th Sept., 1883, H. commenced an action in the Chancery Division in England to restrain S. from interfering with his alleged rights, and, in the alternative, for rectification of the lease. On the 22nd Sept., 1883, S. commenced a common law action in Ireland against H. for trespass. The Irish action was heard first, resulting in a verdict (sustained by a divisional court) for S., with 6*d.* damages. H. had also raised by his defence a plea for rectification of the lease, but it did not appear clearly that this question was ever submitted to the jury. Upon a summons in the English action raising the question of *res judicata*:—Held, that the pleadings and judgments in the Irish action might be put in evidence, having been only very briefly referred to by S. in his defence, as amended with leave, upon the analogy of the old practice, which permitted a judge in similar cases to refer to a master for a report as to the nature of the questions raised and decided in another action. Upon looking into such proceedings the court was not satisfied that the question of rectification was ever really decided against H., and accordingly refused to stay the present action on

that ground. *Houston v. Sligo (Marquis)*, 29 Ch. D. 448; 52 L. T. 96—Pearson, J.

Action in another Branch of Court.]—An action having been brought in the Common Pleas Division against the defendant as executor de son tort of B., deceased, the defendant obtained letters of administration to B., and then issued a writ in the Chancery Division for administration of the real and personal estate of the deceased, and before obtaining a decree the defendant moved the Common Pleas Division for an order to restrain the plaintiff's action, and obtained an order staying the proceedings pending the administration suit:—Held, that the court had no jurisdiction to restrain the plaintiff's action, as no decree for administration had been obtained. *Higgins v. Browne*, 16 L. R., Ir. 173—C. A.

Section 27, sub-s. 5 of the Judicature (Ireland) Act, 1877, only gives the court power to stay proceedings in cases where the Court of Chancery, before the act, could have restrained the action. *Id.*—Per Sir E. Sullivan, C.

ii. Non-payment of Costs.

Of Former Action—Second Action for same Matter.]—A bill for an account of the personal estate of W. J., an intestate, was filed by the legal personal representative of E. B. against the personal representatives of the deceased administrators of W. J., alleging that the administrators of W. J. had got in the greater part of the estate, and that E. B. was the sole next of kin. The suit was revived in 1877 by M., a subsequent personal representative of E. B., against X. and Y., as representatives of one of the administrators, and Z., as representative of the others, and was ultimately dismissed in 1880 with costs, as against all three defendants, on the ground that the title of E. B., as next of kin, was not proved. After this M. took out administration de bonis non to W. J., and brought his action as such administrator against Z. for an account of the personal estate of W. J. received by the administrators whom Z. represented:—Held, that although M. formerly sued as personal representative of E. B., and now sued as personal representative of W. J., the action was in substance a second proceeding for the same matter under the same alleged title, and that proceedings must be stayed until the costs of the old suit had been paid. *Martin v. Beauchamp (Earl)*, 25 Ch. D. 12; 53 L. J., Ch. 1150; 49 L. T. 334; 32 W. R. 17—C. A.

The next of kin of a testator instituted a suit for administration with a will annexed bearing date 1868, of which the sole executor and universal legatee was the testator's wife, who predeceased him. In opposition, parties claiming to be legatees set up the contents of a later will alleged to have been executed in 1877 or 1878, but which could not be found. The Court of Appeal decided that there was not sufficient evidence of the contents of the second will, and their decision was affirmed in the House of Lords. A fresh suit for probate of the second will was then commenced by the executor of the testator and residuary legatee of the will of 1877–8, who had been the confidential solicitor of the deceased, and who had acted as solicitor for the legatees all through the litigation. This

suit was founded upon fresh evidence of the contents and execution of the second will:—Held, that although the plaintiff had been privy to the prior action, an application to stay the proceedings generally could not be granted, but that the proceedings ought to be stayed until the costs of the plaintiffs in the prior action had been paid. *Peters v. Tilly*, 11 P. D. 145; 55 L. J., P. 75; 35 W. R. 183—Butt, J.

Interlocutory Costs.]—Although mere non-payment of the costs of an interlocutory motion, which a plaintiff has been ordered to pay, is not per se sufficient ground for ordering further proceedings in his action to be stayed in cases where the party is acting vexatiously in withholding payment of costs, there is jurisdiction, upon application by summons, to stay proceedings until he has complied with the order for payment. *Neal, In re* (31 Ch. D. 437), and *Youngs, In re* (31 Ch. D. 239), questioned. *Wickham, In re, Marony v. Taylor*, 35 Ch. D. 272; 56 L. J., Ch. 748; 57 L. T. 468; 35 W. R. 525—C. A.

Pending a summons before North, J., to whose court the action was attached, to stay all further proceedings until the plaintiff should have paid the costs which he had been ordered to pay, the action, at the plaintiff's instance, came on for trial before Kekewich, J., to whom it had been transferred for trial only. Defendant having taken the preliminary objection that the costs in question had not been paid, Kekewich, J., ordered the trial to stand over generally, with liberty to plaintiff to restore the action to the paper on payment of the costs:—Held, that the order ought to have postponed the trial, not until the costs should have been paid, but until the summons before North, J., should have been disposed of:—Held, also, that North, J., had in the circumstances, rightly upon the summons ordered proceedings to be stayed until the plaintiff had complied with the order for payment of costs. *Id.*

Where a plaintiff is in contempt through breach of an order for payment of the costs of an application in the action, the court will, at the instance of the defendant, upon the action being called on for trial, stay all further proceedings until the plaintiff has cleared his contempt. *Neal, In re, Weston v. Neal*, 31 Ch. D. 437; 55 L. J., Ch. 376; 54 L. T. 68; 34 W. R. 319—V.-C. B.

Where a party prosecuting proceedings is in contempt for not paying costs, the proceedings will be stayed. *Youngs, In re, Doggett v. Revett*, 31 Ch. D. 239; 55 L. J., Ch. 371; 54 L. T. 50; 34 W. R. 290—Pearson, J.

— **When Application to be Made.]**—An application for payment prior to the case being called on is not necessary. *Neal, In re, Weston v. Neal*, supra.

iii. Frivolous and Vexatious Actions.

Innate power of Court.]—The Queen's Bench Division has an innate and inherent authority to dismiss or stay a frivolous or a vexatious action. This authority is distinct from the authority conferred on it by Ord. XXV. r. 4, which is limited to pleadings which are frivolous or

vexatious or otherwise objectionable. *Blair v. Cordner*, 36 W. R. 64—D.

The Probate Division has, apart from Ord. XXV. r. 4, an inherent jurisdiction, in common with other courts, to stay proceedings which are frivolous and vexatious, and an abuse of the process of the court. *Willis v. Beauchamp (Earl)*, 11 P. D. 59; 55 L. J., P. 17; 54 L. T. 185; 34 W. R. 357—C. A.

An action was brought to obtain revocation of letters of administration granted in 1798, the plaintiff claiming to represent the next of kin of the intestate, and the defendants being the representatives of the deceased administrator:—Held, that, having regard to the lapse of time, the fact that the defendants did not and could not succeed to the administration sought to be revoked, and the other circumstances of the case, the action was frivolous and vexatious, and must be dismissed. *Id.*

— **Statute of Limitations—Striking out Statement of Claim.**—The plaintiff sued in the Chancery Division to recover estates as heir-at-law of J. L., who died intestate, seised in fee and in possession thereof, in 1816. The plaintiff alleged that on J. L.'s death J. T. wrongfully took possession; that the solicitors of J. L. knew the address of the heir-at-law, who resided in America, and were about to communicate with him, but that J. T. persuaded them not to do so, and to deliver to him the deeds and evidence showing J. L.'s title, including a deed of compromise by virtue of which he had obtained possession; that by reason of the premises the heir and the persons claiming under him had remained ignorant of their title till 1886, and that the fraud could not with reasonable diligence have been discovered sooner. The plaintiff had previously commenced an action in the Queen's Bench Division to recover the same estates, the statement of claim in which merely alleged his title as heir-at-law, but contained no allegations of fraud to take the case out of the Statute of Limitations. The defendants applied to strike it out, as showing no cause of action. The plaintiff then, after the regular time for amendment, applied for leave to amend, and exhibited a proposed amended statement of claim containing allegations of concealed fraud. The Queen's Bench Division refused leave to amend, and struck out the statement of claim and dismissed the action on the ground that no cause of action was shown. The plaintiff then commenced this action in the Chancery Division, the allegations of fraud in the statement of claim being nearly the same as those in the proposed amendments in the Queen's Bench Division, but meeting some of the points in which those amendments had been observed upon by the judges as defective. The defendants moved that the statement of claim might be struck out and the action dismissed:—The court held that the inducing the solicitors to deliver the deeds to J. T. was a concealed fraud, which would prevent the operation of the statute, and that, the court not being satisfied on the evidence that the allegations of fraud were fictitious, the action must be allowed to proceed; but held by the Court of Appeal that, independently of the general orders, the court has jurisdiction to stay vexatious actions; that the conclusion to be drawn from the whole of the materials before the court was that the allegations of fraud were

made without any reasonable ground, and that the statement of claim, assuming its allegations if true to show a cause of action, ought to be struck out and the action dismissed as an abuse of the process of the court. *Lawrence v. Norreys (Lord)*, 89 Ch. D. 213; 59 L. T. 703—C. A.

iv. Abuse of Process.

Action for Trivial Amount.—The court refused to set aside, as an abuse of the process of the court, a writ of summons for 3*l.* 1*l.*s., due for goods sold:—Semble, an action for any sum not less than 40*s.* is not beneath the dignity of the court. *Hannay v. Graham*, 12 L. R., Ir. 413—Q. B. D.

Action instituted without Authority.—The ground on which the court in a proceeding before itself will stay proceedings in an action instituted without authority in the name of a third party is that it has jurisdiction to prevent an abuse of its own process. *London and Blackwall Railway v. Cross*, 31 Ch. D. 354; 55 L. J., Ch. 313; 54 L. T. 309; 34 W. R. 201—C. A.

v. In other Cases.

Executors, Actions by—Probate of Will.—A testatrix, having indorsed and delivered a bill of exchange to her bankers for collection at maturity, died before the bill became due, and her executors, before probate of the will was granted, sued the bankers for a return of the bill or its value. The defendants were always willing to pay over the proceeds of the bill to the plaintiffs upon production of probate:—Held, that all proceedings in the action ought to be stayed until the plaintiffs obtained probate. *Webb v. Adkins* (14 C. B. 401) followed. *Tarn v. Commercial Banking Company of Sydney*, 12 Q. B. D. 294; 50 L. T. 365; 32 W. R. 492—D. See also cases ante, cols. 798, 799.

On Bankruptcy.—See BANKRUPTCY, XVIII., 2.

On Winding up of Companies.—See COMPANY, XI. 4.

Separate Actions against several Defendants—Stay pending Trial of one Action.—See *Colledge v. Pike*, post, col. 1444.

Pending Appeal to House of Lords or Court of Appeal.—See APPEAL, I., II. 7.

c. PARTICULARS.

i. In what Cases.

Definite Sum Claimed—Not Account merely.—Where a plaintiff claims to recover a definite sum made up of a number of items he will be ordered to give particulars of demand, though he will not be ordered to do so if he only claims an account. *Blackie v. Osmaston*, 28 Ch. D. 119; 54 L. J., Ch. 473; 52 L. T. 6; 33 W. R. 158—C. A.

The plaintiffs by their statement of claim alleged that they and their testator had paid sums of money under a contract of suretyship under which the defendant was also liable,

and that, after deducting the contributions received from other quarters, the balance paid by them was 16,233*l.*; that the defendant had paid nothing, and was liable to pay to the plaintiffs one half of this balance, and the plaintiffs claimed payment of 8,116*l.*. The defendant, before putting in his defence, applied for an order that the plaintiffs might give particulars of the sums making up the 16,233*l.*:—Held, that as the plaintiffs did not ask merely for an account, but claimed payment of a definite sum, they must give particulars of demand. *Ib.*

Claim for Account—Particulars of Receipts.]

—It was alleged by counter-claim to a redemption action that the mortgage comprised: (1) certain commission; (2) a sum also secured by bills of exchange; (3) a sum due on an open account, and that the mortgagee had received divers sums in respect of the bills of exchange and on the open account. The mortgagee counterclaimed for an account and foreclosure or sale. Particulars of the sums received by him on the bills of exchange and the open account were ordered to be given. *Kemp v. Goldberg*, 36 Ch. D. 505; 56 L. T. 736; 36 W. R. 278—North, J.

Payment into Court—Apportionment.]—See ante, col. 1426.

False Imprisonment—Reasonable and Probable Cause.]—The plaintiff sued the defendant for having wrongfully made and signed an order, stating that the plaintiff was a person of unsound mind, in consequence of which the plaintiff had been assaulted and removed to a lunatic asylum and kept there against his will; and he also claimed damages for the libel contained in such order. The defendant, in his defence, pleaded (inter alia) reasonable and probable cause for believing the plaintiff to have been a person of unsound mind, and fit to be detained under care and treatment:—Held, that the allegation of reasonable and probable cause was an immaterial allegation, and that the defendant could not be ordered to give particulars thereof. *Cave v. Torre*, 54 L. T. 515—C. A.

Libel—Publication.]—In an action for libel brought by the plaintiff as director of a company against the defendants, a committee of the shareholders in the company, for statements contained in a report drawn up, and alleged to be maliciously published by them, the defendants had obtained, after the pleadings had been closed, an order for particulars of the occasion of any publication by them to persons other than shareholders:—Held, that the defendants were not entitled to such particulars, since, the publication complained of clearly included publication to others than shareholders, though not expressly so stated, and sufficiently complied with the requirements of pleading as laid down under Ord. XIX. r. 4. *Roselle v. Buchanan* (16 Q. B. D. 656) distinguished, as applicable only to actions for slander. *Gouraud v. Fitzgerald*, 37 W. R. 55—D. Affirmed 37 W. R. 265—C. A.

— **Defence that Libel true in Substance and in Fact—Newspaper.]**—Defendant published articles alleging that the plaintiff, who was governor of Mauritius, had been charged by members of the council with sending to the

colonial office garbled reports of their speeches. The articles were also alleged by the plaintiff to impute that he had in fact transmitted such garbled accounts. An action for libel having been brought, the defendant pleaded that the alleged libels were true in substance and in fact:—Held, that the plaintiff was entitled to further and better particulars, it not being clear whether the defence meant that what was charged against the plaintiff had been truly reported, or that what was reported to have been charged was in fact true. *Hennessy v. Wright*, 57 L. J., Q. B. 594; 59 L. T. 795; 36 W. R. 878—C. A.

Slander—Names of Persons to whom Slander uttered.]—In an action for slander the court ordered the plaintiff, upon a summons taken out by the defendant before delivery of the defence, to give particulars of the names of the persons to whom the alleged slander was uttered. *Roselle v. Buchanan*, 16 Q. B. D. 656; 55 L. J., Q. B. 376; 34 W. R. 488—D.

A statement of claim alleged that T., “at the request and by the direction of the defendant, falsely and maliciously spoke and published of and concerning the plaintiff” certain slanderous words, which were set out:—Held, that the defendant was entitled to particulars of the persons to whom the words were uttered. *Bradbury v. Cooper*, 12 Q. B. D. 94; 53 L. J., Q. B. 558; 32 W. R. 32—D.

When particulars are required to be given of the names of persons who may have heard the defendant utter certain slanders in a public room, an order that the plaintiff is to deliver “the best particulars he can give of the persons present” when the slanders were uttered is correct, and will not be varied by the court. *Williams v. Ramsdale*, 36 W. R. 125—D.

Highway—Acts of Dedication.]—In an action to restrain trespass on a road, the defendants pleaded that it was a highway, and were ordered to amend their defence so as to show the mode or title in or under which they claimed that the road had become a highway. The defendants amended by alleging that the road had for many years been used by the public as of right and was a highway, having been dedicated to the public by the plaintiff and her predecessors in title or some of them. An order was then made that the defendants should deliver to the plaintiff full particulars of the nature of all acts of dedication relied on by the defendants, and if the defendants claimed by acts of dedication other than permissive user, particulars of such acts of dedication, with dates, and by whom made. The defendants appealed:—Held, that under the present system the court will oblige a party to give such information as to the nature of his case as is requisite to prevent his opponent from being taken by surprise at the trial, but that the order made went too far, and that the proper order was that if the defendants relied on any specific acts of dedication, or specific declarations of intention to dedicate, whether alone or jointly with evidence of user, they should set forth the nature and dates of those acts or declarations, and the names of the persons by whom they were done or made. *Spedding v. Fitzpatrick*, 38 Ch. D. 410; 58 L. J., Ch. 139; 59 L. T. 492; 37 W. R. 20—C. A.

Infringement of Trade Mark—Particulars of

Names of Persons Deceived.]—In an action to restrain infringement of trade mark, the plaintiff alleged, by his statement of claim, that "divers persons" had been thereby induced to purchase the defendant's goods as the plaintiffs'. After defence, the defendant took out a summons that plaintiff might give the names of the persons so induced to purchase:—Held, that defendant was entitled to the order. *Humphries v. Taylor Drug Company*, 39 Ch. D. 693; 59 L. T. 177; 37 W. R. 192—Kekewich, J.

Breaches of Trust—General Allegations.]—Where in an administration action, the plaintiff alleged that the defendant, one of the executors, in various ways had misapplied parts of the rents and profits of the leaseholds, and thereby injured the plaintiff and committed breaches of trust, and the plaintiff specified one misapplication of a sum of 25*l.*:—On summons by the defendant, the court made an order striking out the general allegations unless the plaintiff furnished particulars within seven days. *Anstice, In re, Anstice v. Hibell*, 54 L. J., Ch. 1104; 52 L. T. 572; 33 W. R. 557—V.-C. B.

Alleged False Entries in Books.]—A company which had bought the business of the defendants, and employed them to manage it, brought an action against them for an account of what was due from them under a guarantee that the profits should amount to a certain yearly sum. The statement of claim alleged that the defendants had made false entries in the books for the purpose of making their working expenses appear less than they had been, and so relieving themselves of liability under the guarantee. The defendants obtained an order for the plaintiffs to furnish particulars of the false entries alleged. The plaintiffs set out a list of the items complained of transcribed from the books, with references to the parts of the books where they were found. The defendants applied for further and better particulars:—Held, that as an entry might be wrong in different ways, the mere specification of the entries complained of did not give the defendants sufficient information of the nature of the case they had to meet, and that the plaintiffs must state shortly as to each item the general nature of the objection they made to it. *Newport Slipway Dry Dock Company v. Paynter*, 34 Ch. D. 88; 56 L. J., Ch. 1021; 55 L. T. 711—C. A.

Particulars in Probate Action.]—See WILL.

ii. Practice.

At what Period ordered—After Defence—Waiver of Right to.]—The statement of claim, in an action by a principal against his stock-brokers to open settled accounts, alleged fraud, and that the plaintiff was unable to give particulars before discovery. An application by the defendants for particulars was ordered to stand over till after a defence had been delivered. A defendant by delivering a defence does not waive his right to particulars. *Sachs v. Spielman*, 37 Ch. D. 295; 57 L. J., Ch. 658; 58 L. T. 102; 36 W. R. 498—North, J.

— **Before Defence.]**—See *Roselle v. Buchanan*, *supra*.

— **After Discovery.]**—Where the defendant has the means of knowing the facts in dispute and the plaintiff has not, the defendant is not entitled to particulars until after he has given discovery. *Millar v. Harper*, 38 Ch. D. 110; 57 L. J., Ch. 1091; 58 L. T. 698; 36 W. R. 454—C. A.

The plaintiffs, who were the executors of a married woman, sued her husband to establish that a quantity of the furniture and other chattels comprised in an inventory which had been taken of the goods in the defendant's house, belonged to the separate estate of the wife. The husband applied for particulars of demand showing which chattels they claimed:—Held, that the application ought to stand over till the husband had made an affidavit as to which of the articles belonged to the wife. *Ib.*

Of Fraud—Application for Production of Documents.]—See *Whyte v. Ahrens*, post, col. 1452.

— **Effect of, on Discovery.]**—Ord. XIX. r. 6, which requires that where the party pleading relies upon any misrepresentation or fraud, he shall give particulars of it in his pleading, is a rule of pleading only; and the generality of an allegation of fraud does not prevent discovery so as to enable the plaintiff to plead the fraud in detail. *Leitch v. Abbott*, 31 Ch. D. 374; 55 L. J., Ch. 460; 54 L. T. 258; 34 W. R. 506; 50 J. P. 441—Per Bowen, L. J.

Amendment of—Terms.]—In an action on a policy of marine assurance, the defence was that the loss was not caused by perils of the sea, and that the subject-matter of the policy, viz., two lighters in tow of a tug, was unseaworthy. Particulars of the unseaworthiness were delivered, stating that the lighters were of improper construction for the purpose of being towed. Evidence as to the lighters was taken abroad on commission, and questions were asked as to the tug. Subsequently, at a time when the evidence of the captain of the tug could no longer be obtained, the defendant applied for leave to amend the particulars, so as to state that the tug was of insufficient power, whereby the subject-matter of the policy was rendered unseaworthy:—Held, that the amendment should be allowed on terms, as no injury would be caused to the plaintiffs for which they could not be compensated by costs. *Clara-pede v. Commercial Union Association*, 32 W. R. 261—C. A.

d. SECURITY FOR COSTS.

i. Persons resident Abroad.

Plaintiff a Seafaring Man—No Fixed Residence.]—A seafaring man, whose family had a permanent residence within the jurisdiction, and who resides with them on his return from abroad, but who has himself no fixed residence, will be ordered to give security for the costs of an action brought by him. *Martin v. Russell*, 21 L. R., Ir. 196—V.-C.

One of several Plaintiffs coming within Jurisdiction before Appeal.]—An action was brought by a mercantile firm, all the members of which were in America, against a firm at Manchester.

The defendants put in a defence and counterclaim, and then applied to the judge for an order for the plaintiffs to give security for costs. The plaintiffs filed an affidavit stating that they with other persons carried on business at Manchester, and that the firm there had assets amounting to 2,000*l*. The judge refused the application. On the appeal the plaintiffs produced an affidavit stating that since the order one of the plaintiffs had come to Manchester for the purpose of carrying on the action :—Held, that the affidavit as to the property of the plaintiffs in England was ambiguous and was not sufficient to support the order in the court below. But held, that as one of the plaintiffs had come to England since the order was made, although for a temporary purpose, the defendants were not entitled to security for costs, and therefore the order must be affirmed. *Redondo v. Chaytor* (4 Q. B. D. 453) followed. *Ebrard v. Gassier*, 28 Ch. D. 232; 54 L. J., Ch. 441; 52 L. T. 63; 33 W. R. 287—C. A.

Petitioner—Solicitor's Bill, Order to Tax.]—

A person resident out of the jurisdiction presented a petition for taxation of a solicitor's bill of costs; the court ordered the petitioner to give security for the costs of the matter and for the balance alleged to be due to the solicitor. *Cornwall, In re*, 15 L. R., Ir. 144—M. R.

Plaintiff Resident in England—Action in Ireland.]—

Security for costs may be required from a plaintiff resident in England or Scotland. The practice of the Court of Chancery in this respect is not affected by the 71st section of the Supreme Court of Judicature Act (Ireland), 1877. *Nicholson v. Wood*, 15 L. R., Ir. 76—M. R.

Foreigner Serving Notice of Motion in Action.]—

The plaintiff obtained an injunction to restrain the defendants from parting with goods alleged to bear improperly the plaintiff's trade-mark. The defendants, who were ship-owners, had no interest in the goods, which had only been put in their hands for transmission. S., a resident in America, who claimed to be owner of the goods, served notice of motion that he might be at liberty to reship the goods to a foreign port, and that if necessary he might be added as a defendant to the action :—Held, that S. must give security for the costs of the motion, for that whatever his position as to costs might be if and when he was made a defendant, he must on this motion be treated as a person resident abroad, coming forward to enforce a right, and stood in the position of a plaintiff. *Apollinaris Company v. Wilson*, 31 Ch. D. 632; 55 L. J., Ch. 665; 54 L. T. 478; 34 W. R. 537—C. A.

Counterclaim—Defendant out of Jurisdiction.]—

Where a defendant residing out of the jurisdiction sets up a counterclaim which amounts to an independent action, he may be ordered to give security to the plaintiffs for the costs of the counterclaim. *Lake v. Haseltine*, 55 L. J., Q. B. 205—D.

Where a claim and counterclaim arise out of different matters, so that the counterclaim is really in the nature of a cross action, the defendant, if he is residing out of the jurisdiction,

may be required to give security for the plaintiff's costs of the counterclaim, and, if the only dispute remaining arises on the counterclaim, it is beyond doubt right that he should be so required. *Sykes v. Sacerdoti*, 15 Q. B. D. 423; 54 L. J., Q. B. 560; 53 L. T. 418—C. A.

—Security to Answer—Foreign State Plaintiff.]—

The Court of Admiralty has power under section 34 of the Admiralty Court Act, 1861, to stay proceedings in an action in rem until the plaintiffs have given security to answer the defendants' counterclaim, even though the plaintiffs' ship, because it is owned by a foreign Government, is by the comity of nations privileged from arrest. *The Newbattle*, 10 P. D. 33; 54 L. J., P. 16; 52 L. T. 15; 33 W. R. 318; 5 Asp. M. C. 356—C. A.

ii. Plaintiff a Trustee in Bankruptcy.

Insolvency.]—The court will not require security for costs to be given by a plaintiff who sues as trustee in bankruptcy even where he is in insolvent circumstances. *Denston v. Ashton* (4 L. R., Q. B. 590), approved. The observations in *Pooley's Trustee v. Whetham* (28 Ch. D. 38) dissented from. *Cowell v. Taylor*, 31 Ch. D. 34; 55 L. J., Ch. 92; 53 L. T. 483; 34 W. R. 24—C. A.

Where the trustee of a bankrupt brought an action in his official name as the trustee of the bankrupt, and there was no evidence that the trustee was in insolvent circumstances, the court refused to require him to give security merely because he was suing in his official name. The insolvency of the plaintiff not being established, the court expressed no opinion whether the decision in *Denston v. Ashton* (4 L. R., Q. B. 590) was right or wrong. *Pooley's Trustee v. Whetham*, 28 Ch. D. 38; 54 L. J., Ch. 182; 51 L. T. 608; 33 W. R. 423—C. A.

iii. Action not for Plaintiff's Benefit.

Order when made.]—On a motion to dismiss an action for want of prosecution (the plaintiff having omitted to give notice of trial within the proper time), or that the plaintiff might be ordered to give security for costs, the defendant in support of the application adduced evidence that the plaintiff was in insolvent circumstances, that he had no settled residence, that he had mortgaged his interest in the property which was the subject-matter of the action to his solicitor, and that there were charges on the property to its full amount. The costs for which the plaintiff was already liable in the action to the defendant were estimated at about 70*l*., and the future costs at 50*l*.. The judge, being of opinion that the plaintiff was carrying on the action not for his own benefit, but for that of his solicitor, ordered the plaintiff to give security for costs to the amount of 200*l*., and directed the proceedings to be stayed in the meantime :—Held, on appeal, that the court would not interfere with the discretion of the judge as to ordering security, but that the amount must be reduced to 100*l*.. Semble, that such an order ought to be made only under very special circumstances. *Wilmott, v. Freehold House Property Company*, 52 L. T. 743; 33 W. R. 554—C. A.

iv. Insolvency of Plaintiff.

Receiving Order.—The fact that a plaintiff is insolvent, and that there is a receiver of his assets, is not necessarily a ground for requiring him to give security for costs. *Malcolm v. Hodgkinson*, (8 L. R. Q. B. 209) commented on. A receiving order, made under the Bankruptcy Act, 1883, does not divest the debtor of his property; and what he recovers as plaintiff in an action is his property both legally and equitably, although he must, when he recovers it, hand it over to the official receiver for the benefit of his creditors, if he does not pay or compound with them. Therefore the debtor, against whom a receiving order has been made, ought not merely on that ground to be ordered to give security for the costs of any action in which he may be the plaintiff. *Rhodes v. Dawson*, 16 Q. B. D. 548; 55 L. J., Q. B. 134; 34 W. R. 240—C. A.

Insolvent Corporation—Receiver.—A corporation, plaintiff in an action, cannot be required to give security for costs on the ground that a receiver of its property has been appointed by the court. *Dartmouth Harbour Commissioners v. Dartmouth Mayor*, 55 L. J., Q. B. 483; 34 W. R. 774—D.

Where Plaintiff a Trustee in Bankruptcy.—*See supra.*

v. Married Women.

Suing Alone.—A married woman suing alone and having no separate estate, will not be ordered to give security for costs. *Isaac, In re, Jacob v. Isaac*, 30 Ch. D. 418; 54 L. J., Ch. 1136; 53 L. T. 478; 33 W. R. 845—C. A.

Suing by Next Friend—Next Friend Insolvent.—A married woman who had brought an administration action by her next friend, in which an order had been made directing certain enquiries, was, on evidence that her next friend was a person of no means, directed to give security for costs. *Thompson, In re, Stevens v. Thompson*, 38 Ch. D. 317; 57 L. J., Ch. 748; 59 L. T. 427—C. A.

vi. Fund in Court.

Payment out to Successful Party—Judgment Reversed—Order on Solicitor to Repay.—An action being dismissed at the hearing with costs, a sum of money which had been paid into court as security for the defendants' costs was ordered to be paid out to the solicitors for the defendants in part payment of the defendants' costs. The judgment was reversed by the Court of Appeal, and the costs ordered to be paid by the defendants. The plaintiffs asked for an order against the defendants' solicitors for repayment by them:—Held, that the court had no jurisdiction on the appeal to order the defendants' solicitors to refund the money, the solicitors not being present; nor, *semble*, could such an order have been made if they had been served with notice of the application. *Lydney and Wiggpool Iron Ore Company v. Bird*, 33 Ch. D. 85; 55 L. T. 558; 34 W. R. 749—C. A.

e. CONSOLIDATION OF ACTIONS.

Separate Actions by same Plaintiff against several Defendants for publication of same Libel.—The plaintiff having brought an action against the defendant Pike, a newspaper proprietor and publisher, for publishing a libel in his newspaper, and having also at the same time brought a separate action against each of sixteen other different defendants for publishing the same libel in their several newspapers, the judge at chambers refused an application on the part of all the seventeen several defendants for an order that all further proceedings might be stayed in all the said actions except the first above-mentioned action until the verdict should be given; the said several defendants undertaking to be bound and concluded by the verdict in the said test action, provided such verdict should be to the satisfaction of the judge who might try the same. On the hearing of an appeal, the court (1) refused to make an order to consolidate the said actions on the ground that, although the libel was the same in each case, yet the several publications and the circumstances attending them being different, the causes of action in the several cases were different; but (2) they made an order that all further proceedings in all the said actions, save one to be selected by the plaintiff, be stayed pending the trial of such selected action, the defendant therein to have seven days' time to deliver his defence after notice to him of such selected action; and further that, if the plaintiff be dissatisfied with the verdict obtained on the trial of such action, he should be at liberty to select one other action for trial, the defendant therein having like time after notice to deliver his defence; and further, the defendants by their counsel undertaking to be bound by the verdicts in the said selected first and second actions, that the plaintiff be at liberty to sign judgment against the defendants in all the remaining actions for the maximum amount of damages found by the jury. *Colledge v. Pike*, 56 L. T. 124—D.

Action in Inferior Court—Cross Action in High Court—Plaintiffs.—When an action is transferred from an inferior court and consolidated with a cross-action begun in the High Court, the plaintiffs in the action in the inferior court will be placed in the position of plaintiffs in the consolidated actions, if they began the action in the inferior court before the cross-action in the High Court. *The Never Despair*, 9 P. D. 34; 53 L. J., P. 30; 50 L. T. 369; 32 W. R. 599; 5 Asp. M. C. 211—Hannen, P. S. P. *The Bjorn*, 9 P. D. 36, n.; 5 Asp. M. C. 212, n.; and *The Cosmopolitan*, 9 P. D. 35, n.; 5 Asp. M. C. 212, n.

f. TRANSFER OF ACTIONS.

On what Principles determined.—Under s. 24, sub-s. 6 of the Judicature Act, 1873, and in the absence of consent to the contrary, a common law action tried in or transferred to another division is to be determined on the same common law principles as would have been applied to it in the Queen's Bench Division. *The Gertrude, The Baron Aberdare*, 13 P. D. 105; 59 L. T. 251; 36 W. R. 616; 6 Asp. M. C. 316—per Fry, L.J.

Common Law Division—Donatio mortis causâ.]—The Common Law Divisions have jurisdiction to entertain an action to establish a donatio mortis causâ, even where the legal right has not passed to the donee; but in such cases the action is more properly instituted in the Chancery Division. *Cassidy v. Belfast Banking Company*, 22 L. R., Ir. 68—Ex. D.

Salvage—Admiralty Division.]—Although an action in which the sole question is a question of salvage may under Order XLIX. r. 3, be properly transferred to the Admiralty Division, such a transfer should not be ordered where there are other questions in the action capable of being tried by a jury. *Ocean Steamship Company v. Anderson*, 33 W. R. 536—C. A.

Administration Actions.]—An order for the transfer to the judge before whom an administration action is pending of actions against the executors should not be made by the order for administration. *Poole, In re, Poole v. Poole*, 55 L. T. 56—North, J.

An action may be transferred from the Common Law Division under Ord. L. r. 4, after an order for administration accounts has been made. *Henderson v. Maxwell*, 17 L. R., Ir. 225—V.-C.

Transfer to Chancery Division—Counterclaim for Specific Performance.]—An action will not be transferred from a Common Law Division to the Chancery Division merely because there is an equitable counterclaim, as, for, instance, one for specific performance of an agreement, unless there is some practical difficulty in determining the questions raised in the Common Law Division. *Bridges v. Dyas*, 12 L. R., Ir. 377—Ex. D.

In an action by a purchaser of land against the vendor for return of the deposit, the defendant counter-claimed for specific performance:—Held, that the action ought to be transferred to the Chancery Division. *London Land Company v. Harris*, 13 Q. B. D. 540; 53 L. J., Q. B. 536; 51 L. T. 296; 33 W. R. 14—D.

Action by Mortgagee for Balance—Cross-action for an Account.]—The personal representative of a deceased mortgagee commenced an action in the Queen's Bench Division against the mortgagor for payment of the balance of moneys lent by the mortgagee and interest. Twelve days afterwards the defendant commenced an action in the Chancery Division against the mortgagee's personal representative and heir-at-law claiming an account and payment of the balance owing by the deceased and redemption:—Held, that the first action ought not to be transferred to the Chancery Division, as the accounts could be more conveniently taken before an official referee than before the chief clerk. *Newbould v. Steade*, 49 L. T. 649—C. A.

Action for Partnership and other Accounts.]—Where the plaintiff brought an action in the Queen's Bench Division, and his claim was to have an account taken of partnership dealings extending over a period of four years, and to have the affairs of the partnership wound up, and also to have an account taken of moneys had and received by the defendant otherwise than under the partnership deed:—Held, that

notwithstanding Ord. XV. r. 1 (a), this action should be transferred to the Chancery Division for the purpose of having the partnership and other accounts taken, as the Queen's Bench Division had not suitable machinery for the taking of such accounts. *Leslie v. Clifford*, 50 L. T. 690—D.

Transfer to and from County Court.]—See COUNTY COURT, 3, 4.

g. DISCONTINUANCE.

What amounts to—Amendment of Claim—Fresh Cause of Action set up.]—The plaintiff, by his statement of claim, alleged that he was the proprietor of the copyright in a design representing an infant asleep upon a pillow, which was duly registered by him in 1879, and that the defendant had infringed such copyright, and he claimed an injunction to restrain the defendant. The design was registered under the Fine Arts Copyrights Act, 1862 (25 & 26 Vict. c. 68). The defendant delivered a defence in which he alleged that, for certain reasons connected with registration, which he stated, the plaintiff was not the proprietor of the copyright in the design, and that the action was not sustainable. The plaintiff thereupon amended his claim by striking out the paragraph which alleged that he was the proprietor of the copyright in a design, and substituting a statement that, in 1870, he caused to be registered at Stationers' Hall a certain book, of which a subsequent edition was published, in which was contained a drawing representing an infant asleep upon a pillow. The book was registered under the Copyright Act, 1842 (5 & 6 Vict. c. 45). More than eight days after the delivery of the amended statement of claim the defendant moved that the plaintiff might be ordered to pay the costs of the action up to the time of the delivery of such amended pleading, and also the costs of the motion, and that the action might be stayed until the payment of all such costs. He contended that what had been done by the plaintiff amounted to a discontinuance of his original action and the commencement of a new one:—Held, that the motion was altogether irregular, and must be refused with costs, as the proper course was for the defendant to have moved, under Ord. XXVIII. r. 4, within eight days after the delivery of the amended pleading, for a disallowance of the amendment, or allowance thereof subject to terms as to costs or otherwise, provision for the costs of such amendments being made by r. 13 of the same order. *Bourne v. Coulter*, 53 L. J., Ch. 699; 50 L. T. 321—Kay, J.

Payment into Court with Denial of Liability—Costs.]—In an action for breach of contract, in which the plaintiffs alleged several distinct breaches, the defendants, while denying all liability, paid into court in the alternative a sum by way of satisfaction of one alleged breach. The plaintiffs took out the sum so paid in, and gave notice that they accepted the same in full satisfaction of the causes of action in the statement of claim mentioned:—Held, that what the plaintiffs had done was equivalent to a discontinuance, that they were entitled to tax their costs under Ord. XXII. r. 7, and that it was not necessary for them also to give notice of discontinuance under Ord. XXVI. r. 1. *McIlwraith*

v. *Green*, 14 Q. B. D. 766 ; 54 L. J., Q. B. 41 ; 52 L. T. 81—C. A.

Jurisdiction to order Defendant to Pay Costs.]

—Upon an application by a plaintiff for leave under Ord. XXVI. r. 1, to discontinue an action, the court or judge has no jurisdiction to make the defendant pay any costs of a defence which, if undisputed, or if it had been found in the defendant's favour, would have disintitiled the plaintiff from maintaining his action. Where a court or judge is expressly given a discretion as to costs, the exercise of such discretion cannot be delegated. *Lambton v. Parkinson*, 35 W. R. 545—D.

Costs—Effect of Payment into Court by Defendant.]

—On a summons under Ord. XIV. for the payment of a sum of money, the master ordered the defendant to pay money into court as to part of the claim, and gave leave to defend as to the remainder. After issue joined, the plaintiff discontinued the action. The taxing-master gave the defendant the whole costs of the action from the beginning. On appeal for review of taxation :—Held, that the costs were not governed by Ord. XXVI. r. 1, but were in the discretion of the court, under Ord. LXV. r. 1, and that the plaintiff was entitled to his costs up to the time of payment into court. *Langridge v. Campbell* (2 Ex. D. 211) distinguished. *Suckling v. Gabb*, 36 W. R. 175—D.

Of part of Claim—Striking out Pleading.]

See *Brooking v. Maudslay*, post, col. 1505.

h. CONFESSION OF DEFENCE.

Plaintiff signing Judgment for Costs.]—An action was brought by a member of a club "on behalf of himself and all other members" of such club, "except the defendant," against the committee of the club, charging them with breaches of trust in making profits out of contracts entered into by them on behalf of the club. The defence, in addition to other matters, stated that since action brought a meeting of the club had been held at which the contracts had been ratified by every member except the plaintiff, and that resolutions expressing confidence in the committee had been passed. The plaintiff delivered a confession of defence, and signed judgment for his costs of the action. The defendants moved to set aside the judgment and dismiss the action :—Held, that the plaintiff could not avail himself of Ord. XXIV. r. 3, as the above grounds of defence did not amount to a waiver of the other pleas. *Foster v. Gamgee*, (1 Q. B. D. 666,) distinguished. *Harrison v. Abergavenny (Marquis)*, 57 L. T. 360—Kay, J.

Defendants delivered a further defence of matter arising since the delivery of the defence. The plaintiffs delivered a confession of the amended defence, and signed judgment for costs against the defendants. The judgment for costs was set aside on terms of the defendants withdrawing their amended defence. *Bridgetown Waterworks Company v. Barbados Water Supply Company*, 38 Ch. D. 378 ; 57 L. J., Ch. 1051 ; 59 L. T. 314 ; 36 W. R. 852—North, J.

i. DISMISSAL FOR WANT OF PROSECUTION.

Consent Order—No Bar to Fresh Action.]

An order by consent, in the absence of an agreement to compromise the cause of action, to dismiss an action for want of prosecution is no bar to the institution of a fresh action. In this respect the practice of the old Court of Chancery remains unchanged. *Magnus v. National Bank of Scotland*, 57 L. J., Ch. 902 ; 58 L. T. 617 ; 36 W. R. 602—Kay, J.

The plaintiffs in an action, wherein the same parties were respectively plaintiffs and defendants, and the same relief was sought as in the present action, had paid the defendants' costs and consented to an order, made on summons taken out by the defendants, dismissing the action for want of prosecution. The plaintiffs subsequently brought the present action, whereupon the defendants moved that the question of law might first be tried whether the plaintiffs were not estopped from bringing the present action by reason of the consent order made in the previous action :—Held, that the defendants were not entitled to the order asked for. *Ib.*

Default in Proceeding to trial—Verdict set Aside.]

An action, in which the place of trial was out of Dublin, was tried at the Spring Assize, 1883, when a verdict was directed for the defendant. This verdict was set aside on the ground of misdirection, and a second trial took place at the Spring Assizes, 1884, resulting in a verdict directed for the plaintiff, which was also set aside, and a third trial ordered in the Michaelmas Sittings, 1884. The plaintiff not having served notice of trial for the next ensuing assizes, the defendant moved to dismiss the action for want of prosecution, contending that the case fell within Ord. XXXV. rr. 2, 4 :—The court refused the motion. Semble, the only remedy open to a defendant under such circumstances is trial by proviso under the old practice. *Foott v. Benn*, 16 L. R., Ir. 247—Ex. D.

—**Abortive Trial.]**—A defendant is entitled to have an action dismissed for want of prosecution after an abortive trial if the plaintiff fails to proceed. *National Bank v. Canning*, 16 L. R., Ir. 444—Q. B. D.

Cause not entered for Trial.]—A plaintiff gave notice of trial, but did not enter the cause for trial within six days after the notice of trial was given, in accordance with Ord. XXXVI. r. 16 :—Held, that the defendant was entitled to move to dismiss the action for want of prosecution. *Crick v. Hewlett*, 27 Ch. D. 354 ; 53 L. J., Ch. 1110 ; 51 L. T. 428 ; 32 W. R. 922—Pearson, J.

Effect of Obtaining Order for Security for Costs—Counterclaim.]

An order obtained by the defendants for security for costs, with a stay of proceedings until the security is given, does not prevent the defendant from moving to dismiss the action for want of prosecution. Upon an application by a defendant who has delivered a counterclaim to dismiss an action for want of prosecution, he is entitled in default of reply to judgment on his counterclaim. *London Road Car Company v. Kelly*, 18 L. R., Ir. 43—Q. B. D.

j. INSPECTION OF PROPERTY.

In Patent Actions.]—See PATENT, III. 2.

As between co-Plaintiffs or co-Defendants.]—Ord. L. r. 3 provides that it shall be lawful for the court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for (among other things) the inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein. Claims being made against two defendants severally in the same action:—Held, that under the above-mentioned rule inspection could not be granted to one defendant of property belonging to another defendant when there was no right in question as between them in the action. *Brown v. Watkins* (16 Q. B. D. 125) explained. *Shaw v. Smith*, 18 Q. B. D. 193; 56 L. J., Q. B. 174; 56 L. T. 40; 35 W. R. 188—C. A.

Timber on Ship in Harbour.]—The court, under Ord. LI. r. 3, gave the plaintiff leave to inspect a ship lying in harbour, on which it was alleged that certain timber, part of the subject-matter of the action, had been placed by the defendant for removal. *Morris v. Howell*, 22 L. R., Ir. 77—Q. B. D.

Authority to dig up Soil.]—Under rule 3 of Ord. L. the court has power to make an interlocutory order before trial, giving liberty to a plaintiff to enter upon land belonging to the defendant, and to excavate the soil thereof for the purposes of inspection. *Lumb v. Beaumont*, 27 Ch. D. 356; 53 L. J., Ch. 1111; 51 L. T. 197; 32 W. R. 985—Pearson, J.

Inspection by Trinity Masters before Trial.]—Before the hearing of an action an application was made under 24 Vict. c. 10, s. 18, by the plaintiffs, that two Trinity masters should inspect the lights of the defendants' ship:—Held, that the application was premature, and ought to be refused. *The Victor Covacevich*, 10 P. D. 40; 54 L. J., P. 48; 52 L. T. 632; 5 Asp., M. C. 417—Butt, J.

Inspection of Documents.]—See DISCOVERY.

k. ACCOUNTS AND INQUIRIES.

Reference of Matters of Account.]—See ARBITRATION.

Application for, by Accounting Party.]—Ord. II. r. 5, and Ord. XIV. are not confined to cases where the account claimed is an account to be rendered by the defendant, but they apply to cases where the plaintiff will himself be the accounting party—e.g., where a personal representative seeks to have the usual administration accounts taken. *Molony v. Molony*, 21 L. R., Ir. 91—V. C.

No Jurisdiction to Order whole Matter to be tried in Chambers.]—The plaintiff, an equitable mortgagee, brought an action for foreclosure or sale against several other mortgagees, insisting that under the circumstances she was entitled to priority over the defendants. The alleged priority of the plaintiff to the defendants depended

on questions of notice and fraud. On the application of the plaintiff, Kay, J., on summons under Ord. XXXIII. r. 2, made an order directing an inquiry what were the respective priorities of the incumbrances of the plaintiff and the respective defendants, and an account of what was due to the incumbrancers respectively. One of the defendants appealed:—Held, on appeal, that this order must be discharged, for that Ord. XXXIII. r. 2, was not intended to authorise the sending the whole of the questions in a cause to be tried in chambers, but only to authorise the court to direct, before trial, accounts and inquiries which would otherwise have been directed at the trial. *Garnham v. Skipper*, 29 Ch. D. 566; 52 L. T. 239—C. A.

Useful only if Case established at Trial.]—A mortgagee of shares of the proceeds of the residuary real and personal estate of a testator who died in 1872, brought an action in 1884 for the administration of the estate, alleging misapplication by one of the trustees of moneys raised by mortgage of parts of the real estate, and advanced to the same trustee of parts of the testator's estate on equitable mortgage. The plaintiff applied, under Ord. XV. r. 1, for the common accounts and inquiries in an administration suit, and also for inquiries as to mortgages of the real estate, and as to advances to the trustee:—Held, that only common accounts and inquiries could be directed on an application under the rule, and not accounts and inquiries, the right to which depended on the plaintiff establishing a case for them at the hearing, and that the special inquiries therefore could not be directed. *Gybon, In re, Allen v. Taylor*, 29 Ch. D. 834; 54 L. J., Ch. 945; 53 L. T. 539; 33 W. R. 620—C. A.

Held, further, that Ord. XV. r. 1, must be read in connexion with Ord. LV. r. 10, which makes it not obligatory on the court to order a general administration, and that the Vice-Chancellor was right in refusing the common accounts and inquiries in a case where, having regard to the period elapsed since the testator's death, it was uncertain whether a general administration order would be found at the hearing to be desirable, and where if the plaintiff at the hearing established a case of breach of trust, accounts and inquiries would have to be directed, going over in part the same ground as the common accounts and inquiries. *Id.*

Right to Stay Proceedings—Insufficiency of Assets.]—Order made staying until further order, with liberty to apply, the prosecution of accounts and inquiries directed by a judgment in the nature of a foreclosure judgment (unless the defendants would give security for the costs of the proceedings), on the ground that it was shown to be highly probable that the amount due to the plaintiffs would greatly exceed the value of the property, and that the costs of further proceedings would be thrown away. *Exchange and Hop Warehouses v. Land Financiers' Association*, 34 Ch. D. 195; 56 L. J., Ch. 4; 55 L. T. 611; 35 W. R. 120—North, J.

Possession of Premises by Father or Mother as Bailiff for Children.]—See INFANT, III.

Foreclosure Action—Judgment.]—A plaintiff in a foreclosure action, where there is no pre-

liminary question to be tried, may obtain by summons in chambers, under Rules of Supreme Court, 1883, Ord. XV. rr. 1 and 2, an order for an account and foreclosure—that is to say, the usual foreclosure judgment. *Smith v. Davies* or *Davies v. Smith*, 28 Ch. D. 650; 54 L. J., Ch. 278; 52 L. T. 19; 33 W. R. 211—Chitty, J. But see *Blake v. Harvey*, post, col. 1491.

See further, MORTGAGE, VII. 1. b.

Redemption Action—Preliminary Account—Form of Order.—A general redemption decree will not be made upon a summons for preliminary accounts under Ord. XV. r. 1. Where, therefore, a writ had been issued in an action against mortgagees in possession, but no other pleadings had been delivered, and minutes of judgment were drawn up upon a summons under Ord. XV. r. 1, directing the necessary accounts, and further directing that the defendants' costs should be taxed, and the amount of such costs, as well as the certified amount found due upon the accounts, paid by the plaintiff to the defendants within six months, and in default that the action should be dismissed.—Held, that the order must be for accounts only, and that the further directions, which made the order equivalent to a decree, must be struck out. *Clover v. Wilts and Western Benefit Building Society*, 53 L. J., Ch. 622; 50 L. T. 382; 32 W. R. 895—V.-C. B.

Order for Account not referring to Settled Account.—By the rules of a benefit society it was provided that the accounts should be audited, and that after they had been audited and signed by the auditors, the secretary and treasurer should not be answerable for any mistakes, omissions, or errors that might afterwards be proved in them. An action for an account was commenced by two shareholders, on behalf of themselves and all other the shareholders, against the secretary. No pleadings were delivered, and on a motion for a receiver being made the defendant submitted to an order for an account of all moneys and property of the society come to his hands, without any direction as to settled accounts. The defendant carried in a complete account, and the plaintiffs carried in a surcharge. The defendant then set up certain accounts which had been audited under the rules, as vouching his account for the period over which they extended. The point was brought before the judge, who was stated to have expressed his opinion that the audited accounts must be treated as conclusive. The plaintiffs then applied for a direction that in taking the accounts the audited accounts might be disregarded, on the ground that as the order did not save the settled accounts, they could not be attended to. The application was refused, and the plaintiffs appealed.—Held, that the audited accounts ought not to be disregarded, and that the appeal must be dismissed: but the dismissal was prefaced by a statement of the opinion of the court, that the plaintiffs, in taking the accounts under the order, were at liberty to impeach the audited accounts for fraud. *Holgate v. Shutt*, 27 Ch. D. 111; 53 L. J., Ch. 774; 51 L. T. 433; 32 W. R. 773.—C. A.

Under an order directing an account, and not referring to settled accounts, the accounting party may set up settled accounts, though the order does not direct that settled accounts shall

not be disturbed, and the opposite party may impeach them, though the order does not expressly give him liberty to do so. *Holgate v. Shutt*, 28 Ch. D. 111; 54 L. J., Ch. 436; 51 L. T. 673; 49 J. P. 228—C. A.

Opening Settled Accounts—Allegations of Fraud—Particulars.—The plaintiffs employed the defendants to purchase goods, as their agents, at the lowest possible prices. The plaintiffs sued for an account, and in their statement of claim alleged that the defendants had purchased goods at prices higher than the current prices, and had secretly received from the vendors allowances or commissions. The charges against the defendants were stated in general terms, no particulars being mentioned. The defendants denied the charges, and pleaded a settled account.—Held, by Cotton, L.J., affirming the decision of Bacon, V.-C. (diss. Fry, L. J.), on an application for production of documents, that the plaintiffs were entitled thereto without giving particulars of fraud. *Whyte v. Ahrens*, 26 Ch. D. 723; 54 L. J., Ch. 145; 50 L. T. 344; 32 W. R. 649—C. A.

Held, by Fry, L.J., that the allegations of fraud in the pleadings, not being sufficient to enable the plaintiffs to open a settled account, discovery ought to be refused until the allegations had been made sufficient. *Id.*

Lapse of Time.—In a foreclosure action a defence and counterclaim were put in claiming payment of what should be found due to the defendant on taking the accounts, but not expressly claiming to open the accounts or specifying improper charges. An application to amend at the hearing was refused. The court, however, permitted the parties to give evidence as to the accounts, on the ground that it might be the duty of the court, under Ord. XXVIII. r. 1, to make all such amendments as should be necessary for determining the real question between the parties, and having heard the evidence without ordering amendment, the court treated the pleadings as amended, and decided on the evidence. *Ward v. Sharp*, 53 L. J., Ch. 313; 50 L. T. 557; 32 W. R. 584—North, J.

Accountant's Fee—Percentage.—Where an accountant had been employed by consent of all parties to assist the chief clerk in taking very complicated accounts, and had taken them before the 19th January, 1884, he was held entitled to his percentage fee under the order of October, 1875, though the certificate was not signed till after the order of January, 1884. *Hutchinson, In re, Hutchinson v. Norwood*, 50 L. T. 486; 32 W. R. 392—C. A.

Effect of Order upon Powers of Trustees.—A. by will appointed three trustees, one of whom was B., the tenant for life, and directed that any vacancy in the number of trustees should be filled up within one year after it occurred. One trustee disclaimed, the other died after some years, leaving B. surviving. An action was commenced, asking for the general execution of the trusts of the will. The court, under Ord. LV. r. 3, sub-s. 10, ordered only certain special inquiries, among which was an inquiry whether new trustees had been appointed, and whether any or what steps ought to be taken for their appointment. Pending this inquiry B. appointed

a new trustee. The plaintiffs now moved to restrain the funds being handed to him and his acting as trustee:—Held, that the special inquiry made it the duty of B. not to fill up the appointment without the approval of the court, but that the power was not destroyed; all that was necessary was for B. to appoint a person whom the court would approve, and it not being alleged that the new trustee was an improper person, the court would not interfere with the appointment, and it was not necessary formally to sanction it. *Hall, In re, Hall v. Hall*, 51 L. T. 901—Pearson, J.

In Administration Action.]—See EXECUTOR AND ADMINISTRATOR, VI.

7. MANDAMUS, INJUNCTION, AND RECEIVER.

i. Effect of Judicature Act, 1873, s. 25, sub-s. 8.

Equitable Execution—"Just and Convenient."

—A judgment debtor had lands in Surrey subject to an equitable mortgage; and his judgment creditor obtained an order for a receiver of these lands. This order was not registered. After the appointment of the receiver the debtor sold the lands to a purchaser for value without notice:—Held, that under the circumstances of the case it was just and convenient for the court to appoint a receiver within the Judicature Act, 1873, s. 25, sub-s. 8. *Pope, In re*, 17 Q. B. D. 743; 55 L. J., Q. B. 522; 55 L. T. 369; 34 W. R. 693—C. A.

Under the general power to appoint receivers given by the Judicature Act, 1873, s. 25, sub-s. 8, and having regard to Rules of Supreme Court, 1883, Ord. XLII. rr. 4 and 28, the court has jurisdiction to enforce a judgment for payment of money into court by a defaulting trustee, by the appointment of a receiver of his equitable interest in property in this country; and order accordingly where, from the debtor being out of the jurisdiction, service of a writ of attachment could not be effected. *Coney, In re, Coney v. Bennett*, 28 Ch. D. 993; 54 L. J., Ch. 1130; 52 L. T. 961; 33 W. R. 701—Chitty, J.

An order was made against the defendants in an action, who were defaulting trustees, for the payment of money into court. The defendants having failed to comply with such order, an application was made by the plaintiffs that a writ of attachment might issue against them. At the defendants' instance, however, the court made an order allowing payment by weekly instalments. L., one of the defendants, had made an affidavit on that occasion stating that all the property he possessed was the furniture in his house. It subsequently transpired that L. had executed bills of sale affecting the furniture; but that the plaintiffs in other proceedings, had successfully disputed the validity of such bills of sale. An application was accordingly made on behalf of the plaintiffs for the appointment of a receiver of the furniture by way of equitable execution. For the defendant L. it was contended that the legal and proper remedy of the plaintiffs was by sequestration, and that the court had no jurisdiction to appoint a receiver:—Held, that, although under r. 4 of Ord. XLII. of the Rules of Court, 1883, sequestration was the appropriate remedy, yet under s. 25,

sub-s. 8 of the Judicature Act, 1873, the court had jurisdiction to appoint a receiver if it appeared just or convenient so to do; and that, in the present case, it was just and convenient to appoint a receiver, and that an order must be made accordingly. *Whiteley In re, Whiteley v. Leary*, 56 L. T. 846—Kay, J.

Deceased's Estate.]—The Judicature Act, 1873, s. 25, sub-s. 8, enables any judge of the High Court to appoint a receiver of a deceased's estate (before grant of probate or administration), notwithstanding the absence of his pendens; but applications for any such order, being on the way to probate proceedings, are properly made in the Probate Division, and if made elsewhere will not be encouraged. *Parker, In re, Dearing v. Brooks*, 54 L. J., Ch. 694—Chitty, J.

Mortgagee.]—A legal mortgagee, being in possession of the mortgaged property, applied to the court for the appointment of a receiver:—Held, that although the mortgagee might, under the Conveyancing Act, 1881, appoint a receiver without coming to the court, it was more desirable, where an action was pending, that the appointment should be made by the court under the Judicature Act, 1873. *Tillett v. Nisom*, 25 Ch. D. 238; 53 L. J., Ch. 199; 48 L. T. 598; 32 W. R. 226—Pearson, J.

Under s. 25, sub-s. 8, of the Judicature Act, 1873, a mortgagee in possession is entitled to the appointment of a receiver, notwithstanding that he has been paid all his interest and costs out of rents received by him while in possession, and that he has surplus rents in his hands. *Mason v. Westoby*, 32 Ch. D. 206; 55 L. J., Ch. 507; 54 L. T. 526; 34 W. R. 498—V.-C.B.

Judicature (Ireland) Act, s. 28, sub-s. 8.]—

The 3rd section of 19 & 20 Vict. c. 77, has been repealed by the 28th section of the Judicature (Ireland) Act, sub-s. 8, and, therefore, the court may appoint a receiver on foot of any judgment mortgage, notwithstanding that the rental of the estate is less than 100*l.* per annum. The court will, under special circumstances, appoint a receiver where less than one year's interest is due. *Martin's Estate, In re*, 13 L. R., Ir. 43—Land Judges.

In an action to recover damages for obstructing a watercourse, and for an injunction, the plaintiffs obtained a verdict for nominal damages. The defendant having continued the acts of obstruction complained of, the court granted an injunction. *Agnew v. McDowell*, 14 L. R., Ir. 445—Ex. D.

ii. Prerogative Mandamus.—See MANDAMUS.

iii. Injunction.—See INJUNCTION.

iv. Receiver.

a. In what Cases.

Where Interpleader Issue directed.]—An interpleader issue being ordered to try the right to goods seized in execution, the court or a judge may, under the Judicature Act, 1873, s. 25, sub-s. 8, and Ord. LVII. r. 15, order that, instead of a sale by the sheriff, a receiver and

manager of the property be appointed. *Howell v. Dawson*, 13 Q. B. D. 67—D.

In Partnership Actions.—See PARTNERSHIP.

Receiver appointed by way of Equitable Execution.—See EXECUTION, 5.

Appointment of—Effect on Executor's Retainer.—See EXECUTOR AND ADMINISTRATOR, I. 4.

Under Railway Companies Act.—See RAILWAY.

Action by Debenture Holders.—See COMPANY, IV. 3, e.

Application for after Foreclosure absolute.—See MORTGAGE, VII. 1, b.

Appointment by Mortgagee.—See MORTGAGE, VI. 2.

Judgment against Married Woman—Separate Estate—Remuneration.—In an action against a married woman alleged to be possessed of separate estate, no defence was delivered, and the master found that she was entitled to separate property vested in trustees and subject to certain charges. The plaintiff was appointed receiver without security of the residue of the income of the separate estate, after payment of the prior charges, the plaintiff undertaking to act without remuneration. *McGarry v. White*, 16 L. R., Ir. 322—Q. B. D.

Granted before Probate.—See *Moore, In Goods of*, ante, col. 798.

B. The Application.

Ex parte.—Ex parte applications for a receiver ought not to be granted even after judgment, except in cases of emergency. *Lucas v. Harris*, 18 Q. B. D. 127; 56 L. J., Q. B. 15; 55 L. T. 685; 35 W. R. 112—C. A.

Originating Summons.—Semble, that a receiver may be appointed under an originating summons. *Gee v. Bell*, 35 Ch. D. 160; 56 L. T. 305; 35 W. R. 805—North, J.

In an administration action, commenced by originating summons, a receiver may (in a proper case) be appointed immediately after the service of the summons and before any order for administration has been made. *Franchise, In re, Drake v. Franche*, 57 L. J., Ch. 437; 58 L. T. 305—North, J.

A mortgagee issued a writ asking for the usual order for foreclosure, and moved for the appointment of a receiver, and on the motion being heard, a receiver was appointed. A statement of claim was delivered, but the mortgagor having become bankrupt, the plaintiff withdrew his claim for payment:—Held, that the plaintiff should have proceeded by originating summons. The court made the usual foreclosure order, but directed the taxing-master to allow such costs as the plaintiff would have been entitled to if he had proceeded by originating summons and no more. *Barr v. Harding*, 58 L. T. 74; 36 W. R. 216—Kay, J.

Service of Summons on Foreigner out of Jurisdiction.—See *Weldon v. Gounod*, post, col. 1483.

Evidence of Property.—Where a plaintiff obtained judgment and issued execution, and the sheriff returned nulla bona, the court will not appoint a receiver on the ground that since the return, the defendant has been found to be possessed of a patent the value of which did not appear from the evidence before the court. *Smith v. Carter*, 52 J. P. 615—D.

Form of Order—Security.—Where a judgment creditor, in an action for equitable execution, obtained the appointment of a receiver for the purpose of creating a charge upon the debtor's property subject to prior incumbrances, but not for the purpose of entering into possession or receiving the rents and profits, the receiver was not required to give security, the plaintiff and the receiver undertaking not to act without the leave of the court. *Hewett v. Murray*, 54 L. J., Ch. 572; 52 L. T. 380—V.-C. B.

γ. Practice.

Payments by—Receipts to.—A receiver is only justified in paying the person named in the order for payment, or on a power of attorney duly executed by him. Express authority for payment in any other mode must be shown by the receiver, on peril of being disallowed credit therefor in vouching his accounts. The solicitor having carriage of the proceedings has not, as such, and in the absence of special authority in that behalf, power to give a valid receipt for moneys ordered to be paid by a receiver to his client. *Browne's Estate, In re*, 19 L. R., Ir. 183—C. A.

What he can Receive—Fund in Discretion of Trustees—Order against Trustees for Payment.

—An order was made, in an action in a county court, appointing a receiver to receive the interest of a sum of money in the hands of trustees, and ordering the trustees to pay a specific amount out of the interest to the receiver half-yearly until the judgment in the action should be satisfied. The trustees were trustees of a will, by which they were directed to set apart and invest the sum in question, and were authorised, at their absolute discretion, from time to time, and at such time or times as they should think proper, to pay or apply the whole or any part of the income to or for the benefit of the judgment debtor in such a manner in all respects as they should think proper. The trustees applied for a prohibition:—Held, that as it depended on the discretion of the trustees whether anything should be paid to the judgment debtor, the receiver could not be entitled to receive the interest in their hands, and that an order for payment could not be made against the trustees, who were strangers to the action, and therefore the county court judge had exceeded his jurisdiction, and the proper remedy was by prohibition. *Reg. v. Lincolnshire County Court Judge*, 20 Q. B. D. 167; 57 L. J., Q. B. 136; 58 L. T. 54; 37 W. R. 174—D.

Remuneration—Partnership Assets.—See *Prior v. Bagster*, ante, col. 1336.

— Neglect of Duty — Fees — Discharge — Costs.—When a receiver was discharged, owing to gross dereliction of duty, the order disallowed his fees and poundage on all accounts not passed within the prescribed time, and directed him to pay interest on the balance (if any) from time to time in his hands, and to pay the costs of the motion to discharge him, of his own discharge, and of appointing his successor. *St. George's Estate, In re*, 19 L. R., Ir. 566—Monroe, J.

Costs of—Priority.—*See Batten v. Wedgwood Coal and Iron Company*, ante, col. 431.

— Objections to — Action for.—Where items have been included in a receiver's bill of costs, which are charges for work done outside the scope of the receivership, objection must be made to their being included in the taxation at the time; and no action will lie for the subsequent recovery of the money due on such items. *Terry v. Dubois*, 32 W. R. 415—D.

Change of Receiver — Bankruptcy of Mortgagor.—A receiver and manager had been appointed on an ex parte application by the plaintiff in a foreclosure action under a mortgage of brewery premises. The mortgagor, the defendant, afterwards became bankrupt on his own petition. The official receiver opposed a motion by the plaintiff for the continuance of the original receiver and manager, contending that he ought to be substituted:—Held, that an order must be made confirming the previous appointment, and continuing the person then appointed as receiver of the rents and profits of the premises comprised in the mortgage, and as manager of the business, he to be at liberty to use any of the vats, fixed motive machinery, and other property comprised in the mortgage, but nothing else. *Deacon v. Arden*, 50 L. T. 584—Pearson, J.

— Substitution of Liquidator on Winding-up of Company.—*See ante*, col. 422.

Action to restrain Receiver appointed in another Action.—A person who is prejudiced by the conduct of a receiver appointed in an action by way of equitable execution, ought not, without leave of the court, to commence a fresh action to restrain the proceedings of the receiver, even though the act complained of was beyond the scope of the receiver's authority, but ought to make an application for such relief as he is entitled to in the action in which the receiver was appointed. *Searle v. Choat*, 25 Ch. D. 723; 53 L. J., Ch. 506; 50 L. T. 470; 32 W. R. 397—C. A.

Interference with—Contempt of Court.—*See Helmore v. Smith*, ante, col. 1338.

9. PLEADINGS—*See post*, col. 1497 et seq.

10. THIRD PARTIES—NOTICE CLAIMING CONTRIBUTION OR INDEMNITY.

a. IN WHAT CASES.

Must arise from Express or Implied Contract—Right to Damages Insufficient.—A land

company had an agreement from B. to demise to them certain lands for building purposes, the agreement to be voidable as to all land not actually demised if the buildings were not completed within a certain time. B. agreed to sell part of the land to a railway company subject to the building agreement. The time for building having expired without the buildings being erected, the railway company took possession and treated the building agreement as at an end. The land company thereupon brought their action against the railway company, alleging that an agreement had been made between them and B. for extension of the time, and that the railway company bought with notice of it, and seeking to restrain the railway company from interfering with the land till they compensated the land company, pursuant to the Lands Clauses Act. The railway company applied for leave to serve B. with a third-party notice on the ground that he sold to them free from all incumbrances, except the building agreement, and without notice of the extension of time, and was bound to indemnify them against any claim the land company could establish:—Held, that in order to bring a case within Ord. XVI. r. 48, it is not enough that if the plaintiff succeeds the defendant will have a claim for damages against the third party, but the defendant must have against the third party a direct right to indemnity as such, which right must—generally, if not always—arise from contracts express or implied, and that here there was no ground for implying such a contract. *Birmingham Land Co. v. London and North-Western Railway*, 34 Ch. D. 261; 54 L. J., Ch. 956; 55 L. T. 699; 35 W. R. 173—C. A.

Marine Insurance—Underwriters—Suing and Labouring Clause.—The defendant insured his ship under a policy containing the usual suing and labouring clause. In an action to recover for work alleged to have been done and expenses incurred by the plaintiffs for the defendant, at his request, in respect of attempting to save the ship during the continuance of the policy:—Held, that the defendant was not entitled to bring in the underwriters as third parties under Ord. XVI. r. 48, because they did not, by the suing and labouring clause, contract to indemnify the defendant in respect of any contract made by him with the plaintiffs. *Johnston v. Salvage Association*, 19 Q. B. D. 458; 57 L. T. 218; 36 W. R. 56; 6 Asp. M. C. 167—C. A.

Restrictive Covenant—Constructive Notice.]

—In 1857, A. granted a lease of a house for a term of ninety-three years, with a restrictive covenant against the user of the house for any art, trade, or business. The term granted by the lease became vested in B., and in Oct. 1883, B. granted a lease of the house to C. for twenty-one years, with an express permission that he might use the house in his profession of teaching music and singing, and with the usual covenant for quiet enjoyment. There was constructive notice of the original lease in the under-lease, but C. had no personal knowledge or notice of the restrictive covenant. A breach of this covenant having been committed by C., the devisees in trust of A. brought an action against B. and C., claiming an injunction and damages. By his defence C. claimed to be indemnified by B. against all expenses and damages occasioned by

the breach of the covenant for quiet enjoyment, and served a third-party notice upon B., to which he appeared:—Held, that C. was not entitled to any relief against his co-defendant B., inasmuch as the claim was not one for "contribution or indemnity" within the meaning of rule 55. *Tritton v. Bankart*, 56 L. J., Ch. 629; 56 L. T. 306; 35 W. R. 474—Kekewich, J.

Against Defaulting Trustee.]—A. and B. were trustees of the marriage settlement of X. and Y.; some of the investments were sold and the proceeds placed to the credit of A., who advanced the moneys in breach of trust to the husband X.; in an action commenced by the children of X. and Y. against A. and B. for such breaches of trust, A. and B. gave each other cross notices of claim for contribution:—Held, that Ord. XVI. r. 55, enabled the court to make an order for contribution in such a case. *Sawyer v. Sawyer*, 28 Ch. D. 601—Chitty, J.

Misrepresentation on Contract for Sale—Auctioneer.]—An action by a vendor against the purchaser of a house and premises, and the auctioneer who advertised and sold them, for specific performance of the contract or damages. The purchaser stated that he was induced to purchase the property in consequence of the advertisement in the newspapers inserted by the auctioneer, representing that the purchase-moneys would be allowed to remain on mortgage. The representation was alleged to have been unauthorised, and the purchaser applied by summons under Rules of Supreme Court, 1883, Ord. XVI. r. 55, for leave to serve his co-defendant, the auctioneer, with a notice claiming indemnity from him against the claim of the vendor:—Held, that this was not a case for indemnity within r. 55, and that the summons must be dismissed. *Pontifex v. Foord* (infra) followed. *Cotton v. Bennett*, 26 Ch. D. 161; 53 L. J., Q. B. 685; 50 L. T. 383; 32 W. R. 485—Kay, J.

Covenant to Repair—Underlessee.]—The plaintiff sued the defendant for breach of a covenant to repair contained in a lease of a dwelling-house for a term of twenty-one years from Michaelmas, 1861. The defendant obtained leave to serve, and served a third-party notice, claiming contribution or indemnity from a sub-lessee to whom he had let the premises from Midsummer, 1869, for the remainder of the original term, less ten days. The under-lease contained a covenant to repair, which was in terms precisely similar to those of the covenant in the original lease, and for breach of which the defendant claimed relief against the sub-lessee:—Held, that, inasmuch as the terms of the covenant to repair must in each case be construed with reference to the age and character of the premises at the time of the demise, the covenant in the under-lease could not be construed as a covenant to indemnify the defendant against or to perform the covenant in the original lease; that the defendant's claim was not one for contribution or indemnity from the third party within Ord. XVI. r. 52, and that, therefore, no directions as to trial could be given under that rule. *Pontifex v. Foord*, 12 Q. B. D. 152; 53 L. J., Q. B. 321; 49 L. T. 808; 32 W. R. 316—D.

Damage to Cargo—Charterer against Owner—Warranty.]—Where a defendant is not entitled to claim contribution against a person not a party to the action, he can only be entitled, under Ord. XVI. r. 48, to issue a third-party notice to such person, where under a contract, expressed or implied, he is entitled to indemnity over against him. Therefore, where the defendants were sued for damages to the plaintiffs' goods while on board a vessel of the defendants on a certain voyage, by reason of the vessel being not seaworthy for the voyage:—Held, that the defendants were not entitled to a third-party notice, under Ord. XVI. r. 48, to the persons of whom the defendants had hired the vessel with a warranty that she was tight, staunch, strong, and fitted for the service. *Speller v. Bristol Steam Navigation Company*, 13 Q. B. D. 96; 53 L. J., Q. B. 322; 50 L. T. 419; 32 W. R. 670; 5 Asp. M. C. 228—C. A.

Forged Transfer of Shares—Transferee.]—The plaintiff, who was the owner of stock in a public company registered in her name, ascertained that it had been transferred to F. by virtue, as she alleged, of a forged transfer. She brought an action against the company to have her name reinstated in the books of the company. The company obtained leave to serve F. with a claim for indemnity:—Held, without deciding that the claim for indemnity was valid, that leave to serve F. was rightly given. *Speller v. Bristol Steam Navigation Company* (13 Q. B. D. 96), distinguished. *Carshore v. North-Eastern Railway*, 29 Ch. D. 344; 54 L. J., Ch. 760; 52 L. T. 232; 33 W. R. 420—C. A.

Mortgage of Policy of Insurance—Valid Discharge to Company—Joinder of Mortgagor.]—M., a married woman, on the 6th November, 1879, effected a policy of insurance on her own life for 3,000*l.* M. and her husband, on the 19th of October, 1880, mortgaged the policy to T., to secure the repayment of 2,534*l.* 7*s.*, with interest at 6*l.* per cent. In the mortgage deed there was a power of attorney by M. and her husband to T., but there was not any special receipt clause empowering T. to give a valid discharge to the assurance society. The deed also contained a provision that if the covenants were fulfilled, T. should not call in the money before the 1st of May, 1890. T. gave notice to the assurance society of the mortgage. M. died, and probate of her will was granted to her husband. At the date of her death 2,762*l.* 12*s.* 6*d.* was due on the policy, and there was due to T., for principal and interest, 2,618*l.* 18*s.* 7*d.*, besides a sum of 28*l.* for costs due to T. as solicitor for M. and her husband. T. called upon the insurance company to pay him the whole of the moneys due on the policy, but they refused to do so unless M.'s husband, as her personal representative, joined in the receipt, which he declined to do, except upon terms which T. rejected; and the company having persisted in their refusal, T. brought an action against them, and the company moved for leave to bring in M.'s husband as a third party:—Held, that the company was entitled to have M.'s husband brought before the court, and that they should be at liberty to lodge in court the amount due on the policy. *Tench v. Eykyn*, 18 L. R., Ir. 45—Q. B. D.

Indemnity after Service of Writ.—Leave may be given to a defendant to serve notice of claim for indemnity on a third party, under Rules of Supreme Court, 1883, Ord. XVI. r. 48, whether the indemnity has been given after or before action brought. *Edison Electric Light Company v. Holland*, 33 Ch. D. 497; 56 L. J., Ch. 124; 55 L. T. 587; 35 W. R. 178—V.-C. B.

b. PRACTICE.

Service of Notice out of Jurisdiction.—By Ord. XI. r. 1, service out of the jurisdiction of a . . . notice of a writ of summons may be allowed by the court or a judge whenever . . . (g) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction:—Held, that Ord. XI. r. 1 (g), does not apply to service out of the jurisdiction of a third-party notice on a third party domiciled or ordinarily resident in Scotland. *Speller v. Bristol Steam Navigation Company*, supra.

Leave whether necessary.—To Co-defendant.]—Under r. 55 of Ord. XVI., a defendant need not obtain the leave of the court or a judge before issuing to a co-defendant a notice claiming contribution or indemnity from him. But it will be open to the co-defendant, after he has been served with the notice, to move to set aside the service. *Towse v. Loveridge*, 25 Ch. D. 76; 53 L. J., Ch. 499; 49 L. T. 466; 32 W. R. 151—Pearson, J.

Application for Leave—Time—Delay.]—An application for a defendant for leave to issue a third-party notice under rule 48 of Ord. XVI. of the Rules of Court, 1883, should be made promptly; the time contemplated by the Order as that within which the application is to be made being, as a general rule, within the time limited for delivering the defence, and at the latest before the pleadings are closed. *Birmingham Land Company v. London and North-Western Railway*, 56 L. T. 702—Chitty, J.

Points for Consideration of Court.]—On the application for leave the court will not go into any question as to the merits of the action or the validity of the claim for indemnity. *Edison Electric Light Company v. Holland*, 33 Ch. D. 497; 56 L. J., Ch. 124; 55 L. T. 587; 35 W. R. 178—V.-C. B.

In giving leave to a defendant to serve notice of a claim for contribution or indemnity on a third party, the court will not consider whether the claim is a valid one, but only whether the claim is bona fide, and whether if established it will result in contribution or indemnity. *Carshore v. North-Eastern Railway*, supra.

Circumstances under which Third Parties not added as co-Defendants.]—An action was brought against a railway company to compel them to re-transfer stock which the plaintiffs alleged to have been transferred out of their names by means of forged transfer deeds. The transferees were not made parties, but the company, under Ord. XVI. r. 48, served them with

third-party notices, claiming indemnity. The company in their defence, set up all the grounds of defence that could be relied on against the plaintiff's claim. Some of the third parties desired to defend, and liberty was given to them to appear at the trial and take such part as the judge should direct. Two of them appealed from this order, asking that they might be at liberty to deliver a defence, appear at the trial, and put in evidence, and cross-examine the plaintiff's witnesses:—Held, that the third parties were not, under the old practice, necessary parties to the action, and that as the company had raised all proper grounds of defence, and was bona fide defending the action, the order gave the third parties all reasonable protection, and that the appeal must be dismissed, for that while, on the one hand, the court ought to take care that the third parties had full opportunity of seeing that the questions in the cause were fairly tried, it ought, on the other hand, to take care that the plaintiffs were not embarrassed and put to expense by unnecessarily allowing persons, who were not necessary parties to the action, to take all the same steps as if they had been made defendants. *Barton v. London and North-Western Railway*, 38 Ch. D. 144; 57 L. J., Ch. 676; 59 L. T. 122; 36 W. R. 452—C. A.

What Defences open to Third Party.]—When a third party has been given leave to defend under Ord. XVI. r. 53, he is at liberty to raise any defences which the defendant might have raised against the plaintiff's claim, although the defendant may, by admission or otherwise, have debarred himself from raising any particular defence. *Callendar v. Wallingford*, 53 L. J., Q. B. 569; 32 W. R. 491—D.

Application for directions always necessary.]—Where a defendant serves a co-defendant with a third-party notice but omits to take out a summons for directions under Ord. XVI. r. 52, he will not be entitled to any relief as against him. *Tritton v. Bankart*, 56 L. J., Ch. 629; 56 L. T. 306; 35 W. R. 474—Kekewich, J.

Non-admission of Liability by Third Party—Liberty to appear at Trial.]—Where in an action for damages in respect of alleged injury to the plaintiff's premises, the defendant, claiming to be entitled to indemnity over against a person not a party to the action, had served such person with a third-party notice under Ord. XVI. r. 48, and he had appeared thereto, the court, upon a summons for directions taken out by the defendant, gave the third party, who did not admit his liability, liberty to appear at the trial of the action and take such part as the judge should direct, and be bound by the result, and ordered the question of his liability to indemnify the defendant to be tried at the trial of the action, but subsequent thereto. In case a third party served with notice appears and admits his liability to indemnify, the court will give him leave to defend the action. *Coles v. Civil Service Supply Association*, 26 Ch. D. 529; 53 L. J., Ch. 638; 50 L. T. 114; 32 W. R. 407—Kay, J.

Judgment on Application—Against Married Women.]—Under Ord. XVI. r. 52, judgment against a third party who has appeared pursuant to a third-party notice, but, at the hearing of

an application by the defendant for directions, declines to state any defence, may be ordered, if the judge is not satisfied that there is any question proper to be tried as to the liability of the third party. The rule is consistent with the Judicature Act, 1873, s. 24, sub-s. 3, and the Judicature Act, 1875, s. 21, and is not ultra vires. Such judgment under the rule may, since the Married Women's Property Act, 1882, be ordered against a married woman, third party, as a feme sole, declaring her separate estate chargeable even in respect of a liability created before that act. *Gloucestershire Banking Company v. Phillips*, 12 Q. B. D. 533; 53 L. J., Q. B. 493; 50 L. T. 360; 32 W. R. 522—D.

Right of Third Party to Judgment before Payment.]—A defendant who is entitled to an indemnity from a co-defendant upon a special agreement is entitled to sign judgment against his co-defendant for the amount of his (the defendant's) liability before he has actually paid anything in discharge of it. *English and Scottish Trust Company v. Flatau*, 36 W. R. 238—D.

Counterclaim by Third Party against Plaintiff.]—The court has no power to give a third party, who has been served with notice by a defendant under Ord. XVI. r. 48, leave to file a counterclaim against the original plaintiff. *Eden v. Weardale Iron and Coal Company*, 28 Ch. D. 333; 54 L. J., Ch. 384; 51 L. T. 726; 33 W. R. 241—C. A.

Discovery by and against.]—See DISCOVERY, I. 1; II. 1.

Costs of Third and Fourth Parties.]—D. covenanted by deed that he and his heirs or assigns would pay S. a royalty on coals, which should be got from land purchased from S., and which should be shipped for sale. D. did not execute the deed. In an action on the covenant, D.'s representative brought in his assigns as third parties, and they brought in fourth parties:—Held, that there was no jurisdiction to throw the costs of the third and fourth parties on the plaintiffs. *Witham v. Vane*, 32 W. R. 617—H. L. (E.) Affirming, 44 L. T. 718—C. A.

11. DEMURRER, PROCEEDINGS IN LIEU OF.

Effect of Judicature Acts and Rules.]—Demurrers are in form abolished, but Ord. XXV. takes notice of three forms, in which the object of demurrers may be obtained; first, by raising on the pleadings a question of law, so that the parties may have it decided quickly; secondly, by raising the question on a pleading whether it discloses any reasonable cause of action or answer, in which case the court may order the pleading to be struck out, not necessarily disposing of the whole action; and, thirdly, in case an action or defence is shown by the pleadings to be frivolous or vexatious, then the court or a judge can dismiss the whole action, or order it to be stayed, or judgment to be entered accordingly as may be just. *Burstall v. Beyfus*, 26 Ch. D. 35; 53 L. J., Ch. 565; 50 L. T. 542; 32 W. R. 418—Per Selborne, L. C.

Jurisdiction of Court.]—Ord. XXV. r. 4, enables the court to deal in an easy and summary manner with demurrable actions, and also affirms the inherent power of the court to protect itself from the abuse of its procedure by the bringing of frivolous and vexatious actions. *Metropolitan Bank v. Pooley*, 10 App. Cas. 210; 54 L. J., Q. B. 449; 53 L. T. 163; 33 W. R. 709; 49 J. P. 756—H. L. (E.).

The Probate Division has, apart from Ord. XXV. r. 4, an inherent jurisdiction, in common with other courts, to stay proceedings which are frivolous and vexatious, and an abuse of the process of the court. *Willis v. Beauchamp (Earl)*, 11 P. D. 59; 55 L. J., P. 17; 54 L. T. 185; 34 W. R. 357—C. A.

Based on Pleadings, not on Evidence.]—Applications under Ord. XXV. r. 4, must be tried upon the allegations contained in the pleadings, and evidence in support of the applicant's case is not admissible. *Republic of Peru v. Peruvian Guano Company*, 36 Ch. D. 489; 56 L. J., Ch. 1081; 57 L. T. 337; 36 W. R. 217—Chitty, J.

When Jurisdiction exercised.]—Although proceedings under rr. 2 and 4 of Ord. XXV. take the place of demurrers in the sense that the court is enabled, when it sees no reasonable ground of action or defence, to put an end to the action or defence, the court is not bound to regard the case with the same strictness as under the old practice on demurrer, the court now having more regard to the reasonableness or unreasonableness of the claim or defence. *Dadswell v. Jacobs*, 34 Ch. D. 278; 57 L. J., Ch. 233; 55 L. T. 857; 35 W. R. 261—C. A.

A pleading will not be struck out under Ord. XXV. r. 4, on the ground that it discloses no reasonable cause of action, unless it is frivolous. Demurrers have not been abolished only in name, and the above rule is not to be construed so as to allow applications under it to take their place. *Bathyanay, In re, Bathyanay v. Walford*, 32 W. R. 379—Chitty, J.

The power given by Ord. XXV. r. 4, of ordering any pleading "to be struck out on the ground that it discloses no reasonable cause of action," will be exercised where in the opinion of the court, there is no reasonable prospect that the case raised by the pleading will succeed at the hearing of the action; secus, where the pleading, though it might under the former practice have been open to demurrer, presents a substantial case. *Republic of Peru v. Peruvian Guano Company*, supra.

Claim Disclosing no Reasonable Cause of Action—Malicious Prosecution.]—The plaintiff was charged by the defendants under 6 & 7 Vict. c. 96, s. 4, with having published a libel knowing the same to be false. At the preliminary stage of the proceedings the charge under s. 4 was withdrawn, but the prosecution for the minor offence under s. 5 of the same act was continued, and the plaintiff was committed for trial under the 5th section. An indictment was preferred against the plaintiff under the 4th section, and the jury found that the plaintiff issued the libel believing it to be true. This verdict was held to be one of guilty under the 5th section, and, after respite of judgment and argument, the plaintiff was sentenced to two months' imprisonment without hard labour.

The plaintiff brought his action for malicious prosecution under the 4th section of the above act, and set forth the above facts in his statement of claim, in which he alleged that the finding of the jury was an acquittal under the 4th section, under which he had been indicted. The defendants applied to have the statement of claim struck out as not disclosing any reasonable cause of action:—Held, that the statement of claim ought not to be struck out as disclosing no reasonable ground of action, and that where a statement of claim discloses some ground of action, the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for its being struck out. *Boaler v. Holder*, 54 L. T. 298—D.

No action can be brought by a bankrupt for maliciously procuring his adjudication so long as the adjudication itself has not been set aside. Such an action may be dismissed as frivolous and vexatious on summons under Ord. XXV. r. 4. *Metropolitan Bank v. Pooley*, supra.

— **Entry on Plaintiff's Land—Specific Performance.**—A plaintiff set out certain building agreements in his statement of claim, and alleged that by reason of the defendant having wrongfully entered into possession of the plaintiff's land and building materials, he had been unable to carry out his agreements and had thereby suffered loss. The plaintiff claimed specific performance of the agreements and damages. A motion under Ord. XXV. r. 4, to strike out the statement of claim upon the ground that it disclosed no reasonable cause of action was dismissed. *Boddington v. Rees*, 52 L. T. 209—V.-C. B.

Points of Law raised by Pleadings—Validity of Agreement—Hearing before Trial.—An action had been brought to determine questions of disputed accounts in respect of the joint local and continental traffic of two railways. The validity of an agreement was disputed by the pleadings. The plaintiffs now moved under Ord. XXV. r. 2, that the points of law raised by the pleadings might be set down for hearing forthwith, and be disposed of before the trial of the action:—Held, that the application would be granted, as the case was a proper one for exercising the jurisdiction conferred upon the court by Ord. XXV. r. 2. *London, Chatham, and Dover Railway v. South-Eastern Railway*, 53 L. T. 109—Chitty, J.

"Point of Law"—Dismissal of Action with Costs.—An action having been by the consent of the parties set down for hearing under Rules of Supreme Court, Ord. XXV. r. 2, upon a "point of law" raised by the defence, and the point having been decided in favour of the defendant, the judge, as the decision substantially disposed of the whole action, dismissed the action under r. 3, and with costs, by analogy to the former practice on demurrer. *O'Brien v. Tyssen*, 28 Ch. D. 372; 54 L. J., Ch. 284; 51 L. T. 814; 33 W. R. 428—V.-C. B. *S. P. Percival v. Dunn*, 29 Ch. D. 128; 54 L. J., Ch. 572; 52 L. T. 320—V.-C. B.

Time for Application—Amended Statement of Claim.—A defendant who has put in a defence to an original statement of claim, cannot, when the plaintiff afterwards delivers an amended statement of claim, which alleges no new matter

against him, apply to strike out the amended statement of claim, on the ground that it discloses no reasonable cause of action. *Jenkins v. Rees*, 33 W. R. 929—Pearson, J.

Precedence over other Actions.—Where, by consent of parties, an action has been set down for hearing under Ord. XXV. r. 2, before the trial, on a point of law, the decision of which will substantially dispose of the whole action, it is not entitled to precedence over other non-witness actions, but must take its place in the general list. *Thorniley, In re, Woolley v. Thorniley*, 53 L. J., Ch. 499; 32 W. R. 539—Pearson, J.

12. DISCOVERY, INSPECTION, AND INTERROGATORIES—See DISCOVERY.

13. REFERENCE TO ARBITRATION—See ARBITRATION.

14. TRIAL.

a. PLACE OF TRIAL.

Local Venue—Highway Acts.—The provisions of the Highways Act, 1835, s. 109, as to local venue are abolished by the Rules of Court, 1875, Ord. XXXVI. r. 1. *Phelips v. Hadham Highway District Board*, 1 C. & E. 67—Coleridge, C. J.

— **Action against Constable.**—Section 19 of 1 & 2 Will. 4, c. 41, by which, in all actions for anything done in pursuance of that act, the venue is to be local, applies only to such acts as a constable might at the date of the statute have been called upon to perform; the section therefore does not apply in the case of a constable acting under the Contagious Diseases (Animals) Act, 1878. *Bryson v. Russell*, 14 Q. B. D. 720; 54 L. J., Q. B. 144; 52 L. T. 208; 33 W. R. 34; 49 J. P. 293—C. A.

Change of Venue.—The court will not change a venue laid by a plaintiff unless a defendant can show some serious injury and injustice to his case by trying it at that venue. *Shroder v. Myers*, 34 W. R. 261—C. A.

— **Amended Statement of Claim.**—A plaintiff who wishes to name some place other than Middlesex as the place of trial must name it in the original statement of claim. If he omits to do so he cannot name it in an amended statement of claim; and if he has named a place of trial in the original statement of claim, he cannot alter it in an amended statement of claim. *Locke v. White*, 33 Ch. D. 308; 55 L. J., Ch. 731; 54 L. T. 891; 34 W. R. 747—C. A.

— **Order causing Delay—Convenience.**—In an action for the specific performance of an agreement, wherein fraud and concealment connected with the conveyance of certain mines and property in the county of Cornwall were alleged, it appeared that the plaintiff resided at Wakefield, in Yorkshire, and most of the witnesses and the defendant in or within an easy distance of London, but that one of the most important

witnesses, who was eighty years old, lived in Cornwall, and that the place of business of the solicitor who transacted the business connected with the conveyance was at Plymouth. The plaintiff in his statement of claim had fixed the venue at Exeter. On a motion by the defendant that the venue might be changed to Middlesex, on the ground of convenience and to save expense, and because the action was one which ought properly to be assigned to the Chancery Division, and contained points of law which would probably be referred from the assizes to London :—Held, that the venue must be changed to Middlesex, not because the action was a Chancery action, but on the ground of convenience for the witnesses and of saving expense; also that the necessary delay which must ensue was not in itself a sufficient reason for permitting the case to go to the assizes. *Green v. Bennett*, 54 L. J., Ch. 85; 50 L. T. 706; 32 W. R. 848—Chitty, J. See *Cardinall v. Cardinall*, infra.

Action assigned to Chancery Division.]—

Under Ord. XXXVI. r. 1, a plaintiff is entitled to lay the venue of an action in any place that he pleases, although it is specially assigned to the Chancery Division, and has been commenced in that division. *Phillips v. Beale*, 26 Ch. D. 621; 54 L. J., Ch. 80; 50 L. T. 433; 32 W. R. 665—C. A. See also *Cardinall v. Cardinall*, *Powell v. Cobb*, *Old Mill Company v. Dukinfield Local Board*, and *Shafte v. Bolckow, Vaughan, and Co.*, infra.

—Entry at Assizes—Power of Judge at Assizes to Remit to Chancery Division.]—

In a patent action commenced in the Chancery Division, the plaintiff named Manchester as the place of trial, and the action was set down for trial at Manchester Assizes. When the case came on for trial the judge of assize declined to try it, on the ground of pressure of business, and remitted it for trial in the Chancery Division :—Held, that this was not a sufficient ground for an order under Ord. XXXVI. r. 34, that the case might have been made a remanet, and that the order must be discharged. *Fairburn v. Household*, 53 L. T. 513—C. A.

b. MODE OF TRIAL.

Order for Trial by Judge with Jury.]—A party who desires that an action shall be tried with a jury must obtain an order to that effect; and if the case falls within Ord. XXXVI. r. 6, the Master has no discretion but must make the order. *Trower v. Law Life Assurance Society*, 54 L. J., Q. B. 407; 52 L. T. 888; 33 W. R. 674—C. A.

Time for Application for Trial by Jury—Entry of Cause for Trial.]—

By Ord. XXXVI. r. 6, upon the application within ten days after notice of trial has been given, of any party for a trial with a jury of the cause, an order shall be made for a trial with a jury. Notice of a trial was given by the plaintiff, but the cause was not entered for trial by either party within the time prescribed by the rules, and the notice was therefore no longer in force. The plaintiff gave a second notice of trial, entered the cause for trial on the same day, and then applied for a

trial by jury :—Held (Manisty, J., dissenting) that under Ord. XXXVI. r. 6, the application for a jury was too late. Per Manisty, J.—The first notice of trial should, under the circumstances, be regarded as countermanded by consent. The second notice of trial was therefore valid, and the application for a trial by jury was made in time within Ord. XXXVI. r. 6, 16. *Tonsley v. Heffer*, 19 Q. B. D. 153; 56 L. J., Q. B. 656; 57 L. T. 481; 36 W. R. 48—D.

An action for an injunction and account having been commenced, the plaintiff moved on the 11th Dec., 1885, for an interim injunction. An order was then made that the motion should stand over until the trial of the action, the plaintiff undertaking to set down the cause for trial forthwith, and deliver a statement of claim within ten days. The defendant gave an undertaking in the terms of the notice of motion. The notice of trial was given on the 12th Dec., 1885, the statement of claim was delivered on the 19th Dec., 1885, and the defence and counterclaim were delivered on the 4th Jan., 1886. On the same date plaintiff received notice of the defendant's intention to apply for a trial before a jury :—Held, upon the construction of the Rules of Court, Ord. XXXVI. r. 6, as amended by the Rules of Court of December, 1885, that the application was made too late, and that no case had been made out for the exercise of the discretion to enlarge the time under the Rules of Court, 1883, Ord. LXIV. r. 7. *Moore v. Deakin*, 53 L. T. 858; 34 W. R. 227—Chitty, J.

Right to Trial by Judge and Jury—Discretion.]

Causes or matters, which previously to the passing of the Judicature Act could, without any consent of parties, have been tried without a jury, are excluded from the operation of Ord. XXXVI. r. 6, and the parties are, therefore, not entitled as of right to a trial with a jury. In such causes or matters an application for a trial with a jury must be made under Ord. XXXVI. r. 7, in which case it is in the discretion of the court or judge to grant the application. *The Temple Bar*, 11 P. D. 6; 55 L. J., P. 1; 53 L. T. 904; 34 W. R. 68; 5 Asp. M. C. 509—C. A.

In an action in rem for previously to a ship the trial was directed to be before a judge at the assizes. The plaintiff applied for an order that the action should be tried with a jury, alleging that he was entitled under Ord. XXXVI. r. 6, to such an order as of right. The judge refused the application :—Held, that the action was not within Ord. XXXVI. r. 6, and that the application could only be made under r. 7 of that order, and therefore the judge would have a discretion to grant the application. *Id.*

Where, in an action brought in the Chancery Division to restrain a nuisance, either party applies for a trial by jury, he cannot claim a jury as a matter of right, but the application is one to the discretion of the court under Ord. XXXVI. r. 7 (a), and he has not even such *prima facie* right to a jury as to throw on the other side the burden of showing that the case can be tried as well without a jury. *Timson v. Wilson*, or *Fanshawe v. London and Provincial Dairy Company*, 38 Ch. D. 72; 59 L. T. 76; 36 W. R. 418—C. A.

The right of a defendant, under r. 6 of Ord. XXXVI., to have an issue of fact sent for trial by a judge and jury, is subject to the discretion

of the court under rr. 4 and 5 of the same order ; and the court, in the exercise of such discretion, will refuse to send the issue for trial by a judge and jury, if it does not appear desirable. *Moss v. Bradburn*, 32 W. R. 368—Pearson, J.

An action which falls within one of the classes of actions which, by sect. 34 of the Judicature Act, 1873, are especially assigned to the Chancery Division, will not be sent for trial by a jury unless it involves a simple issue of fact, the determination of which will decide the action. If such an action depends on the determination of mixed questions of law and fact, it ought to be tried by a judge without a jury, and an order will be made for its trial by the judge of the Chancery Division to whom it has been assigned, without a jury, even though the plaintiff has by his statement of claim proposed a different venue. The mere fact that the action will be tried more quickly, is not a sufficient reason for sending it to be tried at the assizes. *Cardinall v. Cardinall*, 25 Ch. D. 772 ; 53 L. J., Ch. 636 ; 32 W. R. 411—Pearson, J.

In an action for injunction to restrain infringement of copyright and for damages :—Held, that the defendant had no right to a trial by jury, but that, under Ord. XXXVI. rules 4 and 7 (a), the court had a discretion which it exercised by directing a trial without a jury. Semble, that the burden of proof was on the party applying for a jury. *Cooté v. Ingram*, 35 Ch. D. 117 ; 56 L. J., Ch. 634 ; 56 L. T. 300 ; 35 W. R. 390—Chitty, J.

In an action brought by the plaintiff in the Chancery Division against the defendants, in respect of an infringement by them of his registered trade-mark, and claiming an account of profits or damages, the defendants submitted to a perpetual injunction ; and the only question remaining to be tried was, what damages should be paid, the plaintiff waiving any accounts of profits. The plaintiff applied to the court that the action might be transferred to the Queen's Bench Division, so that it might be tried with a jury. This application was opposed by the defendants, on the ground that, under rule 4 of Ord. XXXVI. of the Rules of Court, 1883, the judge had a discretion ; and that the damages could be as well ascertained by the judge in court or chambers as by a jury :—Held, that the judge had no discretion, and that under rule 6 of Ord. XXXVI., an order must be made for a trial with a jury. But held, that, even if the court had a discretion, this was not a case in which such discretion ought to be exercised, the only question remaining at issue in the action being in regard to the amount of damages for the infringement of the trade-mark, which question would be more properly tried with than without a jury. *Fennessy v. Rabbits*, 56 L. T. 138—Kay, J.

The plaintiff in an action to set aside deeds on the ground of fraud, named Cardigan as the place of trial in his statement of claim. On motion by a defendant before issue joined, the court ordered the action to be tried in the Chancery Division without a jury, and this decision was affirmed by the Court of Appeal. *Powell v. Cobb*, 29 Ch. D. 486 ; 54 L. J., Ch. 962 ; 53 L. T. 188—C. A.

An action to restrain the defendants from obstructing the plaintiff's water rights was set down in the Chancery Division on the 27th May, and briefs were delivered on the 7th July. On

motion by the defendants that the trial might take place at Manchester before a judge and jury :—Held, that the defendants had an absolute right to trial by jury ; that Manchester was the proper place for the trial ; the costs to be reserved on account of the defendants' delay in bringing their motion. *Old Mill Company v. Dukinfield Local Board*, 54 L. J., Ch. 160 ; 51 L. T. 414—V.-C. B.

The plaintiffs sued in respect of certain alterations made by the defendant in his house at Bath, which adjoined the plaintiffs' house. The plaintiffs claimed, first, specific performance of an agreement entered into upon a sale of the land on which the house stood, whereby a certain building scheme was provided ; and, secondly, an injunction to restrain the defendant from so building as to interfere with the light and air coming to the plaintiffs' house. A motion was made on behalf of the defendant for an order that the action might be tried before a judge and jury, and that the trial might take place at the forthcoming assizes at Bristol. The defendant's contention was, that the issue as to obstructing ancient lights not being one of those matters which by the Judicature Act, 1873, was assigned to the Chancery Division, the court had, so far as that part of the action was concerned, no discretion in the matter ; but that the defendant had a right to have that issue at all events tried before a judge and jury. Further, that, supposing such a right did not exist, yet, as this issue was quite independent of the question of specific performance, and as moreover the locus in quo was Bath, and therefore great expense would be saved by having the trial at Bristol, the court, in the exercise of its discretion, ought to direct a trial before a jury :—Held, that the action being one which by the Judicature Act was assigned to the Chancery Division, the court had a discretion whether or not it would allow a trial by jury ; and that the defendant had no right to say that he would split the action in two and insist upon one portion of it being tried before a jury. Held, also, that as to the exercise of that discretion, this was not a case in which the issue sought to be tried before a jury was preliminary to the rest of the action, and might put an end to it ; that in whichever way the issue as to the obstruction of light was decided, the question of specific performance would remain, and would have to be tried in the Chancery Division ; and that therefore the application must be refused. *Sheppard v. Gilmore* 53 L. T. 625 ; 34 W. R. 179—Kay, J.

— Counterclaim for Damages — Plaintiff Applying for whole Action to be Tried with a Jury.]—The plaintiff brought an action for redemption of shares mortgaged by him. The defendant by counterclaim sought relief incident to his position as mortgagee, and also damages for alleged fraudulent misrepresentations made by the plaintiff to the defendant which affected the amount of the balance to secure which the mortgage was given. The plaintiff applied to have the action tried with a jury, which was refused :—Held, on appeal that the case did not come within Ord. XXXVI. r. 6, so as to give the plaintiff a right to have the action tried with a jury ; that his proper course would have been to apply to have the counterclaim for damages tried separately, as a claim which could not be conveniently tried in the

pending action, and that the appeal must be dismissed. *Lynch v. Macdonald*, 37 Ch. D. 227; 57 L. J., Ch. 651; 58 L. T. 293; 36 W. R. 419—C. A.

— **Prolonged Examination of Documents—Local Prejudice against Defendants.**—

Where in an action (the place of trial being Durham) to restrain the Ecclesiastical Commissioners from working mines under the plaintiff's land the plaintiff applied for a trial by jury, the court refused to order such trial upon evidence (1) that the issue was one requiring a prolonged examination of documents under Ord. XXXVI. r. 6, and (2) that the Ecclesiastical Commissioners could not get a fair trial on account of the local prejudice existing against them as landlords. *Shafto v. Bolckow, Vaughan, and Co.*, 57 L. T. 17; 35 W. R. 686—Chitty, J.

— **Action Assigned to Chancery Division—Joinder of Cause of Action not so Assigned.**—

The plaintiff commenced an action in the Chancery Division, alleging that the defendant was trustee of a sum of 700*l.* for her, and claiming payment of that sum with interest, and, if necessary, an account of profits made by the defendant by using it in his business, and also claiming the return of certain chattels, or their value, and damages for their detention. The defendant denied the trust, stated that the money had been lent to him by the plaintiff, and long ago repaid, and denied that he ever had any chattels of the plaintiff in his possession. The plaintiff, after the defence had been put in, applied to have the issues of fact tried by a jury:—Held, that the action came within Ord. XXXVI. r. 3, and not within r. 6 of the same order. That the action therefore was to be tried by a judge without a jury, unless it could be made out that it was better to have it tried by jury, and that in the present case this was not shown. *Gardner v. Jay*, 29 Ch. D. 50; 54 L. J., Ch. 762; 52 L. T. 395; 33 W. R. 470—C. A.

c. NOTICE OF TRIAL.

Right of Defendant to give—Abridgment of Time.—Ord. XXXVI. r. 12 provides that, if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the court or a judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the court or a judge to dismiss the action for want of prosecution. Ord. LXIV. r. 7, provides that the court or a judge shall have power to enlarge or abridge the time appointed by the rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require:—Held, that the period of six weeks mentioned in Ord. XXXVI. r. 12, is not a time appointed for doing any act or taking any proceeding within Ord. LXIV. r. 7, and consequently that the court could not make an order giving the defendant leave to give notice of trial, if the plaintiff did not give such notice within a shorter period than six weeks from the close of the pleadings. *Saunders v. Pawley*, 14 Q. B. D. 234; 54 L. J., Q. B. 199; 51 L. T. 903; 33 W. R. 277—D.

Cause not entered—Motion to Dismiss for Want of Prosecution.—A plaintiff gave notice

of trial (in Middlesex) within the six weeks limited by rule 12 of Ord. XXXVI., but did not, as required by rule 16, enter the trial within six days after the notice of trial was given. The trial not having been entered:—Held, that the defendant was entitled to move to dismiss for want of prosecution, and an order dismissing the action was accordingly made. *Crick v. Hewlett*, 27 Ch. D. 354; 53 L. J., Ch. 1110; 51 L. T. 428; 32 W. R. 922—Pearson, J.

— **Whether fresh Notice necessary.**—See *Tonsley v. Heffer*, ante, col. 1468.

Cause Struck Out—Fresh Notice necessary.—

The plaintiff had given notice of trial, and the cause, after standing over for more than a year, had been struck out under Ord. XVII. r. 10, of the Rules of 1883. It was subsequently re-entered by the plaintiff in the cause-book on the payment of 2*l.*, as required by the scale of fees; but, as he had given no fresh notice of trial, the defendant now submitted that the re-entry was erroneous, and ought to be struck out:—Held, that, where a cause has been struck out under Ord. XVII. r. 10, the notice of trial is no longer in force, and that consequently another must be given before the plaintiff can re-enter the cause for trial. *Le Blond v. Curtis*, 52 L. T. 574; 33 W. R. 561—Chitty, J.

Default in Proceeding to trial after Verdict set Aside—Trial by Proviso.—

An action, in which the place of trial was out of Dublin, was tried at the Spring Assizes, 1883, when a verdict was directed for the defendant. This verdict was set aside on the ground of misdirection, and a second trial took place at the Spring Assizes, 1884, resulting in a verdict directed for the plaintiff, which was also set aside, and a third trial ordered in the Michaelmas Sittings, 1884. The plaintiff not having served notice of trial for the next ensuing assizes, the defendant moved to dismiss the action for want of prosecution, contending that the case fell within Ord. XXXV. r. 2, 4:—The Court refused the motion. Semble, the only remedy open to a defendant under such circumstances is trial by proviso under the old practice. *Foott v. Benn*, 16 L. R., Ir. 247—Ex. D.

d. PROCEEDINGS AT TRIAL.

Non-appearance of Plaintiff.—

Where notice of trial had been served on the defendants, and the plaintiff did not appear, the defendants moved to dismiss the action, with costs against them:—Held, that it was not necessary for them to produce an affidavit of service of notice of trial, and that they might have their order as a matter of course. *Palmer, In re, Skipper v. Skipper*, 49 L. T. 553—V.-C. B.

Non-appearance of Defendant—Relief claimed by Pleadings.—

Action to enforce specific performance by the purchaser of an open contract to purchase leaseholds. Defendant had paid a deposit and accepted the title, but failed to complete. By his pleading the defendant admitted that he was unwilling to complete. At the trial (the defendant not appearing) the plaintiff asked for judgment for rescission and forfeiture of the deposit:—Held, that the plaintiff was entitled to judgment for specific

performance as claimed by his pleadings, but not for rescission and forfeiture. *Stone v. Smith*, 35 Ch. D. 188; 56 L. J., Ch. 871; 56 L. T. 333; 35 W. R. 545—Kekewich, J.

— **On Hearing of Motion.**—*See Montagu v. Land Corporation of England*, post, col. 1509.

Non-appearance—Striking-out Cause—Time for Application to Restore to List.—An action coming on for trial on the 30th July, was dismissed with costs in consequence of the plaintiff not appearing at the trial. On the 31st October a motion was made to discharge the previous order, and to restore the case to the paper to be heard on the merits:—Held, that the court had no power to restore the action except when the application is made within six days of the dismissal. *Walter or Walker v. James*, 53 L. T. 597; 34 W. R. 29—North, J.

Where an application to set aside a judgment obtained against a party on his non-appearance at the trial is made after the time limited for so doing has expired, it is not necessary to first make a substantive application for an extension of time, but the notice of motion should show that the application is out of time. Rule 21 of Ord. XXXIII. of the Chancery of Lancaster Rules, 1884, which provides that an application to set aside a judgment obtained where one party does not appear at the trial must be made "within six days after the trial, or at next sitting of the court," does not give an option to the party against whom judgment has been given to move either within the time named (whether a court sits or not), or at the next following sittings; but means that the application is to be made within six days, if the court is then sitting, and if it does not sit within the six days, the next time it does sit. *Bradshaw v. Warlow*, 32 Ch. D. 403; 55 L. J., Ch. 852; 54 L. T. 438; 34 W. R. 557—C. A.

Hearing in Private.—An appeal from an injunction to restrain the defendant from disclosing confidential information was ordered to be heard in private without the consent of the defendant, the plaintiff stating that a public hearing would defeat the object of the action, and make success on the appeal useless to him. *Mellor v. Thompson*, 31 Ch. D. 55; 55 L. J., Ch. 942; 54 L. T. 219—C. A.

Order for Trial of one Question before the other—Liability—Damages.—Where liability and also the amount of damages are disputed in an action, and the question as to the amount of damages is one of such detail or nature that it probably will be referred to some other tribunal than a jury, it is a proper exercise of discretion under Ord. XXXVI. r. 8, to order the question of liability to be tried, and the question of damages to be postponed until afterwards. *Smith v. Hargrove*, 16 Q. B. D. 183; 34 W. R. 294—D.

Withdrawal of Juror—Breach of Terms of Agreement to withdraw—Jurisdiction to re-try Action.—The withdrawal of a juror upon terms is not necessarily the final determination of an action; and if there be a substantial breach by one of the parties of the terms upon which the juror was withdrawn, the court before whom the case came for trial has jurisdiction to re-try the

action. *Thomas v. Exeter Flying Post Company*, 18 Q. B. D. 822; 56 L. J., Q. B. 313; 56 L. T. 361; 35 W. R. 594—D.

Judgment given contrary to Findings of the Jury.—Under the Rules of the Supreme Court, 1875, the judge, after leaving a question to the jury, had no power to give judgment contrary to the finding of the jury on a question so left to them; where, therefore, this course had been adopted the Court of Appeal ordered a new trial. *Perkins v. Dangerfield*, 51 L. T. 535—C. A.

15. NEW TRIAL.

Notice of Motion—Misdirection—Grounds.—A notice of motion for a new trial on the ground of misdirection should state how and in what matter the judge misdirected the jury. *Pfeiffer v. Midland Railway*, 18 Q. B. D. 243; 35 W. R. 335—D. *S. P. Murfett v. Smith*, 12 P. D. 116; 56 L. J., P. 87; 57 L. T. 498; 35 W. R. 460; 51 J. P. 374—D. And *Taplin v. Taplin*, 13 P. D. 100; 57 L. J., P. 79; 58 L. T. 925; 37 W. R. 256; 52 J. P. 406—D.

Interpleader—Application to what Court.—Under the Rules of 1883, Ord. LVII. r. 11, where an interpleader issue has been tried by a jury, and judgment given according to their finding by the presiding judge, application for a new trial must be made to the Court of Appeal and not to the Divisional Court. *Burstell v. Bryant*, 12 Q. B. D. 103; 49 L. T. 712; 32 W. R. 495; 48 J. P. 119—D. But see next case.

Where a party desires to obtain a new trial in an interpleader issue, the application must be made to a divisional court. If in such a case it is desired both to move for a new trial and also to appeal, under Ord. XL. r. 5, both applications must be made in interpleader as in other cases, in the first instance to a divisional court, from the judgment of which an appeal lies to the Court of Appeal. *Robinson v. Tucker*, 14 Q. B. D. 371; 53 L. J., Q. B. 317; 50 L. T. 380; 32 W. R. 697—C. A.

In County Court.—*See COUNTY COURT*, 5, a.

Action remitted to the County Court for Trial only.—Rr. 3 and 4 of Ord. XXXIX., and r. 1 of Ord. LII. (of 1883), have no application to cases sent for trial to a county court under 19 & 20 Vict. c. 108, s. 26; applications for new trials, therefore, are still regulated by the old practice. *Pritchard v. Pritchard*, 14 Q. B. D. 55; 54 L. J., Q. B. 30; 51 L. T. 859; 33 W. R. 198—D.

Trial at Bar—Application not Ex parte.—Where an information to recover penalties under the Parliamentary Oaths Act of 1866 has been tried at bar, a motion for a new trial must not be made ex parte, but upon notice of motion to the other side. *Att.-Gen. v. Bradlaugh*, 14 Q. B. D. 667; 54 L. J., Q. B. 205; 52 L. T. 589; 33 W. R. 673—C. A.

Damages excessive—Power of Court to Reduce.—In a case where the plaintiff is entitled to substantial damages, and a verdict for the plaintiff cannot be impeached, except on the ground that the damages are excessive, the court has power to refuse a new trial, on the plaintiff alone, and

without the defendant, consenting to the damages being reduced to such an amount as the court would consider not excessive had they been given by the jury. *Belt v. Lawes*, 12 Q. B. D. 356; 53 L. J., Q. B. 249; 50 L. T. 441; 32 W. R. 607—C. A.

The defendant published in a newspaper several libels of the plaintiff, who brought an action thereon. The defendant, in his defence, denied that he published the words complained of in the defamatory sense alleged, and as to one of the libels paid a nominal sum into court. The cause of action in respect of which the money was paid in was the same as that set out in other paragraphs of the statement of claim with a different innuendo. The jury found a verdict for 50*l.* on the paragraph in respect of which the money was paid in, and 3,000*l.* in respect of the rest of the statement of claim:—Held, that verdict and judgment should stand for 3,000*l.*, but that a remittitur damnum should be entered as to the 50*l.* *Bolton v. O'Brien*, 16 L. R., Ir. 97—Q. B. D. Affirmed 16 L. R., Ir. 483—C. A.

Misdirection.—It is not misdirection for the judge to tell the jury his own opinion on the issue before them. *Smith v. Dart*, 14 Q. B. D. 105; 54 L. J., Q. B. 121; 52 L. T. 218; 33 W. R. 455—D.

Verdict against the Weight of Evidence—Principle on which New Trial allowed.—In granting a new trial on the ground that the verdict was against the weight of evidence, the court must be satisfied not merely that the verdict was one which reasonable men ought not to have given, but that it was so unreasonable that a jury could not properly give it, if they really performed the judicial duty cast upon them. *Solomon v. Bitton* (8 Q. B. D. 176) observed upon. *Metropolitan Railway v. Wright*, 11 App. Cas. 152; 55 L. J., Q. B. 401; 54 L. T. 658; 34 W. R. 746—H. L. (E.)

A new trial of an action ought not to be granted on the ground that the verdict was against the weight of evidence if the verdict was one which the jury, acting as reasonable men, could have found. *Solomon v. Bitton* (8 Q. B. D. 176) explained. *Webster v. Friedeberg*, 17 Q. B. D. 736; 55 L. J., Q. B. 493; 55 L. T. 49; 34 W. R. 728—C. A.

Perverse Verdict—Circumstances suggesting Perversity.—Although there is no absolute rule invalidating a verdict certified by the judge at the trial to be perverse, yet such certificate affords ground for setting aside the verdict when coupled with other circumstances appearing in the report suggestive of perversity, such as the award of nominal damages when not apparently warranted by the evidence; though these circumstances would not, per se, and in the absence of such a certificate, be sufficient to disturb the verdict. *Quinlane v. Murnane*, 18 L. R., Ir. 53—C. A.

Power of Court of Appeal to enter Judgment.—The Court of Appeal has power under Ord. LVIII. r. 4, to enter judgment instead of sending a case down for a new trial where it has come to the conclusion that the verdict is against the weight of evidence, and that all the facts are before the court. *Millar v. Toulmin*, 17 Q. B. D.

603; 55 L. J., Q. B. 445; 34 W. R. 695—C. A. See *S. C.* in H. L., *infra*.

Quære, whether on appeal from an order of a divisional court upon an application for a new trial on the ground of the verdict being against the weight of evidence, the Court of Appeal has power to give judgment for the appellants instead of directing a new trial. *Millar v. Toulmin* (17 Q. B. D. 603) doubted. *Toulmin v. Millar*, 12 App. Cas. 746; 57 L. J., Q. B. 301; 58 L. T. 96—H. L. (E.)

16. JUDGMENT.

a. PRACTICE.

Under Order XIV.—See ante, col. 1421.

Judgment by Default—Appeal or Application to Re-hear.—Although the Court of Appeal has jurisdiction to hear a direct appeal from a judgment by default, such appeals will not be encouraged. The proper course for a party against whom judgment has been given by default is to apply to the judge who heard the cause to set aside the judgment and to re-hear the cause. *Vint v. Hudspeth*, 29 Ch. D. 322; 54 L. J., Ch. 844; 52 L. T. 741; 33 W. R. 738—C. A.

Entry of Judgment—Special Directions—Order for Payment by Instalments—Removing Stay of Execution—Amendment.—The plaintiffs having obtained a verdict in an action, under Lord Campbell's Act, for 50*l.* damages, the judge at the trial (without the consent of the plaintiffs, as they alleged), directed judgment to be entered for the plaintiffs, but that the damages and costs should be paid by yearly instalments of 20*l.*, the damages to be paid into the hands of one of the plaintiffs, in trust for herself and her co-plaintiffs (who were infants), and to be paid in priority to the costs. Judgment was entered in accordance with these directions. The defendant failed to pay the first instalment, and was, as the plaintiffs by affidavit alleged, disposing of all his available property. The court, on the application of the plaintiffs and on notice to the defendant, ordered the judgment to be amended by striking out the qualification, so as to stand for a judgment in the ordinary form for the damages awarded and costs, and directed that the order as to suspending execution should be entered as a separate order of the judge at the trial, and as of the date of the trial; and, having regard to the circumstances disclosed on the application, gave liberty to the plaintiffs, notwithstanding such order, to issue immediate execution for the full amount of the judgment. *Brien v. Sullivan*, 14 L. R., Ir. 391—Ex. D.

The power to suspend execution should be exercised by a separate order, and not by a qualification of the judgment. Semble, the order for payment by instalments, and postponement of costs, was not within the discretionary powers as to staying execution conferred by Ord. XLI. r. 15. *Id.*

Non-appearance at Trial.—See ante, cols. 1472, 1473.

Service of Notice of Judgment on Person not Party to Action.—See *Symons, In re, Betts v. Betts*, ante, col. 1400.

Entering Judgment on Application to Court of Appeal for New Trial.—*See Toulmin v. Millar*, supra.

Divisional Court—Junior Judge withdrawing.—In a revenue case on appeal by the Crown to the Divisional Court, the judges were divided in opinion; the junior judge withdrew his judgment in accordance with the old practice in the Court of Exchequer. *Colquhoun v. Brooks*, 19 Q. B. D. 418; 57 L. J., Q. B. 70; 57 L. T. 455; 36 W. R. 332—D. S. P. *Reg. v. Income Tax Commissioners*, 20 Q. B. D. 549; 57 L. J., Q. B. 337; 59 L. T. 455; 36 W. R. 671; 52 J. P. 695—D.

The withdrawal of the judgment of the junior judge only takes place where there is an appeal, at least I am not prepared to say that if there were no appeal it would be done, because judges are equal in point of authority. *Colquhoun v. Brooks*, 21 Q. B. D., p. 56—Per Lord Esher, M.R.

Where a case, requiring to be heard before a divisional court, is heard by a court consisting of only two judges, and these judges differ in opinion, the proper practice is to have the case re-heard before three or more judges of that division, and the old practice of one of the judges withdrawing his judgment should not be adopted. Where one of two judges withdraws his judgment, the order made is that of a single judge, and not of a divisional court. *Greene v. Thornton*, 16 L. R., Ir. 381—C. A.

Refusal to execute Instrument in compliance with.—*See post*, col. 1491.

b. MOTION FOR JUDGMENT.

Admission on Pleadings—Counter-claim.—In an action for a liquidated demand the defendants pleaded admitting the claim, but setting up a counter-claim for unliquidated damages to a greater amount. The court refused an application under Ord. XL. r. 11, for an order to sign judgment for the plaintiffs upon the claim, and for payment of the amount thereof by the defendants into court to abide the result of the action. *Mersey Steamship Company v. Shuttleworth*, 11 Q. B. D. 531; 52 L. J., Q. B. 522; 48 L. T. 625; 32 W. R. 245—C. A.

Part of Demand—Right to Proceed for Residue.—In an action upon a fire policy to recover 1,000*l.*, the defendant company pleaded that the policy was subjected to a condition that if at the time of loss or damage by fire there was any other insurance effected by the insured, or any other person, covering the same property, the defendant company should not be liable to pay or contribute more than their rateable proportion of such loss; that at the time of the alleged damage by fire the premises were insured against fire by a sub-tenant of the plaintiff, upon which insurance a certain sum was paid to the sub-tenant, who by covenant with the plaintiff was bound to keep the premises in repair, and that the apportionment of the loss which the defendant company were bound to pay under the policy was 62*l.* This sum was not brought into court. The plaintiff having moved under Ord. XXXIX. r. 9, for judgment for this sum without prejudice to his right to

proceed for the residue of the amount claimed:—Held, that the rule only applied to cases in which the plaintiff was willing to accept the admitted sum in satisfaction of his claim, and that the motion must, therefore, be refused. *Andrews v. Patriotic Assurance Company*, 18 L. R., Ir. 115—Ex. D.

Enquiry as to Damages—Infringement of Patent.—Where in an action for the infringement of a patent the defendant admits the validity of the patent, and admits ten infringements and no more, the plaintiff moving for judgment on admissions under Ord. XXXII. r. 6, is entitled to an injunction and an inquiry as to damages from the admitted infringements, but not to a general inquiry as to damages. *United Telephone Company v. Donohoe*, 31 Ch. D. 399; 55 L. J., Ch. 480; 54 L. T. 34; 34 W. R. 326—C. A.

Non-delivery of Reply.—A defendant is entitled, under Ord. XXXIX. r. 9, to judgment on admissions of facts in the pleadings, by reason of the plaintiff not delivering a reply to the defendant's defence. *Elliott v. Harris*, 17 L. R., Ir. 351—M. R.

Withdrawal of Defence—Infant Defendants.—The defence of two infant defendants in an ejectment action was withdrawn under an order of court. The other defendants having made admissions, judgment was moved for, supported by an affidavit proving the statement of claim:—Held, that the correct course where infants are parties and their defence is withdrawn and judgment is moved for, is to prove the statement of claim by affidavit. *Fitzwater v. Waterhouse* (52 L. J., Ch. 83) followed. *Gardner v. Tupling*, 33 W. R. 473—North, J.

Motion or Summons in Chambers.—An action was brought to restrain the defendants from publishing or issuing a certain trade circular. By their defence they offered to submit to a perpetual injunction in the terms of an interlocutory injunction which had already been obtained against them, "to be obtained on summons issued for that purpose." The action was set down on motion for judgment, and the plaintiffs moved for judgment for a perpetual injunction as offered by the defendants:—Held, that there was jurisdiction to make the order in chambers, that the application should have been so made, and that the plaintiffs should only be allowed such costs as would have been incurred upon a summons in chambers. *London Steam Dyeing Company v. Digby*, 57 L. J., Ch. 505; 58 L. T. 724; 36 W. R. 497—North, J.

Applications for orders upon admissions on pleadings should be made by summons in chambers, to come on in court as adjourned summonses. *Gough v. Heatley*, 49 L. T. 772; 32 W. R. 385—Pearson, J.

In Default of Pleading.—*See infra*, B. 7.

c. SETTING ASIDE, VARYING OR IMPEACHING.

Application by Person not Party to Record.—If a person, who is not a party to the record,

seeks to set aside a judgment by which he is injuriously affected, which the defendant in the action has allowed to go by default, he ought by summons, taken out in the name of the defendant, or if not entitled to use the defendant's name, then taken out in his own name, but in that case served on both the plaintiff and the defendant, apply for leave to have the judgment set aside, and to be allowed either to defend the action on such terms of indemnifying the defendant as the judge may consider right, or to intervene in the action in the manner pointed out by the Judicature Act, 1873, s. 24, sub-s. 5. Ord. XXVII. r. 15, is designed to enable judgments by default to be set aside by those who have or who can acquire a locus standi, and does not give a locus standi to those who have none. *Jacques v. Harrison*, 12 Q. B. D. 165; 53 L. J., Q. B. 137; 50 L. T. 246; 32 W. R. 471—C. A.

Frivolous Applications to Impeach—Form of Order.]—Repeated frivolous applications for the purpose of impeaching a judgment having been made by the same parties, the Court of Appeal made an order prohibiting any further application without leave of the court. *Grepe v. Loam*, 37 Ch. D. 168; 57 L. J., Ch. 435; 58 L. T. 100—C. A.

Setting aside—When Irregularly obtained.]—Where a plaintiff has obtained judgment irregularly, the defendant is entitled ex debito justitiæ to have such judgment set aside; and the court has only power to impose terms upon him as a condition of giving him his costs. *Antaby v. Prætorius*, 20 Q. B. D. 764; 57 L. J., Q. B. 287; 58 L. T. 671; 36 W. R. 487—C. A.

—Consent Order—Powers of Court and Parties by Consent.]—The owners of the B. sued the owners of the C. for a collision. In the course of the trial a compromise was arrived at, whereupon the court made an order by consent dismissing the action, including a counter-claim, without costs. The owners of the cargo on the B. then sued the owners of the C., and obtained a judgment, declaring both ships to blame. The owners of the C. began a suit to limit their liability, and paid the limitation fund into court. Subsequently, the owners of the B., with the consent of the owners of the C., obtained on summons, without application to the court, an order in the registry setting aside the first order, and made a claim upon the fund in court:—Held, that the second order was invalid, and did not operate to set aside the first order, which was a judgment of the court, and therefore that, as the owners of B. had no claim against the owners of the C., the claim was rightly disallowed. Whether in the absence of fraud the court itself could have set aside the first order, *quære*. *The Belleairn*, 10 P. D. 161; 55 L. J., P. 3; 53 L. T. 686; 34 W. R. 55—C. A.

—Obtained by Collusion.]—D., the residuary legatee of Mrs. Y., brought an action for administration of Mrs. Y.'s estate against R., the surviving executor. Mrs. Y. had been the surviving executrix of her husband. V., one of the residuary legatees of the husband, shortly afterwards brought her action against R. as sole defendant, for administration of the husband's estate, alleging breaches of trust by Mrs. Y., and asking administration of her estate, if R. as

her representative did not admit assets to pay what should be found due from her estate to the husband's estate. On the 28th February V. moved for judgment. There was no evidence before the court that Mrs. Y. was indebted to her husband's estate, or that she had been guilty of wilful neglect or default. R. by his counsel admitted that she was so indebted, and he submitted to a judgment, directing an account of personal estate of the husband, which she had received with an inquiry as to the balances in her hands, and directing administration of her estate. It appeared that from information R. had received, he felt sure that Mrs. Y. would be found a debtor to her husband's estate, and that it would be advisable to submit to the judgment, so as not to incur costs. D. on the 26th of June moved to discharge or vary the judgment of 28th February:—Held, that although R. might have acted injudiciously in submitting in February, 1885, to an order which went further than any order that could have been made adversely on the materials before the court, the order could not be discharged unless the court was satisfied that R. had submitted to it fraudulently in collusion with V., and in this case the court was satisfied that R. had acted *bonâ fide*. *Youngs, In re, Doggett v. Revett, Vollum v. Revett*, 30 Ch. D. 421; 53 L. T. 682—C. A.

—Judgment in Default of Defence.]—An order was made on the defendant in an action to produce certain documents for inspection. The defendant wilfully refused production, and accordingly an order was made under Ord. XXXI. r. 21, to strike out the defence, and judgment was given against the defendant in default of pleading. On an application by the defendant, under Ord. XXVII. r. 15, the court refused to set aside the judgment. *Haigh v. Haigh*, 31 Ch. D. 478; 55 L. J., Ch. 190; 53 L. T. 863; 34 W. R. 120—Pearson, J.

—Proceedings instituted without Authority—Time for Application.]—Where a shipowner applied to the court to set aside an order condemning him in the costs of unsuccessful legal proceedings taken in his behalf by the managing owner, on the ground that the proceedings had been instituted without his knowledge, consent, or ratification, and that the first intimation he had of the proceedings was a notice received by him about a month previous to the present application, condemning him in the costs of such proceedings:—The court refused to grant the application, as it did not appear that the applicant, though he had no knowledge of the institution of, was not aware of the pendency of, the proceedings; and because he had not at once applied to the court on becoming aware of the proceedings, instead of delaying to take any steps for over a month. *The Belleairn*, 54 L. T. 544; 5 Asp. M. C. 582—Butt, J.

Correction of Error—Accidental Slip.]—The court has jurisdiction to correct an error in a judgment arising from an accidental slip, although the time for appealing from the judgment has expired. At the trial the judgment allowed the defendant to set off a sum named for interest paid on account of the plaintiff. The amount was arranged between the parties on the faith of a statement made *bonâ fide* by the defen-

dant, and accepted by the plaintiff as accurate, that the defendant had made the payments of interest from a certain date. After the judgment had been drawn up and the time for appealing had expired, the plaintiff found that the interest allowed by the judgment had for two years already been allowed to the defendant in account:—Held, that there was jurisdiction under Ord. XXVIII., r. 11, to correct the error. *Barker v. Purvis*, 56 L. T. 131—C. A.

Variation of—Facts known before Trial.]—On the hearing of a partnership action judgment was pronounced declaring the dissolution of the partnership, and directing the usual accounts to be taken, but no direction as to return of the premium paid by the plaintiff was given or asked for by him. The plaintiff subsequently applied to the court that an inquiry should be made or direction given as to return of premium. It did not appear that any further facts had come to the knowledge of the plaintiff other than those which were known to him and put in evidence on the hearing of the action:—Held, that the relief sought was supplemental relief in the nature of equitable damages, and that, in the absence of evidence that new facts had come to the knowledge of the plaintiff, the court, in the exercise of its discretion, ought not to entertain the application. *Edmonds v. Robinson*, 29 Ch. D. 170; 54 L. J., Ch. 586; 52 L. T. 339; 33 W. R. 471—Kay, J.

Judgment passed and Entered—Jurisdiction to Amend.]—The court has inherent jurisdiction to correct mistakes in the record of its judgments. Where the judgment does not correctly represent what was actually decided by the court, the court has jurisdiction to amend the judgment, although it has been passed and entered. But the proper course is to move to vary the minutes after they have been settled, and before they have been passed and entered; and, if this course is not followed, the judgment will be afterwards amended only under special circumstances, and on the terms of the applicant paying all the costs. *Swire, In re, Mellor v. Swire*, 30 Ch. D. 239; 53 L. T. 205; 33 W. R. 785—C. A.

17. EXECUTION.—See EXECUTION.

18. ATTACHMENT.—See ATTACHMENT.

19. MOTIONS, SUMMONSES, PETITIONS, AND ORDERS.

a. MOTIONS.

Specially constituted Court—Public Interest.]—The Divisional Court will decline to specially constitute a court to hear a motion for a rule to show cause, which, it is alleged, involves questions of great constitutional importance and public interest, although it might specially constitute a court to hear the rule argued on the question of its being made absolute. *Lewis, Ex parte*, 52 J. P. 264—D.

Notice of Motion—Notice for a Day not in the Sittings.]—A notice of motion was given for a

day not in the sittings of the court:—Held, that the notice was good. *Daubney v. Shuttleworth* (1 Ex. D. 53), overruled on this point. *Coulton, In re, Hamling v. Elliott*, 34 Ch. D. 22; 56 L. J., Ch. 312; 55 L. T. 464; 35 W. R. 49—C. A.

— Amendment of.]—A notice of motion having been given for a day not in the sittings, the court amended the notice in this respect. *Williams v. De Boinville*, 17 Q. B. D. 180; 54 L. T. 732; 34 W. R. 702—D.

A notice of appeal by motion from the order of a judge in chambers to a divisional court is bad if the day for which it is given falls at a time when no court could by any possibility be sitting. *Maullin v. Rogers*, 55 L. J., Q. B. 377; 55 L. T. 121; 34 W. R. 592—D. But see preceding cases.

On an application for an interlocutory injunction, the court, on being satisfied that under the circumstances no injustice would be done, gave leave to amend by claiming a receiver. *Hubback v. Helms*, 56 L. J., Ch. 536; 56 L. T. 232; 35 W. R. 574—Stirling, J.

On motion for judgment in default of defence, a defence has been put in before the hearing, but as it disclosed no real grounds of defence, the court ordered the notice of motion to be amended by making it a motion for judgment on admissions in the defence. *Gill v. Woodfin*, 25 Ch. D. 707; 53 L. J., Ch. 617; 50 L. T. 490; 32 W. R. 393—C. A.

— Form of.]—A notice that the court will be moved at the Royal Courts of Justice is sufficient, though the judge be sitting in chambers. *Petty v. Daniel*, 34 Ch. D. 172; 56 L. J., Ch. 192; 55 L. T. 745; 35 W. R. 151—Kay, J.

Affidavit not Served with Notice of Motion.]—A notice of motion to set aside an award, which would expire on the last day of the sittings next after such award, was served without any copy of the affidavit in support of the application:—Held, that though the court may not have power to enlarge the time for making the application under Ord. LXIV. r. 7, there is power under Ord. LXX. r. 1, to hear the application, although the time has expired, if the court deem fit. *Wiggston Hospital and Stephenson, In re*, 54 L. J., Q. B. 248; 52 L. T. 101; 33 W. R. 551—D. See also ATTACHMENT, I.

— Summons or Motion.]—The court had granted an injunction restraining the defendants from polluting a stream, but suspended the order for three months. The plaintiff, soon after the expiration of that period, served them with notice of motion under Ord. XLIII. r. 31, for leave to issue sequestration. The defendants contended that copies of the affidavits intended to be used had not been served with the notice of motion, and that the application for leave, if necessary, ought to have been by summons in chambers:—Held, that copies of affidavits need only be served with the notice of motion in cases where the liberty of the subject is involved, as in attachment, and that under the circumstances, the plaintiff was right to move the court in the first instance, instead of proceeding by summons in chambers. *Selous v. Croydon*

Rural Sanitary Authority, 53 L. T. 209—Chitty, J.

Further Evidence after Hearing in Chambers.]

—After a summons has been heard by the judge personally in chambers, and he has given his decision upon it, further evidence, which was not before him in chambers, will not be received upon a motion in court to discharge the order made in chambers. *Munn and Longden, In re*, 50 L. T. 356—Kay, J.

Motion for Injunction — No Statement of Claim.]—Semble, where a motion for an injunction is treated as the hearing of the action, and there is no statement of claim, the plaintiff is precluded from asking relief on any ground not specifically claimed by the writ. *Serff v. Acton Local Board*, 54 L. T. 379—Pearson, J.

Order made subject to Affidavit of Service.]—

An order dismissing an action for want of prosecution was made subject to production of an affidavit of service, no one appearing for the plaintiff. Shortly afterwards counsel appeared for the plaintiff, but the judge refused to have the case argued. No affidavit of service was sworn or filed until after the day on which the motion was made. The registrar drew up the order on production of an office copy of an affidavit of service sworn and filed after that day, omitting in the order the date of the affidavit. It appeared that since the passing of the Judicature Acts the rule in *Lord Milltown v. Stuart* (8 Sim. 34) had not been uniformly observed by the registrars:—Held that, assuming the drawing up of the order on an affidavit sworn and filed after the day on which the motion was made to be irregular, the irregularity was not such that the court ought on that ground to discharge the order. *Seaar v. Webb*, 25 Ch. D. 84; 53 L. J., Ch. 464; 49 L. T. 481; 32 W. R. 351—C. A.

For Attachment of the Person.]—See ATTACHMENT, I.

To Dismiss for want of Prosecution.]—See ante, col. 1448.

For Judgment in Default of Pleading.]—See post, col. 1506.

For Judgment on Admissions in Pleadings.]—See ante, cols. 1477, 1478.

b. SUMMONS.

i. Service of.

On Foreigner out of the Jurisdiction.]—The plaintiff having obtained judgment against the defendant, a foreigner resident out of the jurisdiction, a summons was issued by leave of a judge at chambers calling on the defendant to show cause why a receiver should not be appointed. On an application for leave to serve this summons on the defendant out of the jurisdiction:—Held, that there was no jurisdiction to grant such leave. *Weldon v. Gounod*, 15 Q. B. D. 622—D.

Leave will not be given to serve a summons for taxation of costs upon a foreigner out of the

jurisdiction. *Brandon, Ex parte, Bouron, In re*, 54 L. T. 128; 34 W. R. 352—D.

Where the plaintiffs sued for goods in the possession of the defendant, and it appeared that a foreigner residing out of the jurisdiction claimed the right to the same goods, and would probably sue the defendant in respect of them, the court gave the defendant leave to serve an interpleader summons out of the jurisdiction upon the foreigner. The effect of service out of the jurisdiction in such a case is to give the foreigner notice of the proceedings within the jurisdiction, so that he may appear and prosecute his claim, or, if he does not appear, so that any future claim prosecuted by him against the defendant in respect of the subject-matter of the action within the jurisdiction may be barred. *Credits Gerundeuse v. Van Weede*, 12 Q. B. D. 171; 53 L. J., Q. B. 142; 32 W. R. 414; 48 J. P. 184—D.

Of Originating Summons.]—See infra.

ii. Originating Summons.

a. Service of.

Similar to Service of Writs.]—In an administration action commenced by originating summons under Ord. L.V. rr. 3 and 4, of the Rules of Court, 1883, the defendant being a person of sound mind not so found by inquisition, the summons was served, as required for writs by Ord. IX. r. 5, of the same rules, on the person under whose care the person of unsound mind was. No appearance was made by the defendant on return of the summons, and none was entered. Notice of motion was served for the appointment of a guardian ad litem, as required by Ord. XIII. r. 1, of the same rules in case of default of appearance to writs. The court, holding that the rules as to the service of writs applied to an originating summons, made an order appointing a guardian ad litem. *Pepper, In re, Pepper v. Pepper*, 53 L. J., Ch. 1054; 50 L. T. 580; 32 W. R. 765—V.-C. B.

Out of the Jurisdiction.]—Where an originating summons was taken out by an executor for the purpose of deciding the question of the domicile of a testator, and the widow and one adult child and two infants were separately represented by counsel; but one adult child C. B. was in Calcutta and could not be served, and the property was of great value; the court refused to decide the question in the absence of C. B., but gave leave to issue a writ, and gave leave to serve the writ out of the jurisdiction, and to serve notice of motion on C. B. in Calcutta, in order to have a declaration deciding the question, the evidence on the summons to be used on the motion. *Bullen-Smith, In re, Berners v. Bullen-Smith*, 57 L. T. 924—Kay, J.

The court cannot order service of an originating summons out of the jurisdiction. *Busfield, In re, Whaley v. Busfield*, 32 Ch. D. 123; 55 L. J., Ch. 467; 54 L. T. 220; 34 W. R. 372—C. A.

B. Jurisdiction.

Objection to—Time for—Costs.]—An objection to the jurisdiction upon an originating summons

having been taken by the defendants for the first time after the hearing of the summons had been adjourned into court:—Held, that the objection ought to have been taken in chambers, and that, though the objection was good, and the summons must be dismissed with costs, the defendants could not be allowed the costs of the adjournment into court. *Davies, In re, Davies v. Davies*, *infra*.

Determination of Questions at issue in Action.]

—Except to the extent to which special provisions are made by the rules, as, for instance, by Ord. XV., the plaintiff in an action is not entitled to take out a summons for the determination of the questions which are at issue in the action, and which will properly be decided at the trial. *Borthwick v. Ransford*, 28 Ch. D. 79; 54 L. J., Ch. 569; 33 W. R. 161—Pearson, J.

Question between Legal Devisees.]—Upon an originating summons under r. 3 of Ord. LV. of the Rules of Supreme Court, 1883, there is jurisdiction to determine such questions only as before the existence of that rule could have been determined under a judgment for the administration of an estate or execution of a trust. Consequently, there is no jurisdiction upon an originating summons to decide a question arising between legal beneficial devisees under a will. *Davies, In re, Davies v. Davies*, 38 Ch. D. 210; 57 L. J., Ch. 759; 58 L. T. 312; 36 W. R. 587—North, J.

Question affecting Person claiming adversely to Will.]—The court has no jurisdiction, on an originating summons under rule 3 of Ord. LV. of the Rules of Court, 1883, to determine a question affecting a person claiming adversely to the will of a deceased person. *Bridge, In re, Franks v. Worth*, 56 L. J., Ch. 779; 56 L. T. 726; 35 W. R. 663—Kay, J.

Construction of Will—Settlement.]—H. devised lands to T. in terms which raised a question whether the lands passed to T. in fee or for life only, with remainder to A. as tenant in tail under a prior settlement, the legal estate in the lands passing direct to the devisee or devisees, and there being no trustees of the will. H. died in 1863. T. died in 1884, having devised his real estate to trustees. A. executed a disentailing deed and a re-settlement of his estate. The trustees of T.'s will took out an originating summons under Ord. LV. r. 3, making A. and the trustees of his re-settlement defendants, for the determination of the questions whether the lands devised by the will of H. passed to T. in fee, and thence to the trustees of his will, or whether they belonged to T. for life only with remainder to A. in tail, and if so, were included in A.'s re-settlement:—Held, that Ord. LV. r. 3, did not apply to the case, and that the court had no jurisdiction to determine the questions upon an originating summons. *Carlyon, In re, Carlyon v. Carlyon*, 56 L. J., Ch. 219; 56 L. T. 151; 35 W. R. 155—North, J.

Appointment of Receiver.]—Semble, that a receiver may be appointed upon an originating summons. *Gee v. Bell*, 35 Ch. D. 160; 56 L. J., Ch. 718; 56 L. T. 305; 35 W. R. 805—North, J.

In an administration action, commenced by

originating summons, a receiver may (in a proper case) be appointed immediately after the service of the summons and before any order for administration has been made. *Francke, In re, Drake v. Francke*, 57 L. J., Ch. 437; 58 L. T. 305—North, J.

A mortgagee issued a writ asking for the usual order for foreclosure, and moved for the appointment of a receiver, and on the motion being heard, a receiver was appointed. A statement of claim was delivered, but the mortgagor having become bankrupt, the plaintiff withdrew his claim for payment:—Held, that the plaintiff should have proceeded by originating summons. *Barr v. Harding*, 58 L. T. 74; 36 W. R. 216—Kay, J.

To set aside Release.]—Two legatees having alleged that they had been induced to execute a release, indemnifying the executors of a testator's estate, without having had independent advice:—Held, that they were entitled to take out an originating summons under Ord. LV. r. 3, of the Rules of Court, 1883, to have the release set aside, the question of the validity of the release being one "arising in the administration of the estate" and "affecting" the rights of the legatees within the meaning of that order. *Garnett, In re, Gandy v. Macaulay*, 50 L. T. 172; 32 W. R. 474—V.-C. B.

The court, in its discretion, will not allow a claim which involves setting aside a release to be determined on an originating summons, but will require a writ to be issued. *Ellis' Trusts, In re, Nelson v. Ellis*, 59 L. T. 924; 37 W. R. 91—Kay, J.

Direction to Trustees.]—An originating summons ought not to be taken out under Ord. LV. r. 3, for the purpose of obtaining a direction to trustees to do or abstain from doing an act which is outside the scope of their trusts. *Suffolk v. Laurence*, 32 W. R. 899—Pearson, J.

Payment of Moneys into Court—Wilful Default of Trustees.]—An originating summons was taken out under Ord. LV. of the Rules of Court, 1883, by one of the residuary legatees under the will of a testator, against the executors and trustees thereof, asking that certain questions or matters arising in the administration of the estate of the testator might be determined and relief given in respect thereof. The summons asked that a sum of stock standing in the names of the trustees might be transferred into court; that a mortgage deed for securing the payment of a sum forming part of the testator's estate might be deposited in court; that the trustees might be ordered to pay into court a sum forming part of the estate and improperly used by them in their respective businesses; for proper accounts; a declaration of the rights and interests of the persons beneficially entitled; that so far as might be necessary for the purposes aforesaid the estate might be administered by the court; and that the trustees might be ordered to pay the costs. It was objected that the case ought to have been commenced by a writ in an action, inasmuch as trustees could not properly be charged with wilful default by an originating summons:—Held, that the court had jurisdiction, upon an originating summons, to order payment into court of moneys which have been received

by trustees and improperly applied by them; and therefore to grant the relief asked for in the present case. *Chapman, In re, Fardell v. Chapman*, 54 L. T. 13—Kay, J.

Question whether Defendant Co-trustee with Plaintiff.]—The plaintiff claimed, by action, that it might be determined whether the defendant was co-trustee with him of a settlement under which both of them had been appointed trustees, and that a new trustee might be appointed in the defendant's place. The defendant denied that he had ever accepted the trusts or acted as trustee, or that he had refused to concur in the appointment of a trustee in his place; and it was objected that the application ought to have been by originating summons:—Held, that relief could not have been granted under an originating summons, and that the plaintiff had rightly proceeded by action and was entitled to his costs thereof. *Elworthy v. Harvey*, 60 L. T. 30; 37 W. R. 164—Kekewich, J.

Appointment of New Trustees.]—Upon an originating summons asking for general administration of an estate and the appointment of new trustees, the court can make an order for the appointment of new trustees, all the parties interested in the appointment being before the court. *Allen, In re, Simes v. Simes*, 56 L. J., Ch. 779; 56 L. T. 611—Stirling, J.

The court has no jurisdiction, upon an originating summons in chambers, to make an order appointing new trustees, and vesting in them the trust estate. *Gill, In re, Smith v. Gill*, 53 L. T. 623; 34 W. R. 134—Kay, J., and see *Elworthy v. Harvey*, supra.

Approval of Sale by Court.]—Under r. 3 (f) of Ord. LV. the court can only approve of a sale which the executors or trustees of the will or deed to which the originating summons relates could have made themselves. *Robinson, In re, Pickard v. Wheeler*, infra.

c. PETITIONS.

Service out of Jurisdiction.—Payment out of Court.]—Where some of the persons entitled to certain funds in court were residing out of the jurisdiction, and it was impossible to deal with such funds unless a petition, which had been presented asking for payment out of a portion thereof, was served upon such persons, the court gave liberty to serve the petition, together with a copy of the order, upon them. *Colls v. Robins*, 55 L. T. 479—Kay, J.

The court has no jurisdiction to allow service out of the jurisdiction of a petition under the Trustee Relief Act for payment of money out of court. *Gordon's Settlement Trusts, In re* (W. N. 1887, p. 192), not followed. On appeal from this decision, it appearing that the order sought by the petition was only for carrying into full effect an order which had recently been obtained by the respondents, the Court of Appeal, without deciding that leave was necessary, gave leave to serve the petition on the solicitors who had presented the former petition, and who were willing to accept service. *Jellard, In re*, 39 Ch. D. 424; 60 L. T. 83—North, J., and C. A.

Petition or Summons for Payment out of Court.]—See ante, col. 1430, and LANDS CLAUSES ACT, III. 3.

d. ORDERS.

Enforcing Undertaking.]—At the trial of an action for specific performance of an agreement to make a road, the defendant gave an undertaking that he would complete the road in question. An order was subsequently made, fixing a date by which the road was to be completed. This not having been done, the plaintiff moved, under Order XLII. r. 30, for an order that he might be at liberty to complete the road himself at the cost of the defendant:—Held, that the case did not fall within the rule, but nevertheless, the court would enforce the undertaking by permitting the plaintiff to do the works, with liberty to apply that the defendant should pay the expenses so incurred in completing the road. *Mortimer v. Wilson*, 33 W. R. 927—North, J.

Jurisdiction to make Declaratory Order.]—Under Ord. XXV., r. 5, the court has now jurisdiction to make a declaratory order, though no consequential relief is claimed; but such jurisdiction will be exercised with great caution. *Austen v. Collins*, 54 L. T. 903—Chitty, J.

Sale of Real Estate.—“Cause or Matter relating to Real Estate”—Ord. LI., r. 1.]—An action was brought by the infant heir-at-law (by a next friend) of an intestate against the widow, who was the administratrix, claiming accounts of the personal estate, and of the rents and profits of the real estate received by the defendant. The action came on for hearing on motion for judgment, and the court was asked under Ord. LI., r. 1, to make an order for the sale of the real estate. The defendant did not object:—Held, that this was not “a cause or matter relating to real estate” within the meaning of the rule, and that the court could not order a sale under that rule. But, upon a summons under the Settled Land Act, a sale was ordered. *Staines, In re, Staines v. Staines*, 33 Ch. D. 172; 55 L. J., Ch. 913; 35 W. R. 75—North, J.

Under r. 1 of Ord. LI. the court has power to order a sale of real estate only when it is necessary or expedient for the purposes of the action before it that the property should be sold. No new power to order a sale is conferred. *Robinson, In re, Pickard v. Wheeler*, 31 Ch. D. 247; 55 L. J., Ch. 307; 53 L. T. 865—Pearson, J.

Where property consisted of agricultural land in Norfolk which was much depreciated in value, the court refused to order the estate to be sold under Rules of Court, 1883, Ord. LI. r. 1, for the purpose of paying the costs of a petition action, in which a declaration of the rights of the parties entitled had been obtained, and a receiver appointed against their father, who had previously been in possession and refused to account, but directed the receiver to apply any funds in his hands after keeping down incumbrances in payment of costs. *Miles v. Jarvis*, 50 L. T. 48—Kay, J.

— Misrepresentation and Concealment of Facts by Purchaser.]—The proposition laid down by the Court of Appeal, that “a person desirous of buying property which is being sold under the direction of the court must either abstain from

laying any information before the court in order to obtain its approval, or must lay before it all the information he possesses, and which it is material that the court should have to enable it to form a judgment on the subject under its consideration," is too broadly stated. It does not follow that because information on some material point or points is offered, or is given on request, by a purchaser from the court, it must therefore be given on all others as to which it is neither offered nor requested, and concerning which there is no implied representation, positive or negative, direct or indirect, in what is actually stated. *Coaks v. Boswell*, 11 App. Cas. 232; 55 L. J., Ch. 761; 55 L. T. 32—H. L. (E.). Reversing 33 W. R. 376—C. A.

— **Leave to Bid—Solicitor.**—Leave to bid at a sale by the court, granted to a solicitor on the record, relieves him from his fiduciary character, and places him in the same position as an ordinary purchaser. *Id.*

— **By Consent—Form.**—Where an order has been agreed to and arranged between the parties to an action, and has not been sanctioned or directed by the court, it should appear on the face of the order that it is an order by consent. *Michel v. Mutch*, 55 L. J., Ch. 485; 54 L. T. 45; 34 W. R. 251—Chitty, J.

— **Facts not mentioned to Court—Withdrawal of Consent.**—An action was brought against a local board to restrain them from pulling down certain houses of the plaintiff's, and for damages. On a motion for an injunction coming on, the defendants' counsel, by the authority of his clients, consented to an order for a perpetual injunction, with costs, and an inquiry as to damages, and such order was taken by consent without opening the case to the court. Before the order had been passed, the defendants formally withdrew their consent, and the registrar thereupon declined to pass the order without the direction of the court. The plaintiff moved that he might be directed to proceed to perfect the order. The defendants alleged that their instructions to consent had been given under a misapprehension, but did not enter into any evidence in support of that allegation.—Held, that where counsel by the authority of their clients consent to an order, the clients cannot arbitrarily withdraw such consent, and that the registrar must be directed to proceed to perfect the order, without prejudice to any application which the defendants might make to the court below to be relieved from their consent, on the ground of mistake or surprise, or for other sufficient reason. *Harvey v. Croydon Union Rural Sanitary Authority*, 26 Ch. D. 249; 53 L. J., Ch. 707; 50 L. T. 291; 32 W. R. 389—C. A.

— **Withdrawal of Consent—Mistake or Surprise.**—An action was brought for an injunction to restrain the defendant from selling certain buttons alleged to be an infringement of the plaintiffs' registered trade-mark. The defendant, believing that he had no defence to the action, consented to an order for a perpetual injunction with costs. Before the order was drawn up, he received a letter from the manufacturer of the buttons, which were made in Germany, wherefrom it appeared that the

buttons had been sold in this country long before the registration of the plaintiffs' trade-mark. On motion by the defendant that he might be relieved from the consent so given:—Held, that a party who has deliberately consented to a perpetual injunction cannot be permitted to withdraw his consent merely because he has subsequently discovered that he might have a good defence to the action; that the case was not one of mistake; and that the motion must be refused. *Elzas v. Williams*, 54 L. J., Ch. 336; 52 L. T. 39—Kay, J.

— **Rectification—Costs.**—On the 31st Jan. the defendants in an action obtained an ex parte injunction against the plaintiffs until the 4th Feb. On the 4th Feb. a motion was made to commit the plaintiffs. The order on the motion to commit as drawn up by the registrar recited the ex parte injunction and the affidavits in support of it, but contained no order as to costs, except that the plaintiffs were to pay the costs of the motion, and the taxing-master disallowed the costs of the ex parte motion accordingly:—Held, that the court had power under Ord. XXVIII., r. 11, to correct the order made on the 4th Feb. by adding thereto a direction for taxation and payment by the plaintiffs of the defendants' costs of the ex parte order of the 31st Jan. *Blakey v. Hall*, 56 L. J., Ch. 568; 56 L. T. 400; 35 W. R. 592—Chitty, J.

— **Mistake—Misrepresentation.**—Where a wrong order has been made by reason of misrepresentation or mistake of fact, the error may be corrected by a new order made notwithstanding the former order. *Stanier v. Evans*, 34 Ch. D. 470; 56 L. J., Ch. 581; 56 L. T. 87; 35 W. R. 286—North, J.

— **Amendment of Error after Order passed and entered.**—The plaintiffs in a foreclosure action applied by summons under Ord. XV. r. 1, for an account. The chief clerk pronounced the usual order for an account and foreclosure. The defendants objected to the direction for foreclosure, and the plaintiffs assenting, the order was drawn up for an account only, and was passed and entered in that form. When the parties came before the chief clerk to proceed with the account, he objected to the order as not being the one he had pronounced, and refused to proceed with the account. Subsequently the registrar at the instance of the chief clerk, without any motion or summons, altered the order by adding the usual directions for foreclosure. The defendants moved to strike out the additions. Kay, J., declined to do so, as he considered that the parties were not at liberty to have an order drawn up, different from the order pronounced, without applying to the court for the purpose; but, being of opinion that the addition had been irregularly made, he stayed proceedings under the existing order, giving the plaintiffs liberty to apply for a fresh order for accounts and foreclosure. The defendants appealed:—Held, that assuming the order as passed and entered to contain an error arising from an accidental slip or omission, an alteration made in it without any motion or summons for the purpose was irregular, and must be discharged, and that the plaintiffs must pay the costs, as they ought to have applied to the judge when the chief clerk refused to proceed with

the accounts. *Blake v. Harvey*, 29 Ch. D. 827; 53 L. T. 541; 33 W. R. 602—C. A.

Scotch Court—Enrolment in Chancery Division.]—On a petition of course the registrar made an order directing enrolment in the Chancery Division of a decree of the Court of Session in Edinburgh, sequestrating the estate of the company, appointing a judicial factor, and ordering delivery of the books of the company:—Held, that there was no authority either by statute or custom for making such an order, and that the enrolment must be vacated. *Dundee Suburban Railway, In re*, 58 L. J., Ch. 5; 59 L. T. 720; 37 W. R. 50—Kay, J.

To execute Deeds.]—An order may be made on a party to an action to execute a conveyance of lands directed to be sold in such action, although the conveyance has not been settled at chambers. *Dougherty v. Teaz*, 21 L. R., Ir. 379—V. C.

—Non-Compliance—Who appointed.]—The Probate Division has jurisdiction under s. 14 of the Judicature Act, 1884, in the event of any person neglecting or refusing to obey its order to execute a deed, to direct its execution by any other person whom it may nominate for the purpose. *Howarth v. Howarth*, 11 P. D. 95; 55 L. J., P. 49; 55 L. T. 303; 34 W. R. 633—C. A. Affirming 50 J. P. 376—Hannen, P.

Where a defendant refused to obey an order, directing her to execute a mortgage, the judge appointed his chief clerk to execute it under s. 14 of the Judicature Act, 1884. *Edwards, In re, Owen v. Edwards*, 33 W. R. 578—Pearson, J.

Compromise of Divorce Action—Power to make Agreement an Order of Queen's Bench Division.]—An action for judicial separation in the Divorce Division was compromised by the parties, and an agreement of compromise signed by them which provided that a separation deed should be executed; that the agreement might be made a rule of the High Court, and that the respondent should pay the petitioner's taxed costs. A separation deed was afterwards executed, but the respondent refused to pay the taxed costs, and the agreement was made an order of the Queen's Bench Division for the purpose of enforcing payment:—Held, that there was power to make the agreement an order of court in the Queen's Bench Division, and that as the agreement of compromise had been reduced to an agreement to pay costs, the discretion of the court to make the order had been rightly exercised. *Smythe v. Smythe*, 18 Q. B. D. 544; 56 L. J., Q. B. 217; 56 L. T. 197; 35 W. R. 346—D.

Execution—Service of Order and Certificate.]—A. obtained a common order for taxation of the costs of his former solicitor B., the order directing payment by A. to B. of the amount of the taxed costs within twenty-one days after the service of the order and of the certificate of taxation. The order and certificate were served, not on A. personally, but on the solicitor then acting for him in the taxation. A. failed to pay the amount within twenty-one days after service of the order and certificate on the solicitor, and B. applied for the issue of a writ of *fi. fa.* against A. for the

amount, but the officer of the court refused to issue the writ, on the ground that A. had not been personally served with the order and certificate:—Held, that B. might have the writ at his own risk, without service of the order and certificate on A. personally. *Solicitor, In re*, 33 W. R. 131—Pearson, J.

20. PROCEEDINGS IN CHAMBERS.

a. JUDGE AT CHAMBERS.

Jurisdiction of Judge—Prohibition.]—A judge sitting at chambers has jurisdiction to set aside a writ of prohibition issued out of the Petty Bag Office. *Salm Kyrburg v. Posnanski* (13 Q. B. D. 218) followed. *Amstell v. Lesner*, 16 Q. B. D. 187; 55 L. J., Q. B. 114; 53 L. T. 759; 34 W. R. 230—D.

—Attachment.]—A judge at chambers has power to give leave to issue a writ of attachment. *Salm Kyrburg v. Posnanski*, 13 Q. B. D. 218; 53 L. J., Q. B. 428; 32 W. R. 752—D.

Motion to Discharge Order — Counsel — Appeal.]—When an order has been made by a judge in chambers, the court has no power to alter that order unless upon motion, under s. 50 of the Judicature Act, 1873, to discharge the order. Where all parties concerned have been represented by counsel in chambers, the practice is for the chief clerk to give a certificate, and upon that the parties may go direct to the Court of Appeal. *Attorney-General v. Llewellyn*, 58 L. T. 367—Kay, J.

Fees on entering Appeal.]—See *infra*, 21.

Appeal from Judge in Chambers.]—See APPEAL, IV.

b. MASTER AT CHAMBERS.

Reference to Master to Report.]—See ARBITRATION, III.

Jurisdiction of Master to stay Execution pending Appeal.]—A master has jurisdiction under Ord. LVIII. r. 16, to stay execution on a judgment pending an appeal to the Court of Appeal. *Oppert v. Beaumont*, 18 Q. B. D. 435; 56 L. J., Q. B. 216; 35 W. R. 266—C. A.

c. CHIEF CLERK.

Jurisdiction—Summons for General Administration.]—The proviso in Ord. LV. r. 15, that no judgment or order for general administration shall be made under r. 4 of that order by the chief clerk, extends to orders for general administration of trusts constituted by deed. *Davidson v. Young*, 54 L. J., Ch. 747—Chitty, J.

—Inquiry as to Debts—Purchase of Debts by Plaintiff's Solicitor.]—The solicitor to the plaintiff in a creditor's action bought up debts; the estate was insolvent:—Held, that the question whether the solicitor was trustee for the creditors of any profit on the purchase could not be raised by the certificate of the chief clerk, in the absence of any direction on the subject in

the order under which the certificate was made. *Tillet, In re, Field v. Lydall*, 32 Ch. D. 639; 55 L. J., Ch. 841; 54 L. T. 604; 35 W. R. 6—North, J.

Varying Certificate of—Summons.—On an application upon the further consideration of an action for an extension of the time, under rule 71 of Ord. LV. for applying to vary a finding in a chief clerk's certificate:—Held, that the applicant should take out a summons for the purpose. *Dove, In re, Bousfield v. Dove*, 27 Ch. D. 687; 53 L. J., Ch. 1099; 33 W. R. 197—Pearson, J.

Money found Due—Motion for Payment—Time.—The chief clerk, by his certificate, found that a certain sum was due from the defendants as occupation rent. Before the certificate had become binding on the defendants the plaintiffs moved for leave for the receiver in the action to distrain for the rent, or that the defendants should give some security:—Held, that the motion must stand over until the certificate had become binding. *Craven v. Ingham*, 58 L. T. 486—Stirling, J.

Appeal to Judge.—See APPEAL. V.

21. COURT FEES.

“Entering Cause or Matter for Trial or Hearing”—Rule to Justices.—Under the order as to Supreme Court Fees, 1884, Schedule 52—which directs that a fee of 2*l.* shall be paid on entering or setting down, or re-entering or re-setting down an appeal to the Court of Appeal, or a cause or matter for trial or hearing in any court in London or Middlesex, or at any assizes—such fee is payable though the matter for hearing does not arise in an action, as in the case of a rule nisi against a justice under 11 & 12 Vict. c. 44, s. 5. *Hasher, Ex parte*, 14 Q. B. D. 82; 54 L. J., M. C. 94—D.

— Appeals from Chambers.—Schedule 52 of the order as to Supreme Court Fees, 1884, which provides for the payment of a fee of 2*l.* on entering or setting down a cause or matter for trial or hearing, does not apply to appeals from chambers. *Hasher, Ex parte*, supra, distinguished. *Dudley, Ex parte, Solicitor, In re*, 33 W. R. 750—D.

Percentage—Managers' Accounts.—In the case of accounts rendered periodically in chambers by managers of a business, a percentage will be payable, under item 72 of the schedule to the order as to Court Fees, 1884, upon the amounts found to have been received, and not on the amounts found to be due, notwithstanding the use of the words “the amount found to be due” in the note (d) relating to item 72. If an account has been merely lodged, and no further steps are taken with regard to it, no fee will be payable. *Crawshay, In re, Dennis v. Crawshay*, 39 Ch. D. 552; 57 L. J., Ch. 923; 59 L. T. 598; 37 W. R. 25—North, J.

— Sale of Property with Approbation of Judge.—By item No. 69 in the schedule to the

order as to Supreme Court Fees, 1884, it is provided that:—“On the sale or mortgage of any land or hereditaments pursuant to any order directing a sale or mortgage with the approbation of the judge, made in any cause or matter for the purpose of raising money to be dealt with by the court in such cause or matter, for every 100*l.*, or fraction of 100*l.* of the amount raised—2*s.*” It is also provided in the same schedule that: “The amounts for or in respect of which the following fees are payable shall be limited to 200,000*l.* in the following cases: (a) The amount raised at any time or times in the same cause or matter in the cases to which the fee No. 69 is applicable.” Upon a sale by the court of lands and hereditaments belonging to a company in liquidation the purchase moneys of all the lands exceeded 200,000*l.*, and were paid upon a sale made under several orders of court. The question arose between the solicitors of the company and the Treasury whether the limit of 200,000*l.* applied where there were several orders of such a nature as would make the sale fall within item No. 69, or whether it only applied where there was one order:—Held, that the limit of 200,000*l.* applied to cases where the limit had been reached irrespectively of the number of orders under which the sale was effected. *Oriental Bank Corporation, In re*, 56 L. T. 731—Chitty, J.

22. VACATIONS.

Ex parte Order of Vacation Judge—Application to Discharge.—An order was made by the vacation judge, on the ex parte application of the plaintiffs, for service of the writ and notice of motion on the solicitors and at the place of business in England of a foreigner residing out of the jurisdiction. Without formally entering an appearance the defendant filed affidavits in opposition to the motion, and instructed counsel, who opposed the motion on the merits:—Held, that the defendant had thereby waived the right to raise any objection as to the irregularity of the order, and must be treated as if he had been properly served and had formally appeared; that the fact that the ex parte order had been passed and entered did not prevent the right of the defendant to move to discharge it; but that r. 12 of Ord. LXIII. did not apply to such a case, and that the proper mode of proceeding (if there had been no such waiver as aforesaid) would have been to apply, not to the Court of Appeal or the vacation judge, but to the judge to whose court the action was assigned, to discharge the order of the vacation judge. *Boyle v. Sacher*, 39 Ch. D. 249; 58 L. J., Ch. 141; 58 L. T. 822; 37 W. R. 68—C. A.

Appeal to Divisional Court—Time for.—An order was made by the vacation judge in chambers on 11th Sept. and on 1st Oct. the plaintiff gave notice of appeal for the 24th Oct.:—Held, that Order LIV. rule 24, and Order LII. rule 6, applied, and that the plaintiff should have given notice of appeal within five days from the decision appealed against, and that therefore the notice of appeal was out of time. *Steedman v. Hakin*, 59 L. T. 607—D. Affirmed 22 Q. B. D. 16; 58 L. J., Q. B. 57; 37 W. R. 208—C. A.

23. DISTRICT REGISTRY.

Proceedings in.—*See* DISTRICT REGISTRY.

24. SPECIAL CASE.

Power of Railway Commissioners to state.—*See* RAILWAY.

Power of Justices to state.—*See* JUSTICE OF THE PEACE, 6, a.

Appeal to Court of Appeal.—*See* APPEAL, II. 2, c.

Trustees acting under—Protection.—By the combined effect of R. S. C., Ord. XXXIV., r. 8, and the saving clause in the Statute Law Revision Act, 1883, the protection given to trustees and others acting on the declaration of the court on a special case is preserved, notwithstanding the repeal of the Act. *Forster v. Schlesinger*, 54 L. T. 51—Pearson, J.

Costs of.—*See* COSTS, II. 5.

25. STOP-ORDER.

Petition or Summons—Fund in Court exceeding £1,000.—Where a fund in court, paid in under the Trustee Relief Act, 1847, exceeds 1000*l.*, and there has been no prior application in the matter of the fund, a petition and not a summons is the proper mode of applying, under rr. 12 and 13 of Ord. XLVI. of the Rules of Court, 1883, for a stop-order on the fund so paid in. *Toogood's Trusts, In re*, 56 L. T. 703—Chitty, J.

Fund partly in Court and partly in Hands of Trustees—Notice.—When an assignment is made of an interest in a trust fund, part of which is in court and part in the hands of the trustees, the assignee, in order to complete his title, must, as regards the fund in court, obtain a stop-order, and as regards the fund in the hands of trustees, give notice to the trustees. *Mutual Life Assurance Society v. Langley*, 32 Ch. D. 460; 54 L. T. 326—C. A. Affirming 32 W. R. 792—Pearson, J.

Fund in Court—Notice of Prior Incumbrance to Second Incumbrancer.—A second incumbrancer of a fund in court, who at the time of taking his security had notice of the existence of the first incumbrance, cannot, by obtaining a stop-order, gain priority over the first incumbrancer, even although the latter never obtains a stop-order. *Holmes, In re*, 29 Ch. D. 786; 55 L. J., Ch. 33—C. A.

An incumbrancer who obtains a stop-order on a fund in court does not lose his priority over a previous incumbrancer who has obtained no stop-order, by the fact that he had notice of the previous incumbrance at the time of obtaining the stop-order, if he had no notice of it when he took his security. *Elder v. Maclean* (5 W. R. 447) observed upon. *Mutual Life Assurance Society v. Langley*, 32 Ch. D. 460; 54 L. T. 326—C. A.

Order charging Cash standing to Credit in Chancery Division.—A charging order upon cash standing to the credit of the debtor in the

Chancery Division in the name of the Paymaster-General, may be made ex parte, and in order to give effect to it it is not necessary to obtain a stop-order; but notice given to the Paymaster-General will be sufficient to secure priority. *Brereton v. Edwards*, 21 Q. B. D. 488; 60 L. T. 5; 37 W. R. 47—C. A. Affirming on other grounds, 52 J. P. 647—D.

26. TIME—NOTICE TO PROCEED.

In what Cases Applicable.—Where a defendant had failed to appear to a writ indorsed for a liquidated demand and no proceeding had been taken for more than a year after service of the writ:—Held, that the case came within Ord. LXIV. r. 13, and the plaintiff could not enter final judgment under Ord. XIII. r. 3, but was bound to give defendant a month's notice of his intention to proceed. *Webster v. Myer*, 14 Q. B. D. 231; 54 L. J., Q. B. 101; 51 L. T. 560; 33 W. R. 407—C. A.

Power to abridge Time.—Ord. XXXVI. r. 12 provides that, if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the court or a judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the court or a judge to dismiss the action for want of prosecution. Ord. LXIV. r. 7 provides that the court or a judge shall have power to enlarge or abridge the time appointed by the rules, or fixed by any order enlarging time, for doing any act or taking any proceedings, upon such terms (if any) as the justice of the case may require:—Held, that the period of six weeks mentioned in Ord. XXXVI. r. 12, is not a time appointed for doing any act or taking any proceeding within Ord. LXIV. r. 7, and consequently that the court could not make an order giving the defendant leave to give notice of trial, if the plaintiff did not give such notice within a shorter period than six weeks from the close of the pleadings. *Saunders v. Pawley*, 14 Q. B. D. 234; 54 L. J., Q. B. 199; 51 L. T. 903; 33 W. R. 277—D.

27. INTERPLEADER—*See* INTERPLEADER.28. AFFIDAVIT—*See* EVIDENCE.29. EVIDENCE—*See* EVIDENCE.30. COSTS—*See* COSTS.

31. PROCEEDINGS IN PARTICULAR ACTIONS.

a. ACTIONS FOR RECOVERY OF LAND—EJECTMENT.

Pleadings in.—*See* PLEADINGS, infra.

Joinder of Causes of Action.—*See* ante, col. 1423.

By Lunatic.]—See LUNATIC, IV.

Discovery—Privilege.]—See DISCOVERY, I. 4.

Judgment under Ord. XIV.]—See ante, col. 1421.

Relief against Forfeiture.]—See LANDLORD AND TENANT, VI. 2.

Lease by Administratrix—Action by Administrator de bonis non.]—An administratrix made a lease, in 1854, of premises forming portion of the intestate's assets, for a term of twenty-one years. The lease did not purport to be made by her in her representative capacity. The lessee admittedly went into possession under the lease, but never paid any rent. He continued in possession until 1883, when the administrator de bonis non of the intestate brought an ejectment for non-payment of rent. The jury having found that the defendant had continued in possession on the terms of the lease :—Held, that the plaintiff (the administrator de bonis non) was entitled to a verdict for possession and arrears of rent. *Doyle v. Maguire*, 14 L. R., Ir. 24—C. P. D.

Jurisdiction of County Court—Landlord and Tenant.]—See *Friend v. Shaw*, ante, col. 547.

Writ of Possession when Plaintiff's Title has expired.]—Where a landlord has recovered judgment in an action against his tenant for the possession of premises which had been held over after the expiration of the tenancy, he will be allowed to issue the writ of possession notwithstanding that his estate in the premises terminated after the commencement of the action and before the trial, unless it be unjust and futile to issue such writ, and it is for the defendant to show affirmatively that this will be the result of issuing such writ. *Knight v. Clarke*, 15 Q. B. D. 294; 54 L. J., Q. B. 509; 50 J. P. 84—C. A.

b. ADMINISTRATION ACTIONS—See EXECUTOR AND ADMINISTRATOR.

c. PARTITION ACTIONS—See PARTITION.

d. PARTNERSHIP ACTIONS—See PARTNERSHIP.

(B.) Pleadings.

1. GENERALLY.

“Material Facts”—What are.]—With reference to L.'s claim in respect of lights, B. alleged that in another action (a new trial of which was still pending) L. had sworn that the lights in question were not ancient, and was therefore estopped from alleging in the present action that they were ancient :—Held, that the words “material facts” in Ord. XIX. r. 4, do not mean merely facts which must be proved in order to establish the existence of the cause of action, but include also any facts which the party pleading is entitled to prove at the trial, but that the above allegation did not come within this definition, and was calculated to

prejudice the fair trial of the action. *Lumb v. Beaumont*, 49 L. T. 772—Pearson, J.

Rules 4 and 15 of Ord. XIX. apply to such facts as are material to the cause of action or defence, and not to damages. *Wood v. Durham (Earl)*, 21 Q. B. D. 501; 57 L. J., Q. B. 547; 59 L. T. 142; 37 W. R. 222—D.

Judgment on Admissions.]—See ante, col. 1477.

2. STATEMENT OF CLAIM.

Form in Schedule—Insufficiency.]—A statement of claim in a salvage action was drawn in the Form, No. 6, of Appendix C. to the Rules of the Supreme Court, 1883; on motion by the defendants under Ord. XIX. r. 7, for a further and better statement of claim or particulars :—Held, that the plaintiffs must deliver a fuller statement of claim, and that in salvage actions a fuller form than that given in Appendix C., No. 6, should generally be followed. *The Isis*, 8 P. D. 227; 53 L. J., P. 14; 49 L. T. 444; 32 W. R. 171; 5 Asp. M. C. 155—Hannen, P.

Right of Way—Alleging Plaintiffs' Title generally.]—In an action for interfering with the plaintiffs' right of way to a certain quarry, the plaintiffs alleged, in the first paragraph of their statement of claim, that they were entitled to a right of way from the public highway through a certain gateway along a certain passage to the said quarry, and back again from the said quarry to the public highway, for themselves, their agents, servants and licensees, on foot and with horses, carts and carriages, at all times of the year; and in the second paragraph they alleged that they were entitled to a right of way from the public highway through a certain gateway along a certain passage to the said quarry, and back again from the said quarry to the public highway, for themselves, their agents, servants and licensees, on foot and with horses and carts, at all times convenient and necessary for the working of the said quarry, and for removing stones, gravel and other material therefrom. On motion to set aside the first and second paragraphs of the statement of claim :—Held, that the statement of claim was sufficient. *Kenmare (Lord) v. Casey*, 12 L. R., Ir. 374—Q. B. D.

Action on Covenants in a Lease—Title to Reversion.]—In an action upon covenants in an expired lease, the plaintiff stated the lease; that the term had expired; that at its expiration the defendants were the assigns of the lease, and liable to perform the lessee's covenants; that the plaintiff became, and at the expiration of the term was entitled to the immediate reversion in the demised property, subject only to the term; that he was and is entitled to enforce all the lessee's covenants, and that the defendants had for eight years paid him rent :—Held, such pleading was insufficient, that the plaintiff ought also to have shown what the reversion was which the lessor had, and how the plaintiff derived his title to that particular reversion, and that the statement of claim must be struck out under Ord. XIX. r. 27, as a pleading tending to embarrass the fair trial of the action. *Phillips v. Phillips* (4 Q. B. D. 127) followed.

Davis v. James, 26 Ch. D. 778 ; 53 L. J., Ch. 523 ; 50 L. T. 115 ; 32 W. R. 406—Kay, J.

Ejectment—Allegation of Plaintiff's Derivative Title.—In an action to recover possession of land for non-payment of rent by a plaintiff claiming under a derivative title, the statement of claim set out a lease, and alleged that the defendant entered into possession under it, and then stated that, on the death of the lessor, all his estate and interest came to and was now vested in the plaintiff. The defendant having moved to set aside the statement of claim as embarrassing :—Held, that the statement of the devolution of the plaintiff's title was sufficient. *Beatty v. Leacy*, 16 L. R., Ir. 132—C. A.

Notice in lieu of.—In an action for money alleged to have been obtained from the plaintiffs by fraudulent misrepresentation, the nature of which misrepresentation, and the particulars of the sums sued for being set out in the indorsement of the writ of summons, the plaintiff delivered a notice in lieu of statement of claim under Ord. XX. r. 2 :—Held sufficient, and motion by the defendant to compel a statement of claim to be delivered, refused. *Young v. Beattie*, 16 L. R., Ir. 192—C. P. D.

3. DEFENCE.

What is—Signing Judgment in Default.—The plaintiff issued a writ for the recovery of possession of certain premises against the defendant on 2nd February, and on the 13th of that month the defendant delivered at the office of the plaintiff's solicitor, a document dated and signed by the defendant, setting out the terms under which he alleged that he held the premises. The plaintiff's solicitor signed judgment on the ground that no defence had been delivered. On a summons to set aside the judgment as irregular :—Held, that the document so delivered was not a defence and that the judgment must stand. *Marshall v. Jones*, 52 J. P. 423—D.

Time for Delivery—Specially indorsed Writ.—The service of a writ specially indorsed under Ord. III. r. 6, is delivery of a statement of claim to the defendant within the meaning of Ord. XXI. r. 6 ; so that the defendant has ten days from the time limited for appearance within which to deliver his defence. *Anlaby v. Practorius*, 20 Q. B. D. 764 ; 57 L. J., Q. B. 287 ; 58 L. T. 671 ; 36 W. R. 487—C. A.

—Recovery of Possession of Land.—In an action to recover possession of land a defendant may deliver his defence at any time before judgment entered against him, notwithstanding that the time limited by Ord. XXI. r. 1 (Ir.) has elapsed. *Harding v. Lyons*, 14 L. R., Ir. 302—Ex. D. But see cases, post, col. 1508.

Default in Delivery—Setting Aside.—See cases, post, col. 1508.

Payment into Court with Defence.—See ante, col. 1426.

Plea to Damages.—The plaintiff, a profes-

sional jockey, sought to recover damages for a libel which stated that he was in the habit of pulling horses belonging to a certain stable. The defendant pleaded a justification, but sought leave to amend his defence by stating that the plaintiff was commonly reputed to have been in the habit of so unfairly and dishonestly riding horses (generally and not of a particular stable) as to prevent their winning races :—Held, that the amendment could not be allowed, since it was a plea to damages only. *Wood v. Durham (Earl)*, 21 Q. B. D. 501 ; 57 L. J., Q. B. 547 ; 59 L. T. 142 ; 37 W. R. 222—D.

4. SET-OFF AND COUNTERCLAIM.

Effect of Judicature Act and Rules.—Rule 3 of Ord. XIX., Rules of Court, 1875, was not intended to give rights against third parties which did not exist before ; but it is a rule of procedure designed to prevent the necessity of bringing a cross action in all cases where the counter-claim may conveniently be tried in the original action. *Milan Tramways Company, In re, Theys, Ex parte*, 22 Ch. D. 122 ; 52 L. J., Ch. 29 ; 48 L. T. 213 ; 31 W. R. 107—Kay, J. Affirmed 25 Ch. D. 587 ; 53 L. J., Ch. 1008 ; 50 L. T. 545 ; 32 W. R. 601—C. A.

What allowed—Pleading tending to Embarrass.—In an action to recover possession of land for non-payment of rent, and for a year's rent, amounting to 346l. 2s. 6d., due the 29th September, 1883, the defendant, inter alia, pleaded, as to 21l., part of the rent claimed, eviction by the plaintiff from a portion of the lands, in 1877, the value of which the defendant alleged was 21l. ; as to 10l. 18s. 10d., other part of the rent claimed, a set-off for poor-rate, to which the plaintiff, as landlord, was liable, and he brought the residue of the rent claimed into court. The defendant also delivered a counter-claim, as to so much of the plaintiff's claim as claimed payment of the said sum of 346l. 2s. 6d., for 84l. for the plaintiff's use and occupation of the seven acres for four years ; and, secondly, for 100l. damages for breach of an alleged contract by the plaintiff, in consideration of the surrender of the said seven acres, to grant a reasonable abatement of the rent of the residue of the lands during the defendant's unexpired term. The poor-rate was paid after action brought. On motion by the plaintiff to strike out so much of the defence as relied on the set-off and payment into court as embarrassing, on the grounds that the payment relied on by way of set-off was made after the commencement of the action, and the payment into court was irregular and not in compliance with the statute and Ord. XXX. r. 5, and that the counter-claim could not be conveniently tried in the action, the court granted the motion, and set aside these portions of the defence and counter-claim. *Bourke v. Nichol*, 12 L. R., Ir. 415—C. P. D.

—Defendant against Principal—Action by Agent.—In an action of trover and for goods sold and delivered a defendant cannot set off a claim for unliquidated damages, which he has against a third party on another transaction, although the third party happens to be the plaintiff's principal. *Tagart v. Marcus*, 36 W. R. 469—D.

Breach of Trust—Bill of Exchange.]—An action was brought by a tenant for life and other cestuis que trust against the trustees of a settlement for breaches of trust. One of the trustees alleged as a defence that the breaches of trust had been sanctioned by the tenant for life; and also set up a counter-claim upon a bill of exchange for 45*l.*, claiming payment of that amount, and that the income of the tenant for life, arising from the property subject to the settlement, might be applied towards payment of the 45*l.*, and any other sums which the trustee might be ordered to pay:—Held, that the counter-claim must be struck out under Ord. XXI. r. 15. *Fendall v. O'Connell*, 52 L. T. 538—V.-C. B.

Action to Recover Possession of Land—Arrears of Annuity.]—In an action by the assignee of the lessor to recover possession of demised land for non-payment of rent, the defendant, the assignee of the lease, delivered a counter-claim for a sum exceeding the rent in arrear, and consisting partly of arrears of annuities claimed by the defendant, and partly the sums which the defendant alleged she had been compelled to pay for head-rent of the premises. The annuities were, under the will of the original lessor (according to the construction of the will for which the defendant contended), chargeable on the lessor's interest in the premises. The court refused a motion by the plaintiff to set aside the counter-claim, but directed the counter-claim to be amended by setting out the material portions of the will in extenso, with liberty to the plaintiff to reply and demur to the amended pleading. *Whitton v. Hanlon*, 16 L. R., Ir. 137—Ex. D.

Third Party cannot Counterclaim against Plaintiff.]—See *Eden v. Weardale Coal and Iron Company*, ante, col. 1463.

5. AMENDMENT OF.

Statement of Claim—Alteration of Place of Trial.]—A plaintiff who wishes to name some place other than Middlesex as the place of trial must name it in the original statement of claim. If he omits to do so he cannot name it in an amended statement of claim; and if he has named a place of trial in the original statement of claim, he cannot alter it in an amended statement of claim. *Loche v. White*, 33 Ch. D. 308; 55 L. J., Ch. 731; 54 L. T. 891; 34 W. R. 747—C. A.

Disallowance of.]—See *Bourne v. Coulter*, ante, col. 1446.

Extent of Power of Court.]—There is no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace. *Cropper v. Smith*, 26 Ch. D. 710; 53 L. J., Ch. 891; 51 L. T. 733; 33 W. R. 60—Per Bowen, L.J.

After Evidence put in.]—Leave to amend pleadings ought to be granted even at the last moment, where it is necessary to enable the court

to finally dispose of the questions between the parties, if the party making the application is acting bona fide, and his opponent can be fully indemnified against any injury occasioned to him; but such leave is an indulgence, and ought only to be granted on terms. *Tildesley v. Harper* (10 Ch. D. 393) followed. *Trufort, In re, Trafford v. Blanc*, 53 L. T. 498; 34 W. R. 56—Kay, J.

Grounds for Refusing Leave.]—An amendment in a statement of claim, under Ord. XXVI. r. 1, will not be allowed, unless the court is satisfied that there are reasonable grounds for the cause of action sought to be saved by the amendment, and that such cause of action is presented bona fide for the benefit of the plaintiff. *Dillon v. Balfour*, 20 L. R., Ir. 600—Ex. D.

Prejudice to Plaintiff.]—The defendants, a tramway company, were sued in respect of injuries alleged to have been occasioned to the plaintiff through their not having maintained a road upon which their tramway ran, in a safe and proper condition. Six months after the close of the pleadings the defendants applied for leave to amend their defence by setting up a contract under s. 29 of the Tramways Act, 1870, by which the liability to maintain the road was shifted from them to the vestry, the road authority of the district. Since the close of the pleadings the statutory period of limitation within which the plaintiff could have sued the vestry had elapsed:—Held, that the defendants ought not to be allowed to amend their defence, because the plaintiff could not be placed in the same position as if the defendants had pleaded correctly in the first instance. *Steward v. North Metropolitan Tramways Company*, 16 Q. B. D. 556; 55 L. J., Q. B. 157; 54 L. T. 35; 34 W. R. 316; 50 J. P. 324—C. A.

Claim barred by Statute of Limitations.]—A plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have become barred by the Statute of Limitations. *Weldon v. Neal*, 19 Q. B. D. 394; 56 L. J., Q. B. 621; 35 W. R. 820—C. A.

After Joinder of Issue and Point of Law decided—Terms on which Granted.]—An action was brought by a municipal corporation to restrain the local board from interfering with water mains and pipes laid down by the corporation in the district of the local board. Issue was joined and admissions made to raise the point of law whether the corporation had any legal right to break up the streets vested in the local board, which was decided against the plaintiffs. The plaintiffs then moved to be allowed to amend their reply by pleading acquiescence and estoppel by conduct on the part of the defendants:—Held, that the court would allow the amendment, but only on the terms of the plaintiffs paying the costs which might turn out to have been thrown away by reason of the amendment, and of the costs of the motion being costs in the action, but to be the defendants in any event. *Preston Corporation v. Fulwood Local Board*, 34 W. R. 200—North, J.

Issue joined — Action set down — Counter-claim for Recovery of Land.]—In an action for specific performance of an agreement to grant a lease and build a house, issue had been joined, the pleadings showed no real dispute between the parties, and the action had been set down for trial. The plaintiff had taken possession under the agreement:—Held, that leave ought not to be given to the defendant to amend his counter-claim by adding thereto a claim for recovery of the land agreed to be let. *Clark v. Wray*, 31 Ch. D. 68; 55 L. J., Ch. 119; 53 L. T. 485; 34 W. R. 69—V.-C. B.

At Trial—Evidence given.]—An allegation in the statement of claim was not denied in the defence, though evidence was adduced contradicting it. On the defendant, at a late stage of the case, asking leave to amend:—Held, that, on the balance of convenience, leave to amend must be refused. *Louthier v. Heaver*, 59 L. T. 631; 37 W. R. 55—Kekewich, J. Affirmed 41 Ch. D. 248; 58 L. J., Ch. 482; 60 L. T. 310; 37 W. R. 465—C. A.

The plaintiff claimed specific performance of a contract for the purchase of a business by the defendant, or, in the alternative, damages. The statement of claim contained an allegation, which was denied by the defendant, that the plaintiff "is and always has been ready and willing to perform the contract so far as it is to be performed by him." The plaintiff, after action brought, sold the property, the subject-matter of the contract, but neither before nor at the hearing of the action did he ask to amend by striking out the claim for specific performance:—Held, that the action being for specific performance, and the plaintiff by his own act having made performance impossible, he was not ready and willing to perform the same at the time of the hearing of the action, and that as he had not applied to amend the claim at the proper time, namely, either before the hearing or before the case was opened at the hearing, leave to amend would not be granted. *Hipgrave v. Case*, 28 Ch. D. 356; 54 L. J., Ch. 399; 52 L. T. 242—C. A.

The statement of claim in an action for fraudulent misrepresentation in a prospectus relating to a company, contained a general allegation, that the prospectus comprised many untrue and misleading statements, and then set out certain specific instances of alleged misrepresentation, amongst others the following: "That the plastic or surface clay on the Fletton property was of an average depth of thirteen feet, whereas, in fact, at the deepest part such clay was only eleven feet or thereabouts in depth, diminishing to two feet." At the trial the plaintiff proposed to adduce evidence that there was an average depth of six feet of clay, that only four feet of this could be used for making the best bricks, and that instead of there being thirty-three acres in the property, as stated in the prospectus, there were in reality only eighteen acres:—Held, that evidence of these alleged misrepresentations could not be admitted as they had not been specifically pleaded, and that that leave to amend would not be granted. *Symonds v. City Bank*, 34 W. R. 364—North, J.

In a foreclosure action a defence and counter-claim were put in claiming payment of what should be found due to the defendant on taking the accounts, but not expressly claiming to open

the accounts or specifying improper charges. An application to amend at the hearing was refused. The court, however, permitted the parties to give evidence as to the accounts, on the ground that it might be the duty of the court, under Ord. XXVIII. r. 1, to make all such amendments as should be necessary for determining the real question between the parties, and having heard the evidence without ordering amendment, the court treated the pleadings as amended, and decided on the evidence. *Ward v. Sharp*, 53 L. J., Ch. 313; 50 L. T. 557; 32 W. R. 584—North, J.

Where in an action on an agreement for sale reserving the vendor's lien a defence of the Bills of Sale Act is intended to be relied on, it should be pleaded; but leave to amend was given at the trial, so as to raise the question. *Coburn v. Collins*, 56 L. T. 431; 35 W. R. 610—Kekewich, J.

Matter struck out—Time for Appealing expired.]—In action under s. 32 of the Patents Acts of 1883 to restrain a patentee from issuing threats, the plaintiffs, in their statement of claim, alleged that the defendant's patent was invalid; and the court ordered this to be struck out. After the time for appealing had long expired, the plaintiffs applied to the judge, to whom the action had been transferred, for leave to amend by inserting the same allegation. The application was refused:—Held, by Cotton and Bowen, L.J.J., that liberty to amend ought to be given, but upon special terms, in order that the defendants might not suffer any loss by the plaintiffs not having taken the proper course of appealing in due time from the first order. Fry, L.J., dissented, and was of opinion that, though the amendment was in itself proper, it was not competent to the court to allow it, when doing so was inconsistent with and substantially reversed the first order of the court, which was not liable to be appealed from. *Kurtz v. Spence*, 36 Ch. D. 770; 58 L. T. 320; 36 W. R. 438—C. A.

6. STRIKING OUT.

For Prolixity.]—Although there is no rule of court specially giving power to the court to take pleadings off the file for prolixity, yet the court has an inherent power to do so, to prevent its records from being made the instruments of oppression. *Hill v. Hart-Davis*, 26 Ch. D. 470; 51 L. T. 279—C. A.

Scandalous and Embarrassing Matter.]—L. brought an action against B. claiming (1) to restrain him from continuing a connexion between his premises and L.'s private drain; (2) to have a building which had been erected by B. pulled down as darkening L.'s ancient lights; (3) damages. B., by his defence, alleged that the drain in question did not belong to L.; that he (B.) had never connected his premises with any drain belonging to L. who, however, had constructed a new drain, for private purposes of his own, below and in connexion with the existing main sewer; and he alleged that "the plaintiff's acts aforesaid were in various particulars unlawful, but the defendant is in no wise responsible for them:"—Held, that the latter allegation was ambiguous, "scandalous, and embarrassing," and must be struck out. *Lumb v. Beaumont*, 49 L. T. 772—Pearson, J.

— **Discontinuance as to Part of Claim.**—In an action respecting a policy of marine insurance, the plaintiff, the underwriter, by his statement of claim alleged that the risk was of a special and dangerous character, that the defendants well knew; that they failed to communicate such fact to the plaintiff; that the ship was unseaworthy when she commenced her voyage; and that the defendants knew of but concealed the fact of her being unseaworthy. The defendants admitted that the ship was unseaworthy, but stated that the unseaworthiness was solely owing to her being overladen, and was not known to them. They wholly denied the allegations of concealment and non-communication of facts. The plaintiff in his reply joined issue generally, but stated that he did not proceed further in this action with the charges in the statement of claim as to concealment and non-communication by the defendants of material facts:—Held, that Ord. XIX. r. 27, applied; that the allegations in the statement of claim were clearly unnecessary, because the plaintiff subsequently stated that he did not intend to ask any relief grounded on concealment or non-communication, and that they were consequently scandalous and embarrassing, and must be struck out. *Brooking v. Maudslay*, 55 L. T. 343; 6 Asp. M. C. 13—Kay, J.

— **Action to enforce Compromise of Previous Action.**—In an action to enforce the compromise of a former action brought in assertion of rights of water, as to which disputes had arisen, the plaintiff will not be allowed, by setting out in his statement of claim the allegations as to his right and the corresponding liabilities of the defendant which were contained in his former statement of claim, to re-litigate the questions raised in the former action, and intended to have been finally disposed of by the compromise. Such allegations were accordingly ordered to be struck out under Ord. XIX. r. 27, as embarrassing and unnecessary, though a motion for that purpose had been refused by the court below. *Knowles v. Roberts*, 38 Ch. D. 263; 58 L. T. 259—C. A.

— **Inconsistent Defences.**—Pleadings will not necessarily be struck out as embarrassing because they are inconsistent. *Morgan, In re, Owen v. Morgan*, 35 Ch. D. 492; 56 L. J., Ch. 603; 56 L. T. 503; 35 W. R. 705—C. A.

In an action by the representatives of a wife against the executor of the husband in respect of sums of money and stock alleged to have been received by the husband as trustee for the separate use of the wife, the defence pleaded (1) that the sums had not been received; (2) if received, not as trustee; (3) if received, repayment; (4) alternatively, free gift by the wife to the husband; (5) alternatively, accord and satisfaction; (6) alternatively, set-off; (7) the Statute of Limitations; (8) laches and delay. On a summons to have defences 3, 4, 5, and 6 struck out, it was held that the defence was embarrassing, and the defendant had leave to amend. Upon appeal, the court discharged the order, and directed the defendant either to amend or to give particulars within fourteen days after discovery of documents. *Id.*

— **Reasons why Act not Ultra Vires.**—In an action by a stockholder in a railway company to restrain the company from subscribing out of their funds the sum of 1,000l. towards the Imperial Institute, on the ground that the proposed subscription was ultra vires and illegal, the company delivered a defence which contained paragraphs alleging a circular from the secretary of the Institute inviting railway companies to subscribe, and stating the amounts of the capital and average net annual income of the company, the objects of the Institute, an agreement with another railway company for through booking to the Institute, which it was said would lead to increased traffic over the defendants' line, and the practice of railway companies as to contributing to exhibitions, regattas, race meetings, and other objects calculated to encourage traffic over their lines. The plaintiff moved under Ord. XIX. rule 27, to strike out these paragraphs:—Held, that a reasonable latitude must be given to that rule, and parties must be allowed to plead reasons why a particular act said to be ultra vires was not ultra vires; that it would be a wrong application of the rule to order such reasons to be struck out unless the matter sought to be struck out was utterly irrelevant; and that it was not the meaning of the rule that any matter alleged in the defence as a reason should be struck out merely because it was a bad reason; and that it could not be said that any part of the defence was so irrelevant that the rule ought to be applied. *Tomkinson v. South Eastern Railway*, 57 L. T. 358—Kay, J.

Frivolous and Vexatious.—See *Lawrence v. Norreys (Lord)*, ante, col. 1436.

No reasonable Cause of Action or Defence.—See ante, col. 1464.

Not stating Title.—See ante, col. 1498.

Embarrassing Counterclaim.—See ante, cols. 1500, 1501.

7. DEFAULT IN PLEADING AND PROCEEDINGS THEREON.

Default in Defence.—See *Marshall v. Jones*, ante, col. 1499.

Motion for Judgment—Proof of Case.—An action was brought by a vendor for specific performance of an agreement against a purchaser who was in possession. The statement of claim set out the agreement. The defendant had not put in any defence. A motion was made on behalf of the plaintiff for judgment in default of defence, the action being set down as a short cause. The agreement had not been proved; but it was contended that the defendant, by making default in defence, had admitted the agreement as alleged, and that evidence of it was consequently unnecessary:—Held, that the agreement must be duly verified by affidavit, and the action was ordered to stand over for that purpose. *Holmes v. Shaw*, 52 L. T. 797—Kay, J.

On a motion for judgment in default of pleading, under Ord. XXVIII. r. 10, the plaintiff,

where his title depends on documents, must produce and prove them. *Crisford v. Dodd*, 15 L. R., Ir. 83—M.R.

Where in a partition action some of the plaintiffs and some of the defendants were infants, and the plaintiffs moved for judgment in default of defence:—Held, that no affidavit verifying the statement of claim was necessary. *Ripley v. Sawyer*, 31 Ch. D. 494; 55 L. J., Ch. 407; 54 L. T. 294; 34 W. R. 270—Pearson, J.

In a foreclosure action against a mortgagor and subsequent mortgagees the mortgagor made default of appearance, and the remaining defendants appeared but made default in pleading. Upon motion for judgment under Ord. XXVII. r. 11, the plaintiffs filed an affidavit in support of their claim:—Held, that the costs of the affidavit must be disallowed against all the defendants. *Jones v. Harris*, 55 L. T. 884—Stirling, J.

The court does not require evidence upon motion for judgment in default of pleading. *Bagley v. Searle*, *infra*.

— **Delivery of Minutes.**—In a vendor's action for specific performance the plaintiff moved for a common form judgment against the defendant, he having made default in pleading. The notice of motion did not state the terms of the proposed judgment:—Held, having regard to the form of the notice of motion, that minutes must be prepared and a copy delivered to the defendant. *Bagley v. Searle*, 56 L. T. 306; 35 W. R. 404—Stirling, J.

Upon a motion for judgment in default of pleading in a specific performance action, the plaintiff asked for an order in the usual form, but no minutes of the proposed judgment had been left with the judge's clerk before the cause was put into the paper:—Held, that, in such a case, where a copy of the minutes has not been delivered, the plaintiff should state in his notice of motion the precise words of the judgment for which he asks. *De Jongh v. Newman*, 56 L. T. 180; 35 W. R. 403—Stirling, J.

— **Judgment confined to Statement of Claim.**—Where a married woman is the defendant to an action on a contract, and has made default in delivering a defence, the plaintiff's statement of claim must contain an allegation that the defendant has a separate estate; otherwise the court will refuse to make an order against the defendant on the statement of claim under Ord. XXVII. r. 11. *Tetley v. Griffith*, 57 L. T. 673; 36 W. R. 96—Chitty, J.

By his statement of claim the plaintiff asked for specific performance and ancillary relief, but not for any declaration of lien. Upon a motion for judgment as in default of defence:—Held, that the plaintiff could not have any declaration of lien. *Tacon v. National Standard Investment Company*, 56 L. J., Ch. 529; 56 L. T. 165—Stirling, J.

In an action for specific performance the statement of claim alleged an agreement (to which agreement the plaintiff claimed leave to refer) whereby the defendant agreed to purchase from the plaintiff certain hereditaments situate in the parish of St. Peter the Great, otherwise sub-deanery, in the city of Chester and described in the schedule to the said agreement. The schedule was not set out in the statement of claim. The defendant appeared, but did not

put in a defence. On the motion for judgment in default of delivery of a defence:—Held, that the evidence was admissible as to the agreement. Held also, that the property not being sufficiently described in the statement of claim, the statement of claim must be amended, setting out the property sufficiently to enable the court to give judgment in accordance with the pleadings, and the amended statement of claim must be re-served. *Smith v. Buchan*, 58 L. T. 710; 36 W. R. 631—Kay, J.

— **Defence Delivered after Time—Setting aside.**—

Where, after the time for delivery of the defence had expired, and an order had been made fixing the mode of trial, a defendant delivered his defence without leave, the court, on motion by the plaintiff, set the defence aside. *Wilson v. Noble*, 11 L. R., Ir. 546—V.-C.

In an action of ejectment on the title, a defendant applied for leave to deliver a defence after the time limited for doing so had expired; and such application having been refused, but before judgment entered, he delivered and filed a defence: The court, on motion by the plaintiff, set it aside as irregular. *Meehan v. Meehan*, 14 L. R., Ir. 300—C. P. D. See also *Harding v. Lyons*, *ante*, col. 1499.

— **Not to be treated as a Nullity.**—S. gave to G. a charge upon costs due from B. to S. G. brought his action against S. and B., asking for an account and foreclosure against S., and that B. might be ordered to pay the amount of the bill of costs (359l.) into court. The time for delivering defence was enlarged from the 1st of August to the 16th of August, 1882. No defence having been delivered, notice of motion for judgment was served on the 18th of November. On the 2nd of December B. took out a summons for leave to deliver defence, which was dismissed on the 6th. The defence which he proposed to put in alleged that there were other dealings between B. and S., and that no substantial part of the bill of costs was due, and moreover that B. was going to have the bill taxed. On the 19th of February, 1883, the motion for judgment came on for hearing. The court refused to look at the defence, and gave a judgment directing an account against S., and ordering B. to bring the 359l. into court. B. appealed:—Held, that on motion for judgment for want of defence, if a defence had been put in, though irregularly, the court would not disregard it, but will see whether it sets up grounds of defence which, if proved, will be material, and if so, will deal with the case in such manner that justice can be done, and that in the present case the order for bringing the 359l. into court must be discharged, and an account directed of what was due from B. to S. in respect of the bill of costs. *Gibbings v. Strong*, 26 Ch. D. 66; 50 L. T. 578; 32 W. R. 757—C. A.

The defendants in an action, having obtained leave for further time to put in their defence, suffered that time to expire. The plaintiff accordingly moved, under Ord. XXVII. r. 11, of the Rules of Court, 1883, for judgment on his statement of claim in default of defence. The defendants being served with notice of motion delivered their defence, but did not appear at the hearing of the motion:—Held, that the defence which had been delivered ought not to be treated as a mere nullity, though the plaintiff had rightly declined to state it to the court;

but that, as the defence was not duly in form, the judgment would be according to the statement of claim, with a direction that the order was not to be drawn up for a week, and that the order now made was to be served on the defendants with notice that they were to be at liberty, within seven days from such service, to move to discharge the order. *Montagu v. Lund Corporation of England*, 56 L. T. 730—Chitty, J.

A defendant made default in putting in a defence under Ord. XXIX. r. 10 (1875), and the plaintiff gave notice of motion for judgment in default of defence. But before the motion was heard the defendant put in a defence:—Held, that, though put in after time, it could not be treated as a nullity, and that the plaintiff was not entitled to judgment in default of defence. But as the defence disclosed no real defence to the action, the Court of Appeal ordered the notice of motion to be amended and judgment to be given for the plaintiff on the admissions in the defence. *Gill v. Woodfin*, 25 Ch. D. 707; 53 L. J., Ch. 617; 50 L. T. 490; 32 W. R. 393—C. A.

Default of Pleading to Counterclaim.—Ord. XXIII. r. 4, and XXVII. rr. 11, 12, of the Rules of 1883, apply when a motion for judgment in default of pleading is made after, although the default itself is made before, they came into operation. And these rules apply to a case where a defendant to a counterclaim has made default in pleading to it, and entitle the plaintiff in the counterclaim to move for judgment against the defaulting defendant. *Street v. Crump*, 25 Ch. D. 68; 49 L. T. 397; 32 W. R. 89—North, J.

Where a plaintiff fails to deliver a defence to a counterclaim, and his action is dismissed under a master's order, judgment on the counterclaim can only be signed by the defendant upon a motion for judgment under Ord. XXVII. r. 11. *Higgins v. Scott*, 21 Q. B. D. 10; 58 L. J., Q. B. 97; 58 L. T. 383—D.

Default in delivering Reply.—Where the plaintiff made default in delivering a reply to a defence which, as to part of a claim for goods sold, alleged that the goods were not up to sample, and had been returned, and, admitting the residue of the claim, paid the amount of such residue into court; the defendant was allowed on motion to enter final judgment, with the costs of the action, and 3l. 3s. costs of the application. *Fussell v. O'Boyle*, 14 L. R., Ir. 53—Q. B. D.

Reply delivered after Time.—A reply delivered more than three weeks after the delivery of the defence is irregular, unless the time for delivering the reply has been extended by the court. *Webb v. Kerr*, 14 L. R., Ir. 294—Q. B. D.

Default in Reply — Dismissal for want of Prosecution.—See *London Road Car Company v. Kelly*, ante, col. 1448.

Judgment on Admissions.—A defendant is entitled under Ord. XXXIX. r. 9, to judgment on admissions of facts in the pleadings, by reason of the plaintiff not delivering a reply to the defence. *Elliott v. Harris*, 17 L. R., Ir. 351—M. R.

PREMIUM.

On Insurance Policies.]—See INSURANCE.

On Dissolution of Partnership.]—See PARTNERSHIP.

PRESCRIPTION.

See EASEMENT.

PRESENTATION TO LIVINGS.

See ECCLESIASTICAL LAW.

PRESUMPTIONS.

See EVIDENCE.

PRINCIPAL AND AGENT.

I. RIGHTS AND LIABILITIES AS BETWEEN PRINCIPAL AND THIRD PARTIES.

1. *Action by Principal on Contract by Agent*, 1510.
2. *Liability of Principal to Third Party*.
 - a. On Contracts, 1512.
 - b. Other Acts of Agent, 1515.
3. *Effect of Factors' Acts*, 1517.

II. LIABILITIES OF AGENT TO THIRD PARTIES, 1518.

III. RIGHTS AND LIABILITIES AS BETWEEN PRINCIPAL AND AGENT, 1521.

I. RIGHTS AND LIABILITIES AS BETWEEN PRINCIPAL AND THIRD PARTIES.

1. ACTION BY PRINCIPAL ON CONTRACT BY AGENT.

Undisclosed Principal — Set-off against Principal of Debt due from Agent—Estoppel.]

—Where an agent sells in his own name for an undisclosed principal, and the principal sues the buyer for the price, the buyer cannot set-off a debt due from the agent unless in making the contract he was induced by the conduct of the principal to believe, and did in fact believe, that the agent was selling on his own account.

Cooke v. Eshelby, 12 App. Cas. 271; 56 L. J., Q. B. 505; 56 L. T. 673; 35 W. R. 629—H. L. (E.)

L. & Co. sold cotton to C. in their own names, but really on behalf of an undisclosed principal. C. knew L. & Co. were in the habit of dealing both for principals and on their own account, and had no belief on the subject whether they made this contract on their own account or for a principal.—Held, that C. could not in an action brought by the principal for the price of the cotton set-off a debt due from L. & Co. *Id.*

Merchants in London, upon the instruction of shipping agents at Havannah, with respect to a cargo of tobacco to be consigned to the London merchants, and after receiving the shipping documents, effected policies of marine insurance in the ordinary form on behalf and for the benefit of all parties whom it might concern. The Havannah agents shipped and consigned the tobacco in their own names, but were in fact acting as commission agents for Havannah merchants to whom the tobacco belonged; and the London merchants, before effecting the policies, had notice that the Havannah agents had an unnamed principal. A total loss having occurred, the London merchants received the policy moneys, but before receipt had notice that the moneys were claimed by the Havannah principals.—Held, that an action lay by the Havannah principals against the London merchants for the policy moneys; that the London merchants were not entitled to a lien upon the moneys for the balance of their general account with the Havannah agents, and could not in that action set off their claim to that balance, or set off anything, except the premiums, stamps, and commission in respect of the insurance. *Mildred v. Masspons*, 8 App. Cas. 874; 53 L. J., Q. B. 33; 49 L. T. 685; 32 W. R. 125; 5 Asp. M. C. 182—H. L. (E.).

Held, also, by Lord Blackburn, that the case fell within the Factors Act (6 Geo. 4, c. 94), s. 1. *Sed quere*, by Lord Fitzgerald. *Id.*

Ignorance of Principal—Whether Knowledge of Agent is Knowledge of Principal.—A policy of marine insurance effected through a broker is not rendered void by the non-disclosure of a material fact which was unknown to the assured and to the broker, though it had come to the knowledge of a different broker while previously employed by the assured to effect another policy in respect of the same risk. Observations on *Fitzherbert v. Mather* (1 T. R. 12), *Gladstone v. King* (1 M. & S. 35), *Stribley v. Imperial Marine Insurance Company* (45 L. J., Q. B. 396), and *Proudford v. Montefiore* (36 L. J., Q. B. 225). *Blackburn v. Vigors*, 12 App. Cas. 531; 57 L. J., Q. B. 114; 57 L. T. 730; 36 W. R. 449; 6 Asp. M. C. 216—H. L. (E.).

The plaintiffs, a firm of underwriters, instructed Glasgow brokers to effect a re-insurance on an overdue ship. The Glasgow brokers thereupon telegraphed to their London agents to insure at the rate named by the plaintiffs. The London agents replied stating the market rate. Meantime the Glasgow firm received information of the loss of the vessel, and, without communicating this to the plaintiffs or to the London agents, telegraphed to the London agents in the plaintiff's name to insure at the market rate. Subsequent negotiations were carried on directly between the plaintiffs and the London firm, who effected a re-insurance at a higher rate than that originally named by the

plaintiffs. Upon an action being brought against underwriters of this policy, the jury found that the Glasgow firm were employed to effect the insurance, and that it was effected through their agency:—Held, upon this finding, that, there having been concealment of material facts by the Glasgow firm, the plaintiffs could not recover upon the policy. *Blackburn v. Haslam*, 21 Q. B. D. 144; 57 L. J., Q. B. 479; 59 L. T. 407; 36 W. R. 855—D.

2. LIABILITY OF PRINCIPAL TO THIRD PARTY.

a. On Contracts.

Right to sue Undisclosed Principal—Mutual Insurance Company.—*See ante*, col. 1020.

Election to charge Undisclosed Principal.—*See Dunn v. Newton*, post, col. 1521.

Authority of Agent to Sign Memorandum of Association.—A man's name may be subscribed to the memorandum of association of a company by his agent, and it is not necessary that the agent should be authorised to sign his principal's name by deed under seal. *Whitley & Co., In re, Callam, Ex parte*, 32 Ch. D. 337; 55 L. J., Ch. 540; 54 L. T. 912; 34 W. R. 505—C. A.

Variation between Bought and Sold Notes.—Where a broker employed by the seller alone, effects a contract by means of a note sent to and accepted by the purchaser, a variation between this note and a note sent by the broker to the seller is immaterial. *McCaull v. Strauss*, 1 C. & E. 106—Stephen, J.

Bill drawn on Firm—Acceptance in Name of Individual—Authority.—The defendant, a partner in a firm of C. Brothers, agreed with her co-partner that the partnership should be dissolved, that the affairs of the firm should be liquidated by an agent, who should realise the assets and pay the creditors, and that the business should thereafter be carried on by the defendant. The defendant and the agent opened a joint banking account, and requested the bank to honour drafts signed by either of them. Cheques were drawn on the joint account, signed by the agent in the names of the defendant and himself, and bills were drawn on C. Brothers, and accepted by the agent in the names of the defendant and himself, and honoured. The defendant knew nothing of these cheques and bills. The plaintiff sued as indorsee for value of a bill of exchange, drawn on C. Brothers, accepted by the agent in the names of himself and the defendant, and made payable at the bank where the joint account was opened:—Held, that the agent had no authority to accept the bill in the defendant's name, so as to bind her, and that, not being a partner in the firm of C. Brothers, he had no authority to accept bills drawn on the firm, and the defendant was not liable. *Kirk v. Blurton* (9 M. & W. 284) commented on and distinguished. *Odell v. Cormack*, 19 Q. B. D. 223—Hawkins, J.

Promissory Note—Authority of Manager of Trading Company Abroad.—The business of a company was that of importers and dealers in

tinned ox-tongues and other provisions. Hunter was appointed manager of the company's business in South America, "to take the entire charge of the interests of the company there." No express authority was conferred on him to sign or accept bills or promissory notes on behalf of the company. He was desirous of entering into a contract with one Liberos for the supply of ox-tongues to the company in South America. Liberos refused to enter into a contract unless a guarantee was given by some third person, and, at the request of Hunter, one Simpson agreed to give the required guarantee, which he did by depositing 1,000*l.* in a bank to the order of Liberos. As a counter security to Simpson, Hunter gave him a promissory note for 1,000*l.*, signed by him "in representation of" the company. The company made default in carrying out the provisions of the contract with Liberos, and, under a power contained in it, he forfeited the deposit, which was paid over to him by the bank. No goods were supplied to the company under the contract. The company never recognised the promissory note, and it was dishonoured at maturity. The company being in liquidation, Simpson claimed to prove in the winding-up upon the note:—Held, that it not being shown that the giving of the note was necessary for the carrying on of the business of the company, or that it was in the ordinary course of the business of such a company, the note was not binding upon the company, and the claim in respect of it could not be admitted. *Cunningham & Company, In re, Simpson's Claim*, 36 Ch. D. 532; 57 L. J., Ch. 169; 58 L. T. 16—North, J.

Stewards of Fête—Authority of "General Manager" to pledge Credit.—On a programme for a fête the names of the two defendants appeared as stewards, and the name of P. as "general manager." P. ordered tents and flags from the plaintiff for use at the fête. On the programme was a statement that the stewards reserved the right of altering the programme, that five should form a quorum, and that tents would be provided. At the fête the defendants took an active part. The plaintiff sent in his bill to the stewards. The stewards stated that every one providing things for the fête would be paid:—Held, that there was evidence on which the court might find that P. was authorised to pledge the credit of the two defendants for the tents, and that they were therefore liable. *Pilot v. Craze*, 52 J. P. 311—D.

There is a broad distinction between acting stewards, such as those mentioned, and provisional committeemen, who only lend their names. *Id.*—Per Wills, J.

Previous Judgment against Agent set aside.]

—The plaintiff had supplied goods on K.'s order to a theatre, and had obtained judgment against K. for the price. Whilst the judgment was still standing the plaintiff commenced an action against the lessee of the theatre for the price of the same goods. The lessee objected that the matter was *res judicata*. The judgment against K. was set aside before the hearing of an appeal to the Divisional Court:—Held, that as the judgment had been set aside, the action was rightly brought against the lessee. *Partington v. Hawthorne*, 52 J. P. 807—D.

Counterclaim against Principal in Action by Agent.—In an action of trover and for goods sold and delivered, a defendant cannot set off a claim for unliquidated damages which he has against a third party on another transaction, although the third party happens to be the plaintiff's principal. *Tugart v. Marcus*, 36 W. R. 469—D.

Authority of Agent to receive Mortgage Money.]

G. and H. were mortgagees for 1,000*l.* on property of S. Their solicitors, D. and P., who had the deeds in their custody, applied to the defendant, who was also a client of theirs, saying that they believed he had 1,000*l.* to invest on mortgage, and that G. and H. wanted 1,000*l.* on a transfer of S.'s mortgage. The defendant inspected the property, and being satisfied, he, on the 19th of June, 1878, sent the 1,000*l.* to D & P., who gave him a receipt for it. In July D. & P. fraudulently induced G. and H. to execute a deed of transfer to the defendant with a receipt indorsed, which deed they stated to G. and H. to be a deed of reconveyance to S. on his paying off the mortgage. D. & P. shortly afterwards handed his deed with the title-deeds to the defendant, and went on paying him interest as if they had received it from S., who was in fact paying his interest to the agents of G. and H.; G. and H. made no inquiry as to the mortgage, and this went on till 1883, when D. & P. became bankrupts, and the 1,000*l.* received from the defendant, which had never been handed over to G. and H. was lost. G. and H. then brought their action against the defendant asserting a right against the property in the nature of an unpaid vendor's lien:—Held, that as the plaintiffs by the deed of transfer and receipt which they handed to D. & P. enabled them to represent to the defendant that the 1,000*l.* which he had previously handed to D. & P. had come to the hands of the plaintiffs, they had raised a counter equity which prevented their claiming a vendor's lien, though this would not have been the case if (D. & P. having no authority to receive money for the plaintiffs) the defendant had paid the 1,000*l.* to D. & P. at the time when the deeds were delivered to him, since he would then have known that the plaintiffs had not received the money. *Swinbanks, Ex parte* (11 Ch. D. 525), distinguished. *Gordon v. James*, 30 Ch. D. 249; 53 L. T. 641; 34 W. R. 217—C. A.

Quære, per Cotton, L.J., whether D. & P., assuming them to have authority to receive mortgage money on behalf of the plaintiffs, could be taken ever to have, in fact, received this 1,000*l.* on their behalf. *Id.*

Warranty on the Sale of a Horse.]—The servant of the owner of a riding-school who was in the habit of buying and selling horses was intrusted to deliver for approval and to negotiate for the sale of a horse to the plaintiff. At the trial the jury found (1) that the servant warranted the horse free from disease; (2) that it was suffering from mange, which the servant well knew; and (3) that the master was aware there was something the matter with the horse, but that he did not know the nature of the disease:—Held, that the master was bound by the servant's warranty. *Baldry v. Bates*, 52 L. T. 620—Huddleston, B.

A servant, entrusted by his master with the sale of a horse at a fair, may have an implied

authority to give a warranty to the purchaser. *Brady v. Todd*, (9 C. B., N. S. 592) commented on and distinguished. *Brooks v. Hassell*, 49 L. T. 568—D.

Sale of Goods—Scope of Employment.]—Where an agent of an English firm instructed to buy goods at a foreign auction within a limited price, bought the goods by private contract before the auction at less than the limited price; it was found by the jury that this was within the scope of his authority. *Stein v. Cupe*, 1 C. & E. 63—Denman, J.

A sale of engravings by a cashier in the employment of a picture engraver is not a sale within the ostensible authority of the cashier. *Graves v. Masters*, 1 C. & E. 73—Coleridge, C.J.

b. Other Acts of Agent.

Representation by Agent—For his own Benefit.]—A principal is not liable in an action of deceit for the unauthorised and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's or agent's private ends. The secretary of a company answered questions which were put to him as secretary as to the validity of certain debenture stock of the company. The answers were untrue and were fraudulently made by the secretary for his own benefit. In an action against the company for loss arising from the representations, the jury found that the secretary was held out by the company as a person to answer such inquiries on their behalf:—Held, that the company were not liable. *British Mutual Banking Company v. Charnwood Forest Railway*, 18 Q. B. D. 714; 56 L. J., Q. B. 449; 57 L. T. 833; 35 W. R. 590; 52 J. P. 150—C. A.

Secretary of Company.]—The defendants, a tramway company, employed contractors to execute certain works. By the contract the defendants had a right to retain a certain percentage of the amounts for which their engineer from time to time certified on account of the price of the works, until after the completion of the same. The contractors applied to the plaintiffs for an advance upon the security of retention moneys under the contract. The defendants' secretary, in answer to inquiries made by the plaintiffs, erroneously represented to them that there was a certain amount of retention money in the defendants' hands which would be payable after the completion of the works, whereas in fact it was not so. The plaintiffs thereupon advanced money to the contractors on the security of an assignment of the retention money. There was no evidence to show that the secretary had authority to make the representations which he had made:—Held, that it is not within the scope of a secretary's authority to make such representations, and, therefore, in an action by the plaintiffs as assignees of the retention money, the defendants were not estopped from denying that such money was due. *Barnett v. South London Tramways Company*, 18 Q. B. D. 815; 56 L. J., Q. B. 452; 57 L. T. 436; 35 W. R. 640—C. A.

The secretary of the defendant company falsely, fraudulently, and without the know-

ledge of the directors of the company, represented to the plaintiff that if the plaintiff took certain shares in the company he would be appointed solicitor to the company, and afterwards represented that the plaintiff had been appointed solicitor. The plaintiff was induced by the secretary's representations to apply for shares in the company. He accepted and paid for the shares, and afterwards paid calls on them, and received a dividend:—Held, in an action by the plaintiff against the company, that the secretary had no such implied authority to make representations on behalf of the company as to render the company liable to the plaintiff for the fraudulent representations of the secretary, and therefore the plaintiff was not entitled to have his name struck off the register of shareholders, nor to recover the price which he had paid for the shares, or the calls which he had paid, and was liable to the defendants on their counterclaim for further calls. *Newlands v. National Employers' Accident Association*, 54 L. J., Q. B. 428; 53 L. T. 242; 49 J. P. 628—C. A.

Forgery by Secretary of Company—Certificate for Shares.]—G. having, through the plaintiff, as his broker, purchased 200 shares in the defendant company, had a transfer and apparently regularly issued certificates sent to him in ordinary course. The transfer and certificates were lodged at the company's office with a request for registration, and what purported to be a certificate that G. was the registered proprietor of 200 shares was issued to him, signed by one director and the secretary, and bearing the seal of the company. The form of this certificate was in accordance with the company's deed and resolutions, but, in fact, the name of the director was forged by the secretary. Subsequently G. deposited the certificate, as security for advances, with the plaintiff, who gave the company notice of such deposit, neither G. nor the plaintiff having any knowledge or ground for suspicion that the certificate was not genuine. On a case stated, raising the question whether the plaintiff had a good title to the shares as against the company:—Held, that he had; that the company were liable for the fraud of their agent perpetrated in the ordinary course of his employment, as they had here placed the secretary in a position to warrant the genuineness of the signature and the seal. *Shaw v. Port Phillip Gold Mining Company*, 13 Q. B. D. 103; 53 L. J., Q. B. 369; 50 L. T. 685; 32 W. R. 771—D.

Agent's Negligence—Scope of Employment.]—The R., which was anchored in F. outer harbour, having to be beached in the inner harbour, S., the harbour-master directed the master of the R. where to beach her. Before the R. left the outer harbour, S. came on board, although a Trinity-house pilot was on board, and when she had arrived near the place where she had to be beached, gave directions as to the lowering of her anchor. The R. overran her anchor and grounded on it, sustaining damage. In an action against the harbour commissioners and S., the court found as a fact that there was negligence on the part of S., and that the place where the R. grounded was outside the jurisdiction of the harbour commissioners:—Held, that the duties of the harbour-master comprised directions as to the mooring and beaching of

vessels; that by giving directions when he went on board, S. had resumed the functions as harbour-master, and that he and the commissioners were therefore liable for the damage done to the R. *The Rhosina*, 10 P. D. 131; 54 L. J., P. 72; 53 L. T. 30; 33 W. R. 794; 5 Asp. M. C. 460—C. A.

3. EFFECT OF FACTORS ACTS.

Power of Agent to Mortgage.—The Factors Acts do not empower an agent acting under a power of attorney in a non-mercantile transaction to mortgage the property of the principal. *Lewis v. Ramsdale*, 55 L. T. 179; 35 W. R. 8—Stirling, J.

Advances by Brokers to Agents for Sale.—The appellants, merchants at Singapore, employed M. in London as agent to sell, without authority to pledge, cargoes which they from time to time consigned to him. M. employed the respondents, London brokers, to sell the appellants' consignments, and also in speculative purchases on his own account. The respondents purchased shellac for M. without disclosing that they were buying as agents, and therefore were personally liable to the vendors on the contracts. Subsequently they made advances to M. to enable him to pay deposits on the shellac, and took as security bills of lading of some of the appellants' cargoes. They had no notice that M. was acting improperly in pledging the cargoes. On obtaining the advances M. gave the respondents cheques for the amount of the deposits, which were then paid by the respondents:—Held, that the obligation under which M. lay to the respondents to pay the deposits and thus prevent their being called upon to pay them, did not constitute an antecedent debt within the meaning of the Factors Act, 5 & 6 Vict. c. 39, s. 3, and that the pledges were made in respect of bona fide advances, and not of antecedent debts, and were valid against the appellants. *Kaltenbach v. Lewis*, 10 App. Cas. 617; 55 L. J., Ch. 58; 53 L. T. 787; 34 W. R. 477—H. L. (E.)

M. also pledged with the respondents pepper consigned to him for sale by the appellants, to secure an advance protected by the Factors Acts. The goods had been sold for M. by the respondents, but not delivered to the purchasers, nor paid for, when M. died insolvent and heavily indebted to the respondents on a general account. After the sale, but before receiving the proceeds, the respondents had notice that the appellants claimed the pepper and the proceeds:—Held, that after repayment of the respondents' advance the surplus proceeds of sale belonged to the appellants; that the appellants could sue the respondents for such surplus, whether on the ground of privity of contract, or on the ground of property, or under the Factors Act, 5 & 6 Vict. c. 39, s. 7. *New Zealand and Australian Land Company v. Watson* (7 Q. B. D. 374), distinguished and explained. *Ib.*

What Transactions within.—See *Mildred v. Maspons*, ante, col. 1511.

II. LIABILITIES OF AGENT TO THIRD PARTIES.

To Trustee in Bankruptcy of Principal.—See BANKRUPTCY, XI. 7.

Warranty of Authority—Personal Liability.]

—Where a person by asserting that he has the authority of the principal, induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred. *Firbank v. Humphreys*, 18 Q. B. D. 60; 56 L. J., Q. B. 57; 56 L. T. 36; 35 W. R. 92—Per Lord Esher, M. R.

— **Measure of Damages.**—L. instructed his brokers to apply for fifty shares at 1*l.* each in a company which he named. They by mistake applied for and obtained an allotment to L. in another company. L. repudiated the shares, but his name was placed on the register. The company had at that time a very large number of shares unallotted, and in the opinion of the court the shares were unsaleable in the market. The company was soon afterwards wound up, and the name of L. was removed on his application from the list of contributors. The official liquidator then claimed 50*l.* from the brokers by way of damages for their misrepresentation of authority:—Held, that the general rule as to measure of damages for breach of warranty of authority was applicable; that the liquidator was entitled to recover from the brokers the amount which the company had lost by losing the contract with L.; and that as L. was solvent and the shares unsaleable in the market, that loss was represented by the whole sum of 50*l.* payable for the shares. *National Coffee Palace Company, In re, Panmure, Ex parte*, 24 Ch. D. 367; 53 L. J., Ch. 57; 50 L. T. 38; 32 W. R. 236—C. A.

The plaintiff brought an action in England against a marine insurance company carrying on business in the United States and obtained judgment in default of appearance for 1,000*l.* Negotiations for a settlement then took place between the plaintiff and the defendants, the agents of the company in England, and the defendants by mistake represented to the plaintiff in good faith that they were authorised by the company to offer 300*l.* in settlement of the plaintiff's claim. The plaintiff, relying upon the accuracy of the representation, entered into an agreement with the defendants, on behalf of the company, for the settlement of his claim for 300*l.*, but it afterwards appeared that the defendants were not authorised to make the agreement, and he was unable to enforce the performance of it. In an action against the defendants to recover damages for breach of warranty of authority, the defendants paid into court a sum representing the expenses incurred by the plaintiff in negotiating the compromise:—Held, on the authority of *National Coffee Palace Company, In re, Panmure, Ex parte* (24 Ch. D. 367), that the measure of damages was the loss by the plaintiff of the gain which

he would have derived from the contract which the defendants warranted should be made, and that inasmuch as the judgment obtained by him was of no value (for the company had no assets in England, and the judgment could not under the circumstances be enforced in the American Courts), and the value of the plaintiff's remedy on the policy could not be estimated, the plaintiff was entitled to recover from the defendants 300*l.* in addition to the sum paid into court. *Meek v. Wendt*, 21 Q. B. D. 126; 59 L. T. 558—Charles, J.

Money in hands of Agent—Announcement that next Dividend will be paid in full—Revocation by Principal.—Agents in London of a foreign Government, having money in their hands for the payment of a dividend on a loan, on the 22nd May advertised that the coupon due on the 1st June would be paid in full; but on the 1st June, being advised by the foreign Government, they advertised that the payment would be made less 5 per cent. On action brought by a bondholder against the agents:—Held, that the announcement to pay in the future, a debt due in the future, was not a contract, and did not bind the agents. Also, that, if the decree authorising the deduction of 5 per cent, was valid according to the law of the foreign Government, the revocation of the advertisement of payment in full was valid. *Henderson v. Rothschild*, 33 Ch. D. 459; 55 L. J., Ch. 939; 55 L. T. 165; 34 W. R. 769—V.-C. B. Affirmed 56 L. J., Ch. 471; 56 L. T. 98; 35 W. R. 485—C. A.

Bill of Exchange.—The defendants, two directors and the secretary of an incorporated limited company, which had no power to accept bills, at the request of their engineer, and in accordance with a resolution that the company should accept his draft on account of professional services, gave to the engineer an acceptance in the following terms:—"Accepted payable at . . . for and on behalf of the tramway company—G. K., S. F. P. (directors), B. W. (secretary)." When giving the acceptance the directors told the engineer that they did so on the understanding that he should not negotiate it, and only as a recognition of the company's debt to him, as the company had no power to accept bills; and the engineer, on pressing them for the acceptance, told them that he could raise money on it from his father-in-law. The engineer indorsed the bill to the plaintiffs for value, and without notice to them of the understanding between him and the defendants. The bill was dishonoured, and the defendants were sued by the holders:—Held, that the defendants were personally liable, as by accepting the bill and putting it within the power of the drawer to negotiate it, they represented that they had authority to accept, and such representation being false in fact would therefore support an action. *West London Commercial Bank v. Kitson*, 13 Q. B. D. 360; 53 L. J., Q. B. 345; 50 L. T. 656; 32 W. R. 757—C. A. Affirming 47 J. P. 824—D.

Where Principal Non-existent.—There is no rule of law by which an agent professing to contract on behalf of a principal, either non-existent, or under a legal disability to contract, is to be

deemed to be himself the contracting party. *Hollman v. Pullin*, 1 C. & E. 254—Williams, J.

Sale of Goods—Broker making Sold-note "for and on account of Owner"—Custom.—The defendants, who were hop-brokers, gave to the plaintiffs the following sold-note: "Sold by Ongley & Thornton (the defendants) to Messrs. Pike, Sons, & Co., for and on account of owner, 100 bales . . . hops . . . (Signed) for Ongley & Thornton, S. T." In an action for non-delivery of hops according to sample, the plaintiffs sought to make the defendants personally liable on the above contract, and tendered evidence to show that by the custom of the hop trade, brokers who do not disclose the names of their principals at the time of making the contract are personally liable upon it as principals, although they contracted as brokers for a principal. No request was made by the plaintiffs to the defendants to name their principal:—Held, that the custom gave a remedy against the brokers as well as against the principals, that it was not in contradiction of the written contract, and that evidence of the custom was properly admitted at the trial. *Hutchinson v. Tatham* (8 L. R., C. P. 482), considered. *Pike v. Ongley*, 18 Q. B. D. 708; 56 L. J., Q. B. 373; 35 W. R. 534—C. A.

A written contract, made by brokers on behalf of undisclosed principals for the sale of hides, provided that "if any difference or dispute shall arise under this contract, it is mutually agreed between the sellers and buyers that the same shall be settled by the selling brokers, whose decision in writing should be final and binding on both sellers and buyers." In an action against the brokers in respect of inferior hides delivered under the contract, the buyers made a claim for the breach against the brokers as principals by custom of the trade:—Held, that evidence of a custom of the trade that a broker who does not disclose his principal is personally responsible for the performance of the contract and liable for the breach, was rightly rejected, as such custom was inconsistent with the arbitration clause, which would, if the custom were incorporated, make the brokers judges in their own cause. *Barrow v. Dyster*, 13 Q. B. D. 635; 51 L. T. 573; 33 W. R. 199—D.

By a contract in writing, the defendants "sold to" the plaintiffs a cargo of cotton seed cake of a specified quality. The contract contained a clause that "should any of the above goods turn out not equal to quality specified, they are to be taken at an allowance, which allowance, together with any dispute arising on this contract, is to be settled by arbitration." The defendant signed the contract with the addition of the word "brokers," and were acting as agents. Some time after the contract was signed, the defendants named their principals. The cargo proved to be of inferior quality, and an arbitration (which the plaintiffs did not attend) to determine the liability of the defendants was held; the arbitrators decided by their award that the defendants were not liable, inasmuch as a custom existed that a broker upon naming his principals ceases to be liable on the contract. At the trial of the action, the jury found that the alleged custom did not exist:—Held, that the defendants were personally liable on the contract. *Hutcheson v. Eaton*, 13 Q. B. D. 861; 51 L. T. 846—C. A.

— **In Rice Trade.**—In the rice trade a custom exists that where a broker does not disclose in the contract note the name of the principal dealt with, although he may mention it orally, he is liable on the contract as a principal. *Baumeister v. Fenton*, 1 C. & E. 121—cor. Manisty, J.

Broker on Stock Exchange.—Quære, whether a custom exists on the London Stock Exchange that a broker not disclosing the name of the principal dealt with, renders himself personally liable. *Wildy v. Stephenson*, 1 C. & E. 3—cor. Lopes, J.

Election to Charge.—The knowledge of the real facts required as the foundation of an election to charge the agent or the undisclosed principal must be actual knowledge. *Dunn v. Newton*, 1 C. & E. 278—Mathew, J.

III. RIGHTS AND LIABILITIES AS BETWEEN PRINCIPAL AND AGENT.

Commission—Right to must arise from Contract.—In order to found a legal claim for commission on a sale, there must not only be a casual, but also a contractual relation between the introduction of the purchaser and the ultimate transaction of sale. *Toulmin v. Millar*, 58 L. T. 96—H. L. (E.).

— **When Earned—Introduction of Purchaser.**—On January 7th, 1887, an estate agent, in whose hands the debtor had placed certain property for sale, introduced to such debtor a person with a view to purchase, but no agreement could then be come to as to terms, and the debtor a few days afterwards presented his own petition in bankruptcy. On January 17th, 1887, further negotiations took place between the person so introduced and the trustee in the bankruptcy in respect of the property, and on January 24th, 1887, the purchase was completed, but a proof subsequently tendered by the estate agent for his commission was rejected by such trustee:—Held, that the sale was brought about in consequence of the introduction, and was traceable thereto. *Durrant, Ex parte, Beale, In re*, 5 M. B. R. 37—D.

The plaintiffs were employed by the defendant to sell an estate for him upon the terms that they should be paid a commission on the amount of such sale. The estate was divided into lots, some of which were purchased by one A., and upon the completion of that purchase the plaintiffs received their commission. The defendant withdrew his authority to sell from the plaintiffs, and A. subsequently purchased the remainder from the defendant by private contract:—Held, that the jury were entitled to find that the ultimate sale was not due to any introduction of the plaintiffs, so that they could not recover their commission. *Lumley v. Nicholson*, 34 W. R. 716—D.

— **Shipbroker's Commission when earned.**—A shipbroker, introducing a seller and buyer of vessels, is only entitled to commission on the business resulting proximately from the introduction. *White v. Baater*, 1 C. & E. 199—Williams, J. Reversed in C. A.

— **How much recoverable when Principal prevents Performance.**—In an action for damages by a commission agent for wrongfully preventing him from earning his commission, the damages recoverable, where nothing remained to be done by the commission agent to entitle him to his commission if the transaction had gone through, are the full amount of the commission which he would have earned. *Roberts v. Barnard*, 1 C. & E. 336—Mathew, J.

— **Person whether Agent of Mortgagor—Insurance Premiums.**—The plaintiff mortgaged her life interest in a fund to the defendants, it being part of the agreement that a policy should be effected on her life, and the premiums be secured on the mortgaged property. In an action for redemption the chief clerk found that 173*l.* 19*s.* 1*d.*, "premiums paid on policies," was due from the plaintiff to the defendants. L., a solicitor and agent to all the parties, paid the premiums to the insurance offices, receiving from them 5 per cent. commission. On summons to vary the chief clerk's certificate by the amount of the commission, on the ground that the "premiums paid on policies" only amounted to 165*l.* 5*s.*:—Held, that after the premiums had been paid to the insurance offices, the mortgagor had no interest in them. The insurance offices received the premiums, and paid the commission out of them to their own agent. *Leete v. Wallace*, 58 L. T. 577—Kay, J.

Right of Indemnity—Repudiation of Bet before Payment.—The plaintiff, a turf commission agent, was employed by the defendant to make bets for him in the plaintiff's name. After the plaintiff had so made some debts, but before he had paid those which were lost, the defendant repudiated the bets. On the settling day, the plaintiff, who was a member of Tattersall's, paid the bets as, if he had been a defaulter, he would have been subject to certain disqualifications in connexion with racing matters, and he then sued the defendant for the amount so paid:—Held (Brett, M.R., dissenting), that he was entitled to recover the amount. *Read v. Anderson*, 13 Q. B. D. 779; 53 L. J., Q. B. 532; 51 L. T. 55; 32 W. R. 950; 49 J. P. 4—C. A.

— **Agent omitting to do Something made Necessary by Statute—Stock Exchange Rules.**

—The defendant employed the plaintiffs, who were stockbrokers on the Stock Exchange, to buy shares in a joint stock banking company. He had on many previous occasions employed the plaintiffs to buy similar shares, and on none of those occasions did the contract or advice note forwarded to him specify the distinguishing numbers of the shares purchased. The plaintiffs purchased the shares from a jobber on the Stock Exchange in the usual way, and forwarded to the defendant a contract note in the usual form, stating that the contract was made subject to the rules and regulations of the Stock Exchange. The contract was not made with reference to any distinguishing numbers of the shares, nor did the contract note specify any numbers. It is not the practice on the Stock Exchange to specify the numbers of the shares in dealing in bank shares. The defendant before the settling-day wrote to the plaintiffs repudiating the contract, on the ground that the numbers of the shares were not specified pursuant to 30 & 31

Vict. c. 29, s. 1. Notwithstanding such repudiation, the plaintiffs completed the contract and paid for the shares. By the rules of the Stock Exchange the committee only recognise the members of the Stock Exchange as the parties to contracts, and if a member does not carry out a contract he may be declared a defaulter and expelled from the Stock Exchange, and "no application, which has for its object to annul any bargain on the Stock Exchange, shall be entertained by the committee unless upon an allegation of fraud or wilful misrepresentation." The plaintiffs sued the defendant to recover the price of the shares paid by them:—*Held*, that the plaintiffs were entitled to recover. *Seymour v. Bridge*, 14 Q. B. D. 460; 54 L. J., Q. B. 347—Mathew, J.

The defendant instructed the plaintiffs, stock-brokers of Bristol, to purchase for him shares in a joint stock banking company on the London Stock Exchange. The plaintiffs gave directions accordingly to their London agents, brokers on the London Stock Exchange, who purchased the shares from jobbers on the Stock Exchange in the usual way, without having in the contract distinguishing numbers of the shares, it not being the practice on the London Stock Exchange to specify the numbers or otherwise comply with 30 & 31 Vict. c. 29 (Leeman's Act), s. 1. By the rules of such Stock Exchange it is provided that the Stock Exchange shall not recognise in its dealings any other persons than its own members, such members, if they do not carry out contracts, being liable to be expelled from the Stock Exchange, and that no application to annul a contract shall be entertained by the committee of the Stock Exchange unless upon a specific allegation of fraud, or wilful misrepresentation. Before the settling-day the defendant repudiated the contract, but the committee of the Stock Exchange refused to annul the contract, and therefore the plaintiffs completed it, and paid the price of the shares. The defendant was ignorant of the usage of the London Stock Exchange with regard to dealings in shares of banking companies, and did not know that the purchasing broker was by such usage bound to perform a contract for the purchase of banking shares, though void at law under Leeman's Act:—*Held*, that the plaintiffs were not entitled to recover from the defendant the money paid by them as the price of the shares, since the usage of the Stock Exchange to disregard Leeman's Act, and to recognise as valid a contract which was made contrary to that act, was unreasonable as against strangers who did not know it, and therefore was not binding on the defendant. *Perry v. Barnett*, 15 Q. B. D. 388; 54 L. J., Q. B. 466; 53 L. T. 585—C. A.

A. having instructed his brokers, B. & Co., to purchase shares in the O. Bank, received from them a bought-note stating the purchase of shares from C. (a jobber), but, according to the usual practice on the Stock Exchange, not specifying the registered numbers of the purchased shares. Between the date of purchase and the settling-day the bank stopped payment and proceedings were taken to wind it up. A.'s solicitors thereupon wrote B. & Co. repudiating the contract for purchase contained in the bought-note, on the ground that the contract was illegal and void, being in contravention of 30 Vict. c. 29, and giving notice that if they completed it, it would be at their own risk. On the same day A.

wrote a private letter to B. calling attention to the formal letter, "and I wish you clearly to understand that whatever position you may have to assume with regard to them (the shares) I consider myself fully bound to support you." The name of A., as the purchaser of the shares, was returned to C. by B. & Co., and on receiving a transfer and the share certificates the money was paid by them to the transferor's brokers. A. refused to execute the transfer, and returned it to B. & Co., in whose possession it remained, without, for some time, any intimation to the vendor that A. repudiated the transaction:—*Held*, that as the liability of C. (the jobber) in respect of the shares had ceased on the acceptance of the transfer by B. & Co., it followed that A., though he had not executed the transfer, had in the circumstances, and not by definitely repudiating the authority given to B. & Co. as his agents, become equitable owner of the shares, and bound to indemnify the vendor against all loss and liability in respect of them. *Loring v. Davis*, 32 Ch. D. 625; 55 L. J., Ch. 725; 54 L. T. 899; 34 W. R. 701—Chitty, J.

— **Authority to Sell Shares on Stock Exchange.**—A person who employs a broker to sell shares on the Stock Exchange authorises such broker to make a contract of sale in accordance with the rules and regulations therein in force, and undertakes to indemnify the broker against any liability incurred by him under those rules, unless the rules relied on by the broker are either illegal or unreasonable and not known by the principal. *Harker v. Edwards*, 57 L. J., Q. B. 147—C. A.

Sale of Agent's own Property to Principal—Non-Disclosure of Interest.—A director of a company as the company's agent purchased for the company a property in which, before he became director, he had acquired an interest. The company had gone into liquidation, and a shareholder, whose shares were fully paid up, took out a summons under s. 165 of the Companies Act, 1862, and sought to make the director liable for misfeasance or breach of trust on the ground that the director had allowed the company to make the purchase without disclosing his own interest, and at a price far exceeding the value:—*Held*, that the application must be dismissed, the evidence adduced by the applicant failing to show either that the director had not disclosed his interest or that the purchase price was above the value. *Cavendish-Bentinck v. Fenn*, 12 App. Cas. 652; 57 L. J., Ch. 552; 57 L. T. 773; 36 W. R. 641—H. L. (E.)

Production of Documents by Agent to Persons appointed by Principal.—A firm of merchants residing abroad brought an action against their agent in this country claiming production of the documents relating to their business to a person appointed by them for that purpose. The defendant put in a defence stating that the person appointed by the plaintiffs was a clerk in a rival and unfriendly house of business, for which reason he objected to produce the documents to him, but that he was willing to produce them to any proper person. The plaintiffs moved, under Ord. XXV. r. 4, to strike out the defence:—*Held*, that although a principal had a general right to the production of documents in the hands of his agent to any person appointed

by him, he cannot insist on their being produced to an improper person; and therefore the defence disclosed a reasonable answer to the claim. Whether an action for the sole purpose of enforcing the production of documents to a particular person will lie, *quære*. *Dadswell v. Jacobs*, 34 Ch. D. 278; 56 L. J., Ch. 233; 55 L. T. 857; 35 W. R. 261—C. A.

Money Received—Agent betting for Principal—Wagering.]—The plaintiff employed the defendant for a commission to make bets for him on horses. The defendant accordingly made such bets, and he received the winnings from the persons with whom he had so betted. In an action by the plaintiff for the amount which the defendant had so received:—Held, that 8 & 9 Vict. c. 109, s. 18, which makes null and void all contracts by way of wagering, did not apply to the contract between the plaintiff and defendant, and that, therefore, notwithstanding that statute, the plaintiff was entitled to recover in respect of the bets which had been so paid to the defendant. *Beyer v. Adams* (26 L. J., Ch. 841), overruled. *Bridger v. Savage*, 15 Q. B. D. 363; 54 L. J., Q. B. 464; 53 L. T. 129; 33 W. R. 891; 49 J. P. 725—C. A.

—Duty to account—Interest from Date of Refusal.]—A person who has received money as agent is bound not only to account for the same, but also to pay it over to the principal when requested so to do; and in an action for money had and received, is chargeable with interest on the amount so received from the date of the refusal to pay it over. *Pearse v. Green* (1 Jac. & W. 135), followed. *Harsant v. Blaine*, 56 L. J., Q. B. 511—C. A.

Duty to Account for Bonuses received.]—The managing director was before the formation of the plaintiff company a shareholder in two other companies, and in consequence of employing them to supply ice to the plaintiff company's ships, and to take away the fish from them, he received from those companies certain bonuses paid out of surplus profits after payment of dividends at a fixed rate. Under an agreement with the company he was allowed to engage in any other business or venture not prejudicial to the interests of the company, and the articles provided that the directors might enter into contracts, and do business with the company:—Held, that he must account to the plaintiff company for the bonuses, though the plaintiff company could not have obtained them from the other companies. *Boston Deep Sea Fishing Company v. Ansell*, 39 Ch. D. 339; 59 L. T. 345—C. A.

Letters addressed to Agent at Principal's Office—Rights as to, after Dismissal.]—B. was employed to manage one of L.'s branch offices for the sale of machines, and resided on the premises. He was dismissed by L., and on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at L.'s branch office. He admitted that among the letters so forwarded to him were two which related to L.'s business, and that he did not hand them to L., but returned them to the senders. After this dismissal he went about among the customers, making oral statements reflecting on the solvency of L., and advised some of them not

to pay L. for machines which had been supplied through himself. L. brought an action to restrain B. from giving notice to the post-office, to forward to B.'s residence letters addressed to him at L.'s office, and also asking that he might be ordered to withdraw the notice already given to the post-office:—Held, that the defendant had no right to give a notice to the post-office, the effect of which would be to hand over to him letters, of which it was probable that the greater part related to L.'s business, and a mandatory injunction was granted to compel the defendant to withdraw his notice, the plaintiff undertaking to open the letters at stated times, with liberty for the defendant to be present at the opening. *Herman Loog v. Bean*, 26 Ch. D. 306; 53 L. J., Ch. 1128; 51 L. T. 442; 32 W. R. 994; 48 J. P. 708—C. A.

Liability of Agent for sub-Agent.]—The secretary of a benefit building society employed H. as his private clerk to transact the business of the society. H. was not an officer of the society. The directors had drawn cheques from time to time, which were handed over to H. by the direction and with the knowledge of the secretary, for the purpose of being paid by him to the withdrawing members; but instead of being so applied they were misappropriated by H.:—Held, that the secretary was responsible for the acts of his clerk to whom he intrusted the moneys, in the same manner and to the same extent as if the directors had placed the moneys in the hands of the secretary, and he himself had handed them over to his clerk. *James, Ex parte, Mutual and Permanent Benefit Building Society, In re*, 48 J. P. 54—Kay, J.

An agent employing a sub-agent, though with the knowledge of the principal, is nevertheless liable to the principal for moneys received by the sub-agent. *Skinner v. Weguelin*, 1 C. & E. 12—Day, J.

A plaintiff, appointed by the court paid manager of an estate, who transmitted moneys belonging to the estate to his solicitor in the action for payment into court, was held liable for the solicitor's misappropriation, on the ground of negligence, by reason of his sending the money before the orders for payment in had been actually obtained, and subsequently asking for no vouchers or other direct evidence of payment. *Mitchell, In re, Mitchell v. Mitchell*, 54 L. J., Ch. 342; 52 L. T. 178—Chitty, J.

Right of Lien—Factor.]—An agent who is entrusted with the possession of goods for the purpose of sale, does not lose his character of factor, or the right of lien attached to it, by reason of his acting under special instructions from his principal to sell the goods at a particular price, and to sell in the principal's name. *Stevens v. Biller*, 25 Ch. D. 31; 53 L. J., Ch. 249; 50 L. T. 36; 32 W. R. 419—C. A.

—Action by Undisclosed Principal.]—See *Mildred v. Maspons*, ante, col. 1511.

PRINCIPAL AND SURETY.

1. *The Contract*, 1527.
2. *Discharge of Surety*, 1531.
3. *Rights of Surety*, 1534.

1. THE CONTRACT.

Sufficiency of Memorandum — Statute of Frauds.]—Where the contract between a creditor, debtor and surety is contained in a bill of exchange, in an action by the creditor against the surety on the bill no other evidence save the bill is required to satisfy the Statute of Frauds, if the obligation appearing on the face of the bill is the precise obligation the surety has agreed to undertake. *Holmes v. Durkee*, 1 C. & E. 23—Williams, J.

Duration of Guarantee—Death of Joint Guarantor—Estoppel by Conduct.]—A joint guarantee is not determined by the death of one of the guarantors if the survivors give no notice that they will not be answerable. Three directors of a company gave a joint guarantee to a bank to secure the balance of the company's account to the amount of 2,000*l.* The company was afterwards wound up and reconstructed, but the bank was only told that the company had changed its name, and the account was continued as before:—Held, in an action by the bank to recover 2,000*l.* due on the account, that the guarantors were estopped by their conduct from denying that the guarantee remained in force. *Ashby v. Day*, 54 L. T. 408; 34 W. R. 312—C. A. Affirming 54 L. J., Ch. 935—V.-C. B.

— **Construction — Parol evidence.**]—G., knowing that his son C., who was a stock-broker in London, required advances for the purpose of his business, gave to a bank a letter of guarantee, undertaking to guarantee any advances made to C. to the extent of 1,000*l.* After the death of G., the bank sought to prove on his estate in respect of four items:—1, a promissory note of C. to the bank for 440*l.*, dated the 30th August, 1880, at six months; 2, a sum of 32*l.*, balance due on a bill of exchange drawn by D., and accepted by E., dated the 6th October, 1880, at six months; 3, a promissory note for 490*l.*, of B. to the bank, dated the 18th October, 1880, at six months, and 4, 7*l.* 6*s.* 6*d.*, the overdraft of C.'s current account. The promissory note for 440*l.* had been renewed more than once, and this note, and the renewals, and the bill of exchange had been placed to the credit of C.'s account with the bank while current, and transferred to the debit side of his account when due, discount being charged in cases of renewal to C.'s account. C. drew upon the bank to the full amount for which he was thus credited. C.'s name was not on the bill of exchange, but the bank cashed it on his guarantee, and the proceeds were placed to C.'s credit. The promissory note for 490*l.* represented a note given to the bank by B. some years previously to the date of G.'s guarantee, the amount of which had been then advanced to C. No entry of this note or its renewals appeared in C.'s current account, although the amount of the discounts on it were charged:—Held, (1), that to aid in the

construction of the guarantee, parol evidence was admissible of the circumstances under which it was given; (2), that under the circumstances, the guarantee was a continuing guarantee, extending to advances made after its date; (3), that "advances" was not confined to cash advances or overdrafts, but included the proceeds of bills or notes discounted by the bank, and placed to C.'s credit; (4), that the right of the bank to sue on bills and notes being suspended during their currency was not a giving of time within the rule which discharges a surety; but that, whether each renewal was equivalent to a fresh and independent advance or not, the amount advanced by the bank to C. was within the guarantee; (5), that the bank could not sustain against G.'s estate a claim upon the note for 490*l.* *Grahame v. Grahame*, 19 L. R., Ir. 249—V.-C.

Guarantee of Current Account—Death of Surety—Appropriation of Payments.]—S. guaranteed the account of T. at a bank by two guarantees, one for 150*l.*, the other for 400*l.* By the terms of the guarantees the surety guaranteed to the bank "the repayment of all moneys which shall at any time be due from" the customer "to you on the general balance of his account with you"; the guarantee was moreover to be "a continuing guarantee to the extent at any one time of" the sums respectively named, and was not to be considered as wholly or partially satisfied by the payment at any time of any sums due on such general balance; and any indulgence granted by the bank was not to prejudice the guarantee. S. died, leaving T. and another executor. The bank on receiving notice of his death, without any communication with the executors beyond what would appear in T.'s pass-book, closed T.'s account, which was overdrawn, and opened a new account with him, in which they did not debit him with the amount of the overdraft, but debited him with interest on the same, and continued the account until he went into liquidation, when it also was overdrawn:—Held, that there was no contract, express or implied, which obliged the debtor and creditor to appropriate to the old overdraft the payments made by the debtor after the determination of the guarantee, and that the bank was entitled to prove against the estate of S. for the amount of the old overdraft, less the amount of the dividend which they had received on it in the liquidation. *Sherry, In re, London and County Banking Company v. Terry*, 25 Ch. D. 692; 53 L. J., Ch. 404; 50 L. T. 227; 32 W. R. 394—C. A.

Implied Indemnity—Lawful seizure of Goods for Another's Debt.]—Where an execution has been levied on goods which as between the execution debtor and a third person, are the third person's, but as between the execution creditor and the third person are the execution debtor's, the case comes within the principle that a debtor is liable to indemnify a person whose goods have been lawfully seized for his debt, and the third person can recover the sum realised by the goods from the execution debtor. *Edmunds v. Wallingford*, 14 Q. B. D. 811; 54 L. J., Q. B. 305; 52 L. T. 720; 33 W. R. 647; 49 J. P. 549—C. A. Affirming 1 C. & E. 334—Huddleston, B.

The sheriff had seized goods for the debt of the defendant, and the claim of the plaintiff to

the goods was barred upon interpleader, but the defendant had bound himself by admission as between the parties that the goods were the plaintiff's, and had agreed to pay a sum of money in consideration of the seizure:—Held, that the plaintiff was entitled to recover that sum from the defendant. *Ib.*

—**Mortgagee postponing Charge at Mortgagor's Request.**—Where, at the request of a mortgagor, a second mortgagee postpones his charge for the purpose of facilitating a further charge for the benefit of the mortgagor, the court will imply a promise on the part of the mortgagor to indemnify the second mortgagee, and allow a proof against the bankrupt mortgagor's estate for the amount which the second mortgagee would have received out of the proceeds of sale of the estate if he had not consented to postpone his charge. *Ford, Ex parte, Chappell, In re*, 16 Q. B. D. 305; 55 L. J., Q. B. 406—C. A.

Indemnity—Breach of Trust.—Where there are two trustees and the management of the trust is left in the hands of one, and the acting trustee commits a breach of trust, the passive trustee is not entitled to an indemnity from the acting trustee, unless there are some special circumstances, as where the acting trustee is the solicitor for the trust, or has derived a personal benefit from the breach of trust. *Lockhart v. Reilly* (25 L. J., Ch. 697) and *Thompson v. Finch* (8 D. M. & G. 560) distinguished. *Bahin v. Hughes*, 31 Ch. D. 390; 55 L. J., Ch. 472; 54 L. T. 188; 34 W. R. 311—C. A. See further, TRUST AND TRUSTEE.

Original Lessee not Surety for Assignee of Lease.—The liability of a lessee upon a covenant in a lease after assignment is not that of surety for the assignee. *Baynton v. Morgan*, 22 Q. B. D. 74; 58 L. J., Q. B. 139; 37 W. R. 148; 53 J. P. 166—C. A.

Right of Assignee of Lease to Indemnity from Assignor.—On the dissolution of a partnership between H. and R., H. assigned to R. all his interest in two houses belonging to the partnership held under subleases from C. and D., and R. covenanted to pay the rents and observe the covenants and keep H. indemnified against them. R.'s executors sold the houses to B., and B. to a company which went into liquidation. The landlords C. and D. thereupon sued H. for the rent, and he paid it for the whole of the year 1882. D. also made a large demand against H. for breaches of covenants to repair, but H. made no payment. On the 15th of March, 1883, D. assigned his reversion to H., and in May, 1883, H. acquired C.'s reversion. In June, 1883, H. bought the leasehold interest in both houses from the liquidators of the company, and covenanted thenceforth to pay the rent and observe the covenants. H. sought to prove against the estate of R. for the sums paid for rent, for the rent payable at Lady Day, 1883, on D.'s house, and for the amount of the dilapidations in that house:—Held, that the right of H., under R.'s covenant of indemnity, to prove for the rents which he had paid, was not taken away by his covenant in the assignment by the liquidators, which could not be extended to rents already due and paid. Further,

this right was not defeated on the ground that the right of R.'s representatives, if they paid rent, to recover it from the owner of the lease for the time being, was interfered with by the assignment from the liquidators to H., for that this assignment could not take away any right of action which R.'s executors might have against the persons entitled to the houses at the end of 1882, and that an assignor who pays rent has no lien on the term, and so cannot be prejudiced by its subsequent assignment. Neither was the right defeated on the ground that H. on paying the rent became entitled to a right of distress from the reversioners, which he had destroyed by taking an assignment of the leases, and had therefore discharged the estate of R. by releasing a remedy to the benefit of which R. as a surety was entitled, for that a right of distress is not a security or remedy to the benefit of which a surety paying rent is entitled under the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 5:—Held, therefore, that H. was entitled to prove against R.'s estate for the rent paid in 1882 on both houses, and that he was entitled to prove for the Lady Day rent on D.'s house; but that H. was not entitled to prove for the amount of dilapidations, for that he had sustained no damage by reason of them, inasmuch as he bought the leases from the liquidators at a less price in consequence of the breaches of the covenant to repair; nor for the Lady Day rent of C.'s house. *Russell, In re, Russell v. Shoolbred*, 29 Ch. D. 254; 53 L. T. 365—C. A.

Contribution—Directors—Breach of Trust—Liability of Executor.—The directors of a company advanced moneys of the company upon an unauthorised security, and two sums of 600*l.* and 400*l.* so lent were lost. The 600*l.* formed part of a loan of 800*l.*, and the 400*l.* formed part of a loan of 1,000*l.* which was granted by the board of directors, and of which 400*l.* was actually advanced and repaid, and a second 400*l.* was advanced and not repaid. In an action by the company against one of the directors who had taken part in granting the loans, he was held liable to pay the two sums of 600*l.* and 400*l.* to the company, and, having paid them, sued three of his co-directors for contribution. One of the defendants was not present at the meeting at which the loan of 800*l.* was granted, and at which a cheque for the 800*l.* was drawn, but he was present at a subsequent meeting at which the minutes of the former meeting were read and confirmed. The 800*l.* had been already paid to the borrower:—Held, that, whether the defendant would or would not have been liable to the company, there was no equity to compel him to contribute to the plaintiff in respect of the 600*l.* *Ramskill v. Edwards*, 31 Ch. D. 100; 55 L. J., Ch. 81; 53 L. T. 949; 34 W. R. 96—Pearson, J.

The same defendant was present at the meeting at which the loan of 1,000*l.* was granted, when he protested strongly against it. He was present at a subsequent meeting at which the minutes of the first meeting were read and confirmed, and he then signed a cheque which was drawn for the first 400*l.*:—Held, that by signing the cheque he had adopted the whole loan of 1,000*l.*, and that he was therefore liable to contribute in respect of the second 400*l.* which was lost. *Ib.*

The third defendant died after the commencement of the action, and his administrator was then made a defendant :—Held, that the liability to contribute survived against the defendant's estate. *Ib.*

— **Joint Adventure—Default in Payment of Loss by one party.**—By agreement between the plaintiffs, the defendants, and Messrs. L., B. & Co., a cargo of Californian wheat was to be shipped for their joint account by the correspondents of L., B. & Co. at San Francisco, consigned to the plaintiffs at Liverpool for sale upon certain special terms; the shippers to reimburse themselves for costs and insurance of the cargo by drafts on the plaintiffs at sixty days' sight to the extent of 45s. per quarter, less freight, and for the balance of invoice amount by separate drafts at sixty days' sight upon each of the above parties for one-third of the excess. The cargo was shipped, and a bill was drawn by the San Francisco house for 20,353l. 18s. 1d. on account of the invoice price of the wheat, less freight, upon the plaintiffs, and was duly accepted and paid by them, together with freight, insurance, and other charges in respect of the cargo; and the wheat on arrival was sold by the plaintiffs at a loss. In December, 1883, L., B. & Co. became insolvent and compounded with their creditors for 30 per cent. of their liabilities, which composition the plaintiffs received, leaving an unpaid balance of 1,760l. 10s. 9d. due from that firm for their share of the loss on the adventure :—Held (the judge to draw inferences of fact), that the purchase and shipment of the wheat was a joint partnership adventure, each of the three firms to participate equally in the profit or loss; and that the defendants, according to the rule of equity, which since the Judicature Act, 1873, is to prevail, were liable to contribute equally with the plaintiffs to make good the default of L., B. & Co. *Lowe v. Dixon*, 16 Q. B. D. 455; 34 W. R. 441—Lopes, J.

2. DISCHARGE OF SURETY.

Discharge of Principal—Reservation of Rights against Surety.—Where a creditor discharges the principal debtor, but reserves his rights against the surety, even by parol, the surety is not discharged. *Norman v. Bolt*, 1 C. & E. 77—Field, J.

The acceptor of a bill of exchange for 100l. being sued thereon by the holders, paid into court the sum of 30l. in satisfaction of the whole cause of action. The holders gave notice (in Form 4, App. B. of the R. S. C. 1883) that they accepted that sum, having previously written to the acceptor to say that the indorsers had arranged to pay the balance of 70l., and would sue the acceptor therefor :—Held that the acceptor was not thereby absolutely released, and that the indorsers, having paid the balance, could recover it from the acceptor. *Jones v. Whitaker*, 57 L. T. 216—C. A.

Giving Time—Taking Bill for portion of Debt.—The defendants were sureties to the plaintiffs for H. D., on a continuing guarantee for the value of goods to be supplied by the plaintiffs to H. D. not exceeding 300l. in all. The plaintiffs, without the defendants' knowledge or consent, having

taken from H. D. a bill at three months still current for 45l., on account of portion of the sum due for goods supplied to H. D., the actual amount due having been previously ascertained :—Held, that the defendants were not released from liability to pay the balance of the sum due for the goods supplied to H. D., under the guarantee, but were only discharged to the extent of the 45l. for which the bill was taken. *Dowden v. Lewis*, 14 L. R., Ir. 307—Ex. D. See also *Grahame v. Grahame*, ante, col. 1528.

— **Extension of Time for lodging Instalment by order made upon Consent—Judicial Act.**—S., as principal, and the defendant, as his surety, were jointly and severally indebted to the plaintiffs in the sum of 1,096l. upon three promissory notes. S. carried an arrangement in the Court of Bankruptcy with his creditors for 20s. in the pound, payable by four equal instalments in four, eight, twelve, and sixteen months respectively, the last instalment to be secured by S. lodging the amount thereof with the official assignee on or before a certain date. S. made default to the extent of 715l. in lodging the amount of the fourth instalment, and the plaintiffs, to whom 4,850l. was then due, including the amount of the said promissory notes, consented that the moneys in court should be appropriated to paying in full the last instalment to the other creditors before paying them, and that S. should have further time to lodge the 715l. An order was made by the Court of Bankruptcy, grounded on the plaintiffs' consent, so appropriating the moneys in court, and extending the time for lodging the 715l. S. never lodged or paid this sum. In an action by the plaintiffs against the defendant on the promissory notes, the defendant contended that by this consent of the plaintiffs he was discharged. The plaintiffs having waived their claim to one-fourth of the amount secured by the promissory notes, judgment was entered for them for the remaining three-fourths :—Held, that the extension of time for the lodgment by S. of the last instalment, although made upon the plaintiffs' consent, was a judicial act and did not discharge the defendant from liability for at least the three-fourths, for which judgment was entered. Semble, even as to the one-fourth waived by the plaintiffs, the proceedings in question would not have operated as a discharge to the defendant. *Provincial Bank v. Cussen*, 18 L. R., Ir. 382—C. A.

Bond—Acquiescence in or Connivance at Irregular Payments.—Where G. was the collector of three separate rates, which were to be paid over as received once a week to the corporation employing him, it is no answer to the surety of a bond given to secure the due payment thereof, that payments were, with the obligee's acquiescence, made at irregular intervals, and that G. mixed the proceeds of the various rates together. *Durham (Mayor) v. Fowler*, 52 J. P. 631—Charles, J. Affirmed 22 Q. B. D. 394; 58 L. J., Q. B. 246; 60 L. T. 456; 53 J. P. 374—D.

G. was appointed collector of certain rates under the Public Health Act, 1875 (38 & 39 Vict. c. 55), and the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), by the plaintiff corporation, to secure the due and faithful payment of which the defendants entered into a bond on G.'s behalf with the plaintiffs. G. subsequently ap-

propriated certain moneys so collected by him to his own use. It appeared that, with the acquiescence of the corporation, G. did not make regular payment to the corporation of the moneys so collected, and did not keep the proceeds of the rates of which he had charge separate, in accordance with the conditions of the several bonds and the provisions of the statutes relating thereto. In an action by the corporation against the sureties:—Held, that such acquiescence was not sufficient to discharge the sureties of their bonds. Semble, the sureties would have been liable even if the rate had been invalid. *Ib.*

Omission to fill up Name in Bill—Notice of

Non-payment.—The debtor gave his creditor a bill of exchange accepted by himself, but with the drawer's name left blank. The plaintiff at the same time, as a surety, deposited with the creditor certificates of stock in a joint stock company as collateral security for the debt. The debtor died without the creditor having filled in the name of the drawer, and his estate was insolvent. The bill was never presented for payment, nor was notice given to the plaintiff of its non-payment:—Held, that the creditor had not discharged the plaintiff from his suretyship by his omission to fill up the drawer's name, and to give notice of the non-payment of the bill to the plaintiff. *Carter v. White*, 25 Ch. D. 666; 54 L. J., Ch. 138; 50 L. T. 670; 32 W. R. 692—C. A.

Substitution of Security for Personal Liability.—A surety guaranteed payment of the premiums upon a life policy, which had been assigned by the principal debtor to his creditor to secure payment of part of the debt. Subsequently, the creditor, without the knowledge of the surety, agreed with the debtor to take the security, with the liability of the debtor and surety to pay the premiums thereon, in substitution for the personal liability of the debtor, in respect of that portion of the debt, and released the debtor from personal liability in respect thereof:—Held, that this arrangement discharged the surety. *Lawes v. Maughan*, 1 C. & E. 340—Denman, J.

Mortgage granted by Principal—Sale.—The appellants having become sureties on the faith of a mortgage granted by the principal debtor to his creditor, claimed to be released wholly or pro tanto from liability, on the ground that the creditor had without notice to them sold parts of the mortgaged property in a manner unwarranted by the terms of the mortgage deed, and that inasmuch as the purchaser had failed to pay the price, they had been deprived of the benefit of a security upon which they were entitled to rely for protection:—Held, that on the evidence the sale was effected by the mortgagor, although with the previous consent of the mortgagee, in the due course of his management and in a manner contemplated by the mortgage deed, and that the liability of the sureties was not affected thereby. *Taylor v. Bank of New South Wales*, 11 App. Cas. 596; 57 L. J., P. C. 47; 55 L. T. 444—P. C.

Variation of Liability.—The defendants, Evans, Digby, and Simson, executed a joint and several bond for 150*l.*, in order to comply with an order of a judge at chambers, under Ord. XIV.,

directing the defendant Evans, in an action of *Tatum v. Evans*, to find security as a condition for leave to defend, the condition of the bond being that it should be void if Evans should pay to the plaintiffs the sum of 75*l.*, or such sum (not exceeding that amount) as the court should think fit to award. When the case came on for trial, Evans consented to judgment being directed for 750*l.*, to include costs, payable, as to the first 400*l.*, by instalments of 25*l.* per month; the remainder to be paid by instalments of 50*l.* per month, the first instalment to be payable on the 1st March, 1885, the plaintiff to be at liberty to issue execution for any balance of the 750*l.* upon default in payment of any instalments, the defendant to re-convey all his interest in the premises to the plaintiff forthwith. It was also provided that the first payment by the defendant was to be taken in discharge of the sureties pro tanto, but they were not to be fully discharged until payment of 75*l.* It was found as a fact that the defendant Digby consented to the terms of the judgment, but the defendant Simson did not consent:—Held, that the defendant Simson was discharged from liability under the bond. *Tatum v. Evans*, 54 L. T. 336—Denman, J.

3. RIGHTS OF SURETY.

Crown Debt—Priority.—A surety to the Crown, who has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of his principal's estate. *Churchill (Lord), In re, Manisty v. Churchill*, 39 Ch. D. 174; 58 L. J., Ch. 136; 59 L. T. 597; 36 W. R. 805—North, J.

Specific Performance of Indemnity, before Breach.—In equity a contract to indemnify can be specifically enforced before there has been any such breach of the contract as would sustain an action at law. In equity the plaintiff need not pay and perhaps ruin himself before seeking relief. He is entitled to be relieved from liability. *Johnston v. Salvage Association*, 19 Q. B. D. 460; 57 L. T. 219; 36 W. R. 56; 6 Asp. M. C. 167—Per Lindley, L. J.

Surety for one Partner against another Partner.—The rights of a surety against his principal are not exactly the same as those of the creditor; and therefore, although a creditor who has recovered judgment against one partner cannot sue another partner, that rule does not take away the rights of a surety for one partner as against another partner. *Kendall v. Hamilton* (4 App. Cas. 504), distinguished. *Badeley v. Consolidated Bank*, 34 Ch. D. 536; 55 L. T. 635; 35 W. R. 136—Stirling, J.

Right to Securities—Refusal to give—Damages.—The plaintiff was the drawer of a bill of exchange for 106*l.* as surety for M., the acceptor. The bill was dishonoured at maturity, and the defendant sued the plaintiff and M. on the bill. Against M. he obtained judgment by default, and against the plaintiff on the trial of the action. The plaintiff paid the amount. The plaintiff applied to the defendant for an assignment of the judgment against M. The defendant refused to assign, and the plaintiff

brought an action:—Held, that the plaintiff was *prima facie* entitled to recover as damages the value of specific assets which would have been available for execution under the judgment, if assigned, and that it was not incumbent on him in the first instance to show that there were no other assets available. *Oddy v. Hallett*, 1 C. & E. 532—Denman, J.

Co-Sureties inter se—Concealment.—M. and W. became co-sureties for a sum of 500*l.*, borrowed by B. Of this sum of 500*l.*, 125*l.* was, by previous agreement, advanced by B. to his surety W. No notice of this transaction was given to M. B. became bankrupt, and M. and W. were called upon to pay the unpaid balance of the loan of 500*l.* M. brought an action against W., claiming that W. should be treated as principal debtor on account of the advance of 125*l.* given to him, and claiming the benefit of all securities given to him:—Held, that there was no concealment between the co-sureties of any material fact, and that the plaintiff was not entitled to the relief claimed. *Mackreth v. Walmsley*, 51 L. T. 19; 32 W. R. 819—Kay, J.

Security obtained by one co-Surety who has paid off Debt.—C. being indebted to D., four of his friends joined him in signing and giving four promissory notes to secure the payment to D. of the sum of 13,000*l.* and interest. D. effected three policies on the life of C. for, in the aggregate, 10,000*l.* In 1867, Lord E., of E., one of the co-sureties, having been sued by D. on the notes, paid, with the assistance of his father, the Earl of E., the 13,000*l.* and interest by a mortgage of estates which were settled upon the Earl for life with the remainder to Lord H. of E.; and the Earl having paid the premiums and kept the policies on foot, in September, 1871, shortly after the death of C., obtained an assignment from D. of the policies and received the 10,000*l.* from the insurance office. A., another of the four sureties died. His estate, which was stated to be insolvent, was being administered by the court, and Lord H. of E. brought in a claim against it for contribution in respect of the sum paid to D. on the notes:—Held, that, under all the circumstances of the case, Lord H. of E. and his father, the Earl, must be treated as one person, and that the claim for contribution would be allowed, but only after Lord H. of E. had brought into account, as a set-off, the moneys which were received on the three policies assigned to the Earl, credit being first given for the premiums, and other moneys which had been paid in reference to the transaction. *Arcedeckne, In re, Atkins v. Arcedeckne*, 24 Ch. D. 709; 53 L. J., Ch. 102; 48 L. T. 725—Pearson, J.

Satisfaction of Judgment.—The right of a co-surety under 19 & 20 Vict. c. 97, who has satisfied a judgment obtained by the creditor against the debtor and his sureties, to stand in the place of the judgment creditor, is not affected by the circumstances that such surety has not obtained an actual assignment of the judgment. *M'Myn, In re, Lightdown v. M'Myn*, 33 Ch. D. 575; 55 L. J., Ch. 845; 55 L. T. 834; 35 W. R. 179—Chitty, J.

PRISONS.

Inquests in—Jurisdiction.—See CORONER.

Treatment in Prison—"Criminal Prisoner—Meaning of.—A person committed to prison under 6 & 7 Vict. c. 73, s. 32, and 23 & 24 Vict. c. 127, s. 26, for acting as a solicitor, though not duly qualified, is a "criminal prisoner" within 28 & 29 Vict. c. 126, s. 4, which enacts that "criminal prisoner shall mean any prisoner charged with or convicted of a crime." Such a person is not entitled to be treated as a misdemeanant of the first class by 40 & 41 Vict. c. 21, s. 41. *Osborne v. Milman*, 18 Q. B. D. 471; 56 L. J., Q. B. 263; 56 L. T. 808; 35 W. R. 397; 51 L. J. 437—C. A. Reversing 16 Cox C. C. 138—Denman, J.

A person who is committed to prison in default of distress for non-payment of a sum of money adjudged to be paid by a court of summary jurisdiction on an information under s. 31 of the Vaccination Act, 1867, is a "criminal prisoner" within the meaning of the Prisons Act, 1865, s. 5, and must be treated as such while in prison. *Kennard v. Simmons*, 50 L. T. 28; 48 J. P. 551; 15 Cox, C. C. 397—Lindley, L. J.

Hard Labour—Non-payment of Penalties.—The 5th section of the Summary Jurisdiction Act, 1879, authorises the infliction of imprisonment with hard labour for default in payment of a penalty adjudged to be paid by a summary conviction where the act on which the conviction is founded authorises the infliction of imprisonment with hard labour as a punishment for the offence. *Reg. v. Tyne-mouth JJ.*, 16 Q. B. D. 647; 55 L. J., M. C. 181; 54 L. T. 386; 50 J. P. 454; 16 Cox, C. C. 74—D.

Whether a statute which authorises the punishment of an offence with a penalty, or in the discretion of the court, with imprisonment with or without hard labour, is an act which authorises the punishment of imprisonment with hard labour within the meaning of the exceptions in s. 5 of the Summary Jurisdiction Act, 1879, *quære*. *Reg. v. Tyne-mouth JJ.* (16 Q. B. D. 647), not followed. *Reg. v. Turnbull*, 16 Cox, C. C. 110—D.

Governor of Prison—Action against, for False Imprisonment—Protection of Warrant.—The governor of a prison is protected in obeying a warrant of commitment valid on the face of it, and an action for false imprisonment will not lie against him for the detention of a prisoner in pursuance of the terms of such warrant. The plaintiff having been convicted by a court of summary jurisdiction and sentenced to seven days' imprisonment, a warrant of commitment was issued directing that the plaintiff should be imprisoned in a certain goal for seven days. The plaintiff was arrested on August 24, and lodged in prison on August 25. The governor of the gaol kept the plaintiff in prison until and during August 31:—Held, that, whether or not the plaintiff's sentence ran from August 24 or August 25, the governor was protected by the warrant, and was not liable to an action for false imprisonment in respect of the plaintiff's detention on August 31. *Henderson v. Preston*, 21 Q. B.

D. 362; 57 L. J., Q. B. 607; 36 W. R. 834; 52 J. P. 820—C. A. Affirming 59 L. T. 334—D.

Superannuation of Officers—Compensation—Liability of County to pay.]—At the time of the passing of the Prisons Act, 1877, C. was the governor of a prison, which, pursuant to that statute, was transferred to the Secretary of State for the Home Department. The justices of M. had been the local authority having control of the prison. C. retired from his appointment soon after the coming into force of that act, and the Commissioners of the Treasury awarded to C. an annuity of 582*l.* 13*s.* 4*d.*, and apportioned it as follows:—429*l.* 6*s.* 8*d.* to be borne by the justices of M., and 133*l.* 6*s.* 8*d.* to be borne by grants provided by parliament. At the time of his retirement C. was less than sixty years of age, and he had not become incapable from sickness, age, or infirmity, or injury, of executing his office in person, and he retired for the purpose of facilitating improvements in the management of the prison. The justices having declined to pay the sum of 429*l.* 6*s.* 8*d.*:—Held, that the commissioners had jurisdiction to apportion the annuity granted to C. in the manner above mentioned, and that a mandamus would lie to compel the justices of M. to pay the amount apportioned upon them. *Middlesex Justices v. Reg.*, 9 App. Cas. 757; 53 L. J., Q. B. 505; 51 L. T. 513; 33 W. R. 49; 48 J. P. 104; 15 Cox, C. C. 542—H. L. (E.).

PRIVILEGE.

Of Members of Parliament.]—See PARLIAMENT.

Of Witnesses.]—See EVIDENCE, VII. 3.

Of Solicitors.]—See SOLICITOR.

In Actions for Defamation.]—See DEFAMATION, I. 2.

PRIVILEGED COMMUNICATIONS.

Non-actionable.]—See DEFAMATION.

Non-production, &c., of.]—See DISCOVERY, I. 4 and II. 5.

PRIVY COUNCIL.

Practice and Decisions of.]—See cases sub tit. COLONY.

PROBATE.

Of Wills.]—See WILL.

Duty.]—See REVENUE, III. 6.

PROHIBITION.

Severable Claims — Part Good.]—Where a plaintiff contains two claims, one of which is within and the other without the jurisdiction of the county court, a prohibition may be granted as to one only. *Reg. v. Westmoreland County Court Judge*, 58 L. T. 417; 36 W. R. 477—D.

Acquiescence — Effect of.]—Except on the application of the Crown, the court will refuse to grant a writ of prohibition where the defect in jurisdiction depends upon some fact in the knowledge of the applicant, which he has neglected without excuse to bring forward in the court below, since the writ, though of right, is not of course. *Broad v. Perkins*, 21 Q. B. D. 533; 57 L. J., Q. B. 638; 60 L. T. 8; 37 W. R. 44; 53 J. P. 39—C. A.

When it may be applied for—Before Execution completed.]—Where in an action in an inferior court, upon the facts disclosed at the trial and relied on by the plaintiff, a clear want of jurisdiction over the cause is for the first time made apparent, the defendant has a right, at any time before execution has been completed, to claim a prohibition to restrain all further proceedings, and to prohibit any further excess of jurisdiction. Prohibition will not go to an inferior court, if such court had in fact jurisdiction over the cause, although the facts in evidence at the trial in the inferior court were not such as to give that court jurisdiction. *Heyworth v. London (Mayor)*, 1 C. & E. 312—Hawkins, J. Affirmed in C. A.

After Judgment — Salford Hundred Court — Waiver.]—A defendant in an action in the Salford Hundred Court who has not objected to the jurisdiction of that court in his defence, as provided by s. 7 of the Salford Hundred Court of Record Act, 1868, cannot after judgment has been recovered against him in that court obtain a writ of prohibition on the ground of want of jurisdiction. *Oram v. Breary* (2 Ex. D. 346), overruled. *Chadwick v. Ball*, 14 Q. B. D. 855; 54 L. J., Q. B. 396; 52 L. T. 949—C. A.

To County Court—Insufficient Notice of New Trial — Jurisdiction to hear Case.]—A notice was given by the defendant to the plaintiffs by letter on the 8th Nov. stating that he would apply on the 12th Nov. for a new trial. The plaintiffs refused to accept this notice as being too short, and did not attend at the hearing on the 12th. The fact that the plaintiffs objected to the notice was brought before the judge, who, however, made an order for a new trial. The plaintiffs applied for a prohibition to restrain the judge from hearing the case on the new trial:—Held, that a prohibition ought not to be granted, as the proper proceeding for the plaintiffs to have adopted would have been to have made an application to the judge to set aside the order for a new trial as irregular. *Jones' Trustees v. Gittens*, 51 L. T. 599—D.

Setting aside—Jurisdiction of Judge at Chambers.]—A writ of prohibition, directed to the judge of a county court, had been issued out of the Petty Bag Office, as of course, upon

a formal affidavit that the cause of action did not arise within the jurisdiction:—Held, that a judge at chambers had jurisdiction to set aside the writ. *Amstell v. Lesser*, 16 Q. B. D. 187; 55 L. J., Q. B. 114; 53 L. T. 759; 34 W. R. 230—D.

To Local Government Board.]—Semble, the local government board in exercising its functions as to provisional orders is not a “court,” nor are purely legislative powers, or powers of promoting legislation on principle, subject to prohibition; but a usurpation of jurisdiction of a judicial character by the board might be prohibited. *Kingstown Commissioners, Ex parte*, 18 L. R., Ir. 509—C. A.

PROMISSORY NOTE.

See BILLS OF EXCHANGE.

PROMOTER.

See COMPANY, II. 1.

PROOF OF DEBTS.

In Bankruptcy.]—*See* BANKRUPTCY.

In Winding up.]—*See* COMPANY.

In Administration.]—*See* EXECUTOR AND ADMINISTRATOR.

PROSPECTUS.

See COMPANY, I. 1.

PROTECTOR OF SETTLEMENT.

See SETTLEMENT.

PROXY.

See COMPANY, IX.

PUBLIC COMPANY.

See COMPANY.

PUBLIC HEALTH.

See HEALTH.

PUBLIC HOUSE.

See INTOXICATING LIQUORS.

PUBLIC OFFICER.

See OFFICE.

PUBLIC WORSHIP.

See ECCLESIASTICAL LAW.

QUARTER SESSIONS.

See JUSTICE OF THE PEACE.

QUEENSLAND.

See COLONY.

QUO WARRANTO.

In what Cases—Office held at Pleasure.]—A quo warranto will not be granted to inquire into the right of an office which is held merely at the pleasure of a public official. *Reg. v. Carroll*, 22 L. R., Ir. 400—Q. B. D.

—Rate Collector.]—The office of collector of rates of a borough is not an office for which an information in the nature of a quo warranto will lie. *Reg. v. Whelan*, 20 L. R., Ir. 461—Q. B. D.

RAILWAYS.

1. *Powers and Duties in Constructing and Working*, 1541.
2. *Mines and Minerals*, 1546.
3. *Rolling Stock*, 1548.
4. *Judgment against*, 1548.
5. *Offences against*, 1550.
6. *Arbitration between Railways*, 1551.
7. *Railway Commissioners*, 1552.
8. *As Carriers of Passengers and Goods—See CARRIER.*
9. *Compulsory Purchase of Land, &c.—See LANDS CLAUSES ACT.*
10. *Liability for Negligence—See NEGLIGENCE.*
11. *Rating—See CORPORATION—POOR LAW.*
12. *Liability under Contagious Diseases (Animals) Act—See ANIMALS.*
13. *Parliamentary Deposit—Abandonment—See PARLIAMENT.*

1. POWERS AND DUTIES IN CONSTRUCTING AND WORKING.

Lien on Lands—Unpaid Vendor—Injunction.]

—Where the unpaid vendor of land taken by a railway company has commenced an action against the company to enforce his lien, and an order has been made in such action that the defendants should, on or before a day named, pay the purchase-money and interest, with a declaration that the plaintiff was entitled to a lien on the lands in respect of the purchase-money, interest, and costs, and that in default of payment the plaintiff was to be at liberty to apply to enforce such lien, such order containing no order for sale, the court will on default in payment, there being evidence that the land is unsaleable, grant an injunction to restrain the defendants from running trains over the railway and from continuing in possession of the land. *Williams v. Aylesbury and Buckingham Railway* (21 W. R. 819), and *Munns v. Isle of Wight Railway* (5 L. R., Ch. 414), discussed. *Allgood v. Merrybent and Darlington Railway*, 33 Ch. D. 571; 55 L. J., Ch. 743; 55 L. T. 835; 35 W. R. 180—Chitty, J.

—Surplus Lands—Debenture Stock—Charge

—Priority.]—Section 23 of the Railway Companies Act, 1867, does not give to the holders of debenture stock in a railway company any lien or charge on the surplus lands, or on the proceeds of the sale of surplus lands of the company, nor does that section give debenture-holders any priority in payment over judgment creditors of the company in proceedings taken by such creditors under the Judgments Law Amendment Act, 1864, for the sale of surplus lands of the railway company. The right to priority in payment given to debenture-holders by s. 23 arises in the following cases at all events—(1) in the distribution of moneys collected under s. 4 of the Railway Companies Act, 1867, by the receiver appointed under that section; (2) in the winding-up of an abandoned railway under the joint provisions of the Abandonment of Railways Acts, 1850 and 1869, and of the Companies Acts, 1862 and 1867; and (3) in the working out of a scheme of arrangement under the provisions of the Railway Companies Act, 1867. *Hull, Barnsley, and West Riding Railway, In re*, 40

Ch. D. 119; 58 L. J., Ch. 205; 59 L. T. 877; 37 W. R. 145—C. A.

Station—"No Goods or Cattle Station at."]

In an action the plaintiff asked for an injunction to compel the defendants to pull down a goods station and cattle sheds which they had erected 140 yards from Bala Station, although it was provided by their private act "that at that station there should be no goods or cattle station." The plaintiff had not objected to the buildings till they were nearly completed, owing to his being abroad at the time, and ignorant of their erection till his return. The defendants contended that the buildings in question had not been erected "at" the station, as they were 140 yards off; that if they had been, it was for the public convenience they should be there, and that the plaintiff was precluded by acquiescence from insisting on his claim:—Held, that the erections were a breach of the provisions of the act, and that the plaintiff was entitled to his injunction. *Price v. Bala and Festiniog Railway*, 50 L. T. 787—Chitty, J.

Property in Materials Delivered but not Fixed—Engineer's Certificates.]

—By an agreement, made between the plaintiff company and the defendant, a contractor, for the construction of a railway, it was provided that, once a month, the company's engineer should certify the amount payable to the contractor in respect of the value of the materials delivered, and that such certificates should be paid by the company seven days after presentation:—Held, that the property in "materials delivered," upon their being certified for by the engineer, passed to the company, though the materials were not fixed. *Banbury and Cheltenham Railway v. Daniel*, 54 L. J., Ch. 265; 33 W. R. 321—Pearson, J.

Stoppage of all Trains at Particular Station.]

—By feu charter, dated 1863, between A., the proprietor of land through which a railway was authorised to run, and the railway company, it was provided that the company should be bound to erect on a piece of ground conveyed to them by A. at a nominal feu rent, "a station for passengers and goods travelling by the said" railway, "at which all passenger trains shall regularly stop," to be called Crathes Station. The station was erected. Subsequently certain trains were run, namely (1) excursion trains at low fares to certain places on the line, but not to Crathes Station. They were advertised by special handbills, and were not included in the time-tables except in error. (2) Trains called the Queen's messenger trains, ran by arrangement with the Home Office, who paid the railway company a subsidy. (3) Trains called the Post Office trains, ran by arrangement with the Post Office, for which a subsidy was also paid. The Queen's messenger trains and the Post Office trains only ran during her Majesty's stay at Balmoral; but they were advertised in the railway company's time-table, and through passengers were allowed to travel by them. They stopped at Crathes by signal, but did not stop regularly for setting down or taking up passengers. There was no contract with the Home Office or Post Office that they should not do so. A. sought declarator that all trains, including the above, except only such as might be hired for an individual or individuals for his or their

exclusive use, should regularly stop:—Held, that the trains called the Queen's messenger trains, and the Post Office trains, fell within the terms of the contract; but that the excursion trains in the circumstances materially differed from ordinary passenger trains, and did not come within the obligation. *Burnett v. Great North of Scotland Railway*, 10 App. Cas. 147; 54 L. J., Q. B. 531; 53 L. T. 507—H. L. (Sc.).

Junction with Private Siding—Expense of Fresh Signals—Board of Trade Order.—The plaintiff and his predecessors in title, as owners of land adjoining a single line of railway, had ever since the year 1861 used a junction siding connecting the railway with a foundry on their land, the siding being the only access to the foundry. The defendants, the railway company, having doubled their line, the Board of Trade, acting on the report of their inspector, and as a condition for certifying the line to be fit for traffic, required the company either to provide the junction of the siding with the modern and improved system of interlocking and signalling apparatus, or to remove the junction, which was of an old-fashioned description. The company then called upon the plaintiff to execute the work or pay the costs of it, but this the plaintiff declined to do, whereupon the company took up the junction points:—Held, by Bacon, V.-C., that the plaintiff had, under s. 76 of the Railways Clauses Consolidation Act, 1845, a statutory right to the use of his siding in connexion with the company's railway, the company's parliamentary powers being subject to that right; and an injunction was therefore granted restraining the company from continuing to prevent communication between his siding and the railway, and compelling the company to restore the junction:—Held, on appeal, that as the plaintiff's predecessors in title had acquired a perpetual right to use the siding under a clause as to sidings in an old local act for making a tramway, which had since been converted into the railway of the defendants, and the subsequent acts contained saving clauses sufficient to protect all rights acquired by the plaintiff under the old act, the case did not depend on the Railways Clauses Act, and that the plaintiff retained the right acquired under the old act to use the siding without contributing to the expense of the new apparatus, such act containing nothing to oblige the plaintiff to make or pay for the interlocking apparatus. *Woodruff v. Brecon and Merthyr Tydvil Railway*, 28 Ch. D. 190; 54 L. J., Ch. 620; 52 L. T. 69; 33 W. R. 125—C. A.

Held also, that if the case had turned on the 76th section of the Railways Clauses Act, the court would not have decided the question whether the plaintiff was bound to pay for the interlocking apparatus, without first ascertaining what, in the year 1845, was included in the terms "offset plates" and "switches" used in that section. *Id.*

Power to Underpin Buildings on Adjoining Lands—Retaining Wall of Railway.—A railway company had power to underpin or strengthen buildings on lands adjoining their line. They carried their line in a deep cutting close beside a building belonging to the plaintiffs, and having given the required notice that

they intended to underpin this building, they made a wall of concrete to support the plaintiff's building, part of the thickness of which was under the plaintiff's building, and part on the company's land, the whole wall forming the retaining wall of the railway cutting:—Held, that the fact that the concrete wall was also the retaining wall of the railway did not make it the less an "underpinning" within the meaning of the act; and therefore that the company had not acted beyond their powers in making the wall on the plaintiff's land. *Stevens v. Metropolitan District Railway*, 29 Ch. D. 60; 54 L. J., Ch. 737; 52 L. T. 832; 33 W. R. 531—C. A.

Broken Bridge in Navigable River—Removal of Débris.—The North British Railway (New Tay Bridge) Act, 1881, gave the North British Railway authority to erect a new bridge over the Tay a little higher up the river than one blown down on 28th December, 1879. S. 21 of this act provided, "The company shall abandon and cause to be disused as a railway so much of the North British Railway as lies between the respective points of junction therewith of railway No. 1 and railway No. 2; and shall remove the ruins and débris of the old bridge, and all obstructions interfering with the navigation caused by the old bridge, to the satisfaction of the Board of Trade." The magistrates of Perth, whose jurisdiction extends down the river to within about three miles of the old bridge, raised an action for declarator and implement:—Held (1) that the special act imposed an absolute obligation to remove the old ruins and débris of the old bridge; and s. 21 did not give the Board of Trade a discretionary power to dispense with the performance of any part of this obligation; and it followed that the respondents had an interest to obtain a declarator as to the extent of the obligation; but (2) dissenting from the judgment of the court below, the obligation did not become immediately prestable; and (3) the import of the expression "to the satisfaction of the Board of Trade" was, that though not bound to submit their plans of removal, including the time and manner, yet, as a matter of prudence, the company ought to do so; (4) that in the circumstances it would be inexpedient, though hardly incompetent, to do more now than simply ordain the company to remove the whole ruins and débris in terms of s. 21, for to order the removal "forthwith" might unduly hamper the discretion of the Board of Trade; and if the company were guilty of undue delay in applying to the Board of Trade: or if they should proceed at their own hand so as to cause obstruction to navigation; or if after obtaining the sanction of the Board of Trade to some scheme of removal, they failed to properly execute it, or any conditions attached, the respondents, on application to the court had an effective remedy. *North British Railway v. Perth, Provost of*, 10 App. Cas. 579—H. L. (Sc.).

Bridges—Opening Span—Detention of Vessel.—A railway company carried its line over the river D., which was a navigable river, by a bridge with an opening span:—Held, that the railway company were not bound, by s. 15 of the Railway Clauses Act, 1863, to open the bridge for a barge with a mast so constructed that it

could be lowered, and that refusing to open the bridge for such a vessel was not a detention within the meaning of the act. *West Lancashire Railway v. Iddon*, 49 L. T. 600; 48 J. P. 199—D.

— **Repair—Highway carried over Railway.**—Where a railway crosses a highway, and the road is carried over the railway by means of a bridge in accordance with the provisions of s. 46 of the Railways Clauses Consolidation Act, 1845, the railway company are bound to keep in repair the roadway upon the bridge, such roadway being part of the bridge which by the section the company are to maintain. *Bury (Mayor) v. Lancashire and Yorkshire Railway*, 20 Q. B. D. 485; 57 L. J., Q. B. 280; 59 L. T. 193; 36 W. R. 491; 52 J. P. 341—C. A. Affirmed in H. L., W. N., 1889, p. 156.

Diversion of Road authorised by special Act—Danger—Injunction.—The B. Railway Company had, by their special act, power to divert roads and make the substitutions shown on their deposited plans. The plans showed, as a substitute for a road passing along the side of a mountain on which part of the line was to be constructed, a curved road above the old one to be cut out of the mountain side. The railway company had taken possession of the old road and made an embankment upon it, upon which they had laid a portion of their line, which was in use for ballast trains, used in the construction of the line, but not open to the public. They had made the new road, but it was made dangerous in winter weather by the constant falling upon it of stones from the steep slope of the mountain above it. This was an action by the Attorney-General on the information of the local board for the district claiming an injunction to restrain the railway company from using the old road until they had caused a sufficient road to be made in its stead:—Held, that s. 53 of the Railways Clauses Act, 1845, applied notwithstanding the fact that the taking of the old road and substitution of the new were authorised by the company's special act, and that the injunction must be granted. On the company's undertaking forthwith to lower the inclination of the slope of the mountain above the road so as to make the road safe, the injunction was suspended. *Attorney-General v. Barry Dock and Railway Company*, 35 Ch. D. 573; 56 L. J., Ch. 1018; 56 L. T. 559; 35 W. R. 830; 51 J. P. 644—North, J.

Nuisance—Statutory Powers—Land Purchased otherwise than under Compulsory Powers.—A railway company, having, besides the ordinary compulsory powers of taking land, power to purchase by agreement additional lands, not exceeding fifty acres in all, in such places as should be deemed eligible for any of certain specified purposes connected with the undertaking which it should deem requisite, bona fide selected and acquired additional lands and used them without negligence for one of the purposes authorised, to wit, as a dock or yard for the reception of cattle travelling upon the line. A nuisance was thereby caused to adjoining occupiers:—Held, that the nuisance, being a necessary consequence of the use of the lands for a purpose expressly authorized by Parliament, could not be restrained by injunction. *Re v. Pease* (4 B. & Ad. 30), *Vaughan v. Taff Vale Railway*

(5 H. & N. 679), and *Hammersmith Railway Company v. Brand* (4 L. R., H. L. 171) followed. *Metropolitan Asylum District v. Hill* (6 App. Cas. 193) distinguished. *London, Brighton, and South Coast Railway v. Trumman*, 11 App. Cas. 45; 55 L. J., Ch. 354; 54 L. T. 250; 34 W. R. 657; 50 J. P. 388—H. L. (E.)

Liability for sending Water on adjoining Lands for Protection of Defendants' Premises.

—By reason of an unprecedented rainfall a quantity of water was accumulated against one of the sides of the defendants' railway embankment, to such an extent as to endanger the embankment, when, in order to protect their embankment, the defendants cut trenches in it by which the water flowed through, and went ultimately on to the land of the plaintiff, which was on the opposite side of the embankment and at a lower level, and flooded and injured it to a greater extent than it would have done had the trenches not been cut. In an action for damages for such injury, the jury found that the cutting of the trenches was reasonably necessary for the protection of the defendants' property, and that it was not done negligently:—Held, that though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff, and that they were therefore liable. *Whalley v. Lancashire and Yorkshire Railway*, 13 Q. B. D. 131; 53 L. J., Q. B. 285; 50 L. T. 472; 32 W. R. 711; 48 J. P. 500—C. A.

2. MINES AND MINERALS.

Notice by Owner of Intention to Work—Injunction—Minerals worked by Quarrying.

—An owner of minerals under or near a railway is entitled to give notice under s. 78 of the Railways Clauses Act, 1845, of his intention to work them, although he intends to let them and not to work them himself. But a notice given without any real intention or probability of working or letting the minerals would be invalid, and the court would restrain the owner from acting upon it. Such a notice is not invalid or unreasonable merely because it includes the minerals under a long extent of railway. Sections 77 and 78 of the Railways Clauses Act, 1845, apply to minerals worked by open quarrying as well as those which are got by underground working. *Midland Railway Company v. Harnwood Brick and Tile Company* (20 Ch. D. 552) approved. *Midland Railway v. Robinson*, 37 Ch. D. 386; 57 L. J., Ch. 441; 57 L. T. 901; 36 W. R. 650—C. A.

Working—Tunnelling under Railway—Compensation.

—S. 80 of the Railways Clauses Consolidation Act, 1845, applies to minerals lying more than forty yards from a line of railway, and enables the owner of minerals, whose access to them is cut off, by reason of a railway company having purchased from him the minerals lying under their line of railway or within forty yards from it to tunnel under the railway for the purpose of working his minerals which are on the other side of it. And this power extends, not only to minerals in the ordinary

sense of the word, but also to such a substance as clay, which is usually worked from the surface. And by s. 81 the mineral owner is entitled to be compensated by the company for any additional expense caused by his having to work the minerals in this way. *Midland Railway v. Miles*, 30 Ch. D. 634; 55 L. J., Ch. 251; 53 L. T. 381; 34 W. R. 136—Pearson, J.

The defendant was the owner of the minerals lying in and under a triangular piece of land, which was completely surrounded by three lines of railway belonging to the plaintiffs, and also of the minerals lying under certain portions of those three lines. The company had purchased the surface of the triangular piece of land, and also the surface of the land on which those parts of the three lines were constructed. The minerals in and under the lands so purchased were not in the first instance purchased by the company. The defendant, in April, 1885, gave the company notice, under s. 78 of the Railways Clauses Act, 1845, of his intention to work the minerals belonging to him in and under the triangular piece of land, and also under the lines of railway. The company gave the defendant notice that they were willing to make compensation for the minerals under the lines of railway, and arbitrators were appointed to assess the compensation. The defendant then gave the company notice that he intended to work the minerals in and under the triangular piece of land, and for that purpose to enter upon and across the line of railway:—Held, that such a mode of working would be a trespass, and that the defendant must be restrained from working in that way, but that he would be entitled to tunnel under the railway in order to work the minerals in and under the triangular piece of land, and that the company must compensate him for the extra expense of so working. *Id.*

A railway company under the powers of a special act and of the Railway Clauses Act, 1845, bought a piece of land on part of which they made three railways leaving the rest of the land within the triangle formed by the railways, except two small pieces on the west of their lines. The landowner from whom they bought owned the adjoining land on the east. This he afterwards sold, but acquired a right of way over it. He had also bought the two severed pieces on the west. The conveyances to the railway company did not include the minerals under the land:—Held, that as under the special act and under s. 80 of the Railways Clauses Act, the landowner when he sold the land was entitled to make passages under the railway from his land on the east, no right of way over the railway for the purpose of working the minerals would be implied, and that he had not now such right of way. And that, being neither "owner, lessee, nor occupier" of the land to the east, he had no right, under s. 79 of the Railways Clauses Act, to work the minerals on the land within the triangle by means of passages under the railway; but he might work the minerals from the pieces of land on the west, and under s. 81 get compensation for extra expenses. *Midland Railway v. Miles*, 33 Ch. D. 632; 55 L. J., Ch. 745; 55 L. T. 428; 35 W. R. 76—Stirling, J.

Held also, that under s. 79 of the Railway Clauses Act the owner of the minerals might, having lawfully made a communication with the land sold to the railway company, work the minerals by open workings, that being the usual

mode of working such minerals in the district where the same were situate. *Id.*

3. ROLLING STOCK.

Exemption from Distress—"Work."—A locomotive engine, which was hired by a railway contractor from the respondents, was seized under a distress for rent due from the contractor to the appellants. At the time the engine was seized it was standing in a shed which the contractor rented from the appellant, and which was connected by a siding with the railway:—Held, that the engine was rolling-stock in a "work" within the meaning of s. 3 of the Railway Rolling Stock Protection Act, 1872, and was therefore not liable to distress for rent payable by the tenant of the work. The "work" in s. 3 means any establishment or place, used for the purpose of trade or manufacture, which is connected with a line of railway by sidings along which the rolling stock may be propelled. *Easton Estate Company v. Western Waggon Company*, 64 L. T. 735; 50 J. P. 790—D.

Execution against—Railway ancillary to Docks.—The protection against seizure afforded by the Railway Companies Act, 1867, ss. 3, 4, applies to the railway plant of every company constituted by a statute for the purpose of constructing or working a railway, even although the railway is merely a subordinate and ancillary part of the undertaking authorised by the statute. By two local statutes a company was authorised to construct a wet dock, a lock forming an entrance to the dock, and two short railways, each about half a mile long, to connect the dock with other railways. The plaintiffs had lent money to the company upon mortgage-debentures. The defendants were creditors of the company, and having obtained judgment, seized in execution certain railway plant belonging to it. The plaintiffs having brought an action for an injunction to prevent the defendants from realizing their execution:—Held, that the dock company was a "company" within the Railway Companies Act, 1867, s. 3, and that the railway plant belonging to it was protected from seizure by s. 4. *Great Northern Railway v. Tahourdin*, 13 Q. B. D. 320; 53 L. J., Q. B. 69; 50 L. T. 186; 32 W. R. 559—C. A.

4. JUDGMENT AGAINST.

Exemption of Rolling Stock from Execution.—*See preceding case.*

Appointment of Receiver by Judgment Creditor—Priority.—A judgment creditor of a railway company obtained an order for a receiver and manager under s. 4 of the Railway Companies Act, 1867. After this, another judgment creditor applied for a similar order, which was made without prejudice to the former order:—Held, on appeal, that a judgment creditor gains no priority by obtaining a receivership order, that when a receivership order has been made and is in force, another judgment creditor gains no benefit whatever by obtaining a similar order, and that such subsequent order ought not to be made. The second order was therefore discharged. *Mersey Railway, In re*, 37 Ch. D.

610; 57 L. J., Ch. 283; 58 L. T. 745; 36 W. R. 372—C. A.

— **Railway ancillary to Dock.**—A company formed by Act of Parliament for the purpose of making a dock, was afterwards authorised, by an Act of Parliament obtained by a railway company, to make a short piece of railway over its own land connected with the line of the railway company, and to work it for through traffic:—Held (Lopes, L.J., doubting), that the dock company was a company “constituted by Act of Parliament for the purpose of making a railway,” and so was a railway company within the meaning of the Railway Companies Act, 1867; that a receiver and manager could therefore be appointed on the application of a judgment creditor; and that the receiver and manager must be appointed of the whole undertaking of the company, and not merely of the railway belonging to it. *East and West India Dock Company, In re*, 38 Ch. D. 576; 57 L. J., Ch. 1053; 59 L. T. 237; 36 W. R. 849—C. A.

— **Discretion of the Court.**—In exercising the jurisdiction afforded by s. 4 of the Railway Companies Act, 1867, relative to the appointment of a receiver and manager of a railway company at the instance of judgment creditors, the court whilst not assisting in anything of a speculative nature with regard to the future, should take a fair broad view of the present position and exigencies of the company, and act for the general benefit of all the creditors. But in exercising such jurisdiction, the court is not to consider itself fettered by any contract or arrangement which may have previously been entered into between the railway company and any person, although in the exercise of its discretion the court will have regard thereto. An application was made by first debenture-holders of a railway company to discharge an order made in chambers, appointing F. one of the joint managers of the company, with a salary. The first debenture-holders sought to discharge the order on the ground that the company was not financially in a position to incur the extra expense, which they alleged was unnecessary, and that their interests—their dividends being in arrear—ought to be considered before the extra expense was incurred:—Held, that the first debenture-holders, though creditors, had no voice in the management of the company while it was a going concern, notwithstanding that when their interest was in arrear they had a statutory right to the appointment of a receiver; and, therefore, that the first debenture-holders had no right to dictate what manager should be appointed, nor what salary he should receive; and that, under the circumstances, their application must be refused. *Hull, Barnsley, and West Riding Railway, In re*, 57 L. T. 82—Chitty, J.

Scheme of Arrangement—Debenture Stock issued under Scheme—Working Expenses—Assent—Priority.—The E. Co. recovered judgment against the N. & K. Railway for the sum of 2,881*l.* for rails supplied to make the line. The N. & K. Railway, being unable to meet their engagements, and indebted inter alia upon mortgages prior to the judgment to the extent of 37,900*l.*, filed a scheme of arrangement in the English Court of Chancery, and obtained power to issue

debenture stock to the amount of 70,000*l.* to pay off their debts, viz., 20,000*l.* A. stock and 50,000*l.* B. stock, which were declared by the scheme to be respectively first and second charges on the undertaking of the N. & K. Railway. The E. Co. appeared on the settlement of the scheme, and had it altered (article 3) so as to provide for payment of one-third of their debt out of the A. stock, they undertaking not to proceed for the balance until one month after the completion of the line, or six months after the confirmation of the scheme; and by the order confirming the scheme it was declared that it did not prejudice outside creditors, save so far as the rights of judgment creditors were affected by article 3 so amended. The debenture stock was then issued. The E. Co., not having been paid, filed a bill to compel payment, and the suit was compromised. P., another judgment creditor of the railway, commenced proceedings for a receiver. Upon a reference to settle priorities:—Held (1), that the claim of the E. Co. came under the head of “debts” of the company, and not under the head of “working expenses,” or “other proper outgoings” within s. 4 of the Railway Companies Act, 1867; and (2) that the effect of the E. Co.’s assent to the scheme implied from their intervention, was to postpone their claim to the A. and B. debenture stocks. The claimant company having appealed, the court were equally divided, and the judgment therefore stood. *Navan and Kingscourt Railway, In re, Price, Ex parte*, 17 L. R., Ir. 398—C. A.

Surplus Lands—Debenture Stock—Priority.—See *Hull, Barnsley, and West Riding Railway, In re*, ante, col. 1541.

5. OFFENCES AGAINST.

False Account of Goods—Signing Note.—F., a farmer, was in the habit of sending milk by railway in tankards with the quantity stamped outside. One day F.’s daughter wrote F.’s name on the consignment note, stating that there were eighteen gallons, whereas there were twenty-one gallons, and only eighteen were paid for. F. had told his servants not to fill up the full quantity in the note, because the toll was too high, but there was no evidence that he knew of this note:—Held, that F. could not be convicted under s. 99 of the Railways Clauses Act, 1845, as he had not signed the consignment note. *Frith v. Simpson*, 48 J. P. 150—D.

Trespassing on Railway—Public Right of Way before making Railway—Jurisdiction.—The appellant was convicted by justices in petty sessions—(1) under the 38th section of 45 & 46 Vict. c. ccciv., for having unlawfully trespassed on a railway in such a manner as to expose himself to danger, and (2) under section 23 of the Regulation of Railways Act, 1868, for having been unlawfully on the railway after receiving warning not to go or pass thereon. There was, prior to the making of the railway, and prior to the acts of Parliament authorising the same, a public right of way for persons on foot over the land now occupied by the railway at the place where the appellant crossed, and the appellant went upon and crossed the railway, in the assertion of the right of way which formerly existed

and believing that he was entitled to do so by virtue thereof:—Held, that the conviction on both summonses was wrong—(1) because the claim of the right of way set up by the appellant ousted the jurisdiction of the justices to determine the case; and (2) because there were no provisions in the act of Parliament extinguishing the right of way, which was consequently still in existence. *Cole v. Miles*, 57 L. J., M. C. 132; 60 L. T. 145; 36 W. R. 784; 53 J. P. 228—D.

6. ARBITRATION BETWEEN RAILWAYS.

Agreement "confirmed and made binding" by, and scheduled to, Private Act—Jurisdiction of Railway Commissioners.—An agreement was entered into between two railway companies, one of the clauses of which provided that all questions in difference arising out of the agreement should be determined by arbitration in manner provided by the Railway Companies Arbitration Act, 1859. A private act of Parliament was subsequently passed, in which the agreement was set out verbatim as a schedule, and it was provided by the act that the scheduled agreement should be "confirmed and made binding" upon the parties thereto. Differences having arisen, one of the companies applied to the railway commissioners to determine the questions in dispute under the provisions of the Regulation of Railways Act, 1873. The other company having obtained a rule nisi for a prohibition on the ground that without their consent the railway commissioners had no jurisdiction to entertain the application:—Held, that the right to refer differences to arbitration was derived from the agreement itself; that the difference was not "required or authorised to be referred to arbitration under the provisions of any general or special act" within the meaning of s. 8 of the Regulation of Railways Act, 1873, and that the railway commissioners had no jurisdiction to undertake the arbitration. *Reg. v. Midland Railway or Great Western Railway*, 19 Q. B. D. 540; 56 L. J., Q. B. 585; 57 L. T. 619; 36 W. R. 270; 51 J. P. 550; 5 Nev. & Mac. 267—D.

Agreement to refer Disputes—Action in High Court—Jurisdiction—Time for Application.—Where there is an agreement between railway companies to refer their disputes to arbitration under the provisions of the Railway Companies Arbitration Act, 1859, the true effect of ss. 4 and 26 of that act is to make it obligatory upon the court, if either of the companies insists on it, to make an order to refer the disputes in accordance with the agreement; but these sections do not deprive the court of jurisdiction to deal with the matter and adjudicate upon any dispute of the companies if neither of the companies insist on their right to have the dispute referred to arbitration under the agreement. *London, Chatham and Dover Railway v. South-Eastern Railway*, 40 Ch. D. 100; 55 L. J., Ch. 75; 60 L. T. 370; 37 W. R. 65—C. A.

Where an action has been brought by one railway company against another in respect of a dispute between them, and the court has tried and adjudicated on the matter without either of the companies insisting on the point that the matter ought to be referred to arbitration,

though the point had been raised by one of the companies in their defence, it is too late for the unsuccessful company to raise, at the hearing of an appeal, the point that the dispute should be referred to arbitration under the provisions of the Railway Companies Arbitration Act, 1859. *Id.*

Traffic Facilities—Through Rates—"Connected with."—The special act of the C. W. Railway provided that the L. & N. W. Railway, the G. W. Railway and other companies (seven in all) should afford all proper and sufficient facilities, including through rates, to traffic passing to, from, or over the C. W. Railway, from or to any railway of the seven companies, or any railway connected with them, and that the terms and conditions, pecuniary or otherwise, on which the traffic facilities should be respectively afforded, and the amount and apportionment of the through rates should, failing agreement, be determined by arbitration in manner provided by the Regulation of Railways Act, 1873:—Held, that such special act requires facilities to be afforded to all traffic passing over the C. W. Railway which either comes from or is destined to some point upon and which during its whole course passes uninterruptedly over railways belonging to one or more of the seven companies, or connected for purposes of management or working with one or more of the said seven companies; that the said special act does not grant through rates absolutely; that the sufficiency of through rates existing at any time and the propriety of granting others are among the matters which, failing agreement, are required by the special act to be referred to arbitration; and that the words "connected with," in the said special act, mean connected for the purposes of management or working, and not merely physically connected. *Great Western Railway v. Central Wales Railway*, 5 Nev. & Mac. 1—D.

7. RAILWAY COMMISSIONERS.

Jurisdiction—Undue Preference.—The duties imposed on railway companies by the Railway and Canal Traffic Act, 1854, s. 2, are confined to traffic; therefore, the Railway Commissioners have no jurisdiction to determine complaints against a railway and dock company for inequality of dues levied in respect of a dock forming a distinct part of their undertaking, although such company be also owners of other docks not distinct from but connected with their railway. *East and West India Dock Company v. Shaw, Savill & Company*, 39 Ch. D. 524; 57 L. J., Ch. 1038; 60 L. T. 142; 6 Nev. & Mac. 94—Chitty, J.

—**Arbitration.**—See *Reg. v. Midland Railway*, supra.

Power to state Special Case.—On the hearing of an application made under the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 15, the Railway Commissioners have power to state a special case for the opinion of the High Court. *Hall v. London, Brighton, and South Coast Railway*, 15 Q. B. D. 505; 53 L. T. 345; 5 Nev. & Mac. 28—D.

Appeal to Court of Appeal on Case stated.—There is no appeal to the Court of Appeal from

the decision of a divisional court upon a case stated by the Railway Commissioners under s. 26 of the Regulation of Railways Act, 1873, even though leave to appeal has been given. Sect. 45 of the Judicature Act, 1873, does not apply to appeals from the Railway Commissioners. *Hall v. London, Brighton, and South Coast Railway*, 17 Q. B. D. 230; 55 L. J., Q. B. 328; 54 L. T. 713; 34 W. R. 558; 5 Nev. & Mac. 28—C. A.

RAPE.

See CRIMINAL LAW.

RATES.

Poor Rates.—*See* POOR LAW.

Church Rates.—*See* ECCLESIASTICAL LAW.

Water Rates.—*See* WATER.

County Rates.—*See* COUNTY.

Levied by Municipal Corporation.—*See* CORPORATION.

Highway Rates.—*See* WAY.

In Metropolis.—*See* METROPOLIS.

Under Public Health Act.—*See* HEALTH.

RATIFICATION.

See CONTRACT, II.

RECEIVER.

Equitable Execution.—*See* EXECUTION.

Under Railway Companies Act, 1867.—*See* ante, cols. 1548, 1549.

In other Cases.—*See* PRACTICE, III. A. 8, l.

RECOGNIZANCE.

See JUSTICE OF THE PEACE (PRACTICE).

RECORDER.

See CORPORATION.

RECOVERY OF LAND.

See reff., ante, col. 1496.

RECTIFICATION.

Of Register.—*See* COMPANY, VI. 7.

Of Deeds.—*See* DEED AND BOND, I. 4.

RECTOR.

See ECCLESIASTICAL LAW.

REFERENCE.

See ARBITRATION.

REFORMATORIES.

See SCHOOLS.

REFRESHERS.

See COSTS, VI. 1, b. i.

REGISTRATION.

Of Deeds relating to Land.—*See* DEEDS.

Of Bills of Sale.—*See* BILL OF SALE.

Of Patents.—*See* PATENT.

Of Shares.—*See* COMPANY.

Of Trade-marks.—*See* TRADE.

Of Voters.—*See* ELECTION LAW.

Of Copyright.]—See COPYRIGHT.

Vacating Registration of Lis Pendens.]—See LIS PENDENS.

Of Judgments.]—See JUDGMENT.

RELEASE.

See DEED.

REMOVAL.

Of Paupers.]—See POOR LAW.

From Offices.]—See QUO WARRANTO.

RENT.

See LANDLORD AND TENANT.

RENT-CHARGE.

Recovery of Arrears—Assignment of Part of Lands.]—An action for debt lies for the recovery of arrears of an annuity charged upon land against the assignee of part of such land; and it makes no difference whether the annuity was created by deed or will. *Booth v. Smith*, 51 L. T. 395; 47 J. P. 759—D.

— **Action of Debt—Liability of Owner of Part of Lands charged.]**—The defendant was the owner and occupier of a portion of certain lands in the parish of P., which, by a private act, were charged with the payment to the vicar of an annual sum of 270*l.*, in lieu of tithes. The act provided that, if the annual rents were in arrear, the vicar was to have such and the same powers and remedies as by the laws and statutes of the realm are provided for the recovery of rent in arrear; and also, that if no sufficient distress were found on the premises, the vicar might enter and take possession of the same until the arrears were satisfied. Four years' arrears of the annual rent accrued in respect of the whole of the lands charged, during the whole of which period the defendant was the owner and occupier of a portion only of such lands:—Held, that the vicar might maintain an action of debt against the defendant for the whole amount in arrear; the remedy by real action, which was a higher remedy than the action of debt, having been abolished by 3 & 4 Will. 4, c. 27, s. 36:—Held, further, that the defendant had his remedy in an

action against the co-owners for contribution. *Christie v. Barker*, 53 L. J., Q. B. 537—C. A.

— **Release — Contribution.]**—G. died in 1875, having devised copyhold land to W. G., charged with an annuity to the plaintiff. On the 24th of July, 1876, W. G. contracted to sell part of the land to the defendant, and on the 31st of July, 1876, W. G. surrendered the residue of the land in fee to W., and the plaintiff by deed released the land surrendered to W. from the annuity. In 1883 the plaintiff sued the defendant for arrears of the annuity:—Held, that under s. 10 of Lord St. Leonards' Act, the defendant was liable to pay such a proportion of the rent-charge as was represented by his part of the land with regard to the whole land originally charged. *Booth v. Smith*, 14 Q. B. D. 318; 54 L. J., Q. B. 119; 51 L. T. 742; 33 W. R. 142—C. A.

Title.]—See ECCLESIASTICAL LAW.

REPRESENTATIONS.

See FRAUD AND MISREPRESENTATION.

Amounting to Contract.]—See *Martin v. Spicer*, ante, col. 1075.

Liability of Principal for Acts of Agent.]—See PRINCIPAL AND AGENT, I. 2, b.

REPUTED OWNERSHIP.

See BANKRUPTCY, VIII. 1, b.

REQUISITIONS.

See VENDOR AND PURCHASER.

RES JUDICATA.

See ESTOPPEL.

RESTITUTION.

Of Property.]—See CRIMINAL LAW, II. 16.

Of Conjugal Rights.]—See HUSBAND AND WIFE, II.

RESTRAINT OF TRADE.

Contracts as to.]—See CONTRACT, III. 3, g.

RETURNING OFFICER.

See CORPORATION—ELECTION LAW.

REVENUE.

I. STAMPS, 1557.

II. CUSTOMS AND EXCISE, 1560.

III. TAXES AND DUTIES.

1. *Bodies Corporate and Unincorporate*, 1562.
2. *Property Tax*, 1564.
3. *Inhabited House Duty*, 1565.
4. *Income Tax*.
 - a. *Property and Persons Liable*, 1566.
 - b. *Assessment and Deductions*, 1570.
 - c. *Repayment of Amount overpaid*, 1572.
5. *Succession Duty*, 1573.
6. *Probate Duty*, 1576.
7. *Legacy Duty*, 1578.

I. STAMPS.

Admissibility of Unstamped Document for any Purpose.]—An unstamped document embodying an agreement, not falling within the exceptions specified in 33 & 34 Vict. c. 97, is inadmissible in evidence in civil proceedings for any purpose whatever. *Interleaf Publishing Company v. Phillips*, 1 C. & E. 315—Williams, J.

Charter-party executed Abroad—Time.]—A charter-party executed entirely abroad, and stamped within two months after it has been received in this country, can be received in evidence, since it falls within the provisions of 33 & 34 Vict. c. 97, s. 15, and not of ss. 67 and 68 of that act. *The Belfort*, 9 P. D. 215; 53 L. J., P. 88; 51 L. T. 271; 33 W. R. 171; 5 Asp. M. C. 291—D.

Bill of Exchange drawn Abroad payable in England.]—Section 51, sub-s. 2, of the Stamp Act, 1870, includes bills payable on demand. Therefore a bill drawn in France on the Bank of England was properly stamped by the holder affixing to it and cancelling a penny adhesive stamp. *Boysc, In re, Crofton v. Crofton*, 33 Ch. D. 612; 56 L. J., Ch. 135; 55 L. T. 391; 35 W. R. 247—North, J.

Bill of Exchange or Assignment of Money.]—O'C. & Co. contracted with the defendants to

supply them with timber, and the defendants were indebted to O'C. & Co. on the contract, in the sum of 460*l.* O'C. & Co., while the defendants were so indebted to them, addressed a letter to the defendants as follows:—"We hereby authorise and request you to pay to A. the sum of 395*l.* 10*s.* due from you to us for goods sold and delivered by us to you, and the receipt of A. will be a good discharge." This instrument was duly stamped as an assignment, but was not stamped with an impressed stamp as a bill of exchange. In an action on the instrument, the defendant in his defence denied its validity, on the ground that it was a bill of exchange within the Stamp Act of 1870, and had not been stamped as such before its execution:—Held, that the defence was bad. *Adams v. Morgan*, 14 L. R., Ir. 140—C. A.

Promissory Note or Agreement to pay Money.]

—At the trial of an action to recover money alleged to be due under an agreement, the plaintiff put in evidence (inter alia) the following document:—"I, J. Dawe, promise to pay J. Yeo on his signing a lease . . . the sum of 150*l.*—J. Dawe." The document, which bore a penny stamp, was stamped at the trial as an agreement. The plaintiff alleged that it embodied the result of previous negotiations in reference to a lease. The defendant alleged that the document was a promissory note within s. 49 of the Stamp Act, 1870. A verdict was given for the plaintiff, and it being doubtful whether there was evidence of the agreement, he was left to move for judgment:—Held (diss. Bowen, L.J.), that the document was not a promissory note within the meaning of s. 49 of the Stamp Act, 1870, inasmuch as that act does not apply to a document which is neither given nor accepted as a promissory note, and is not in fact such a note. *Yeo v. Dawe*, 53 L. T. 125; 33 W. R. 739—C. A.

Per Bowen, L.J. The section applies to every document which substantially comprises an effective promise to pay. *Id.*

In order that a document may be a promissory note within s. 49 of the Stamp Act, 1870, it must substantially contain a promise to pay a definite sum of money and nothing more. A document containing a promise to pay money as part of a contract containing other stipulations would not be a promissory note within the act. By an instrument, described as a policy of insurance, after reciting that E. was desirous of being insured with the appellant corporation, and that there had been paid to the corporation the sum of 9*l.* 17*s.* 4*d.*, being the agreed premium for such assurance, it was witnessed that the corporation did thereby guarantee to the assured payment of the sum of 100*l.* on May 18, 1867; provided that, if the assured should be desirous at any time of surrendering the policy, the corporation would allow to him the surrender value thereof as on May 18 last preceding the date of his notice to surrender, such value to be fixed according to the tables of the corporation for the time being in force with reference to surrenders:—Held, that this instrument was liable to stamp duty as an agreement, and not as a promissory note within s. 49 of the Stamp Act, 1870. *Mortgage Insurance Corporation v. Inland Revenue Commissioners*, 21 Q. B. D. 352; 57 L. J., Q. B. 630; 36 W. R. 833—C. A. Affirming 58 L. T. 766—D.

Agreement or Payment under Policy of Insurance.]—A policy of assurance upon mortgage, securing payment of principal and interest to the mortgagee, the assured, is chargeable with the duty of 6*d.* as an agreement; and does not fall within the second clause of the schedule to the act as to policies of insurance, which assesses the duty of 1*d.* for any "payment agreed to be made . . . by way of indemnity against loss or damage of or to any property." *Mortgage Insurance Corporation v. Inland Revenue Commissioners*, 57 L. J., Q. B. 174; 58 L. T. 769—D.

Conveyance on Sale—Compulsory Sale—Compensation for Loss of Trade.]—The schedule of the Stamp Act of 1870 (33 & 34 Vict. c. 97), prescribes an ad valorem duty on every "conveyance or transfer on sale of any property." By s. 70 the term "conveyance on sale" includes every instrument whereby any property upon the sale thereof is transferred to or vested in the purchaser. By deed of conveyance S. & Co. conveyed business premises to a railway company. The deed stated that the jury in a compensation trial under the Lands Clauses Consolidation (Scotland) Act, 1845, had found that S. & Co. were entitled to 28,586*l.* 2*s.* 1*d.*, as the value of the premises which had been taken by the company under the powers of their special act; 14,572*l.* 16*s.* 3*d.* for the value of the buildings, &c., upon the premises, and 9,499*l.* 8*s.* 3*d.* as compensation for loss of business, and that the company had paid the three sums so assessed to S. & Co.:—Held, that the 9,499*l.* 8*s.* 3*d.* allowed by the jury as compensation for loss of business was part of the "consideration for the sale" of the premises, and liable to an ad valorem duty accordingly. *Inland Revenue Commissioners v. Glasgow and South Western Railway*, 12 App. Cas. 315; 56 L. J., P. C. 82; 57 L. T. 570; 36 W. R. 241—H. L. (Sc.).

Revocable Agreement to grant Permission for Erection of Jetty.]—By an instrument not under seal the conservators of the Thames agreed to grant permission during their pleasure to the appellants to construct and retain a jetty in consideration of an annual payment yearly so long as the jetty was allowed by the conservators to remain:—Held, that the instrument was not chargeable with stamp duty under 33 & 34 Vict. c. 97 (the Stamp Act, 1870), either as a "conveyance on sale" within s. 70, or as an instrument whereby any property was transferred to or vested in any person, within s. 78, or as a "lease or tack," or "bond, covenant, or instrument of any kind whatsoever," within the schedule, but only as an "agreement." *Thames Conservators v. Inland Revenue Commissioners*, 18 Q. B. D. 279; 56 L. J., Q. B. 181; 56 L. T. 198; 35 W. R. 274—D.

Voluntary Settlement—Reservation of Life Interest—Accounts.]—By deed dated the 12th of July, 1883, the settlor, in pursuance of a power given by articles of partnership, appointed and transferred to his sons his shares in the partnership business, as from the 1st of October, 1883, or as from the settlor's death, which should first happen, provided that such appointments were conditional upon the execution by the sons before the 1st of October, 1883, of a deed covenanting to pay to the settlor,

from the 1st of October, 1883, during his life, interest at 4 per cent. per annum on the value of the shares appointed as aforesaid, and to pay, out of the profits, certain annuities to other persons. The sons executed this last-mentioned deed on the 12th of July, 1883. The settlor died on the 19th of July, 1883:—Held, that the transfer of the shares was a voluntary settlement within the meaning of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38, sub-s. 2, and that by it an interest for life in the property transferred was reserved to the settlor, and therefore duty was payable under that section on the amount of the shares so transferred. *Crossman v. Reg.*, 18 Q. B. D. 256; 56 L. J., Q. B. 241; 55 L. T. 848; 35 W. R. 303—D.

By a voluntary settlement the settlor assigned to trustees a sum of money, with interest, upon certain trusts, and subject to certain powers, provisoes, agreements and declarations, and it was declared that the trustees should apply the income for the benefit of the settlor and his wife, and children, or, at their discretion, for the benefit of one or more of such persons to the exclusion of the others, and after the settlor's death the money was to be held subject to trusts in favour of his widow and children:—Held, that, notwithstanding the power conferred upon the trustees of depriving the settlor of the benefit of the settled property at their discretion, an interest in such property for life was reserved to the settlor, within the meaning of s. 38, sub-s. 2 (c), of the Customs and Inland Revenue Act, 1881, and therefore on his death duty was payable. *Attorney-General v. Heywood*, 19 Q. B. D. 326; 56 L. J., Q. B. 572; 57 L. T. 271; 35 W. R. 772—D.

II. CUSTOMS AND EXCISE.

Excise Licence—Retail Dealer—Wine and Spirit Merchant's Traveller.]—A traveller for a fully-licensed firm of wine and spirit merchants at B. occupied an office and premises at C. where he resided, and where amongst other places he solicited and obtained orders which he forwarded to his employers at B., who delivered the goods so ordered direct to the purchaser. The firm neither rented nor occupied any premises at all at C., nor did they store goods upon their traveller's premises. Upon information being exhibited by an inland revenue officer against the traveller under s. 26 of 6 Geo. 4, c. 81 and s. 17 of 30 & 31 Vict. c. 90, charging him with taking an order for spirits at his office at C. without having in force a proper licence authorising him so to do, it was held, that he was a bonâ fide traveller taking orders for his employers who were duly licensed to sell spirits, &c., and therefore not liable to take out a licence. *Stuchbery v. Spencer*, 55 L. J., M. C. 141; 51 J. P. 181—D.

— "Sweets" Licence—"Foreign Wine" Licence—"Best Pale Sherry, British."—B., the respondent, was the holder of a licence to retail sweets and made wines, but he was not licensed for the sale of foreign wine. The appellant, an officer of Inland Revenue, visited B.'s shop, and asked for a bottle of the best sherry, and was supplied with a bottle which was labelled "Best Pale Sherry, British," for which

he paid 2s. The cork of the bottle was sealed and bore upon the seal the word "Sherry." B. was summoned, under s. 19 of 23 Vict. c. 27, for "selling foreign wine by retail without a proper licence." The justices dismissed the information:—Held, that B. had committed the offence, under s. 19 of the Act, of selling "foreign wine by retail without a proper licence," because the "Best Pale Sherry" is a foreign wine, and that character is not taken away from it by putting the word "British" underneath it. *Richards v. Banks*, 58 L. T. 634; 52 J. P. 23—D.

Dilution of Beer by Publican—Mixing Beers of different Strengths.—By s. 8, sub-s. 2, of the Customs and Inland Revenue Act, 1885, "a dealer in or retailer of beer shall not adulterate or dilute beer, or add anything thereto, except finings for the purpose of clarification." The appellant, a publican, had in his cellar a cask of beer supplied by a firm of brewers, and also a quantity of small beer of much less strength. He drew off a certain quantity from the cask of stronger beer, and filled it up with small beer, adding some finings for clarification; the result, as tested by the quantity of proof spirit in the two kinds of beer, was that the mixture was about 15 per cent. weaker than the beer which was in the cask as it came from the brewers. No water or any other matter or thing (except the finings) was added to the beer. On appeal against a conviction for "diluting" beer under the above section:—Held, that the mixing of the two kinds of beer amounted to a dilution of the stronger beer, and that the appellant was properly convicted. *Crofts v. Taylor*, 19 Q. B. D. 524; 56 L. J., M. C. 137; 57 L. T. 310; 36 W. R. 47; 51 J. P. 532, 789; 16 Cox, C. C. 294—D.

Grant of Licences by Justices to Sell Intoxicating Liquors.—See INTOXICATING LIQUORS.

Penalty—Metropolitan Magistrates—Jurisdiction.—By 15 & 16 Vict. c. 61, s. 1, an information "for the recovery of any penalty imposed by any Act or Acts relating to the revenue of excise, and incurred for or by reason of any offence committed against any such Act or Acts," may be heard and determined, if the offence has been committed within the limits of the chief office of Inland Revenue in London, before a metropolitan police magistrate:—Held, that the provisions of the section applied to informations for penalties imposed by statute in respect of excise offences created after the passing of the act, and therefore, that a metropolitan police magistrate had jurisdiction to hear and determine an information for the recovery of the penalty imposed by s. 4 of the Customs and Inland Revenue Act, 1887, in respect of the new excise offence created by that section. *Reg. v. Ingham*, 21 Q. B. D. 47; 57 L. J., M. C. 87; 59 L. T. 62; 36 W. R. 811; 52 J. P. 550; 16 Cox, C. C. 505—D. See S. C. on rule obtained, 52 J. P. 375—D. sub nom. *Inland Revenue Commissioners, Ex parte*.

Gun Licence—Orchard not a Curtilage.—An orchard behind the dwelling-house and its out-houses is not within the curtilage, and therefore the occupier who uses a gun there is not exempt from gun licence duty. *Aquith v. Griffin*, 48 J. P. 724—D.

Carriage Tax—Carriage lent by Coachbuilder during Repair to Customer's Carriage.—Where the owner of a carriage, which has accidentally become disabled during the year for which an excise licence has been duly taken out is accommodated by his coachbuilder, during the repair of such carriage, with the use of another carriage without any payment, the coachbuilder is not required to take out a licence in respect of such carriage so lent. *Davey v. Thompson*, 54 L. T. 495; 34 W. R. 411; 50 J. P. 260—D.

Dog Licence—Sheep-Dog Exemption—Burden of Proof.—N., a farmer, obtained a certificate of exemption for a sheep-dog, and was summoned for not having a licence. At the hearing the revenue officer proved that he had seen a trial of the dog as a sheep and cattle dog, and that the dog did not obey its master's orders like a cattle dog:—Held, that as the certificate of exemption was some evidence of a right to exemption, the justices were right in dismissing the information, for the prosecutor had failed to prove that the dog was not a cattle dog. *James v. Nicholas*, 50 J. P. 292—D.

Duty on Male Servants—Groom.—If a man-servant is employed partially as a groom, but substantially in some other capacity, his employer is exempted by 39 Vict. c. 16, s. 5, from the tax imposed by 32 & 33 Vict. c. 14, s. 19. *Yelland v. Winter*, 53 L. T. 912; 34 W. R. 121; 50 J. P. 38—D.

H. was employed by W., a farmer, to attend to the bullocks in his yard and to work on the land, and also to feed W.'s pony. He also cleaned the harness and washed the trap when necessary, and occasionally drove with his master to and from the railway station. W. occasionally attended to the harnessing, unharnessing, and grooming of the pony himself:—Held, that H. was only occasionally and partially employed as a groom, and that W. was exempt from the tax. *Id.*

III. TAXES AND DUTIES.

1. BODIES CORPORATE AND UNINCORPORATE.

Income or Profits of Property—Exemption—Appropriation "for Promotion of Science."—By s. 11 of the Customs and Inland Revenue Act, 1885, a duty is imposed upon the annual value, income, or profits of property belonging to any body corporate or unincorporate, subject to an exemption in favour of property which, or the income or profits whereof, shall be legally appropriated and applied "for the promotion of education, literature, science, or the fine arts":—Held (Lopes, L. J., dissenting), that the property of the Institution of Civil Engineers was entitled to the benefit of the exemption, as it was property which was appropriated and applied for the promotion of science. *Institution of Civil Engineers, In re*, 20 Q. B. D. 621; 57 L. J., Q. B. 353; 59 L. T. 282; 36 W. R. 598; 52 J. P. 549—C. A.

Property of Club—Entrance Fees and Subscriptions.—"Funds voluntarily contributed."—Exemption was claimed by a members' club,

the property of which was vested in trustees, and which had been established less than thirty years, from the duty imposed on the annual value, income, or profits of bodies corporate and unincorporate by s. 11 of the Customs and Inland Revenue Act, 1885, on the ground that the property of the club was "property acquired by or with funds voluntarily contributed" within thirty years preceding, within the meaning of the 6th exemption in that section.' By the rules of the club every member on admission paid an entrance fee and the annual subscription for the current year, and, until payment, was not admitted to any of the benefits or privileges of the club, and payment was considered as a declaration of submission to the rules; an annual subscription was payable on January 1st in each year, and if it was not paid on or before March 1st, the member's name was erased from the list of members, and a member intending to withdraw from the club had to give notice on or before January 1st, or otherwise was liable to pay his subscription for the current year:—Held, that, as the entrance fees and subscriptions were paid by members in consideration of the right to enjoy the benefits and privileges of the club, they were not "funds voluntarily contributed" to the club, and therefore duty was payable on property acquired with money so paid. *New University Club, In re*, 18 Q. B. D. 720; 56 L. J., Q. B. 462; 56 L. T. 909; 35 W. R. 774—D.

Charitable Institution—Funds "Legally appropriated and applied for any Charitable Purpose" — Funds "voluntarily contributed within Thirty Years" — "Property acquired within Thirty Years where Legacy Duty paid." —By s. 11 of the Customs and Inland Revenue Act, 1885, a duty of 5 per cent. is imposed upon the annual value, income, or profits of all property real and personal belonging to or vested in any body corporate or unincorporate during the year of assessment after deducting the costs and expenses of the management of such property, subject to the exemption from duty in sub-ss. 3, 6, and 7 respectively contained, in respect of "property or the income or profits of property legally appropriated and applied for any charitable purpose" (sub-s. 3), "property acquired by or with funds voluntarily contributed to any body corporate or unincorporate within a period of thirty years immediately preceding" (sub-s. 6), and "property acquired by any body corporate or unincorporate within the like period where legacy or succession duty has been paid upon the acquisition thereof" (sub-s. 7). The Linen and Woollen Drapers' Institution was founded in 1832, with the object of making provision for decayed members of the said trades, their widows and children. Rules for the government of the institution were framed, by which any person of three years' standing in any of the said trades, residing within twelve miles of the General Post Office, may, on payment of the life or annual subscription, be elected a member. Medical advice and medicine are also provided free of charge to members or their families; all relief being confined to members, and no member being entitled as of right to assistance, the board of directors having absolute discretion in every case to grant or refuse the same, and in no case can a member receive assistance unless in necessitous circumstances. The property of the institution consists of the accumulated subscrip-

tions of members, and of sums contributed as donations by benevolent persons other than members; but no precise or accurate calculation had been made, showing how much of such invested funds was derived from members' subscriptions, and how much from voluntary contributions within the thirty years immediately preceding:—Held, first, that the institution was not a charitable institution, but was in the nature of a mutual benefit society, and therefore that the portion of the funds derived from such subscriptions was not exempt from duty under sub-s. 3; and, secondly, that the other portions of the funds, derived from voluntary contributions within the specified period of thirty years, and from property acquired within the same period on which legacy duty had been paid were, if the amounts could be ascertained, exempt from duty under sub-ss. 6 and 7. *Linen and Woollen Drapers' Institution, In re*, 58 L. T. 949—D.

2. PROPERTY TAX.

Landlord's Property Tax—Allowances—"Public School"—Charitable Institution.—By s. 61, rule 6, of 5 & 6 Vict. c. 35, allowances in respect of property tax, levied under Schedule A. of the Income Tax Acts, are to be made by the commissioners for the duties charged "on any hospital, public school, or almshouse, in respect of the public buildings, offices, and premises" belonging thereto, if occupied under certain specified conditions:—Held, that a school founded and carried on by the corporation of London under the provisions of an Act of Parliament, not for purposes of profit but for the benefit of a large portion of the public, and maintained partly by a charitable endowment, was a "public school" within the meaning of rule 6, notwithstanding the fact that the school was partly maintained by fees charged for instruction. *Blake v. London (Mayor)*, 19 Q. B. D. 79; 56 L. J., Q. B. 424; 36 W. R. 791—C. A. Affirming 51 J. P. 71—D.

—Self-supporting Institution for Insane.—By 5 & 6 Vict. c. 35, s. 61, rule 6, allowances in respect of property tax levied under Schedule A. of the Income Tax Acts are to be made by the commissioners for the duties charged "on any hospital, public school, or almshouse in respect of the public buildings . . . and for the repairs of such hospital, public school, or almshouse . . . and of the gardens, walks, and grounds for the sustenance or recreation of the hospitaliers, scholars, and almsmen, repaired and maintained by the funds of such hospital, school, or almshouse. . . . Or on the rents and profits of lands," &c., "belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes." By 48 Geo. 3, c. 55, Sched. B., Exemptions, Case 4: "Any hospital, charity school, or house provided for the reception or relief of poor persons" is exempt from the inhabited house duty. An institution for the reception of insane persons was founded by charitable donations, but unendowed. It was vested in trustees and managed gratuitously by a committee, and supported wholly out of payments made by the patients, of whom some paid more, some less than the cost of their maintenance, and a few were maintained gratuitously. After paying expenses there

was an annual surplus of profits which was expended in enlarging and improving the institution:—Held, that the institution being wholly self-supporting was not exempt as an "hospital" within the meaning of either 5 & 6 Vict. c. 35, s. 61, rule 6, or 48 Geo. 3, c. 55, Sched. B, Case 4, which must be restricted to hospitals maintained wholly or in part by charity. *Needham v. Bowers*, 21 Q. B. D. 436; 59 L. T. 404; 37 W. R. 125—D.

3. INHABITED HOUSE DUTY.

Exemptions — "Hospital" — Self-supporting Asylum for Insane.]—See *Needham v. Bowers*, supra.

Part of Infirmary.]—Where a house was situate within the precincts of an infirmary, wherein the medical superintendent is required to reside by minute of the managers and by the exigencies of the hospital, but not by statute:—Held, that the house was a necessary part of the infirmary, and therefore exempt under Case 4, Sched. B, of 48 Geo. 3, c. 55. *Wilson v. Fasson*, 48 J. P. 361—Ex. Scotland.

Occupation by Caretaker.]—A female caretaker resided on premises, and it was a condition of her employment that her son, who was a clerk, employed elsewhere, should sleep on the premises for their better protection:—Held, that the premises were not exempt from inhabited house duty under 41 Vict. c. 15, s. 13, sub-s. 2. *Weguelin v. Wyatt*, 14 Q. B. D. 838; 54 L. J., Q. B. 308; 52 L. T. 807; 33 W. R. 566; 49 J. P. 486—D.

Tenements — Internal Communication.]—A house was occupied on the ground floor as a bank (by the owners) and as stamp and tax offices, on the first floor as writing chambers. There was internal communication throughout these two floors. The second floor was enclosed by a door leading to the staircase connecting the first and second floors, and was occupied as a residence by the bank accountant:—Held, that the whole premises were liable. *Clerk v. British Linen Company*, 49 J. P. 825—Ex. Scotland.

Two houses with internal communication were let to various occupiers, and used partly as offices and partly as a residence. The street door of one house opened into a vestibule, from which two doors led into the offices; and another door opened into the lobby of the residential portion, and afforded the only means of entrance into the residence:—Held, that the house fell within s. 13, sub-s. 1 of 41 Vict. c. 15. *Corke v. Brims*, 48 J. P. 376—Ex. Scotland.

A building was divided into two self-contained tenements, one of which was occupied as offices by a firm whose individual partners owned the building, whilst the other was let to one of the partners, who occupied it as a residence:—Held, that inhabited house duty was chargeable only upon the value of the dwelling-house. *Nisbet v. McInnes*, 48 J. P. 776—Ex. Scotland.

A house was divided into two tenements, which were let to the same tenants under one lease, in which the tenements were separately described:—Held, that s. 13, sub-s. 1, of 41 Vict. c. 15, applied. *Smiles v. Crooke*, 50 J. P. 696—Ex. Scotland.

4. INCOME TAX.

a. Property and Persons Liable.

Assize Courts—Police Station.]—The justices of a county, in the due exercise of statutory powers, erected assize courts, with the usual rooms and offices, and a county police-station, with the usual offices and accommodation for constables living there and for prisoners. The land on which they were built was conveyed, under 21 & 22 Vict. c. 92, to the clerk of the peace, to hold to him and his successors for ever upon trust, for the construction of a police station, and otherwise for such uses as the county justices should from time to time order. The buildings formed one block, and were used for the administration of justice and for police purposes. Parts of the buildings were also used for holding county and committee meetings, and various other occasional purposes, but no rent or profit was received or made in respect of the buildings or any part of them:—Held, that income tax was not payable in respect of the buildings under scheds. A. or B. of 5 & 6 Vict. c. 35, and 16 & 17 Vict. c. 34. *Coomber v. Berks JJ.*, 9 App. Cas. 61; 53 L. J., Q. B. 239; 50 L. T. 405; 32 W. R. 525; 48 J. P. 421—H. L. (E.).

County Lunatic Asylum — Medical Officers' Apartments.]—The justices of a county are properly assessed, under schedule A of the Income Tax Acts, in respect of such parts of a county lunatic asylum as are occupied as apartments by the medical superintendent, medical officers, and steward, and in respect of a separate house occupied by the chaplain of such asylum. *Bray v. Lancashire JJ.*, 57 L. J., M. C. 57; 59 L. T. 438; 52 J. P. 550—D. Affirmed 22 Q. B. D. 484; 58 L. J., M. C. 54; 37 W. R. 392; 53 J. P. 499—C. A.

Hospital—Payments "applied to Charitable Purposes only."]—The managing committee of an hospital, founded by voluntary contribution for the care and treatment of insane persons, made large yearly profits by receiving wealthy patients, who were charged sums greatly exceeding the actual cost of their maintenance and treatment. The committee applied a portion of those profits in aid of the maintenance and treatment of poorer patients, who were themselves unable to pay the actual cost thereof, and the remainder in executing works which were pressed upon the committee by the Commissioners in Lunacy, and were deemed necessary to bring the hospital into a proper state of efficiency:—Held, that the profits were not, by reason of such application of them to the purposes of the hospital, payments "applied to charitable purposes only" within the meaning of s. 105 of 5 & 6 Vict. c. 35, so as to exempt the institution from payment of income tax under Sched. D. *St. Andrew's Hospital v. Shearnsmith*, 19 Q. B. D. 624; 57 L. T. 413; 35 W. R. 811—D.

Vocation — Betting.]—Persons receiving profits from betting, systematically carried on by them throughout the year, are chargeable with income tax on such profits in respect of a "vocation" under 5 & 6 Vict. c. 35 (the Income

Tax Act) Sched. D. *Partridge v. Mallandaine*, 18 Q. B. D. 276; 56 L. J., Q. B. 251; 56 L. T. 203; 35 W. R. 276—D.

Corporation—Surplus Profits—Profits appropriated by Statute.]—A corporation was constituted for the management of the Mersey Docks estate by an act which provided that the moneys to be received by them from their dock dues and other sources of revenue should be applied in payment of expenses, interest upon debts, construction of works, and management of the estate; and that the surplus should be applied to a sinking fund for the extinguishment of the principal of the debts; and that after such extinguishment the rates should be reduced; and that, except as aforesaid, the moneys should not be applied for any other purpose whatsoever; and that nothing should affect their liability to parochial or local rates:—Held, that under the Income Tax Acts the corporation was liable to income tax in respect of the surplus, though applicable to the above-named purposes only. *Mersey Docks v. Lucas*, 8 App. Cas. 891; 53 L. J., Q. B. 4; 49 L. T. 781; 32 W. R. 34; 48 J. P. 212—H. L. (E.).

Burial Board—Application of Surplus Income in aid of Poor-rate—“Profit.”]—A burial board was constituted under 15 & 16 Vict. c. 85, and in pursuance of the act a burial-ground was provided with money charged upon the poor-rate of the parish, and the surplus over expenditure of the income derived from the fees charged by the board was regularly applied in aid of the poor-rate:—Held, that the board were liable to be assessed to the income tax in respect of such surplus, inasmuch as the provision requiring it to be applied in aid of the poor-rate did not prevent it from being a “profit” within 5 & 6 Vict. c. 35, s. 60. *Paddington Burial Board v. Inland Revenue Commissioners*, 13 Q. B. D. 9; 53 L. J., Q. B. 224; 50 L. T. 211; 32 W. R. 551; 48 J. P. 311—D.

Surplus Revenue—Water Supply.]—The Glasgow Corporation Water Commissioners are liable to assessment in respect of surplus revenue derived from supplying water beyond the area of compulsory supply, and from the sale of water for purposes of trade. *Glasgow Corporation v. Miller*, 50 J. P. 503—Ex., Scotland.

By the Dublin Corporation Waterworks Act, 1861 (24 & 25 Vict. c. clxxii.), the corporation were empowered to construct waterworks for the supply of water to the borough of Dublin and certain extra-municipal districts, and were authorised to borrow money for the purposes of the act on the rates leviable under it; and empowered to levy certain rates on the owners and occupiers of property within the borough. They were also authorised to contract with owners or occupiers of property in the extra-municipal districts for the supply of water for domestic use, and to charge rate or rent for such supply, to be called a “contract water rate.” By the Dublin Waterworks Act, 1870 (33 & 34 Vict. c. 96), it was provided that the income derived from the extra-municipal districts should form, with the city rates, a consolidated fund, available for the payment of principal and interest of loans, and applicable to all the purposes of

the act:—Held, that the excess of receipts over expenditure in respect of extra municipal districts was liable to income tax. *Dublin Corporation v. McAdam*, 20 L. R., Ir. 497—Ex. D.

Water Supply to Barracks.]—A waterworks company is liable for profits derived from selling water by meter to barracks within the area of compulsory supply. *Allan v. Hamilton Waterworks Commissioners*, 51 J. P. 727—Ex., Scotland.

Insurance Company—“Profits and Gains”—Bonuses to Participating Policy-holders.]—A life insurance company issued “participating policies,” according to the terms of which any surplus which existed at the end of each quinquennial period in the hands of the company, after payment of policies falling due during such period, and provision for outstanding liabilities, was dealt with as follows: two-thirds of the surplus went to the policy-holders, who received payment thereof either by way of bonus or abatement of premiums; the remaining third of the surplus went to the company, who bore the whole expenses of the business, the portion remaining after payment of expenses constituting the only profit available for division:—Held (by Lords Blackburn and Fitzgerald, Lord Bramwell diss.), that the two-thirds returned to the policy-holders were “annual profits or gains” and assessable to income tax. *Last v. London Assurance Corporation*, 10 App. Cas. 438; 55 L. J., Q. B. 92; 53 L. T. 634; 34 W. R. 233; 50 J. P. 116—H. L. (E.).

Where a life insurance company carrying on business in New York and Great Britain issued participating policies as well as non-participating policies in Great Britain to members of the company, and remitted the net amount received to New York:—Held, that the premium income derived from participating as well as non-participating policies was a “profit or gain” liable to be assessed to income tax. *Last v. London Assurance Corporation* (10 App. Cas. 438) followed. *Styles v. New York Life Insurance Company*, 51 J. P. 487—D.

“Profits and Gains”—Interest arising from Investments made for purpose of carrying on Business.]—The amount of interest arising from investments made by an insurance company for the purpose of carrying on their business on which income tax had been deducted at its source amounted to more than the profits of the company for the year of assessment, but the company had during the year received interest from investments on which income tax had not been deducted at its source:—Held, that under s. 102 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), and sched. D. of s. 2 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), the company were liable to pay income tax on the interest from which income tax had not been deducted at its source. *Last v. London Assurance Corporation* (10 App. Cas. 438) considered. *Clerical, Medical, and General Life Assurance Society v. Carter*, 21 Q. B. D. 339; 57 L. J., Q. B. 614; 59 L. T. 827; 37 W. R. 124—D. Affirmed 22 Q. B. D. 444; 58 L. J., Q. B. 224; 37 W. R. 346; 53 J. P. 276—C. A.

Person residing in England—Trade carried on Abroad—Profits not remitted to England.]—The

respondent, who resided wholly in England, was a partner in a firm carrying on business solely in Melbourne, Australia. Profits were made by the firm, and a portion of the respondent's share thereof was remitted to him in England, and returned by him for assessment to the income tax under Schedule D. The larger portion of his share of the profits of the firm was not remitted to him in England, but was left in Australia. The appellant contended that the respondent was liable in respect of the whole of his share of the profits, whether received by him in England or not, as being profits or gains arising or accruing to him while residing in the United Kingdom from a trade carried on elsewhere, within the meaning of 16 & 17 Vict. c. 34, s. 2, Sched. D. :—Held (Fry, L. J., dissenting), that the respondent was not liable to income tax in respect of that portion of his profits which did not reach him in England. *Colquhoun v. Brooks*, 21 Q. B. D. 52; 57 L. J., Q. B. 439; 59 L. T. 661; 36 W. R. 657; 52 J. P. 645—C. A. Affirmed in *H. L.*, W. N., 1889, p. 168.

Trade exercised within the United Kingdom—Foreigner resident Abroad.—T. & Co. were a firm of wine merchants residing and carrying on business at Bordeaux, and T., the senior partner of the firm, usually spent about four months at different times in every year in England, seeing, and taking orders for wine from, retail wine merchants and other customers, and living during that time chiefly in London, and when there always at an hotel, and having no other English residence. The appellants employed a firm of London wine merchants as their agents, in whose offices a room, the rent of which was paid by the appellants, was provided for their use, and there they had their own clerk, whose salary was paid by them, and their name was painted up on the premises. The wines ordered were shipped by the appellants from Bordeaux, whence also bills of lading and invoices were forwarded by them, sometimes to the purchasers direct and sometimes to the agents, who collected all the accounts, received payment for all the wines ordered, and transacted all the necessary business not transacted by T. in England. For this the agents were paid, not by salary, but by receiving a commission on all wines sold in England by the appellants or ordered through T., such commission covering all expenses attaching to the appellants' business in England, and including a guarantee of all debts for the appellants' wines sold in England: and they, the agents, had been charged and had paid income tax on the profits made by them by this agency :—Held, that the appellants, though non-resident in this country, "exercised a trade" within the meaning of the 2nd clause of Sched. D. to s. 2 of 16 & 17 Vict. c. 34, and were rightly chargeable to income tax on the annual profits and gains derived by them therefrom, notwithstanding that the agents had been charged and paid income tax on their profits; and further, that s. 41 of 5 & 6 Vict. c. 35, was passed in aid and not in derogation of the rights of the Crown in collecting the revenue, and not in any way to alter the incidence of taxation. *Tischler v. Apthorpe*, 52 L. T. 814; 33 W. R. 548; 49 J. P. 372—D.

The appellants, a firm of wine merchants at Rheims, employed a London firm to obtain orders for their wine in England. The wine was adver-

tised in England, and the London firm issued circulars from time to time with the authority of the appellants detailing the price and terms of sale. The name of the appellants' firm was put up at the business premises of the London firm and was published in the London Directory with that address. The appellants had no wine in England, and all orders were forwarded to Rheims, and the wine, invoiced in the appellants' name, was packed and sent direct from thence to the customer at his expense and risk. Payments were either made direct to the appellants' or to the London firm, who remitted the amount to the appellants without carrying it to any current account. Any bill drawn for payment of wine was sent to the London firm to obtain the acceptance and to hold for the appellants. Formal receipts were sent by the appellants to purchasers for all payments, whether made direct or through the London firm. The London firm were paid by a commission on all wine sold, and the appellants alone were interested in the gain or loss on the sales :—Held, that the appellants exercised a trade within the United Kingdom within Sched. D. of 16 & 17 Vict. c. 34, and were assessable to the income tax in respect of the profits arising therefrom. *Werle v. Colquhoun*, 20 Q. B. D. 753; 57 L. J., Q. B. 323; 58 L. T. 756; 36 W. R. 613; 52 J. P. 644—C. A.

A foreign firm of wine merchants, whose chief office is in France and none of whom are resident in England, but who have established a resident agent in London through whom wine is sold to, and money in payment for it received from, English customers, are assessable to the income tax under Sched. D. in respect of the annual profits or gains arising from a trade exercised within the United Kingdom. *Pommery v. Apthorpe*, 56 L. J., Q. B. 155; 56 L. T. 24; 35 W. R. 307—D.

b. Assessment and Deductions.

Coal Mines—Dead Rent and Royalties—Agreement to repay Royalties overpaid.—By an agreement for a lease of coal mines for a term of years from March, 1874, the lessees agreed to pay a dead rent for the mines, and royalties at specified rates per ton on all coal worked; the dead rent to be recoupable out of royalties during the first sixteen years of the term—the effect being, that the lessor received on account of his share of the profits of the concern not less than a fixed annual sum; so that when his share of the royalties did not amount to the fixed sum he received that sum; but when his share of the royalties exceeded the fixed sum he received that sum only until the lessees had been reimbursed the excess paid to the lessor when his share of the royalties did not amount to the fixed sum. The lessees worked the mines for the first time in October, 1880, having paid the dead rent, less income tax, to the lessor up to that year. Upon an assessment to the income tax, made upon the lessees under Sched. D. for the year 1881–2, it appeared that the lessor's share of the royalties for that year had exceeded the dead rent by the sum of 1,477l. :—Held, that in estimating the profits of the concern for the particular year for the purpose of being assessed under the Income Tax Acts, the lessees were not entitled to deduct the 1,477l. from their gross profits. *Broughton Coal Company v. Kirkpatrick*, 14 Q. B. D. 491; 3 E

54 L. J., Q. B. 268; 33 W. R. 278; 49 J. P. 119—D.

Rent—Premium for Lease.—[In order to ascertain what are the profits and gains of a trade for the purposes of Sched. D. of the 5 & 6 Vict. c. 35, the annual expenditure—one element of which is the rent—should be deducted from the gross profits and gains. Where a lessee pays a ground-rent of 250*l.* per annum, having already paid 34,000*l.* as a premium for a lease of twenty-two years, he has no right to deduct one twenty-second part of the premium in each year, although the lease sinks in value as every year is cut off from it. The right principle is to deduct nothing in the way of outlays of money in the shape of expenditure of capital for the future benefit of the estate, but only what may be called current expenditure—that is, the average current repairs for a period of three years, or one year as the case may be. *Gillatt v. Colquhoun*, 33 W. R. 25—D.

Two Businesses—Set-off.—A seed-merchant taking a farm and working it in connexion with his seed business, cannot claim any allowance from the assessment on his profits as seed-merchant in respect of losses on his farm. *Brown v. Watt*, 50 J. P. 583—Ex. Scotland.

Part of Bank Premises used as Dwelling-house by Manager.—By 5 & 6 Vict. c. 39, s. 100, first rule, first case, the duties under Schedule D. in respect of any trade are to be charged on a sum not less than the full amount of the balance of the profits of the trade “without other deduction than is hereinafter allowed;” and by the first rule applicable to the first and second cases in reference to such duties, no deduction shall be allowed for “any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade,” &c., “nor for the rent or value of any dwelling-house, &c., except such part thereof as may be used for the purposes of such trade or concern not exceeding the proportion of the said rent or value hereinafter mentioned.” The respondents, a banking company, carried on their business in buildings which contained accommodation occupied as a dwelling-house by the manager or resident agent:—Held, that the respondents were entitled to deduct from their profits before returning them for assessment under Schedule D. the annual value of the whole bank premises, including the part occupied by the manager. *Russell v. Town and County Bank*, 13 App. Cas. 418; 58 L. J., P. C. 8; 59 L. T. 481; 53 J. P. 244—H. L. (Sc.)

“Annual Value”—Tithe Commutation Rent-charge—Expenses of Collection.—[In estimating the “annual value” of tithe commutation rent-charge for the purpose of charging the owner thereof with property tax under 16 & 17 Vict. c. 34, s. 32, the amount necessarily expended by him in collection of the tithe rent-charge must be deducted. *Stevens v. Bishop*, 20 Q. B. D. 442; 57 L. J., Q. B. 283; 58 L. T. 669; 36 W. R. 421; 52 J. P. 548—C. A.]

Cost of Embankment to protect Lands against Encroachment of Tidal River.—By the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 37,

in charging the duty under Sched. A. in respect of lands, a deduction is to be made for the amount expended by the owner on an average of the twenty-one preceding years in the making or repairing of sea-walls or other embankments “necessary for the preservation or protection of such lands against the encroachment or overflowing of the sea or any tidal river.” The appellant was assessed in the income tax under Sched. A. in respect of the annual value of certain lands. These lands had, prior to 1880, been salt marshes adjoining a tidal river, which were liable to be flooded at every tide, and had a small yearly value as pasturage. The appellant began in 1880 to construct an embankment for the purpose of excluding the water from these lands, which was complete in 1885, and the lands were, by the construction of such embankment, converted into valuable inclosed lands, of much greater value than in their previous state as salt marshes:—Held, that the appellant was not entitled to any deduction under s. 37, on the ground that the embankment constructed by him was not “necessary for the preservation or protection of such lands against the encroachment or overflowing of the sea or any tidal river,” within the meaning of the section, inasmuch as the section did not apply to embankments made for the improvement of the land by altering its condition, but only to embankments made for its protection or preservation in its existing state. *Hesketh v. Bray*, 21 Q. B. D. 444; 57 L. J., Q. B. 633; 37 W. R. 22; 53 J. P. 133—C. A. Affirming 58 L. T. 313—D.

c. Repayment of Amount overpaid.

Time within which Overpayment must be proved—Certificates—Jurisdiction of Commissioners.—By 5 & 6 Vict. c. 35, s. 133, “if within or at the end of the year” of assessment any person charged with income tax under Sched. D. “shall find and shall prove to the satisfaction of the commissioners by whom the assessment was made that his profits during such year for which the computation was made fell short of the sum so computed,” &c., it shall be lawful for the said commissioners to cause the assessment to be amended as the case shall require, and, in case the sum assessed shall have been paid, to certify under their hands to the commissioners for special purposes the amount of the sum overpaid upon such first assessment, and thereupon the last-mentioned commissioners shall issue an order for the repayment of such sum as shall have been so overpaid, &c. An English company, working mines abroad, made, in March, 1887, an application under the above section for certificates in respect of overpayments of income tax assessed on profits for the years ending respectively April 5, 1884, and April 5, 1885, and the commissioners by whom the assessments were made having inquired into the case, gave them certificates under the section. The commissioners for special purposes refused to issue orders for repayment on such certificates on the ground that they were made without jurisdiction, the company not having found and proved “within or at the end of the year,” as required by the section, that their profits in the respective years fell short of the sum computed:—Held, that the

certificates given were valid; and that mandamus lay to compel the commissioners for special purposes to issue orders for repayment of the amounts certified to be overpaid. The expression "at the end of the year" in the above section does not mean at any time after the end of the year, or, on the other hand, within any limit of time generally applicable, but as soon after the end of the year as, having regard to the circumstances of the particular case, is practicable by the use of due exertions. *Reg. v. Income Tax Commissioners*, 21 Q. B. D. 313; 57 L. J., Q. B. D. 513; 59 L. T. 455; 36 W. R. 776; 53 J. P. 84—C. A.

The commissioners by whom the assessment was made are given by the section jurisdiction finally to determine whether the discovery and proof of the profits having fallen short of the sum computed has been made within the period specified in the section as above interpreted. *Id.*, per Lord Esher, M.R.

The commissioners by whom the assessment was made having granted the certificate under the section, the onus of showing that such discovery and proof were not made within the period above mentioned, and that the certificate was therefore invalid, rested on the commissioners for special purposes, and was not satisfied by the mere fact of the application for the certificate not having been made before the date when it was made in the present case. *Id.*, per Lindley, L.J.

How obtained—Petition of Right.—A land company paid debenture interest in excess of the assessments under Schedule A, deducted income tax from the interest, and returned the whole amount deducted for assessment under schedule D. —Held, that a petition of right did not lie to obtain repayment of the sum paid under Schedule D. *Holborn Viaduct Land Company v. Reg.*, 52 J. P., 341—Stephen, J.

5. SUCCESSION DUTY.

Marriage Settlement—Predecessor—Settlor—Successor.—An indenture of marriage settlement recited that the father of the intended husband agreed to advance and give to his son the sum of 6000*l.*, which was to be repaid in the event of the marriage not taking place. It was further recited that it was agreed between all the parties to the deed that certain persons (as trustees) should stand possessed of the sum upon trust for the father until the intended marriage should be solemnised; and if not solemnised before a certain day therein named to transfer the same to the father, and from and after the solemnisation of the marriage upon trust to pay the income to the husband for life, and from and after his decease to pay the income to the wife, should she survive the husband, with the usual trusts over for her children. The husband having died and the widow having become entitled to the income of the said sum, the commissioners claimed payment of succession duty under 16 & 17 Vict. c. 51, as a succession derived from the father-in-law as the predecessor:—Held, that the father-in-law, and not the husband, was the "predecessor" or settlor, and that succession duty was therefore payable. *Attorney-General v. Maule*, 56 L. T. 611—D.

Power of Appointment—Acceleration of Succession by Extinction of prior Interests.—By s. 15 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), "where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place." By a marriage settlement the trust funds were settled upon trust to pay the income to the husband for life, and upon his death to the wife for life if she should survive, with remainder to the children of the marriage as the husband and wife jointly, or the survivor of them, should appoint, and in default of such appointment for the children who should attain the age of twenty-one, or die leaving issue or marry, in equal portions. It was also provided that it should be lawful for the trustees during the joint lives of the husband and wife, or the life of the survivor, with their, his, or her consent in writing, and after the decease of both, at the discretion of the trustees, to raise and apply, or dispose of, all or any part of the then expectant part or share of any such child or issue whose share should not then be payable, for or towards the preferment, advancement or benefit of such child or issue. During the lives of the tenants for life portions of the trust funds were appointed and paid over to the children by the trustees under the power in the settlement:—Held, on the death of the surviving tenant for life, that as to the appointed part of the trust fund, there had been an acceleration of the title to the succession "by the extinction of prior interests" within 16 & 17 Vict. c. 51, s. 15, and that such part was, equally with the unappointed part, subject to succession duty. *Sitwell, Ex parte, Drury Lowe's Marriage Settlement, In re*, 21 Q. B. D. 466; 59 L. T. 539; 37 W. R. 238—D.

Title under Will or by Purchase—Predecessor.]—By the will of X. ecclesiastical leaseholds for lives, of which Y.'s was the last, were settled upon trusts for Y. for life and over. A. having acquired the life interest of Y., bought the reversion in the leaseholds from the Ecclesiastical Commissioners, and had been held to have purchased as trustee for the persons entitled under the will of X. Part of the land was represented by a sum paid into court as compensation by a public body which had taken it under statutory powers. After the death of Y. the equitable interest under the will of X. had become vested absolutely in B., who, after satisfying A.'s lien for purchase money, was entitled (*inter alia*) to the fund in court:—Held, that B.'s title was, for purposes of duty, a title acquired under the will and not by purchase, and that succession duty was payable as on the death of Y. as predecessor. *Fryer v. Morland* (3 Ch. D. 675) distinguished. *De Rechberg v. Barton*, 38 Ch. D. 192; 57 L. J., Ch. 1090; 59 L. T. 56; 36 W. R. 682—Chitty, J.

"Disposition of Property."—By deed making provision for an endowment the donor covenanted that he or his executors or administrators after his death would transfer certain bank stock and certain shares into the names of trustees, and by another deed of the same date he declared that the trustees should stand possessed of the stock and shares upon trust for certain charit-

able purposes. By a subsequent deed he covenanted that he, or his executors or administrators after his death, would transfer a further amount of bank stock into the names of the trustees, and declared that they should stand possessed of it on the same trusts. After the death of the donor, his executors transferred the stock and shares into the names of the trustees:—Held, that the deeds showed a "disposition of property" within s. 2 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), and that the stock and shares so transferred were chargeable with succession duty. *Higgins, In re* (31 Ch. D. 142), discussed. *Attorney-General v. Montefiore*, 21 Q. B. D. 461; 59 L. T. 534; 37 W. R. 237—D.

Incumbrances created or incurred by Successor—Sinking Fund.]—A. devised certain landed estates to trustees for a term of years, and subject thereto upon divers limitations, of which the following alone took effect, viz.: to B. for life, remainder to C. for life, remainder to D. in tail. The trusts of the term were, out of the rents and profits, to keep down the interest on the debts, charges, and incumbrances affecting the said estates and to raise out of the rents and profits 3,000*l.* yearly, to be applied as and when a sufficient fund should have been thereby accumulated in the discharge of the principal moneys due in respect of the said debts, charges, and incumbrances; and of such portion of the testator's simple contract debts as were by his will directed to be paid out of his real estate, in case his personal estate should be insufficient. Upon A.'s death in 1841, B. went into possession of the estates, as tenant for life, and by a decree made in a Chancery suit instituted by the trustees of the will against B. and others, B. was directed to invest the surplus rents, after payment of interest and other outgoings, in $\frac{3}{4}$ per cent. stock (not exceeding 3,000*l.* yearly), and transfer the same from time to time to the credit of the cause. B. died in 1855, and a similar decretal order was made as to C., the next tenant for life, in a supplemental suit, to which C. and D., the next remaindermen in tail, were parties. Several investments and transfers were made pursuant to the said orders, and the sinking fund so formed was accumulated in accordance with the directions in A.'s will up to 1863, when C. and D. barred the entail, and limited the lands to such uses as they should jointly appoint; and C. and D. afterwards raised, upon mortgage of the said lands, a sum of 40,000*l.*, which, with the exception of 4,500*l.*, part thereof, which was transferred to the credit of the Chancery cause in respect of the sinking fund, was paid to C., to recoup him for payments made for the benefit of the estates, including the rebuilding of the mansion-house and other permanent improvements, adding to their letting value; and the lands were re-settled to the use of C. for life, remainder to D. for life, with divers remainders over, subject to a trust term to raise 25,000*l.*, when required by C. and D. and to apply the same as they should direct. C. thenceforward ceased to keep up the sinking fund, until 1877, when the arrears thereof amounted to 42,000*l.*, and an agreement was made between C. and D. providing, amongst other things, that the 25,000*l.* so charged by the resettlement should be released to the extent of 20,000*l.*, such release to be taken in discharge of C.'s liability in respect of the sinking fund up to 20th January, 1878,

that certain sums then standing to the credit of the fund should be forthwith applied in discharge of incumbrances affecting the inheritance, and the sinking fund should be thenceforward regularly kept up by C. This agreement was sanctioned by the court, subject to the addition of certain further provisions, and was carried out by deed. C. continued to keep up the sinking fund till his death in 1883, when D. became entitled to the estates. In assessing the succession duty payable by D. the Commissioners of Inland Revenue disallowed from the list of incumbrances, which D. claimed to deduct, 45,000*l.*, on the ground that incumbrances to this extent would have been paid off but for the suspension of the sinking fund from 1863 to 1878. Upon petition by D.:—Held, that the incumbrances represented by this sum were not created or incurred by D., within the 34th section of the Succession Duty Act, and that he was accordingly entitled to the deduction claimed. *O'Neill (Lord), In re*, 20 L. R., Ir. 73—Ex. D.

Covenant by Settlor to pay Sum during Life or after Death, "free from all Deductions whatsoever."]—A covenant by A. to pay to trustees of a settlement within twelve months after his death the sum of 10,000*l.* free from all deductions whatsoever, is satisfied by the payment by his executors of a sum of that precise amount, without any provision being made for the discharge of succession duty. *Higgins, In re, Day v. Turnell*, 31 Ch. D. 142; 55 L. J., Ch. 235; 54 L. T. 199; 34 W. R. 81—C. A.

Such duty, being by s. 42 of the Succession Duty Act chargeable on the interest of the successor, is payable by the trustees of the settlement, and not by the executors of the covenantor. *Id.*

6. PROBATE DUTY.

Realty forming part of Partnership Assets—Conversion.]—The shares of partners in realty forming part of the partnership property must be regarded as personal estate in the absence of any binding agreement between the partners to the contrary; and probate duty is payable on a deceased partner's share in such realty irrespective of the question whether or not there is in the event any actual conversion into personalty. *Custance v. Bradshaw* (4 Hare, 315) discussed. *Attorney-General v. Hubbuck*, 13 Q. B. D. 278; 53 L. J., Q. B. 146; 50 L. T. 374—C. A.

Freeholds—Conversion.]—Freehold property which is by the doctrine of equitable conversion to be considered as personalty, is chargeable with probate duty. *Gunn, In goods of*, 9 P. D. 242; 53 L. J., P. 107; 33 W. R. 169; 49 J. P. 72—Hannen, P.

Settlement—Covenant to bequeath by Will "the Residue" of Settlor's Estate to Trustees.]—By indenture of settlement, executed upon his marriage, A., in accordance with an agreement in that behalf recited in the settlement, covenanted that he would, out of his real and personal estate, by his will bequeath to the trustees of the settlement the sum of 20,000*l.*

with interest at 4 per cent. from the date of his death, to be held upon certain trusts therein declared, and would also (subject to the payment of the sum of 20,000*l.* and interest, and of his funeral and testamentary expenses and debts) by his will effectually devise and bequeath or appoint to the trustees the whole of the residue of the real and personal estate of or to which he should be seised or possessed, or entitled at his death, to be held upon the trusts in the settlement declared. A., by a codicil to his will, bequeathed to the trustees of his settlement the sum of 20,000*l.*, to be held by them upon the trusts of the settlement, and he left and bequeathed to them the residue of his real and personal property, upon the trusts in the settlement declared as to such residue:—Held, that the amount of the residue of A.'s estate did not constitute a debt due by him at his death under 44 Vict. c. 12; and further, that the residue formed part of the estate and effects of the testator A., and was, as such, subject to probate duty. *Attorney-General v. Murray*, 20 L. R., Ir. 124—C. A.

Lands Purchased by Committee of Lunatic from Accumulations of Personality.]—The committees of a lunatic, acting under certain orders of the Lords Justices of Appeal sitting in Lunacy, invested the accumulations of his personal estate in the purchase of land. In pursuance of, and in conformity with, these orders, certain lands (the price for which was paid out of the accumulations of the lunatic's personal estate) were conveyed "unto and to the use of the" committees, "their heirs and assigns, for ever, upon trust for" the lunatic, "his executors, administrators, and assigns;" and certain powers of leasing and sale were given to the committees; and the deeds of conveyance contained a declaration that the lands thus bought should be considered as part of the personal estate of the lunatic, but they contained in terms no trust for sale:—Held, that the value of the lands thus bought was part of the lunatic's personal estate and effects at his decease, and was liable to probate duty. *Attorney-General v. Ailesbury (Marquis)*, 12 App. Cas. 672; 57 L. J., Q. B. 83; 58 L. T. 192; 36 W. R. 737—H. L. (E.)

Incidence of.]—A married woman who died on the 13th of December, 1887, leaving a husband and three children surviving, made a will on the 7th of September, 1887, in exercise of a power of appointment, and appointed executors. The will did not purport to dispose of any other property. At her death she was entitled to separate personal estate not included in the power. Probate of the will was granted under the Amended Probate Rules of April, 1887, in the ordinary form without any exception or limitation:—Held, that the executors were trustees for the husband of the undisposed-of property, and that the probate duty and the costs connected with probate ought to be apportioned rateably between the appointed and the undisposed-of property. *Lambert, In re, Stanton v. Lambert*, 39 Ch. D. 626; 57 L. J., Ch. 927; 59 L. T. 429—Stirling, J. See also *Currie, In re, infra*.

Return of—Mandamus to Servants of Crown.]—The rule governing the discretion of

the court as to granting a mandamus is, that where there is no specific remedy, a mandamus will be granted that justice may be done. A petition of right is such a remedy, though it depends upon the fiat of the attorney-general being given. *Reg. v. Inland Revenue Commissioners, or Nathan, In re*, 12 Q. B. D. 461; 53 L. J., Q. B. 229; 51 L. T. 46; 32 W. R. 543; 48 J. P. 452—C. A.

The prosecutor applied for a mandamus to the defendants to return excess of probate duty, under 5 & 6 Vict. c. 79, s. 23. Probate duty is paid to the defendants to and for the use of the crown, and when received it is handed over by them to the crown. The defendants had declined to return the duty paid, on the ground that they were not satisfied of the lawfulness of the claim:—Held, that, assuming the claimant to be entitled to some remedy, still a mandamus ought not to issue, for that there was a specific remedy by petition of right, inasmuch as the money was in the hands of the crown. *Id.*

7. LEGACY DUTY.

Trust not Enforceable.]—A devise to executors in full confidence, but without imposing any trust or obligation enforceable either at law or in equity or otherwise, that they will apply a sum of money in a particular manner does not create a trust upon which legacy duty is payable. *Martineau, In re*, 48 J. P. 295—D.

Bequest when free from.]—A gift of six months' full salary is not a gift free from legacy duty. *Marcus, In re, Marcus v. Marcus*, 56 L. J., Ch. 830—North, J.

R. by will gave all his real and personal estate to trustees upon trust for sale and conversion, and directed them, "out of the proceeds to pay to S., until she shall marry, a clear yearly annuity of 250*l.*, and after her marriage upon trust to pay to the said S. a clear yearly annuity of 100*l.* during the remainder of her natural life." The testator proceeded, "And after payment of the said annuity of 250*l.* or 100*l.*, as the case may be, out of the net moneys to arise as aforesaid, upon trust to pay E. a clear yearly sum of 31*l.* 4*s.*, free of legacy duty." This was a summons taken out by the trustees for the determination of the question whether S.'s annuity was given free of legacy duty:—Held, that the words "clear yearly annuity" properly mean an annuity free from legacy duty, and this meaning could not be cut down by the fact that in another case the testator had added the words "free of legacy duty." *Robins, In re, Nelson v. Robins*, 58 L. T. 382—North, J.

A testatrix, after having bequeathed various pecuniary legacies, and also legacies of specific chattels, directed that "all the legacies left by my will and codicil be paid free of legacy duty":—Held that the legacy duty was to be paid out of the estate on all legacies as well pecuniary as specific, the word "paid" not being sufficient under the circumstances to cut down the direction to pecuniary legacies only. *Ansley v. Cotton* (16 L. J., Ch. 55) discussed and followed. *Johnston, In re, Cockerell v. Earl of Essex*, 26 Ch. D. 538; 53 L. J., Ch. 645; 52 L. T. 44; 32 W. R. 634—Chitty, J.

Deficient Estate—Abatement of Annuities.]—When a testator's estate is insufficient (after payment of his debts) to pay in full annuities given by his will, the fund must (after payment of costs) be apportioned between the annuitants in the proportion which the sum composed of the arrears of the annuity in each case plus the present value of the future payments bear to each other, and this rule applies in a case in which the annuitants are all living at the time of distribution. A testator gave an annuity of 150*l.* to his widow, and an annuity of 100*l.* to a stranger in blood, and he directed that the second annuity should be paid free of legacy duty, which should be paid out of his estate. After payment of his debts, the estate was insufficient to pay the annuities in full:—Held, that (after payment of costs) the fund must be apportioned as above between the two annuitants; that the legacy duty payable on the sum apportioned to the second annuitant must be deducted from the whole fund, and the balance then divided in the same proportion between the two annuitants. *Heath v. Nugent* (29 Beav. 266) followed. *Wilkins, In re, Wilkins v. Rotherham*, 27 Ch. D. 703; 54 L. J., Ch. 188; 33 W. R. 42—Pearson, J.

Incidence of.]—Testatrix, in exercise of a general power of appointment, made several appointments of (in each case) “so much and such part of” the said trust in funds as should be of the “clear” value of a specified sum of money in each case, and lastly made an appointment of “all the residue” of the said trust funds. The will disposed of no other property except that subject to the power, and contained no direction for payment of testamentary expenses, probate or legacy duty:—Held, that the testamentary expenses and probate duty, and the legacy duty on the specified portions of the trust funds, must be paid out of that part of the trust funds which was lastly appointed as residue. *Currie, In re, Bjorkman v. Kimberley (Lord)*, 57 L. J., Ch. 743; 59 L. T. 200; 36 W. R. 752—Kay, J.

REVERSION.

Sale of, Setting aside—Undervalue.]—See UNCONSCIONABLE BARGAIN.

REVISING BARRISTER.

See ELECTION LAW.

REVIVOR.

See PRACTICE, ante, col. 1402.

RIVER.

See WATER.

Fishing in.]—See FISH AND FISHERY.

ROAD.

In Metropolis.]—See METROPOLIS.

In Urban or Rural Districts.]—See HEALTH.

In other Places.]—See WAY.

SAILOR.

See SHIPPING.

SALE.

I. OF GOODS.

1. *The Contract*, 1580.
2. *Property in the Goods*, 1582.
3. *Breach of Contract*, 1583.
4. *Warranties*, 1584.
5. *Stoppage in Transitu*, 1585.
6. *Measure of Damages*—See DAMAGES.

II. SALES BY AUCTION, 1588.

III. OF SHIPS—See SHIPPING.

IV. OF LAND—See VENDOR AND PURCHASER.

V. OF FOOD—See HEALTH.

VI. IN MARKET OVERT—See MARKET.

I. OF GOODS.

1. THE CONTRACT.

Statute of Frauds—What within.]—A contract by an artist with a picture dealer to paint a picture of a given subject at an agreed price, is a contract for the sale of a chattel. *Isaacs v. Hardy*, 1 C. & E. 287—Mathew, J.

Receipt and Acceptance.]—Where goods of the value of 10*l.* or upwards are sold by a verbal contract and delivered, and the purchaser retains them, and deals with them in such a way as to prove that he admits the existence of a contract, and admits that the goods were delivered under the contract, this is a sufficient acceptance to satisfy s. 17 of the Statute of Frauds, although the purchaser afterwards rejects the goods on the ground that they are not equal to sample, and if the goods prove equal to sample the purchaser is liable. *Page v.*

Morgan, 15 Q. B. D. 228; 54 L. J., Q. B. 434; 53 L. T. 126; 33 W. R. 793—C. A.

— **Memorandum in Auctioneer's Book—Registration—Bill of Sale.**—See *Roberts, In re*, post, col. 1588.

F. O. B.—Meaning of.—If the goods dealt with by the contract are specific goods, the words "free on board," according to the general understanding of merchants, mean that the shipper is to put them on board at his expense on account of the person for whom they are shipped, and I can see no reason why a person should not agree to sell so much out of a bulk cargo on board or ex such a ship upon the terms that if the cargo be lost the loss shall fall upon the purchaser and not upon the seller. Where the terms "free on board" are used in such a contract, the same meaning must be given to them as is given to them with regard to goods attributed to the contract. *Stock v. Inglis*, 12 Q. B. D. 573; 53 L. J., Q. B. 356; 51 L. T. 449; 5 Asp. M. C. 294—Per Brett, M. R.

Payment in Exchange for Bills of Lading—Sets of Three—Tender—Right of Vendee to reject.—Where by the terms of the contract of sale of goods to be shipped, payment is to be made in exchange for bills of lading of each shipment, the purchaser is bound to pay when a duly-indorsed bill of lading, effectual to pass the property in the goods, is tendered to him, although the bill of lading be drawn in triplicate, and all the three are not then tendered or accounted for; and, if he refuses to accept and pay, he does so at his own risk as to whether it may turn out to be the fact or not that the bill of lading tendered was an effectual one, or whether there was another of the set which had been so dealt with as to defeat the title of the purchaser as indorsee of the one tendered. *Sanders v. Maclean*, 11 Q. B. D. 327; 52 L. J., Q. B. 481; 49 L. T. 462; 31 W. R. 698; 5 Asp. M. C. 160—C. A.

Per Brett, M. R.: The seller of such goods should make every reasonable exertion to forward the bills of lading to the purchaser as soon as possible after the shipment, but there is no implied condition in such a contract that the bills of lading shall be delivered to the purchaser in time for him to send them forward so as to be at the port of delivery either before the arrival of the vessel with the goods, or before charges are incurred there in respect of them. *Id.*

Sending Bill of Exchange with Bill of Lading—Non-acceptance—Conversion of Goods—Measure of Damages.—A shipload of timber having been consigned to the defendants, the consignor sent the bill of lading and other shipping documents, and also a bill of exchange, to the plaintiffs, in pursuance of the usual course of business between him and them, to cover certain advances which they from time to time made to him. The plaintiffs placed the shipping documents and bill of exchange relating to the cargo of timber in the hands of agents who acted between the plaintiffs and the defendants. The agents at the request of the plaintiffs forwarded the documents to the defendants, in order to have the bill of exchange accepted by them. Shortly afterwards the defendants informed the agents that the cargo was thoroughly out of condition, and that they could not take it in its then state. The

agents replied that, unless the defendants returned the bill of exchange accepted, they ought to send back the shipping documents. This the defendants declined to do, as they had paid part of the freight, and intended to take possession of the cargo. Later on they stated that they had been compelled to remove the cargo under the rules of the dock company, but that, if the agents would repay them the freight and certain charges, and their profits on a portion of the cargo which they had sold, they would return the documents. The agents replied that the matter must be left in the hands of the plaintiffs, the owners of the cargo. The defendants then returned to the agents the bill of exchange unaccepted, but retained the bill of lading as security against freight and charges. They offered to yield up the bill of lading on the freight and charges being refunded. Thereupon the plaintiffs commenced an action against the defendants, asking that they might be ordered to accept and deliver up the bill of exchange; and that it might be declared that, until such acceptance and delivery, the defendants were not entitled to retain the bill of lading. They also asked for an injunction, a receiver, and damages. Owing to delay, caused by the fault of both parties, the action did not come on for hearing until about four years after its commencement: Held, that the defendants, having refused to accept the bill of exchange, were bound to have returned the shipping documents, which were only at their disposal on the condition that they should so accept the bill; and that they wrongfully took possession of the cargo, and dealt with it as its owners, although they had repudiated the contract, and refused to accept the bill of exchange, availing themselves of the bill of lading, which they had no right whatever to retain or make use of, to get that possession:—Held, therefore, that the plaintiffs were entitled to damages against the defendants; that the proper measure of damages was the value of the cargo after making a deduction for freight; but that none of the other charges claimed by the defendants could be allowed, except outgoings in connexion with the sale of part of the cargo:—Held also, that defendants must pay damages, in the nature of interest, for keeping the plaintiffs out of possession of their goods; that the ordinary measure of such damages would be 5 per cent. on the value of the cargo from the time the defendants wrongfully took possession thereof; but that, having regard to the delay which had occurred in bringing the action on for hearing, attributable no less to the plaintiffs than the defendants, half damages, computed at the rate of 2½ per cent. only, would be awarded. *Rew v. Payne*, 53 L. T. 932; 5 Asp. M. C. 515—Kay, J.

Personal Liability of Broker.—See *PRINCIPAL AND AGENT*, II.

Rights of Vendor and Administratrix.—See *Evans, In re*, ante, col. 777.

2. PROPERTY IN THE GOODS.

Appropriation—Goods in Bulk.—Where, after a sale of 60,000 bricks, part of a bulk of 117,000, the seller had applied all but 62,000 for other purposes, and was still using them, when seized

in execution:—Held, there was no appropriation of any part of the £60,000 to the sale. *Snell v. Heighton*, 1 C. & E. 95—Grove, J.

Property passing under Bill of Lading.—The mere indorsement and delivery of a bill of lading by way of pledge for a loan does not pass "the property in the goods" to the indorsee, so as to transfer to him all liabilities in respect of the goods within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), s. 1. *Sewell v. Burdick*, 10 App. Cas. 74; 54 L. J., Q. B. 156; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376—H. L. (E.).

Right of Trustee in Bankruptcy to Articles in Course of Manufacture.—See ante, col. 133.

Revesting of Property on Conviction—Goods obtained by False Pretences.—See MARKET.

Materials used in Construction of Railway—Goods Delivered but not Fixed.—See *Banbury and Cheltenham Railway v. Daniel*, ante, col. 1542.

3. BREACH OF CONTRACT.

Monthly Deliveries—Non-payment for one Delivery—Repudiation.—The respondents bought from the appellant company 5,000 tons of steel of the company's make, to be delivered 1,000 tons monthly, commencing January, 1881, payment within three days after receipt of shipping documents. In January the company delivered part only of that month's instalments, and in the beginning of February made a further delivery. On the 2nd February, shortly before payment for these deliveries became due, a petition was presented to wind up the company. The respondents, bonâ fide, under the erroneous advice of their solicitor that they could not, without leave of the court, safely pay pending the petition, objected to make the payments then due unless the company obtained the sanction of the court, which they asked the company to obtain. On the 10th February the company informed the respondents that they should consider the refusal to pay as a breach of contract, releasing the company from any further obligations. On the 15th February an order was made to wind up the company by the court. A correspondence ensued between the respondents and the liquidator, in which the respondents claimed damages for failure to deliver the January instalment, and a right to deduct those damages from any payments then due; and said that they always had been and still were ready to accept such deliveries and make such payments as ought to be accepted and made under the contract, subject to the right of set-off. The liquidator made no further deliveries, and brought an action in the name of the company for the price of the steel delivered. The respondents counter-claimed for damages for breaches of contract for non-delivery:—Held, that, upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery; that the respondents had not by postponing payment under erroneous advice, acted so as to show an intention to repudiate the contract, or so as to release the company from further performance. *Mersey Steel and*

Iron Company v. Naylor, 9 App. Cas. 434; 53 L. J., Q. B. 497; 51 L. T. 637; 32 W. R. 989—H. L. (E.).

Right to reject when inferior to Contract—Custom.—A vendor cannot compel a purchaser to accept goods inferior in quality to that contracted for, where no property in the goods has passed or the sale is not of a specific cargo. No custom exists in the Liverpool corn trade compelling the buyer to accept under such circumstances, and quære as to the reasonableness of such a custom. *Sinidino v. Kitchen*, 1 C. & E. 217—Hawkins, J.

4. WARRANTIES.

Sale of Horse—Condition for Return—Horse disabled—Implied Condition.—The plaintiff bought a horse of the defendant warranted quiet to ride. One of the conditions of the contract was to the effect that if the buyer contended that the horse did not correspond with the warranty it must be returned on the second day after the sale, and that the non-return within the time limited should be a bar to any claim on account of any breach of warranty. The horse was removed by the plaintiff, and while being ridden fell, and was so injured that it could not safely be returned on the second day after the sale, but the plaintiff gave notice to the defendant on that day that the animal was not according to warranty, and was unfit to travel:—Held, that, under these circumstances, the non-return of the horse within the period stipulated by the condition was no bar to an action for breach of the warranty. *Chapman v. Withers*, 20 Q. B. D. 824; 57 L. J., Q. B. 457; 37 W. R. 29—D.

Implied—Sale of Chain-Cable untested and unstamped.—In every case of a contract for the sale of a chain-cable, whether for use on a British ship or not, there is an implied warranty that it has been properly tested and stamped in accordance with the acts. *Hall v. Billingham*, 54 L. T. 387; 34 W. R. 122; 5 Asp. M. C. 538—D.

Contract to manufacture Goods equal to Sample—Caveat emptor—Latent Defect.—Cloth-merchants ordered of cloth manufacturers worsted coatings which were to be in quality and weight equal to samples previously furnished by the manufacturers to the merchants. The object of the merchants was, as the manufacturers knew, to sell the coatings to clothiers or tailors. The coatings supplied corresponded in every particular with the samples, but owing to a certain defect were unmerchantable for purposes for which goods of the same general class had previously been used in the trade. The same defect existed in the samples, but was latent and was not discoverable by due diligence upon such inspection as was ordinary and usual upon sales of cloth of that class:—Held, that upon such a contract there was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality and general character ordinarily would be used. *Mody v. Gregson* (4 L. R. Ex. 49) approved. *Drummond v. Van Ingen*, 12 App. Cas. 284;

56 L. J., Q. B. 563; 57 L. T. 1; 36 W. R. 20—H. L. (E.)

Title—Sale of Government Bonds.—The government of the United States in 1865 issued bonds payable to bearer, redeemable at the pleasure of the government, after 1870, and payable, at all events, in 1885. When the government wished to redeem any of these bonds, they gave notice to holders by public notification that they would be paid on presentation. After such notice, the bonds notified were called "Called Bonds." These bonds are dealt in in England for the purpose of making remittances to America. The course of business is for the seller to supply the buyer with bonds or coupons of railway companies, &c., payable in America at an agreed price, no particular bonds or coupons being specified. It was proved that whenever default was made in payment of the coupons in America, the seller returned the money paid for them, but no evidence was given of any case in which payment of a bond had been refused. A. sold to B. in accordance with the above course of business certain "Called Bonds," which had been originally stolen from American holders, and payment to B. of the bonds was refused by the American government:—Held, that there was an implied warranty of title on the sale by A. to B., and that B. was entitled to recover from A. the price paid. *Raphael v. Burt*, 1 C. & E. 325—Stephen, J.

5. STOPPAGE IN TRANSITU.

Goods Bought for Shipment Abroad—Delivery of Goods on board Ship—Termination of Transit.—

—Goods having been purchased by merchants in London of manufacturers in Wolverhampton, the purchasers wrote to the vendors asking them to consign the goods "to the 'Darling Downs,' to Melbourne, loading in the East India Docks." The goods were accordingly delivered by the vendors to carriers to be forwarded to the ship. The vendors being subsequently informed of the purchaser's insolvency gave notice to the carriers to stop the goods, but too late to prevent their shipment on board the "Darling Downs." The ship sailed with the goods on board for Melbourne, but before she arrived the vendors claimed the goods from the shipowners as their property:—Held, that the transit was not at an end till the goods reached Melbourne, and therefore that the vendors had till then a right to stop them in transitu. *Bethell v. Clark*, 20 Q. B. D. 615; 57 L. J., Q. B. 302; 59 L. T. 808; 36 W. R. 611—C. A. Affirming 6 Asp. M. C. 194—D.

Goods Bought by Commission Agent in England for Foreign Principal.—A commission agent in London was employed by merchants at Kingston, Jamaica, to buy goods for them in England. He ordered the goods of the manufacturers "for this mark," there being in the margin of the letter which gave the order a mark consisting of two letters, with "Kingston, Jamaica," added. The manufacturers knew from previous dealings that this mark had been used by the Jamaica firm. The goods were to be paid for by six months' bills drawn by the manufacturers on the commission agent and accepted by him. On the 11th of September the commission agent

wrote to the manufacturers, telling them to pack the goods and mark them with the mark previously mentioned, and to forward them to specified shipping agents at Southampton, for shipment by a particular ship, "advising them with particulars for clearance." On the 13th September, the manufacturers sent the invoice of the goods to the commission agent, telling him that they had that day forwarded the goods by railway to the shipping agents "with the usual particulars for clearance." The same day the manufacturers wrote to the shipping agents, sending them the particulars of the goods, and adding, "which please forward as directed." The particulars described the goods as marked with the letters originally given by the commission agent, and the words "Kingston, Jamaica," and numbered with specified numbers, but the columns for "consignee" and "destination" were left in blank. The cost of the carriage to Southampton was paid by the manufacturers. On the 14th of September the commission agent sent to the shipping agents particulars of the goods, giving the name of the Jamaica firm as consignees, and stating the destination of the goods to be Kingston, Jamaica. The goods were shipped on board the vessel, the bills of lading describing the commission agent as consignor, and the Jamaica firm as consignees. After the ship had sailed, but before her arrival at Jamaica, the commission agent stopped payment, and the manufacturers, who had not been paid for the goods, gave notice to the shipowners to stop them in transitu:—Held, that, as between the commission agent and the manufacturers, the transit was at an end when the goods arrived at Southampton, and that the notice to stop was given too late. *Watson, Ex parte* (5 Ch. D. 35), distinguished. *Miles, Ex parte, Isaacs, In re*, 15 Q. B. D. 39; 54 L. J., Q. B. 566—C. A.

Purchase by Agent in England for Foreign Principal—Delivery on Principal's Vessel—Mate's Receipts.—B. and S., acting as agents in England for a foreign principal, purchased from F. & Co., in England, cement for the New York market; the cement was ordered to be sent alongside a vessel which B. and S. had purchased for their principal, and was shipped on board that vessel; mate's receipts for the cement were taken by F. & Co. and handed on to B. and S., who exchanged them for bills of lading in which B. and S. were stated to be the shippers, and which made the goods deliverable to the order of B. and S. B. and S. gave all necessary directions as to the destination of the goods and the sailing of the vessel. While the vessel was on its way to New York, B. and S. became bankrupt, and F. & Co. claimed as unpaid vendors to stop the cement in transitu. F. & Co. knew not only that the vessel belonged to B. and S.'s principal, but also that the cement was bought by B. and S. for that principal:—Held, that F. & Co. were not entitled to stop the cement in transitu. *Francis, Ex parte, Bruno, In re*, 56 L. T. 577; 6 Asp. M. C. 138; 4 M. B. R. 146—Cave, J.

Goods Shipped to Order of Vendee.—The right of the vendor of goods to stop them in transitu is not lost by the mere fact that by the bill of lading under which they are shipped they are deliverable to the vendee or his assignees.

Brindley v. Cilgwyn Slate Company, 55 L. J., Q. B. 67—D.

The plaintiffs entered into a contract with the defendants to purchase seventy tons of slates. At the request of the plaintiffs the defendants chartered a ship and loaded her with the slates for Southampton, taking bills of lading by which the slates were deliverable to the vendees or their assignees. Before the arrival of the ship at Southampton the defendants heard of the insolvency of the plaintiffs, and gave orders to the master to stop the slates in transitu. In an action by the plaintiffs for non-delivery of the slates:—Held, that the transit was not at an end, and that the defendants had a right to stop the delivery of the slates. *Ruch v. Hatfield* (5 B. & Ald. 632); *Rosevear China Clay Company, Ex parte* (11 Ch. D. 560) followed. *Id.*

Delivery of Bills of Lading—Telegram.—J., P., & Co., merchants at Pernambuco, having in the course of their business received orders from customers to purchase goods on their account in New York, instructed S. J. & Co., their agents at Liverpool, to purchase the goods and have them shipped to J., P., & Co. S. J. & Co. then instructed R. B. B., the agent at New York of J., P., & Co. and S. J. & Co., to purchase the goods. R. B. B. purchased the goods and shipped them to J., P., & Co., sending with them the invoices and bills of lading. To provide himself with funds to purchase the goods, R. B. B. drew bills of exchange on S. J. & Co., in which were the words “and charge to account as advised.” Attached to each bill was a counterfoil headed “Advice of draft.” This was addressed to S. J. & Co., mentioned the number, date, and amount of the bill, and concluded with these words (*mutatis mutandis*), “Against shipments per steamship ‘Glensannox,’ No. 6, N. Y. to Brazil, via Baltimore. Please protect the drafts as advised above, and oblige drawer. R. B. B., New York, May 9, 1879.” These bills were sold for value in New York, and R. B. B. advised S. J. & Co. of the bills, and at the same time forwarded a statement of account. On presentation of the bills for acceptance, S. J. & Co. detached the counterfoils and kept possession of them. On the 10th June, 1879 (while the plaintiffs, P., S., & Co. were the holders of these bills, drawn, according to this course of business, in respect of a shipment to J., P., & Co., to whom the bills of lading were at the same time sent), S. J. & Co. suspended payment. The same day the failure was known in New York, and R. B. B., under some pressure from P., S., & Co., telegraphed to J., P., & Co., “Having pledged documents and shipments ‘Glensannox,’ hold proceeds subject order P., S., & Co.” The ship “Glensannox” arrived at Pernambuco on the 11th June, and the goods were delivered to the customers (of J., P., & Co.) who had ordered them, the purchase money being received by J., P., & Co. The court found that the bills of lading had been delivered to the customers before the telegram was received. The bills of exchange were dishonoured by S. J. & Co. when presented for acceptance. J., P., & Co. claimed to retain the purchase-moneys against moneys alleged to be due to them by S. J. & Co.—Held, that even if the telegram had reached J., P., & Co. before the transitus was at an end, it would not operate to stop them in transitu. *Phelps v.*

Comber, 29 Ch. D. 813; 54 L. J., Ch. 1017; 52 L. T. 873; 33 W. R. 829; 5 Asp. M. C. 428—C. A.

II. SALES BY AUCTION.

Entry in Auctioneer's Book—Bill of Sale—“Assurance of Personal Chattels.”—Where a contract for sale of goods within s. 17 of the Statute of Frauds is valid solely by virtue of a memorandum in writing, such memorandum is an assurance of personal chattels within the Bills of Sale Act, 1878. *Roberts, In re, Evans v. Roberts*, 36 Ch. D. 196; 56 L. J., Ch. 952; 57 L. T. 79; 35 W. R. 684; 51 J. P. 757—Kay, J.

Commission, when earned—Introduction of Purchaser.—On January 7th, 1887, an estate agent, in whose hands the debtor had placed certain property for sale, introduced to such debtor a person with a view to purchase, but no agreement could then be come to as to terms, and the debtor a few days afterwards presented his own petition in bankruptcy. On January 17th, 1887, further negotiations took place between the person so introduced and the trustee in the bankruptcy in respect of the property, and on January 24th, 1887, the purchase was completed, but a proof subsequently tendered by the estate agent for his commission was rejected by such trustee:—Held, that the sale was brought about in consequence of the introduction, and was traceable thereto, and that the proof for commission must be allowed. *Durrant, Ex parte, Beale, In re*, 5 M. B. R. 37—See also cases ante, col. 1521.

Authority of Auctioneer after Auction.—At a sale by auction D. became the purchaser for 6,000*l.* of certain real estate. Before the sale took place the auctioneer had received a letter from S., stating that he had been prevented from attending the sale, and asking if any of the lots remained unsold. After the sale was concluded the auctioneer informed D. that a client of his was inquiring about the property, and D. then said that he was willing to resell the same for 6,600*l.*, of which 100*l.* should be paid to the auctioneer as commission, provided the offer was accepted within a specified time. The offer was communicated by the auctioneer by letter to S., who wrote a reply to the auctioneer accepting it. S. brought an action against D. for the specific performance of the agreement. The evidence was conflicting as to the time within which D.'s offer was to be accepted, and his contention was that it was not accepted in time. He also contended that the auctioneer's authority did not extend to making a contract, but only to bringing the parties together:—Held, that the auctioneer was authorised to make a binding contract for a sale of D.'s interest under his contract; but that the action must be dismissed on the ground that the offer had not been accepted within the time limited by D. *Saunders v. Dence*, 52 L. T. 644—Field, J.

Trover—Conversion—Sale “in the course of his business as Auctioneer.”—An auctioneer who, in the ordinary course of his business, sells by public auction for A. goods ostensibly belonging to A., but really belonging to B., and, without notice, pays over the proceeds of sale to

A., is not guilty of a conversion. *Turner v. Hockey*, 56 L. J., Q. B. 301—D.

The grantor of a bill of sale, which included a cow, took the cow to a public market kept by the corporation of N., and placed it in one of the pens rented by the defendant, an auctioneer, whom he instructed to sell it. The defendant had before this sold several cows in the same way for him. The defendant, without notice or knowledge of the bill of sale in question or that the cow was not the property of the person instructing him, sold the cow, and immediately after he received the money, paid it over to the ostensible seller, he having previously paid the auctioneer in cash the amount of his commission:—Held, that the grantee of the bill of sale could not afterwards maintain an action against the auctioneer for the value of the cow. *Id.*

Lien on Proceeds—Two Funds, one subject to Lien, the other not—Marshalling.]—The defendants were auctioneers, and had sold for a customer a brewery, and part of the proceeds of the sale was in their hands subject to their claim for charges incurred in connexion with the sale; they had also in their hands the balance of the price of some furniture sold by them for the same customer. The plaintiff was a creditor of the defendants' customer, and he by letter charged the proceeds of the sale of the brewery in favour of the plaintiff. The defendants wrote to the plaintiff acknowledging the receipt of the letter of charge. The defendants afterwards paid their customer the balance of the price of the furniture, and appropriated the part of the proceeds of the sale of the brewery in their hands to the payment of their charges:—Held, that the defendants, as auctioneers, had a lien for their charges upon the part of the proceeds of the sale of the brewery in their hands, and that they were at liberty to appropriate the part of the proceeds of the sale of the brewery in their hands to the payment of their charges, and were not bound to take payment of their charges out of the price of the furniture in order to enable the plaintiff to obtain payment of his charge, and that the doctrine of marshalling did not apply. *Webb v. Smith*, 30 Ch. D. 192; 55 L. J., Ch. 343; 53 L. T. 737—C. A.

Payment by Auctioneer into Bank—Following Trust Money.]—An auctioneer received moneys from a sale of live stock, and paid them into his private account at the defendants' bank. His account was overdrawn to an amount not exceeding 2,500*l.*; but under an arrangement which was then subsisting, he was permitted to overdraw up to 2,500*l.*, and he had no suspicion at the time when he paid in such moneys of any intention on the part of the bank to close his account. The bank shortly afterwards closed the account, and applied the proceeds of the sale in reduction of the overdraft. The bank had notice that the moneys so paid in were substantially the produce of the sale of stock. An action was brought by the plaintiff, on behalf of all the vendors at the sale, against the bank, to recover their respective purchase-moneys, less the auctioneer's commission:—Held, that the auctioneer paid the proceeds of the sale to his private account in the ordinary course of business, and was not guilty of a breach of trust in so doing, and that therefore the plaintiff had no

remedy against the bank. *Marten v. Roche*, 53 L. T. 946; 34 W. R. 253—North, J.

Auctioneer's Remuneration—Scale.]—A testator's real estate was subject to a mortgage for 3,000*l.* The property was put up for sale by an auctioneer and not sold, as the reserve price (7,000*l.*) was not reached. The auctioneer subsequently sold the property by private contract at the reserve price. On the mortgagees bringing their accounts of the sale before the chief clerk, he allowed the auctioneer only the charges usually allowed in cases of sale in court, and struck off 62*l.* 10*s.* from their bill for commission. An action for the administration of the testator's estate came on for further consideration, together with a summons by the mortgagees to vary the chief clerk's certificate by allowing the 62*l.* 10*s.*:—Held, that the auctioneer was only entitled, beyond expenses for outgoings to a proper remuneration according to the scale allowed by the court in sales of property under its control, and that auctioneers had no right to agree among themselves to fix a certain scale of remuneration upon which to charge the persons who employed them, and that the chief clerk was right in disallowing the 62*l.* 10*s.* *Walford, In re, Walford v. Walford*, 59 L. T. 397—Kay, J.

Acceptance of Cheque for Deposit—Reasonableness.]—On a sale by auction on behalf of a mortgagee, in exercise of the power of sale contained in his mortgage deed, the acceptance by the auctioneer, on behalf of the vendor and with his concurrence, of a cheque (which was dishonoured on presentation) in lieu of cash for the deposit is not, having regard to the common practice at sales by auction, unreasonable, and is not such an act of negligence on the part of the mortgagee as to deprive him of his right to the costs of the abortive sale. *Farrer v. Lacy*, 31 Ch. D. 42; 55 L. J., Ch. 149; 53 L. T. 515; 34 W. R. 22—C. A.

SALFORD HUNDRED COURT.

See COURT.

SALMON.

See FISH AND FISHERY.

SALVAGE.

See SHIPPING.

As applied to Insurance Policies—Premiums.]
—See INSURANCE, I. 3.

SANITARY LAW.

See HEALTH.

SATISFACTION.

By way of Accord.]—See ACCORD AND SATISFACTION.

Of Legacies.]—See WILL.

SAVINGS BANKS.

See BANKER.

SCHOOL.

School Boards.

- a. Election, 1591.
- b. Contracts, 1592.
- c. Attendance of Children—Fees, 1593.
- d. Rating—See POOR LAW.
2. *Industrial Schools*, 1594.
3. *Reformatory Schools*, 1595.
4. *Endowed Schools*—See CHARITY, IV.
5. *Contracts as to Schooling*, 1595.

1. SCHOOL BOARDS.

a. Election.

Vote—Ballot-papers, Validity of.]—The Ballot Act, 1872, Sched. II., which applies to municipal elections, directs that a voter shall vote by placing a cross on the right-hand side of the ballot-paper opposite the name of each candidate for whom he votes. A general order of the Education Department, made under the Elementary Education Acts, provides that the poll at elections of school boards in boroughs shall be conducted in like manner as the poll at a contested municipal election as directed by the Ballot Act, 1872, is to be conducted, and the provisions of that Act shall, subject to the provisions of the order, apply to elections of school boards, provided that—"Every voter shall be entitled to a number of votes equal to the number of the members of the school board to be elected, and may give all such votes to one candidate, or may distribute them among the candidates as he thinks fit. The voter may place against the name of any candidate for whom he votes the number of votes he gives to such candidate in lieu of a cross, and the form of directions for the guidance of the voter in voting contained in the Ballot Act, 1872, shall be altered accordingly":—Held, applying the principle of *Woodward v. Sarsons* (10 L. R., C. P. 733), that the provisions of the general order and of the Ballot Act, 1872,

were sufficiently complied with where ballot-papers at the election of a school board in a borough were marked otherwise than in the mode prescribed by the order, if it could be ascertained with reasonable certainty for whom the voter in each case intended to vote, and how many votes he intended to give, and if it appeared that he had not intended to give a greater number of votes than there were members of the school board to be elected:—Applying the above principles, the court held that ballot-papers marked by placing crosses instead of figures, or crosses and figures, or single strokes, opposite the names of candidates, were valid. *Phillips v. Goff*, 17 Q. B. D. 805; 55 L. J., Q. B. 512; 35 W. R. 197; 50 J. P. 614—D.

Petition—Appeal from Commissioner's Decision.]—The High Court has no jurisdiction to entertain an appeal against the decision of a commissioner appointed to inquire into alleged corrupt or illegal practices at a school board election, except on points of law reserved for its decision by way of a case stated by the commissioner. *School Board Election, In re, Ayres, Ex parte*, 54 L. T. 296—D.

b. Contracts.

Compulsory Purchase of Lands—Agreement for Exchange with Third Party prior to Notice to Treat.]—A school board served on R. the customary notice to treat for land belonging to him, all the requisite preliminaries required by the Elementary Education Act, 1870, having previously been complied with. Prior, however, to the service of such notice to treat and to the passing of the Confirmation Act as required by the above act, the board had entertained and adopted, subject to the sanction of the Education Department, a proposal from one B., a neighbouring landowner, for exchanging a portion of the land to be acquired by the board from R. for a piece of B.'s land, he undertaking to form the land so to be conveyed to him by the board into a public road. There was evidence to show that such road, when made, would be advantageous to the school intended to be erected:—Held, on motion by R. for an injunction to restrain the board from putting in force their statutory powers with respect to so much of the land comprised in the notice to treat as they proposed to convey to B., that the board were justified in the course they had taken, and could, if they obtained the sanction of the Education Department, carry out the proposal. *Rolls v. London School Board*, 27 Ch. D. 639; 51 L. T. 567; 33 W. R. 129—Chitty, J.

Officer—Architect—Contract not under Seal—Liability of Board.]—By 33 & 34 Vict. c. 75 (the Elementary Education Act, 1870), s. 30, sub-s. (1), a school board shall be a body corporate . . . having a perpetual succession and a common seal . . . sub-s. (4), any minute made of proceedings at meetings of the school board, if signed by . . . the chairman . . . shall be receivable in evidence in all legal proceedings without further proof . . . sub-s. (6), the rules contained in the third schedule shall be observed. By s. 35 a school board may appoint a clerk and a treasurer and other necessary officers . . . By the Third Schedule, 7, the appointment of any

officer of the board may be made by a minute of the board, signed by the chairman of the board, and countersigned by the clerk (if any) of the board, and any appointment so made shall be as valid as if it were made under the seal of the board. By a minute signed by the chairman of a school board and countersigned by the clerk, the plaintiff was appointed architect of the board, and under orders given by subsequent minutes so signed and countersigned and communicated to him, he prepared plans for the board:—Held, that by virtue of the provisions of the act he was entitled to recover payment for his services although the appointment and orders were not under seal. *Scott v. Great Clifton School Board*, 14 Q. B. D. 500; 52 L. T. 105; 33 W. R. 368; 1 C. & E. 435—Mathew, J. Affirmed in C. A.

c. Attendance of Children—Fees.

Bye-laws—Non-Attendance at School—Reasonable Excuse.—A school board made a bye-law under s. 74 of the Elementary Education Act, 1870, providing that “the parent of every child of not less than five nor more than thirteen years of age, shall cause such child to attend school, unless there be a reasonable excuse for non-attendance,” and that “any of the following reasons shall be a reasonable excuse, namely, that the child is under efficient instruction in some other manner; that the child has been prevented from attending school by sickness or any unavoidable cause; that there is no public elementary school open which the child could attend, within two miles from the residence of such child.” Where it was shown that the non-attendance was caused by the child, a girl aged twelve, with fair elementary instruction, having been in respectable employment, earning wages, which she gave to her parents, who were poor, industrious and respectable people, and applied them to the support of their other children, whom otherwise, from no fault of the parents, they would have been unable sufficiently to support:—Held, that these facts constituted a “reasonable excuse” for non-attendance. *London School Board v. Duggan*, 13 Q. B. D. 176; 53 L. J., M. C. 104; 32 W. R. 768; 48 J. P. 742—D.

— **Non-payment of Fees for Tuition—Causing Child to Attend.**—The London School Board made bye-laws under s. 74 of the Elementary Education Act, 1870, providing that the parent of every child, if not less than five nor more than thirteen years of age, should cause such child to attend school unless there was a reasonable cause for non-attendance, and that every parent who should not observe or should neglect any bye-law should be liable, upon conviction, to a penalty. The respondent sent his child, aged ten, to one of the Board's schools, but did not pay, though he was able to pay, the weekly fees for tuition prescribed by the School Board with the consent of the Education Department. The child was admitted to the school, and received instruction therein:—Held, that the respondent had not caused his child to attend school within the meaning of the bye-laws, and therefore was liable to the penalty. *London School Board v. Wood*, 15 Q. B. D. 415;

54 L. J., M. C. 145; 54 L. T. 88; 50 J. P. 54—D.

Action to recover Fees for Tuition—Implied Promise to pay—Bye-laws.—No action to recover arrears of fees for tuition can be maintained by a school board against the parent of a child attending a public elementary school; for it being compulsory upon the parent to cause his child to attend a school, his act in sending the child to school is not voluntary, and no promise to pay the fees can be implied; and the Elementary Education Acts, 1870 to 1880, contemplate that the remedy to enforce payment of fees shall be by an attendance order and by summary proceedings before justices and not by action. *Saunders v. Richardson* (7 Q. B. D. 388) approved. *London School Board v. Wright*, 12 Q. B. D. 578; 53 L. J., Q. B. 266; 50 L. T. 606; 32 W. R. 577; 48 J. P. 484—C. A.

School Hours—Home Lessons—Unlawful Detention of Scholar.—The Elementary Education Acts 1870 and 1876, do not authorise the setting of lessons to be prepared at home by children attending a board school. The detention at school after school hours of a child for not doing home lessons is therefore unlawful, and renders the master who detains the child liable to be convicted for an assault. *Hunter v. Johnson*, 13 Q. B. D. 225; 53 L. J., M. C. 182; 51 L. T. 791; 32 W. R. 857; 48 J. P. 663; 15 Cox, C. C. 600—D.

Closing School through Disease—Right to Compensation for Master's Fees.—The urban sanitary authority, owing to an attack of measles, ordered the board school to be closed for a fortnight, whereby the master lost his fees, amounting to 30s. per week. He claimed compensation under the Public Health Act, 1875, s. 308:—Held, that his claim could not be allowed, the power to close being given by the Education Code, 1866, s. 98, and not by the Public Health Act. *Roberts v. Falmouth Sanitary Authority*, 52 J. P. 741—D.

2. INDUSTRIAL SCHOOLS.

Person under fourteen years of age living with Prostitutes—Jurisdiction of Justices.—The Industrial Schools Act, 1886, s. 14, provides that there shall be a power to any person to bring before two justices or a magistrate, any child, apparently under the age of fourteen years, that comes within certain descriptions therein set out, to which the Industrial Schools Act Amendment Act, 1880, s. 1, adds the following descriptions, namely, “that is lodging, living or residing with common or reputed prostitutes, or in a house resided in or frequented for the purpose of prostitution; that frequents the company of prostitutes.” The court is always desirous of doing all that can be done to carry out the beneficent object of these acts, and will require justices to whom complaint has been made to issue a summons against the child. If the child does not appear, then a warrant may be issued to bring her before the justices. *Hampshire JJ., In re*, 52 J. P. 311—D.

Child Living with Prostitutes—Summons against Child.—The power given under 29 & 30

Vict. c. 118, s. 14, and 43 & 44 Vict. c. 15, s. 1, to any person to bring before justices a child residing with prostitutes includes the bringing of the child by way of legal process; hence a summons may be served on the child, and process to arrest in the usual way may follow as provided by the Summary Jurisdiction Acts. *Reg. v. Moore*, 52 J. P. 375—D.

3. REFORMATORY SCHOOLS.

Rating.—See POOR LAW.

4. ENDOWED SCHOOLS—See CHARITY, IV.

5. CONTRACTS AS TO SCHOOLING.

Breach of School Rules by Parent—Right of Schoolmaster to refuse to complete his Contract.—The defendant's son was a pupil at the plaintiff's school, one of the rules of which—the defendant having notice of it—was that no "exeat," or permission to leave the school and remain away for one night, was allowed during Easter Term. During Easter Term the defendant requested that his son might be allowed to come home and remain for the night, which the plaintiff refused to allow; but subsequently, on the defendant repeating the request and sending a servant for the boy, the plaintiff allowed him to go home, writing to the defendant at the same time that he did so on the understanding that the boy returned the same night. On the boy reaching home, the defendant telegraphed to the plaintiff that it was not convenient to send the boy that day, but he could return the next morning, to which the plaintiff telegraphed in reply that unless the defendant's son returned that night he should not receive him back. In consequence of the last telegram the defendant did not send the boy back, and the present action was brought to recover the school fees due on the first day of Easter Term, of which term less than three weeks had expired when the boy left. The defendant paid 13*l.* into court with a denial of liability, and counter-claimed damages for breach of contract by the plaintiff:—Held, that the plaintiff's contract was to board, lodge, and educate the defendant's son for the term on the condition that he should be at liberty to enforce, with regard to the boy, the rules of the school, or such of them as were known to the defendant; that this condition having been broken by the defendant, the plaintiff had the right to refuse to complete his contract, and was consequently entitled to succeed in this action both on claim and counter-claim. *Price v. Wilkins*, 58 L. T. 680—Wills, J.

SCOTLAND.

Administration—Jurisdiction—Estate of domiciled Scotch Testator—Trust Funds partly in Scotland, partly in England.—A resident and domiciled Scotchman died leaving a trust disposition and settlement appointing six trustees: three were resident in Scotland, one, being a Scotch member of parliament, resided in Scotland when parliament was not sitting, and the other two were resident in England. The trust had a very large amount of personalty in Scotland as well as heritable estate; and a trifling amount of personal estate only in England. The trustees proved the trust deed in Scotland, and were confirmed as executors. They then had the Scotch probate sealed in accordance with 21 & 22 Vict. c. 56, s. 12, and thus became the personal representatives in England. They removed all but a small portion of the personalty in England into Scotland. A person resident in England, who was entitled to a share of a large legacy, and also to a share of the residue, brought an action in England to administer the estate. The trustees were served and entered an appearance. The plaintiff, an infant, in the English action moved for judgment for administration of the whole estate, and on the 29th November, 1882, the Court of Appeal granted the order. The trustees lodged an appeal to this House. In June, 1883, the trustees carried certain accounts into chambers in the English action. On the 5th July, 1883, four of the residuary legatees commenced this action in Scotland against the trustees for, inter alia, declarator that the trustees were bound to administer the estate in Scotland, subject to the Scotch law, and under the authority and jurisdiction of the Scottish courts alone; and that they were not entitled to place the estate under the control of the English court or any other foreign tribunal furth of Scotland, and for interdict; or, alternatively, to the conclusion for interdict for the removal of the trustees, for sequestration of the estate, the appointment of a judicial factor and for interdict until the estate should be vested in the judicial factor. On the 30th November, 1883, this House affirmed the order of the Court of Appeal. On the 29th February, 1884, the Court of Session granted an interlocutor finding in terms of the declaratory conclusions of the summons: sequestrating the estate, appointing a judicial factor and interdicting the trustees from removing any title-deeds, &c., from Scotland, or accounting to anyone otherwise than the judicial factor. On appeal taken by order of the Court of Chancery in England:—Held, that the decerniture in terms of the declaratory conclusions of the summons, which in effect affirms the exclusive competency of the Scottish jurisdiction, was not supported by statute or authority; and, therefore, that part of the principal interlocutor and that part of the interdict relating to accounting must be reversed; but the remaining portion of the principal interlocutor and the others appealed from must be affirmed, because the Scotch courts had (1) full jurisdiction to sequestrate the estate in Scotland—the persons of the trustees and the trust property being there—and to appoint a judicial factor; and (2) because in the circumstances and on the undertaking given as to the infant

SCOTCH LAW.

See NEXT TITLE

plaintiff becoming a party to the Scotch administration, a *prima facie* case of convenience in favour of a judicial administration in Scotland had been made out. Dicta of Lord Cottenham, in *Preston v. Melville* (2 Rob. App. 107), explained, and of Lord Westbury, in *Enoch v. Wylie* (10 H. L. C. 13), dissented from. *Ewing v. Orr-Ewing*, 10 App. Cas. 453; 53 L. T. 826—H. L. (Sc.).

Bankruptcy—Notour Bankruptcy—Sequestration—Contingent Debt.—The Debtors (Scotland) Act, 1880 (43 & 44 Vict. c. 34), s. 6, enacts that in any case in which, under the provisions of this act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency, concurring with a duly-executed charge for payment followed by the expiry of the days of charge without payment, or where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment, followed by the lapse of the days intervening prior to execution without payment having been made. The Court of Session decreed A. to pay B., with an execution of charge thereon indorsed, dated the 8th of June, 1883. The days of charge on the said decree expired on the 14th of June, 1883, and payment had not been then made; but on the 13th of June A. intimated to B. that he had appealed to this House against the decree, and on the 20th of June the usual order of service in the said appeal granted on the 18th of June was duly served on B. :—Held, that there was notour bankruptcy under the statute, which could not be affected by the appeal. *Fleming v. Yeaman*, 9 App. Cas. 967—H. L. (Sc.).

By letters, C. agreed that any advances he made to A. on I O U's should not be an obligation against A. upon which he could sue A., or use diligence against him, but that they should, until final adjustment of a joint adventure, be retained as vouchers of the current account, "upon which I cannot sue you or use diligence for them against you." A. became notour bankrupt, and C., the petitioning creditor, in a petition for sequestration founded on the debt forming the balance of the accounts current, which he vouched by the I O U's :—Held, that the debtor having become notour bankrupt, C. was not barred by the agreement from applying for sequestration. *Id.*

Per Lord Watson : A contingent debt within the meaning of s. 14 of the Statute of 1856 is a debt which has no existence now, but will only emerge and become due upon the occurrence of some future event. *Id.*

Bridge—Liability for Maintenance—Bridge partly in one County and partly in another.—By the Roads and Bridges (Scotland) Act, 1878, s. 88, after reciting that "there are or may be bridges in Scotland which accommodate, or may accommodate, the traffic, not only of the county or counties, or burgh or burghs, as the case may be, within which they are locally situated, but also of the adjoining county, or of other counties, and burgh or burghs, or one or more of them, and it is not reasonable that the whole burden of managing, maintaining, repairing, and if need be, rebuilding such bridges, and of paying the debt affecting, or which may affect the same, should be imposed upon the county or burgh within which they are so situated," provision is

made for proceedings whereby the localities in which bridges are situate may be relieved of part of the expense of maintaining them where they accommodate the traffic of other localities :—Held, that the provisions of the section are applicable to bridges locally situate in more than one county or burgh. *Glasgow Provost v. Hillhead Police Commissioners*, 11 App. Cas. 699—H. L. (Sc.).

Charitable Trust—Commingle of Different Funds—Excess of Expenditure over Income—Personal Liability of Trustees—Discretion of the Court.—If trustees of a public charitable trust cannot carry out the main purpose of the trust in the mode the truster has expressed, it is their duty to apply to the court for directions. When capital of one trust fund is *bonâ fide* intermixed by the same trustees with capital of another trust fund, both funds being bequeathed for the same public charity, and an *actio popularis* is brought, the duty of the court is to consider what course is best—looking at the whole circumstances—for the interest of the charity; and the court ought to refuse to give any decision until the whole circumstances to form such final decision is before them, it being within the power of the court to order either an independent inquiry or the production of further evidence by the parties. *Andrews v. Mc Guffog*, 11 App. Cas. 313—H. L. (Sc.).

In 1859 James E. left certain sums to A. and B. to found a ragged school in N. S. A. and B. built the school. In 1863 John E., a brother of James E., died, having directed his trustees to hand over to A. and B., as James E.'s trustees, the sum of 7,000*l.*, and directed that if A. and B. were satisfied the ragged school was sufficiently provided for, they should build and fit up—specifying 500*l.* as the cost—another school adjoining the ragged school, "in the same style of architecture," and apply the surplus in maintaining the school as one for middle-class education, the two schools to be called the "E. Institute." In 1866 A. E., sister of the above, died, and by her will left the residue of her estate, about 3,000*l.*, to A. and B., as James E.'s trustees, to be invested, the interest to be applied annually by A. and B. towards the support and maintenance of the ragged school; and should they consider that the funds left by James E. are sufficient for that purpose, to apply the whole or any part of the annual interest in support of the contemplated school for affording superior education. At the time of this last legacy A. and B. had erected and nearly completed the school for superior education, but the accounts had not been all paid, the cost much exceeding 500*l.* The bulk of John E.'s legacy, namely 5,500*l.*, had been invested on deposit note at 4½ per cent., and payment on account of the new building had been met by overdrafts on the bank. On receipt of A. E.'s legacy A. and B. paid these overdrafts by that legacy. D. and C. raised this action on the part of the public to have A. and B. declared personally liable to replace on investment A. E.'s 3,000*l.* A. and B. pleaded that they had considered all these legacies as forming one endowment for the "E. Institute," and no separation was made in the accounts; and that the 3,000*l.* was represented by an aliquot part of the 5,500*l.* on deposit. It was proved that A. and B. had acted *bonâ fide*, had not spent more than was necessary on the

new building, and that they had handed over the 5,500*l.* to the new managers of the school. The Lord Ordinary held A. and B. bound to invest the money. The Second Division recalled that judgment, and dismissed the action simpliciter:—Held, except as to the recall of the Lord Ordinary's judgment, that A. and B. were entitled to absolver as far as the action was directed against them individually; but, secondly, that there not being sufficient evidence before the House, the case must go back to the court below to determine whether the encroachments which have been made on the capital either of John E.'s or A. E.'s bequest ought to be repaid, or any, and if so to what extent, by accumulation of future income:—Held, also, that the fact that John E.'s funds were in other hands ought not to form any impediment to these matters being inquired into. *Ib.*

— **Practice—Partial Decree.**]—Pursuers in an *actio popularis* in a public trust have no right to demand a partial decree, which will leave unsettled matters seriously affecting the future administration of the charity. *Andrews v. McGuffog*, 11 App. Cas. 313—H. L. (Sc.).

Evidence—Statements of Deceased Persons.]—By the law of Scotland statements of a deceased person in relation to facts, which must presumably have been within his personal knowledge, and as to which, if alive, he could have been examined as a witness, may after his death be received as secondary evidence through the medium of writing, or through the medium of a living person who heard the statement. Where, therefore, a member of the family writes a note in a manuscript book to the effect that he has sent original letters to a certain person, and they cannot be found, the copies of such letters, the handwriting, and that the copies were from original letters being proved, the note and the copies of the letters are evidence of the truth of the statements within the writer's personal knowledge, and appearing to be so by the letters themselves. *Lauderdale Peerage, The*, 10 App. Cas. 692—H. L. (Sc.).

So also a statement, whether oral or written, is not vitiated if made with a purpose, where the object was an obvious and legitimate one, and one supporting and not discrediting the presumption of truth. But the statement of a deceased person is not admissible as evidence when its terms, or the circumstances in which it was made, are such as to beget a reasonable suspicion either that the statement was not in accordance with the truth, or that it was a coloured or one-sided version of the truth; and this rule should be applied with greater strictness in criminal cases. *Ib.*

The general rule of the law of Scotland is that hearsay of a deceased person, who if alive would have been a competent witness, is admissible evidence; but if the fact to which the deceased testified was such as he could not have had any special knowledge of it, it is not receivable; and this applies to written as well as oral statements. *Lovat Peerage, The*, 10 App. Cas. 763—H. L. (Sc.).

Inferior Court—Appeal—Question of Fact or Law.]—S. 40 of the 6 Geo. 4, c. 120, provides that where a cause is commenced in the Sheriff Court or other Inferior Court, and a proof is

allowed, the judgment shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law. An action was raised in the Sheriff Court for declarator that the burning of certain heaps of mineral refuse would cause serious nuisance and annoyance to the proprietors of adjacent residential houses. On appeal to the Court of Session, that court found that the ignition of the heaps "would cause material discomfort and annoyance":—Held, that this finding was not upon a question of law, and therefore not the subject of appeal. *Fleming v. Hislop*, 11 App. Cas. 686—H. L. (Sc.).

Interdict—Nuisance.]—The words of an interdict or injunction against causing a nuisance ought not to be so drawn as to shut out all scientific attempts to attain the desired end without causing a nuisance. *Ib.*

Husband and Wife—Marriage—Legitimation.]—By Scotch law marriage of a domiciled Scotchman legitimates his children born previous to the marriage, and the same effect is produced even if the marriage takes place on death bed. *Lauderdale Peerage, The*, 10 App. Cas. 692—H. L. (Sc.).

— **Nullity—Impotence—Want of Sincerity—Triennial Cohabitation.**]—In a suit for nullity of marriage on the ground of impotency, there may be facts and circumstances proved which so plainly imply on the part of the complaining spouse a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect, but the doctrine designated as the "doctrine of want of sincerity" in an action of this kind has been too much extended in English decisions, and that doctrine, apart from "approbate" and "reprobate," has never been recognised by the Scotch law. Delay in raising a suit of nullity on the ground of impotency is a material element in the investigation of a case which upon the facts is doubtful; but there is no definite or absolute bar arising from it. The Canon Law rule of triennial cohabitation has not been recognised in England beyond this point, that where a husband or a wife seeks a decree of nullity propter impotentiam, if there is no more evidence than that they have for a period of three years lived together in the same house, and with ordinary opportunities of intercourse, and it is clearly proved that there has been no consummation, then, if that is the whole state of the evidence, inability on the part of the one or of the other will be presumed. *G. v. M.*, 10 App. Cas. 171; 53 L. T. 398—H. L. (Sc.).

— **Grounds of Divorce—Condonation of Adultery.**]—By the law of Scotland full condonation of adultery (remission expressly or by implication in full knowledge of the acts forgiven), followed by cohabitation as man and wife, is a *remissio injuriæ* absolute and unconditional, and affords an absolute bar to any action of divorce founded on the condoned acts of adultery. Nor can condonation of adultery—cohabitation following—be made conditional by any arrangement between the spouses. Although the condoned adultery cannot be founded on,

condonation does not extinguish the guilty acts entirely, and they may be proved so far as they tend to throw light upon charges of adultery posterior to the condonation. The doctrine laid down in *Durant v. Durant* (1 Hag. Ecc. Rep. at p. 761) not approved without qualification. *Dent v. Dent* (4 Sw. & Tr. 106), direction of Lord Penzance to the jury, questioned on principle, and distinguished from *Blandford v. Blandford* (8 P. D. 19). *Collins v. Collins*, 9 App. Cas. 205; 32 W. R. 500—H. L. (Sc.).

A wife confessed to several acts of adultery with E. Her husband forgave her and resumed cohabitation on the alleged condition that she should not speak or hold any communication with E. again. Subsequently she met E. by appointment several times under suspicious circumstances; but, admittedly, no act of adultery could be proved. The husband sued for a dissolution of the marriage on the ground that the condoned adultery was revived by the wife's subsequent conduct:—Held, that to obtain a divorce he must prove adultery subsequent to the condonation, and no less. *Id.*

Per Lord Blackburn:—The doctrine of revival of adultery as a ground on which a divorce has been granted is to be strongly objected to as varying the status of married persons. On principle, a reconciliation being entered into with full knowledge of the guilt and with free and deliberate intention to forgive it, where that reconciliation is followed by living together as man and wife, the status of the couple ought to be the same and not more precarious than if there was a new marriage. *Id.*

Per Lord Blackburn:—Assuming it to be now established English law that any matrimonial offence, though forgiven, may be revived by any other matrimonial offence of which the courts take cognizance, it is very modern law, and not so obviously just and expedient, that this House ought to infer that it either was or ought to have been introduced into the law of Scotland. *Id.*

See Lord Watson's opinion, for the terms of a remission of adultery which would not constitute plena condonatio in the law of Scotland. *Id.*

— **Married Woman—Separate Estate—Receipt of Income by Husband—Presumption of Gift.**—By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband; with this difference, that by Scotch law she has the privilege of revoking the donation, even after her husband's death, and reclaiming the subject of her gift in so far as it had not been consumed. The same circumstances which are in England held to imply donations between husband and wife are sufficient to sustain a similar inference in Scotland. *Edward v. Cheyne*, 13 App. Cas. 385—H. L. (Sc.).

A married woman living with her husband in Scotland was entitled to the income of a fund settled for her separate use, which stood in the names of trustees, of whom her husband was one; and he also acted as factor of the trust. Payments of income were at first lodged in a bank to the credit of the wife's separate account, then to the credit of an account in the names of both husband and wife; but for many years previous to the husband's death, both before and after he became sole trustee, the income was paid into the husband's private banking account,

and mixed with his own funds:—Held, that these circumstances inferred a complete gift; and, in respect it had not been revoked by the wife, that her representatives were not entitled to an account of the husband's intromissions with her separate estate. *Id.*

— **Ante-nuptial Settlement by Infant—Contract, by what Law governed.**—The appellant, a domiciled Irishwoman, being an infant without legal guardian, married in Ireland, before the passing of the Infants' Settlement Act (18 & 19 Vict. c. 43), a domiciled Scotchman. An ante-nuptial settlement was executed. After the death of her husband she commenced the present action in the Scotch courts to set aside the settlement. No evidence was given as to the capacity of an infant to execute a binding contract by the law of Ireland:—Held, that, the point being raised in the pleadings, the house must take judicial notice that by the law of Ireland the settlement was not binding on the appellant, without regard to whether any, or what, evidence of the law of Ireland, as a matter of fact, had been given in the court below; and, further, that the validity of the settlement was not affected by the fact that at the time of its execution both parties contemplated a Scottish domicile during their married life. *Cooper v. Cooper*, 13 App. Cas. 88; 59 L. T. 1—H. L. (Sc.).

— **Post-nuptial Settlement by Husband—Wife's Assent to Life-rent Provision—Jus relictae.**—A testator, between whom and his wife there was no ante-nuptial contract, by the third purpose of his settlement, directed his trustees to pay over the whole annual income of his estates to his wife for her life; and by the fourth purpose "after the death of the longest liver of me and my wife to convert into money all my estate and with her consent and full approbation (in token of which she has subscribed this deed) to pay" certain legacies. The deed contained no express discharge of the wife's terce and jus relictae; and it reserved a power to the testator to alter or revoke. The wife signed the deed without any limitation being attached to her signature in the testing clause. She survived the testator for two months, but was incapable of transacting any business during that period:—Held, that although the wife's consent to the deed could not be carried beyond the fourth purpose, except so far as it necessarily implied approval of the other purposes, yet the fourth purpose and the antecedent provision of life-rent in the third purpose were so intimately connected that the wife must be held to have accepted the provision, and therefore, although the wife had the power to revoke her consent, her representatives had not, and their claim to her terce and jus relictae was untenable. *Edward v. Cheyne*, 13 App. Cas. 373—H. L. (Sc.).

— **Lease—Joint Tenants—Covenant to pay Rent—Liability of Executors of deceased Tenant during Sole Tenancy of Survivor.**—A mineral lease for thirty-one years was granted to L. and M., "and the survivor of them, but expressly excluding assigns, and sub-tenants, whether legal or conventional." By the lease L. and M. bound themselves and their respective heirs, executors and successors, all conjunctly and severally renouncing the benefit of discussion, to

pay the rent. The lease also provided that if L. or M. became bankrupt it should, in the option of the lessor, become void. Shortly after the commencement of the lease L. became bankrupt, and M. died, but the lessor never exercised his option to determine the lease :—Held, that by the terms of the clause of obligation the lessees were conjunctly and severally liable for rent irrespective of their interest, and that after M.'s death, his representatives, though they had no interest as tenants, remained liable for rent during the currency of the lease. *Burns v. Bryan or Martin*, 12 App. Cas. 184—H. L. (Sc.).

Market—Power of Corporation to let Covered Portion of Market for other Purposes.—By 37 & 38 Vict. c. lxxxv., s. 8, the corporation of Edinburgh (who were grantees of a market in Edinburgh) "may cover in a suitable and convenient manner the fruit and vegetable market-place, and improve and better adapt the same for the purposes of such market, and for the accommodation of parties using the same, and of the public, &c. Provided always that the ground floor only of such market-place shall be used for such fruit and vegetable market, and that all vacant portions of such market-place, whether on the ground floor or above the same, and all vacant and unlet stands, stalls, or shops in or on such market-place, may be let or used by the corporation for such purposes and for such rents or sales as to them shall seem proper :—Held, that the corporation were not entitled to exclude members of the public from the covered portion of the market during market hours and devote the building to other purposes. *Edinburgh Magistrates v. Blackie*, 11 App. Cas. 665—H. L. (Sc.).

Per Lord Watson :—When a grant of market is not confined to any particular locality, the grantee may from time to time change the site in order to suit his own convenience ; but it is an implied condition of the exclusive privilege that he shall provide a market-place, and that implied condition is satisfied so long as he gives reasonable accommodation to those members of the public who use the market either as buyers or sellers, and the extent of the accommodation which must be afforded in each case must vary with the circumstances. *Id.*

Orders—Enrolment of, in England.—See *Dundee Suburban Railway, In re*, ante, col. 1491.

Parent and Child—Entailed Estates—Legitim—Exclusion of Apparent Heir in ante-nuptial Contract of Marriage.—Although the right of children may be barred or excluded altogether, either by direct renunciation between their father and them, or by an express exclusion of their right in the ante-nuptial contract of their parents, yet their right cannot be barred by inference or implication. By ante-nuptial contract of marriage between the settlor, the heir in possession of entailed estates and his intended wife, dated 1851, the settlor, after reciting s. 4 of the Aberdeen Act (5 Geo. 4, c. 87), granted provisions in favour of the children of the marriage, other than and excluding the heir who should succeed to the entailed estates ; he also appointed tutors to the children, and, inter alia, gave directions as to the maintenance and education of the heir as well as the other children, 'which provisions before conceived in favour of

the children of the marriage are hereby declared to be in full satisfaction to them of all heirs' part of gear, legitim, portions natural," &c. :—Held, that the claim of the eldest son and child of the marriage who succeeded to the entailed estates to legitim was not barred by the marriage contract. *Kintore (Countess) v. Kintore (Earl)*, 11 App. Cas. 294—H. L. (Sc.).

—**Acquiescence.**—A son remained in ignorance of his right to legitim for nearly three years after his father's death, and all parties acted as if legitim was not due :—Held, the son's claim to legitim was not barred by acquiescence. *Id.*

Sale of Goods—Delivery—Mercantile Law Amendment (Scotland) Act, 1856—Bankruptcy of Vendor.—By the law of Scotland the effect of the appropriation and acceptance of a specific chattel by the contracting parties is to perfect the contract of sale, and to give the purchaser a right to demand delivery, but the property in the chattel does not pass to him until he has obtained delivery under the contract ; and s. 1 of the Mercantile Law Amendment (Scotland) Act, 1856 (19 & 20 Vict. c. 60) imposes no limitation upon the right of the vendor's creditors to attach goods in his custody until the contract of sale has been so perfected. C. and Son, a firm of engineers, undertook by different contracts to supply and fit up engines in various ships which were being built by the appellants, who were shipbuilders, and advances were made by the appellants as the work progressed. An agreement was subsequently entered into between the parties by which it was stipulated that on payment being made on account of any contract "the portions of the subjects thereof, so far as constructed, and all materials laid down" in C. and Son's yard "for the purpose of constructing the same, shall become and be held as the absolute property of" the appellants, "subject only to the lien of C. and Son" for the "payment of the price, or any balance thereof that may remain due." At the date of this agreement C. and Son were insolvent to the knowledge of the appellants, and the only considerable contracts they had on hand were the contracts with the appellants, which it was then known would result in a loss. It was important to the appellants that the contracts should be completed, and they continued to make advances to C. and Son until the most important contract was completed. After that C. and Son became bankrupt :—Held, that there had been no sale of any specific goods to the appellants within the meaning of s. 1 of the Mercantile Law Amendment (Scotland) Act, 1856, nor delivery of possession, and that the appellants were not entitled, as against the trustee in C. and Son's bankruptcy, to take possession of the materials to be used in carrying out their contracts, which were in C. and Son's yard at the date of their bankruptcy. *Seath v. Moore*, 11 App. Cas. 350 ; 55 L. J., P. C. 54 ; 54 L. T. 690 ; 5 Asp. M. C. 586—H. L. (Sc.).

Sea-shore—Crown Property—Bounding Charter—"With pertinents"—Prescriptive Title—Beneficial Possession—Acts of Ownership—Drift Sea-ware.—The pursuer brought an action to establish his title as against the defenders and the Crown to the foreshore of the sea ex adverso land of which he was the proprietor.

He claimed under a grant of feu made to his ancestor in 1804, which described the property granted as land bounded by the sea, but he did not endeavour to show that the grantor had an express title from the Crown. He, however, endeavoured to prove his title to the foreshore by prescriptive possession following on his own title, and, *inter alia*, adduced evidence to show that his predecessor in 1827 built a retaining wall upon a portion of the foreshore; that he and his predecessors had taken stone and sand from the shore; and that they and their tenants had exclusively carted away the drift sea-ware. The Crown, on the other hand, adduced evidence to show that stones and sand were taken from the shore to build a harbour, and that the villagers had carried away in creels drift sea-ware.—Held, that, notwithstanding the absence of an express title in the superior, the pursuer had given sufficient proof that he and his predecessors had been in possession of the foreshore in question for the prescriptive period specified in the Scottish Act of 1617, c. 12, and the Act of 37 & 38 Vict. c. 94, by virtue of their heritable infeftments, and that he had consequently a valid right of property in the solum of the foreshore as against the Crown. *Lord Advocate v. Young*, 12 App. Cas. 544—H. L. (Sc.).

Security for past and future Advances—Notice of Assignment by Debtor—Further Advances after Notice.]—A disponee who holds property on an *ex facie* absolute title of ownership, but in security only of advances made and to be made to the disponee, is not entitled to hold the property for repayment of advances made after he has received notice that the disposer has, for a valuable consideration, conveyed his reversionary right in the property to another. The principle of *Hopkinson v. Rolt* (9 H. L. C. 514) followed. *Union Bank of Scotland v. National Bank of Scotland*, 12 App. Cas. 53; 56 L. T. 208—H. L. (Sc.).

Superior and Vassal.]—An action of declarator of tinsel of a feu ob non solum canonem is an irredeemable adjudication of the feu in favour of the superior; but the sub-feuar can protect himself from eviction by paying the superior's full preferable debt, and when he does so he has a claim of relief *pro rata* against all the owners of the land on which that debt is charged. It is provided by the Scotch statute 1597, c. 250, that the vassal shall lose the feu of his lands by his failure to pay the feu duty for two years together, in like manner as if an irritant clause to that effect had existed in his feu contract. By feu contract A. disposed in feu farm to B. and C. five acres of building land, with an annual reddendo of 480*l.* The contract of feu contained the expressed declaration "that in case at any time two years' feu duty shall be fully resting, owing and unpaid together, then this present feu right, and all that may follow hereon, shall, in the option of the superior, become void and null. B. and C. divided the lands between them, and each granted, *inter alia*, sub-feus (narrating in the deeds conveying the land the above-mentioned feu contract) of portions of the five acres to D. and E. respectively. Upwards of four years' feu duties became due. A. raised an action of declarator of irritancy ob non solum canonem. D. and E. con-

the mid-superiorities created by B. and C., and had no effect on the portions of land sub-feued on their tendering the sub-feu duty reserved on each.—Held, that the superior's right was not merely a charge upon the mid-superiorities, but a right to annul the charter of his feuars and all sub-feus made by them, to the effect of resuming the full beneficial possession of the lands feued; and that the circumstances did not warrant the conclusion that the superior had consented to the sub-infeudation. *Sandeman v. Scottish Property Society*, 10 App. Cas. 553—H. L. (Sc.).

Warrandice—Liability of Executor—Disposition with Warrandice Clause—Heir and Executor—Residue.]—The grantor, by a disposition *mortis causa* dated 1853, conveyed his whole heritable and moveable estate to trustees for the purpose (*inter alia*), failing heirs of his own body, of conveying his estate of M. and his other lands in the county of Lanark to his brother under a strict entail. By codicil dated 1876, and soon after his marriage, the testator disposed to his wife, in the event of her surviving him, the lands of B. and A., directing these lands to be excepted out of the lands directed by the deed of 1853 to be entailed; and bequeathed to her the whole residue of his estate. By a previous deed he appointed his wife as his sole executrix. The disposition of B. and A. to the wife contained a clause of warrandice in ordinary form under the Titles to Land Consolidation Act of 1868 (31 & 32 Vict. c. 101), s. 8, Sched. B., which under s. 8 imports an absolute warrandice. In 1882 he granted a bond and disposition in security for 250,000*l.* over the estates of "M.," "B.," and "A." On the grantor's death his widow claimed that no part of the debt of 250,000*l.* was payable out of B. and A., or out of residue, but that the whole debt was entirely chargeable against "M."—Held, that the testator had in imposing the obligation of warrandice used words limited in their significance to personal obligation, and that his widow as personal representative and executrix must herself discharge the obligation of warrandice. *Montrose (Dowager Duchess) v. Stuart*, 13 App. Cas. 81—H. L. (Sc.).

Way—Public Right—Prescription—Non-user for long Period.]—According to the law of Scotland, the constitution of a public right of way does not depend upon any legal fiction, but upon the fact of user by the public as matter of right, continuously and without interruption for forty years. And the amount of user must be such as might have been reasonably expected if the road in dispute had been an undoubted public highway. Also, the user must be a user of the whole road as a means of passage from one terminus to the other, and must not be such a user as can be reasonably ascribed either to private servitude rights or to the licence of the proprietor. The continued exclusion of the public from the use of an alleged public road for thirty-seven years will not, *per se*, destroy a pre-existent right of public way unless it is maintained for the prescriptive period of forty years, but it is strong evidence that no such public right ever existed. *Mann v. Brodie*, 10 App. Cas. 378—H. L. (Sc.).

SEA.

Fishery.—*See* FISH AND FISHERY.

Insurance.—*See* INSURANCE (MARINE).

Sea-wall—Prescriptive Liability to Repair—Extraordinary Storm.—A. was a frontager in a level on the Essex shore of the Thames under the jurisdiction of commissioners of sewers. An ancient sea-wall protected the level against incursions of the sea. There was evidence proving a prescriptive liability on the frontagers in the level to maintain and repair the portions of this wall respectively fronting their lands. Part of the wall in front of A.'s land was destroyed by an extraordinary storm and high tide. This part of the wall was previously in good repair and in a proper condition to resist the flow of ordinary tides and the force of ordinary storms:—Held, following *Keighley's case* (10 Rep. 139) and *Rew v. Somerset* (8 T. R. 312), that in the absence of evidence that the prescriptive liability of the frontagers extended to the repair of damage caused by extraordinary violence of the sea, the liability to repair the damage thus caused to the wall fell not upon A. but upon the whole of the level. *Fobbing Commissioners v. Reg.*, 11 App. Cas. 449; 56 L. J., M. C. 1; 55 L. T. 493; 34 W. R. 721; 51 J. P. 227—H. L. (E.).

— **Presentment of Jury of Liability of Frontager—Disqualification of Commissioner by reason of Interest.**—The presentment of a jury at a court of sewers in 1861 found that the then owner of A.'s land was bound by reason of his tenure to repair a portion of the sea-wall fronting the land so as to prevent the influx of the waters. In 1881-2 the commissioners of sewers made orders upon A. as the owner of the land to repair this portion of the wall, it having been destroyed by the aforesaid extraordinary storm and high tide. These orders were made "upon reading the presentment" of 1861. One of the commissioners who made the orders was personally interested as an owner of lands within the level:—Held, that the orders were bad and must be quashed: first, because, following *Reg. v. Wharton* (2 B. & S. 718), s. 13 of 3 & 4 Will. 4, c. 22, which enables orders to be made upon a previous presentment, does not authorise an order upon a person who has become owner of the land since the presentment; secondly, because the presentment being only of the ordinary liability did not justify an order to make good damage caused by an extraordinary storm:—Held, also, that if the commissioners had made the orders under the powers of s. 33 of the Land Drainage Act, 1861 (24 & 25 Vict. c. 133) they must themselves have found as a fact A.'s liability; that if they had exercised such a jurisdiction they would have been acting judicially, and that in that case the orders would have been invalidated by the fact that one of the commissioners was disqualified by reason of interest. *Id.*

— **Vesting—Jurisdiction of Commissioners.**—S. 10 of the Sewers Act, 1883 (amending 23 Hen. 8, c. 5), by which all walls, banks, &c., adjoining the sea or tidal rivers are to be within the jurisdiction of the commissioners, does not vest such walls, &c., in the commissioners until

they have taken them within their jurisdiction in the manner described in s. 47. *West Norfolk Farmers' Manure Company v. Archdale*, 16 Q. B. D. 754; 55 L. J., Q. B. 230; 54 L. T. 561; 34 W. R. 401; 50 J. P. 500—C. A.

Sea-shore not a "Street, Highway, or Public Place."—*See* GAS COMPANY.

Foreshore, Possession of—Prescription.—*See* *Lord Advocate v. Young*, ante, col. 1605.

Right of Access to Sea—Foreshore.—On a petition of right against the government for damages done to the petitioner's tenement by the execution of reclamation and other works upon the foreshore in front of it:—Held, that the petitioner by virtue of his tenement had the same right of access to the sea as a riparian proprietor has in respect to a tidal river. *Attorney-General of Straits Settlement v. Wemyss*, 13 App. Cas. 192; 57 L. J., P. C. 62; 58 L. T. 358—P. C.

SEAMEN.

See SHIPPING.

SEARCH WARRANT.

Malicious Application for.—*See* MALICIOUS PROCEDURE.

SECURED CREDITOR.

See BANKRUPTCY.

SECURITY FOR COSTS.

Of Appeal.—*See* APPEAL, II. 6.

Appeals from County Court.—*See* COUNTY COURT, 6, c.

On Petitions to Wind up Companies.—*See* COMPANY, XI. 3, b.

In other Cases.—*See* PRACTICE, III. A. 8, d.

SEDITION.

See CRIMINAL LAW, II. 27.

SEPARATE ESTATE.

See HUSBAND AND WIFE.

SEPARATION DEEDS AND AGREEMENTS.

See HUSBAND AND WIFE.

SEQUESTRATION.

See ECCLESIASTICAL LAW—EXECUTION.

SERVANT.

See MASTER AND SERVANT.

SERVICE OF WRITS, ETC.

See PRACTICE.

SESSIONS.

See JUSTICE OF THE PEACE.

SET-OFF.

Set-off and Counter-claim.—*See* PRACTICE.

In Winding up of Companies.—*See* COMPANY.

In Bankruptcy.—*See* BANKRUPTCY.

In case of Costs.—*See* COSTS.

SETTLEMENT.**I. SETTLEMENTS.**

1. *Generally*, 1610.
2. *Apportionment of Funds Received or Lost*, 1614.
3. *Forfeiture of Life Interest*, 1616.
4. *Construction*, 1616.
5. *Marriage Settlements.*—*See* HUSBAND AND WIFE.
6. *Voluntary Settlements*—13 *Eliz. c. 5*—27 *Eliz. c. 4.*—*See* FRAUD.
7. *Power of Appointment—Exercise by Will.*—*See* WILL.
8. *Powers of Trustees under.*—*See* TRUST AND TRUSTEE.
9. *Rectification of.*—*See* DEED AND BOND.

II. SETTLED LAND AND ESTATES.

1. *Settlement*, 1620.
2. *Who entitled to Sell.*
 - a. *In General*, 1620.
 - b. *Infants*, 1626.
 - c. *Married Women*, 1627.
 - d. *Trustees*, 1627.
3. *What Property may be Sold or Let* 1630.
4. *Leases*, 1632.
5. *Effect of Settled Land Act on Forfeiture Clauses*, 1633.
6. *Capital Moneys.*
 - a. *What are*, 1633.
 - b. *Application of.*
 - i. *Costs and Incumbrances*, 1633.
 - ii. *Improvements*, 1636.
 - iii. *In other Cases*, 1638.

III. OF PAUPERS.—*See* POOR LAW.**I. SETTLEMENTS.****1. GENERALLY.**

Protector of Settlement—Who is.—The person who, under the Fines and Recoveries Act, s. 22, is the protector of the settlement, as being the "owner of the prior estate" to the estate tail, is the person who is beneficially entitled to the rents and profits. *Ainslie, In re, Ainslie v. Ainslie*, 54 L. J., Ch. 8; 51 L. T. 780; 33 W. R. 148—Pearson, J.

A freehold estate was devised to trustees for a term of ninety-nine years, if the testator's son M. should so long live, upon trust to manage the estate and to pay thereout a yearly sum of 250*l.* to M. for life; and, subject thereto, to pay the surplus of the rents and profits to the person for the time being entitled in reversion immediately expectant upon the term to the rents and profits. Upon the expiration or sooner determination of the term, the estate was devised to the use of the testator's son H. for life, with remainder to H.'s sons in tail male:—Held, that H. was the protector of the settlement. *Ib.*

Jurisdiction of Court to Order Expenditure of Trust Money for Preservation of Estate.—Land and money were vested in the trustees of a settlement for the benefit of the husband and wife for their lives, and after their deaths for

their children. The buildings on a farm on the land were so much out of repair as to make the farm untenable:—Held, that the Court had power under its original jurisdiction to sanction the expenditure of part of the money in repairing the farm buildings. *Conway v. Fenton*, 40 Ch. D. 512; 58 L. J., Ch. 282; 59 L. T. 928; 37 W. R. 156—Kekewich, J. See also *Hotchkys, In re, Freke v. Calmady*, 32 Ch. D. 408; 55 L. J., Ch. 546; 55 L. T. 110; 34 W. R. 569—C. A.

A testator gave his residuary personal estate and devised his real estate (subject, as to the real estate only, to two annuities) to his son for life, and then to his children who were infants. A farm on the estate was vacant. On summons by the trustees for the sanction of the court to the advance of 1,000*l.* to the tenant for life to stock the farm, the court, holding that it was for the preservation of the estate, made the order. *Household, In re, Household v. Household*, 27 Ch. D. 553; 51 L. T. 319—V.-C. B.

Power of Sale—Extinguishment.—J. W., by his will, devised hereditaments, subject to certain prior charges and estates, to the use of J. O. and his assigns during his life, with remainder to the use of his first and other sons in tail male. The will contained a power of sale exercisable by the trustees "at the request in writing of any person who by virtue of this my will shall be tenant for life in possession" of the hereditaments. J. O., and his eldest son F. O., by disentailing deed, conveyed the settled hereditaments to a trustee to hold the same [subject to the prior uses and estates (other than the uses or estates limited to J. O. during his life), but discharged from the said estate in tail and all subsequent estates] to such uses as J. O. and F. O. should by deed jointly appoint, and, in default of such appointment, to such and the same uses and subject to such and the same powers as were subsisting immediately before the execution of the disentailing deed. By deed of resettlement, J. O. and F. O. jointly appointed that the hereditaments should from that date [but subject to the prior uses and estates (other than the uses and estates limited to J. O. and his assigns for his life), and subject also to certain mortgage debts which had been created] remain to the uses thereinafter declared; and, subject to certain rent-charges, the hereditaments were limited to the use of J. O. and his assigns during his life "in restoration and by way of continuance and confirmation of the former life estate of J. O. under or by virtue of the will," with remainders over. It was then provided that nothing therein contained should prejudice or affect the power of sale contained in the will:—Held, that J. O. was still tenant for life in possession by virtue of the will, and that the power of sale was therefore still exercisable by the trustees of the will at his request. *Wright to Marshall, In re*, 28 Ch. D. 93; 54 L. J., Ch. 60; 51 L. T. 781; 33 W. R. 304—Pearson, J.

Permanent Improvements—Trusts of Minority Term—Option to Trustees to pay Charges out of Income or Capital.—By a deed, executed two years before his will, a testator devised estates in Glamorganshire, which comprised a canal, harbour and docks at Cardiff, and also estates in the counties of Bedford, Herts and Durham, to A. B. and C., upon trust out of rents and profits

and sums to be raised by sale or mortgage, to pay expenses, salaries, mortgage debts, and the residue to the settlor. He empowered the trustees to enlarge, improve, and make additional works at Cardiff, and to manage the estates, with powers of leasing, sale, and mortgage. By his will, dated two months before the birth of his first son, the testator devised the Glamorganshire estates (except Cardiff Castle, park, and lands adjoining) to B. and C. and their heirs for a term of 1,500 years, and subject thereto to the use of his first son for life, remainder to his first and other sons in tail male. The trusts of the 1,500 years' term were declared to be, after payment out of income of certain annuities, of a specified sum for certain repairs, "by mortgaging or otherwise disposing of the term . . . or by, with and out of the rents, issues and profits of the same hereditaments . . . or by one . . . or all of the aforesaid ways and means, or by any other reasonable ways and means" to raise moneys sufficient for the above purposes, and with the moneys to arise from the sale of the estates in Bedford, Herts, and Durham, to satisfy the trusts of such sale. The trustees of the term were empowered to manage and improve the hereditaments comprised in the term in the same manner as the trustees of the deed. Testator then directed that, during the minority of a tenant for life of the Glamorganshire estates, D. and A. should enter into possession and receipt of the rents and profits of the same hereditaments, and thereout keep down the interest on mortgages, and maintain mansion-houses and grounds, and pay the surplus to the trustees of the 1,500 years' term for the purposes thereof, and "subject thereto, and after the trusts of the said term of 1,500 years shall be fully performed or satisfied," apply any annual sum they might think proper for the maintenance of the minor, and invest the surplus and accumulate the income for his benefit on attaining majority. The trusts of the proceeds of sale of the Bedford, Herts, and Durham estates were declared to be: (1) to pay debts, including mortgage debts on the Glamorganshire estates; and (2) to purchase lands to be settled as before. Six months after the birth of his first son, testator died, and during the minority the trustees of the 1,500 years' term laid out upwards of 1,000,000*l.* in enlarging and improving the canal, docks, and harbour, and in other works. This sum was largely paid out of income:—Held, that the expenditure was a charge on the corpus of the estates comprised in the term. *Bute (Marquis), In re, Bute (Marquis) v. Ryder*, 27 Ch. D. 196; 32 W. R. 996—V.-C. B.

Bequest of Fund to be Settled—Form of Settlement—Costs, how Paid.—A testator bequeathed as follows: "To my daughter A., wife of M. W., I bequeath 10,000*l.* This amount to be settled upon her for her life, and to be invested for her in good securities in the names of two or more trustees. At her death 8,000*l.* of the above sum to be divided equally amongst her children, and the remaining 2,000*l.* to be given to her husband, if living; if deceased, then the whole amount is to be equally divided amongst her children." The daughter and her husband and child applied for the sanction of the court to a settlement of the legacy; but it was held that a settlement was unnecessary, and it was ordered that the fund should be paid into court and the income paid to the daughter for life,

with liberty to apply on her death; and the executrix was ordered to pay the costs out of the residue:—Held, on appeal, that a settlement ought to be directed, treating the directions in the will as instructions for a settlement:—That, on the construction of the will, the settlement must be so framed as to make the contingent gift of 2,000*l.* to "her husband if living" apply only to M. W., and not to any future husband, and so as to confine the trusts in favour of the daughter's children to her children by him:—Held, further, that the settlement ought to be framed so as to restrain the daughter from anticipating the income, and so as to make the fund divisible only among children who being sons should attain twenty-one, or being daughters attain that age or marry, and that it ought to contain the usual powers of maintenance and advancement, and a power of appointment by the daughter in default of children, with the usual limitations to herself or her next of kin in default of appointment, but not any power of appointment among the children, as such a power would be inconsistent with the direction for equal division. *Oliver v. Oliver* (10 Ch. D. 765) distinguished:—Held, that the costs ought to be paid out of the legacy and not out of the residuary estate. *Parrott, In re, Walter v. Parrott*, 33 Ch. D. 274; 55 L. T. 132; 34 W. R. 553—C. A.

Voluntary—By Mortgagor—Sale by Mortgagee under Powers—Title to Surplus Money.—A. B. having mortgaged estates in fee simple, subsequently made a voluntary settlement of the same estates and all his interest therein to grantees to uses to hold, subject to the mortgage and to a power of raising a sum of money for himself, to the use of himself for life, with remainder to his first and other sons in tail, with remainders over. The mortgagee afterwards sold the estates under the power of sale in the mortgage, and after retainer of his debt and costs paid the balance of the sale moneys into court under the Trustee Relief Act. Upon a petition for payment out, A. B. contended that the sale had destroyed the voluntary settlement, and that the persons claiming thereunder had no equity against the sale moneys, which must be treated as if the sale had been made by A. B. himself:—Held, that the voluntary settlement was a complete disposition by the settlor of the proceeds of the sale of the estate in case the prior mortgagee should exercise his power, and that the volunteers under the settlement were entitled as against the settlor to the fund in court. *Walhampton Estate, In re*, 26 Ch. D. 391; 53 L. J., Ch. 1000; 51 L. T. 280; 32 W. R., 874—Kay, J.

Trust for Accumulation—Trust for Benefit of Mortgagees.—By a voluntary settlement certain freehold estates were settled, subject to the mortgages subsisting thereon, to the use of the settlor for life, with remainder to the use of trustees for 500 years, and subject thereto in strict settlement. And the trusts of the term were declared to be that the trustees should during the period of twenty-one years from the death of the settlor receive out of the rents of the estate the annual sum of 1,000*l.* and accumulate it at compound interest, and should at the expiration of that period, or from time to time during that period, as they might think fit,

apply the accumulated fund in satisfaction of the mortgages then charged on the estate, and should pay the surplus of the rents to the person entitled to the immediate reversion of the estate. Seven years after the death of the settlor the first tenant in tail in possession barred the entail and acquired the fee simple subject to the mortgages; and he then claimed the right to stop the accumulations and to receive the accumulated fund and the whole future rents of the estate:—Held, that the mortgagees were cestuis que trust under the deed equally with the owner of the estate, and that he could not stop the accumulations or receive the accumulated fund without their consent. The doctrine of *Garrard v. Lauderdale* (2 Russ. & My. 451) does not apply to provisions for creditors which do not come into operation till after the death of the settlor. *Fitzgerald's Settlement, In re*, 37 Ch. D. 18; 57 L. J., Ch. 594; 57 L. T. 706; 36 W. R. 385—C. A.

Exercise of Powers by Trustee—Death of Bankrupt.—The Bankruptcy Act, 1869, which for this purpose is in the same words as the Bankruptcy Act, 1883, does not enable a trustee to exercise after the bankrupt's death a power which at the commencement of the bankruptcy the bankrupt might have exercised for his own benefit. By L.'s marriage settlement certain lands were at the date of his bankruptcy vested in trustees in trust for L. for life with remainder as he should appoint, and in default of appointment to Y. L. died pending the bankruptcy, without having exercised the power. After his death the trustee in bankruptcy contracted to sell the property:—Held, that he could not make a good title under the power. *Nicholls and Nissey's Contract, In re*, 29 Ch. D. 1005; 52 L. T. 803; 33 W. R. 840—Pearson, J.

2. APPORTIONMENT OF FUNDS RECEIVED OR LOST.

Insufficient Mortgage Security—Compound Interest.—Money which was settled by a testator's will was invested by the trustees of the will on mortgage. The interest fell into arrear, and when the mortgaged property was sold it realised a sum less than the principal of the mortgage money:—Held, that the sum realised by the sale must be apportioned between the tenant for life of the settled money and the persons entitled to it in remainder, in the proportions which the principal of the mortgage money (which belonged to the persons entitled in remainder) and the arrears of interest (which belonged to the tenant for life) bore to one another, without any computation of compound interest. *Moore, In re, Moore v. Johnson*, 54 L. J., Ch. 432; 52 L. T. 510—Pearson, J.

Windfalls—Capital or Income.—A large part of the income of a settled estate was derived from the thinnings and cuttings of larch plantations, and, during a tenancy for life, high winds blew down a very large proportion of the larches, and it became necessary for the good cultivation of the estate to remove almost the whole of those which remained. It was estimated that it would take forty years for the plantations to yield the same income as before:—Held, that the tenant

for life was not entitled to receive the proceeds of sale either of the trees not blown down but which had to be removed, or of the trees which were actually blown down, but that the whole of the proceeds of sale must be invested as capital. But held, that the tenant for life was entitled to receive out of the income arising from the invested fund and the plantations a fixed annual sum, equal to the average income which would have been derived from the plantations if no gales had occurred—such sum, if necessary, to be made up out of capital; the trustees to be at liberty to have recourse to the investments or the income of the plantations for the purpose of fresh planting. *Harrison, In re, Harrison v. Harrison*, 28 Ch. D. 220; 54 L. J., Ch. 617; 52 L. T. 204; 33 W. R. 240—C. A.

Business on Trust for Successive Tenants for Life—Loss during First, Profit during Second, Tenancy for Life.—In an action to execute the trusts of a settlement, by which (inter alia) a business was assigned to trustees on trust for successive tenants for life and remaindermen, a receiver and manager was appointed to carry on the business. During the life of the first tenant for life the business was carried on by the receiver at a loss; during the life of the second tenant for life profits were earned:—Held, that the loss must be made good out of the subsequent profits, and not out of capital. *Upton v. Brown*, 26 Ch. D. 588; 54 L. J., Ch. 614; 51 L. T. 591; 32 W. R. 679—Pearson, J.

Minerals—Coals won by Innocent Trespassers—Compensation Moneys.—Minerals were devised by will upon trust for B. for life without impeachment of waste, with remainder on trust for the defendant for life without impeachment of waste, with remainders over. During the life, and also after the death of B., part of these minerals were won by instroke by the owners of adjoining mines, who had trespassed innocently and paid compensation moneys for so doing:—Held, that the moneys paid in respect of the minerals so won during the respective lives of B. and the defendant, belonged to the estate of B. and to the defendant respectively. *Barrington, In re, Gamlen v. Lyon*, 33 Ch. D. 523; 56 L. J., Ch. 175; 55 L. T. 87; 35 W. R. 164—Kay, J.

Coals required for Support of Railway—Compensation Moneys.—The minerals were leased by the testator. A railway passed over a portion of the lands under which they lay, and after the death of B., the lessee gave the railway company notice of his desire to work the minerals lying under and adjoining a portion of the railway. The company gave a counter notice that these minerals were required for the support of the railway, and ultimately paid compensation money, part of which was apportioned as paid in respect of the lessor's interest:—Held, that as the minerals in respect of which the compensation money had been paid were not of such extent that they could not possibly have been got during the life of the existing tenant for life, the defendant, as such tenant for life, was entitled to such apportioned part of the compensation money under the 74th section of the Lands Clauses Consolidation Act, 1845. *Id.*

3. FORFEITURE OF LIFE INTEREST.

Effect of Settled Land Act.—See post, col. 1633.

On Alienation—Marriage Settlement.—L. was entitled to a life interest under a voluntary settlement in one-fourth part of certain funds, with remainder to his children who should attain twenty-one, or die under that age, with remainder over. The settlement contained a proviso for the determination of his life interest and the acceleration of the subsequent remainders if he should alien, dispose of, mortgage, charge, or in any wise incur his life interest, or if by reason of bankruptcy, insolvency, or otherwise the income of the funds could no longer be personally enjoyed by him, but would but for that proviso become vested in or payable to any person or persons other than him. By a subsequent settlement made on his marriage, L., amongst other property, assigned to trustees the share to which he was entitled under the former settlement, upon trust to continue the trust funds in their then present investments, or upon the written request of L., and after his death, upon such request or at such discretion as therein mentioned, to sell the same, and pay the income of the proceeds to L. during his life, and after his death to his wife during her life, with remainder for the issue of the marriage as L. and his wife jointly, or the survivor, should appoint, and in default for all the children of the marriage in equal shares:—Held, that no forfeiture of L.'s life interest was produced by the marriage settlement, for the assignment contemplated by the forfeiture clause was one by reason of which the income of L.'s share would become payable to some person other than him, whereas by the marriage settlement the life interest was assigned to trustees for his benefit. *Lockwood v. Sikes*, 51 L. T. 562—Kay, J.

On Bankruptcy.—See BANKRUPTCY, XVII.

4. CONSTRUCTION.

"Eldest or only Son."—Sir C. D. (who died in 1857), by deed in 1852, appointed a fund to trustees in trust for his daughter Lady W., for life, and after her death in trust for the child or all the children, "except an eldest or only son," if more than one, of Lady W., who should attain twenty-one or marry, and failing such trusts then over. Lady W. died in 1883, having had four children only, viz., Thomas, her eldest born son, who attained twenty-one in January, 1869, and died in April following; Sir F. W., who attained twenty-one in 1880; Helena, who attained twenty-one in 1865; and Edith, who died in infancy, in 1864; so that the fund vested in Helena (subject to let in other children) in the lifetime of the eldest born son, and before he attained twenty-one. At the date of the deed certain estates stood limited under a settlement, to which Sir C. D. was a party, to the use of Sir T. W. (the husband of Lady W.) for life, with remainder to the use of the first and other sons of Sir T. and Lady W. in tail male. In March, 1869, Sir T. W. and his son Thomas disentailed the estates, and limited them to the appointees of both, or of the survivor. The

joint power was not exercised; but after the death of Thomas, Sir T. W. by will appointed the estates to Sir F. W. for life, with remainder to his sons in tail male. Upon Lady W.'s death, Sir F. W. claimed half the fund, and Helena the whole of it:—Held, that, if the expression "eldest or only son" was to be read as referring to a son entitled under a settlement to settled estates, the time for ascertaining the excluded son would be the time for distributing the younger children's portions; but that if that expression was to be read according to its natural meaning, the time of vesting would be the time for exclusion. *Domville v. Winnington*, 26 Ch. D. 382; 53 L. J., Ch. 782; 50 L. T. 519; 32 W. R. 699—Kay, J.

Held, also, that the words an "eldest or only son" *prima facie* mean an individual, and that as there was an eldest son in existence when the provision vested in Helena, the clause of exclusion applied to him, and its operation was exhausted, so that any other son who attained twenty-one was entitled to take:—Held, therefore, that Sir F. W. was entitled to one-half of the fund. *Matthews v. Paul* (3 Sw. 328) observed upon. *Id.*

"Issue."]—"Issue," when collocated with parent, is to be taken in the restricted sense of children; and this doctrine applies to a deed as well as to a will. *Barracough v. Shillito*, 53 L. J., Ch. 840; 32 W. R. 875—Chitty, J.

There is no inflexible rule that if the word "issue" is evidently used in one clause of a settlement as meaning "children" only, it must be construed in the same sense in every other clause. *Warren's Trusts, In re*, 26 Ch. D. 208; 53 L. J., Ch. 787; 50 L. T. 454; 32 W. R. 641—Pearson, J.

Ultimate Limitation to "right Heirs" of Strangers—No Male Heirs—Joint Tenancy or Tenancy in Common.—By a settlement, dated in 1856, real estate was settled to the use of trustees during the life of A. upon certain trusts, and after his death to the use of B. for life, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons successively in tail male, and for default of such issue to the use of the "right heirs" of C. for ever. C. had no estate of his own in the property. He died in 1854. His "right heirs" at the time of his death were three sisters and five daughters of a deceased sister. The preceding limitations all failed. The present survivors of the "right heirs" were four of the five daughters of the deceased sister. The question was whether the heirs took as *personæ designatæ* or as coparceners. On the one hand it was contended that the persons who were the "right heirs" took as joint tenants, so that the estate was now vested in the survivors; on the other hand, that the "right heirs" took as tenants in common, and that consequently their shares passed by descent or devise to the several parties claiming under them:—Held, that the persons who were the "right heirs" of C. at his death took as *personæ designatæ*, and as joint tenants, and not as coparceners with descent from them as such; so that on the death of one of them the share did not pass by her will or descend to her heirs, but survived to the others; and, therefore, that the estate was now vested in the four surviving daughters of the deceased sister.

Berens v. Fellowes, 56 L. T. 391; 35 W. R. 356—Kay, J.

Covenant by Settlor for Payment of sum of Money during his Life or after his Death—"Free from all Deductions"—Succession Duty.]

—The father of a married woman covenanted with trustees for payment to them at such time or times during his life as he should think fit, or within twelve calendar months after his death, of the sum of 10,000*l.* "free from all deductions whatsoever," and for payment to them in the meantime of an annuity of 200*l.*, the principal sum and the annuity to be held upon the trusts therein mentioned for the daughter and her family. The covenantor did not pay any part of the 10,000*l.* in his lifetime, but after his death his executor paid to the trustees the full sum of 10,000*l.* The Crown claimed succession duty from the trustees, who paid it, and claimed repayment from the executor on the ground that the 10,000*l.* was to be paid free from all deductions. Both parties agreed that the fund was liable to succession duty, and argued the case on that footing:—Held, that if the duty was payable it must be borne by the fund, for that the relation between the trustees and the executor was simply that of creditors and debtor, that the executor was not liable to be called on by the Crown for the duty, and that when he had paid the 10,000*l.* in full to the trustees, he had discharged his testator's obligation, and was not concerned with the question whether succession duty was payable. Whether any succession duty was payable on the death of the covenantor, *quære*. *Higgins, In re, Day v. Turnell*, 31 Ch. D. 142; 55 L. J., Ch. 235; 54 L. T. 199; 34 W. R. 81—C. A.

Power of Appointment—Revocation and New Appointment—Successive Appointments—Priority.]

—By deed of October, 1860, the donee of a power of appointing 6,000*l.* amongst his children, irrevocably appointed 500*l.* to his daughter B., and subject to revocation, appointed the 5,500*l.* residue to his daughter C. By a subsequent deed the appointment of 5,500*l.* to C. was revoked, and the hereditaments subject to the power were charged with 1,600*l.* to C. and 3,900*l.* to B., in lieu of the 5,500*l.* charged by the first deed, and "subject and without prejudice to the trusts for raising the 500*l.*," trusts for raising the 1,600*l.* and 3,900*l.* were declared. This deed contained a power of revocation and new appointment, confined, however, to the 3,900*l.* By a subsequent deed the appointment of 3,900*l.* was revoked, and that sum was appointed between B. and C. in the proportions of 300*l.* to B. and 3,600*l.* to C., in addition to the sums of 500*l.* and 1,600*l.* then respectively remaining charged thereon—and it was directed that all the sums raisable under the trusts of the term under the three deeds, should be charged and chargeable on the property *pari passu* and without priority:—Held, that the 500*l.* irrevocably appointed by the first deed had priority over the other charges, and that this priority was unaffected by the direction that the charges should rank *pari passu* and without priority; and accordingly that, subject to any question as to election, the 500*l.* had priority, and that the several charges amounting to 5,500*l.* stood subsequent to the 500*l.*, but *inter se* ranked *pari*

passu. *Wilson v. Kenrick*, 31 Ch. D. 658; 55 L. J., Ch. 525; 54 L. T. 461—Chitty, J.

— **Excessive Exercise—Delegated Power to Appoint.**—The donee of a limited power of appointment amongst his own children appointed, by his will, to his son for life; and, after his decease, for the children of the son, as he should appoint; and, in default of appointment, to the son absolutely. The son died without having attempted to exercise the delegated power:—Held, that the ultimate limitation in favour of the son was valid. *Williamson v. Farnell* or *Farwell*, 35 Ch. D. 128; 56 L. J., Ch. 645; 56 L. T. 824; 36 W. R. 37—North, J.

— **Fraud on Power—Portions—Appointment to Infant Children—Time of Vesting.**—Appointments vesting immediately portions charged on land in young children who die soon afterwards, will be looked at by the court with suspicion; and very little additional evidence of improper motive or object will induce the court to set them aside; but without some additional evidence the court will not do so. There is no rule of law by which every power for raising portions for children, in whatever way it is expressed, is subject to the limitation that the portions are not raisable under it unless the children live to want them. *Henty v. Wrey*, 21 Ch. D. 332; 53 L. J., Ch. 667; 47 L. T. 231; 30 W. R. 850—C. A.

A settlement of land contained a power to tenants in possession to charge portions for younger children, and gave the appointor full power to fix the ages and times at which such portions should vest. Under this power the tenant for life in possession, having three daughters, aged nine, seven and one, by deed in 1828, appointed the aggregate amount which he was entitled to charge for the portions of the daughters to be a vested interest in them immediately on the execution of the appointment, and to be paid to them at such times after his death as he should appoint; and in default, at their age of twenty-one or marriage if after his death, or if the same should happen in his lifetime then the payment to be postponed till after his death. There was also a direction for maintenance from his death and a power of revocation. In 1832 he executed a similar appointment by way of confirmation. The two younger daughters afterwards died at the respective ages of fourteen and eighteen, and the father appointed half the fund to be raised and paid after his death to the surviving daughter, and in 1875 he assigned to the plaintiff for value the other moiety appointed to the two deceased daughters:—Held, that the appointment was not a fraud upon the power, and that the plaintiff was entitled to have the remaining moiety raised for his benefit. *Id.*

— **Portions—Priority—Execution of Power.**—The priority of annuities and of portions appointed under a power and secured by a term, determined by the position of the term in the original deed creating them. *Mosley v. Mosley* (5 Ves. 248) explained. Power to W. B. (a tenant for life of settled lands with remainder to his male issue in tail), by any deed or writing, to be by him sealed, delivered and attested by two or more witnesses, to appoint to any woman or women whom he might marry, such grant to

be either prior or subsequent to the said marriage, for the life or lives of such woman or women respectively, a rent-charge not exceeding 500*l.*, and also by such deed or writing, executed and attested as aforesaid, to charge the lands with any sum or sums of money by way of portions for his younger children, provided that the said portions should not in any event exceed 4,000*l.* W. B., on his marriage, in 1858, by deed-poll appointed, in events which happened, 500*l.* a year jointure to be raised for his wife, and 2,000*l.* portions for his younger children. In 1869, W. B. made a will, reciting that he had no male issue, and thereby appointed an additional sum of 2,000*l.* to be raised for his two daughters:—Held, that it was not obligatory upon the donee of the power to exercise the power of jointuring and charging portions by one and the same instrument; and that the appointment of the additional 2,000*l.* by the will was valid. *Bevan v. Bevan*, 13 L. R., lr. 53.

II. SETTLED LAND AND ESTATES.

1. SETTLEMENT.

Definition—Original and Derivative Settlements.—When a complete settlement of land has been made, and derivative settlements have been afterwards made by persons who take interests (not yet in possession) under the original settlement, the original settlement alone is the settlement for the purposes of the Settled Land Act. *Knowles' Settled Estates, In re*, 27 Ch. D. 707; 54 L. J., Ch. 264; 51 L. T. 655; 33 W. R. 364—Pearson, J.

2. WHO ENTITLED TO SELL.

a. In General.

“**Tenant for Life**”—**Power of Sale—Consent of Trustees of Settlement—Notice.**—Except in a case mentioned in s. 15, a tenant for life has, under the Settled Land Act, 1882, an absolute power of selling the settled land without the consent or control of the trustees of the settlement, unless they have reason to believe that any intended exercise of the power is improper, in which case they may apply to the court for directions under s. 44. Consequently, neither the fact that at the time the tenant for life enters into a contract for sale there are no trustees of the settlement under the Act, nor, when there are any, the fact that no notice has been given them by the tenant for life, under s. 45, sub-s. 1, of his intention to proceed to a sale, prevents his making a statutory title. It is sufficient for the protection of the purchaser if by the time he comes to complete there are trustees under the Act to whom he may pay his purchase-money if required so to do by the tenant for life under s. 22, and notice has been given them under s. 45, sub-s. 1; though, under sub-s. 3, a purchaser dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of the notice; but, quære, whether a purchaser incurs liability by completing his purchase with actual knowledge that no notice has been given. *Hatten v. Russell*, 38 Ch. D. 334; 57 L. J., Ch. 425; 58 L. T. 271; 36 W. R. 317—Kay, J.

The relative position and powers of a tenant for life and the trustees of a settlement under the Settled Land Acts, 1882 and 1884, considered. *Id.*

Equitable Tenant for Life—Right to receive Rents—Power of Leasing.]—A testatrix by her will directed her trustees to stand possessed of the net rents of her real estate, upon trust to pay the same to Mrs. W., a married woman, for life, for her separate use, her receipt alone to be a sufficient discharge to the trustees; and the testatrix directed her trustees, out of the rents of her real estate, to keep in repair all the buildings on the estate during the period of their trust, and also the chancel of P. Church. No power of sale or leasing was contained in the will:—Held, that, notwithstanding the direction to the trustees with respect to repairs, Mrs. W. was equitable tenant for life of the settled land, and, as such, was entitled to be let into the possession and management of the estate, upon her undertaking to see to the repairs. But, that, inasmuch as there were no trustees of the settlement created by the will for the purposes of the Settled Land Act, 1882, Mrs. W. was not entitled to exercise the powers of a tenant for life under that act until trustees of the settlement were appointed, and a proper notice of her intention was given them. *Bentley, In re, Wade v. Wilson*, 54 L. J., Ch. 782; 33 W. R. 610—Pearson, J.

Persons entitled to bid at Sale—Life Estates bought back.]—Under a settlement land was appointed to the use of a father for his life, and after his death to the use of trustees during the life of his son W., and after his death to the use of his sons successively in tail male, with remainder to the use of the trustees during the life of the father's son G., with remainders over. And it was declared that the appointments to the trustees were made on trust that they should, as soon as might be, absolutely sell the life estates and pay the net proceeds of sale to W. and G. in equal shares as tenants in common. And it was provided that until sale the rents and profits of the life estates should be paid to W. and G. in equal shares as tenants in common. And W. and G. covenanted with the father, and also separately with the trustees, that neither of them would claim to have the life estates thereby appointed made over to them or either of them in specie, it being the intention of the parties that the trusts for sale should be absolute and irrevocable, notwithstanding any law of equity authorising beneficiaries of proceeds of sale to elect to take the property in lieu of the proceeds of sale. After the death of the father, W. and G. contracted to sell some of the land in fee. The purchaser objected that the vendors were not tenants for life within the meaning of the Settled Land Act, 1882:—Held, that as either W. or G. alone or both of them together might bid at any sale by the trustees, they must be treated as if they had bought the life estates back, in which case they would be tenants for life, and could therefore sell under the powers of the act. *Hale and Clarke, In re, or Hale and Smyth, In re*, 55 L. J., Ch. 550; 55 L. T. 151; 34 W. R. 624—Pearson, J.

Discretionary Trust for Application of Income during Life.]—A trust, although it be to last during the life of A., to apply the rents and

profits of an estate for the benefit of A. and his wife and his children, if any, does not constitute A., or A. and his wife together, a tenant for life of the estate under s. 2, sub-s. 6, of the Settled Land Act, 1882, or a person with the powers of a tenant for life under s. 58 of that act. *Atkinson, In re, Atkinson v. Bruce*, 31 Ch. D. 577; 54 L. T. 403; 34 W. R. 445—C. A. Affirming 55 L. J., Ch. 49—Pearson, J.

"Possession."]—The word "possession," in s. 2, sub-s. 5, and in s. 58, sub-s. 1, is to be read as in antithesis to "remainder" or "reversion." *Id.*

"So entitled."]—The words "so entitled," in s. 2, sub-s. 6, mean entitled under the direction in the preceding sub-section, i.e., for life. *Id.*

No Legal or Equitable Estate in Possession.]—A testator, who died in 1884, by his will made in 1874, devised his residuary real estate to trustees upon trust, during the period of twenty years after his death, out of the rents to manage and superintend his real estate and improve the same, and to accumulate or invest in the purchase of land the unapplied part of the rents, and after the determination of the said term of twenty years to settle and assure the devised and purchased real estate to the uses and upon the trusts of an existing settlement under which the testator's son took certain estates as tenant for life:—Held, that the testator's son, not having any estate or interest in possession until the determination of the term, had not, during its continuance, the powers of a tenant for life under the Settled Land Act with respect to the hereditaments devised by the will. *Strangways, In re, Hickley v. Strangways*, 34 Ch. D. 423; 56 L. J., Ch. 195; 55 L. T. 714; 35 W. R. 83—C. A.

Owner of Undivided Moiety—Concurrence of other Owner.]—The tenant for life of an undivided moiety of land, where the other undivided moiety is out of settlement, cannot sell the moiety of which he is tenant for life, without the concurrence of the owner of the other undivided moiety. *Collinge's Settled Estates, In re*, 36 Ch. D. 516; 57 L. J., Ch. 219; 57 L. T. 221; 36 W. R. 264—North, J.

Conditional Life Estate—Forfeiture by Non-residence—Invalidity of Condition.]—A testator devised his B. estate to the use of his son, "so long as he shall reside in my present dwelling-house, or upon some part of my B. estate, for not less than three months in each year after he shall become entitled to the actual possession thereof"; and after the death of the son, provided that he should have complied with the condition, to such uses for the benefit of his children as he should by will appoint; and, in default of such appointment, or, if he should fail in compliance with the above condition, on the determination of his estate therein, to the use of trustees, on trust for sale and distribution, of the proceeds of sale among the son's children:—Held, that the son had the powers of a tenant for life under the Settled Land Act, and could sell the estate, and that, notwithstanding the condition as to residence, he would, by virtue of s. 51 of the act, be entitled to the income of the proceeds of sale during his life. *Page's Settled*

Estates, In re, 30 Ch. D. 161; 55 L. J., Ch. 42; 53 L. T. 90; 33 W. R. 898—Pearson, J.

Direction for postponed Sale—Contingent Interest—Persons entitled Concurrently—Trust for Accumulation.]—Devise in 1874 of real estates to trustees upon trust for sale, but with a direction that testator's M. estate should not be sold until the expiration of twenty-one years from the date of his will; for the purpose of transmission the real estate to be impressed with the quality of personality from the time of his death; the rents of the real estates previous to conversion to be applied in the same manner as the income of the proceeds of sale; after payment of debts and legacies the surplus proceeds of sale to be invested and (in the events that happened) the capital to be held in trust for all the testator's children who being sons should attain twenty-five, and being daughters should attain twenty-five or marry under that age, and if more than one in equal shares. The trustees were empowered to apply the whole, or such part as might be required, of the annual income of the share to which any child might be entitled in expectancy for his or her maintenance or education, with a direction to accumulate the unapplied surplus of the income in augmentation of the share whence such income should have proceeded, and eventually to devolve in the same manner. The testator died in February, 1888, leaving six children, two sons who had attained twenty-one, but were under twenty-five; and three sons and one daughter, who were infants:—Held, that the children could not exercise the powers of tenants for life over the M. estate, and that that estate could not be sold under ss. 63, 58, or 59 of the Settled Land Act, 1882. *Horne's Settled Estate, In re*, 39 Ch. D. 84; 57 L. J., Ch. 790; 59 L. T. 580; 37 W. R. 69—C. A.

Trust for Sale.]—There was no trust or direction for sale within s. 63. *Id.* per North, J.

Person entitled to Income under Trust for Payment.]—A testator by will dated in 1883 devised an estate to the use of trustees for a term of 1,300 years and subject thereto to his son H. S. for life, with remainders over in strict settlement. The trusts of the term were to raise portions, to pay annuities, H. S. being one of the annuitants, and to apply the residue as a sinking fund to pay off mortgage debts and other charges. It was estimated that the trusts of the term would require from fifteen to twenty years for their fulfilment. The testator directed that the trustees should "during the continuance of the last-mentioned trusts" enter into and hold possession of the rents and profits of the estate "and not deliver the same to any person beneficially interested in any part thereof," and should manage the estate as therein mentioned. Very full powers of management were given to the trustees, provided that when all the trusts of the term should have been fully paid and satisfied the term should cease. He, moreover, gave to the trustees such other powers over the estate as were given to a tenant for life in possession by the Settled Land Act, 1882:—Held, that H. S. was a person having the power of a tenant for life of the estate within the meaning of s. 58, sub-s. 1, cl. ix. of the Settled Land Act, 1882, and that his consent was neces-

sary under s. 56, sub-s. 2, to the effectual exercise by the trustees of the powers of sale and enfranchisement contained in the will. *Clitheroe Estate, In re*, or *Buccleuch's (Duke) Estate, In re*, 31 Ch. D. 135; 55 L. J., Ch. 107; 53 L. T. 733; 34 W. R. 169—C. A.

— Tenant for Years—Estate determinable with Lease.]—A testator who had granted a lease of a house for a term of thirty-one years from the 25th of March, 1859, at a rent of 50*l.* a year, by his will, dated the 20th of June, 1866, devised his freehold interest in such house to trustees upon trust to permit his wife to receive the rent for her own benefit "during the remainder of the term granted by the said lease if she should so long live," and in case she should die "before the expiration of the term created by such lease," then he gave and devised the house to the children of his brother in fee, and he directed that if his wife should "happen to live after the expiration of the term created by such lease" then the trustees should sell the house, and out of the income from the investment of the proceeds pay 50*l.* a year to his wife during her life, and subject thereto he gave the residue of the proceeds for his brother's children. The testator died in 1866, and the question being raised whether his widow could, under the Settled Land Act, 1882, accept a surrender of such lease and grant a new lease of the house for a term of twenty-one years from the 25th of December, 1883, at an increased rent:—Held, that the widow was not a person under s. 58 of that act entitled to the powers of a tenant for life, and was therefore not able to accept a surrender and make a new lease of the house. *Hazle's Settled Estates, In re*, 29 Ch. D. 78; 54 L. J., Ch. 628; 52 L. T. 947; 33 W. R. 759—C. A.

— No Income arising.]—Subject to a term for raising certain sums, freehold estates were devised to the use of trustees during the life of A., with remainders to the use of A.'s children and issue. The trustees of the life estate were directed to enter into possession of and manage the property, pay outgoings, keep down the interest on incumbrances, and during A.'s life to pay out of the residue an annuity of 400*l.* to the person next entitled in remainder, and pay the ultimate residue to A. The estates were so heavily incumbered that, after payment of outgoings and interest, there was not enough to pay the annuity of 400*l.* A. therefore had received nothing, and there was no prospect of his receiving anything for many years:—Held, that A. was a person entitled to the income of land under a trust or direction for payment thereof to him during his life, subject to expenses of management, within the meaning of the Settled Land Act, 1882, s. 58, sub-s. (1), cl. ix., and therefore possessed the power of selling given by the act to tenants for life. *Jones, In re*, 26 Ch. D. 736; 53 L. J., Ch. 807; 50 L. T. 466; 32 W. R. 735—C. A.

Infant—Executory Limitation over—Death under Twenty-one without Issue.]—Certain estates were devised to the use of the testator's wife and G. T., upon trust to pay the net rents and income of the estates to the wife for the maintenance, education and benefit of the testator's son until he should attain twenty-one, and without being liable to account to the trustees

or to the son for the same; and upon the son's attaining twenty-one, then upon trust for him absolutely; but if he should die under twenty-one without leaving issue, then upon trust to permit the wife to receive such rents and income for her life, and after her death upon the trusts therein mentioned:—Held, under the Settled Land Act, 1882, s. 58, sub-s. 2, that the infant son had the powers of a tenant for life, being tenant in fee-simple with an executory limitation over in case of dying under twenty-one without issue. The trustees of the will appointed trustees for the purposes of the act. *Morgan, In re*, 24 Ch. D. 114; 53 L. J., Ch. 85; 48 L. T. 964; 31 W. R. 948—North, J.

A testator by his will devised all the residue of his real estate in trust for his six younger children, and directed that in case any one or more of his six younger children should happen to die in his lifetime leaving issue living at his decease, and which issue, being issue male, should live to attain the age of twenty-one years, or, dying under that age, should leave issue surviving, or, being issue female, should live to attain that age or be previously married: then in such case the share to which such child so dying would, if he or she had survived the testator and had attained the age of twenty-one years, have become absolutely entitled, should be held upon trust for such issue:—Held, that the two infant children of one of the six younger children of the testator who had died in the testator's lifetime took a vested interest in the share of their deceased parent, liable to be divested on their death under the age of twenty-one years, and that they had, therefore, the powers of a tenant for life under the Settled Land Act, 1882, s. 58, sub-s. 2, in respect of that share. *James' Settled Estates, In re*, 51 L. T. 596; 32 W. R. 898—Pearson, J.

Pendency of Administration Action.]—The pendency of an action by tenant for life in which a decree has been made for execution of the trusts of a settlement, does not prevent him from exercising his power of sale under the Settled Land Act, 1882, without the sanction of the court. *Curdigan (Lady) v. Curzon-Howe*, 30 Ch. D. 531; 55 L. J., Ch. 71; 53 L. T. 704; 33 W. R. 836—Chitty, J.

Effect of previous Restrictive Act.]—A settlement of land was made in 1853 by a private act of parliament. By this act the estates were vested in the trustees thereby appointed, upon trust by sale or mortgage thereof to raise money for the purpose of discharging certain incumbrances and liabilities. The act provided that the trustees might from time to time absolutely sell and dispose of all or any part of the estates mentioned in a schedule, provided that the trustees should not sell any of the lands situate in the parishes of C. and H., unless it should be absolutely necessary for the purposes of the act to do so, and in case of such necessity should not sell any of those lands until all the rest of the estates were sold. After the Settled Land Act, 1882, had come into operation, the tenant for life entered into a contract to sell some of the lands situate in the parishes of C. and H. The whole of the rest of the estates had not then been sold:—Held, that the power of sale conferred on the tenant for life by the Settled Land Act was an absolute power over

and above that given to the trustees by the private act, and that he was therefore entitled to sell free from the restriction imposed by the private act on the trustees. *Chaytor's Settled Estate Act, In re*, 25 Ch. D. 651; 53 L. J., Ch. 312; 50 L. T. 88; 32 W. R. 517—Pearson, J.

Staying Proceedings under previous Order of Court—Settled Estates Act, 1877.]—In 1878 an order was made under the Settled Estates Act, 1877, directing the trustees of certain settled estates to sell certain parts thereof with the approbation of the judge. This order was never acted upon, although it remained in force. The tenant for life, being desirous of selling such parts of the estates, the question was whether the order of 1878 deprived him of the statutory power of sale afforded by s. 56 of the Settled Land Act, 1882, or whether the powers given by that act were cumulative. On an application to the court to stay proceedings under the order of 1878:—Held, that the order which had been made was not a positive direction for a sale, but merely an authority to the trustees to sell, and the court had power to delay a sale and stay all proceedings under the order, if circumstances arose making such a course expedient, but that the court would not do so under the present circumstances. *Barrs-Haden's Settled Estate, In re*, 49 L. T. 661; 32 W. R. 194—Kay, J.

Sect. 56 of the Settled Land Act, 1882, was not intended to apply to a case of difference between the powers given by that act, and special powers granted by orders under the Settled Estates Act, 1877. In this respect the powers given by the Settled Land Act, 1882, are not cumulative. Where it is desired to vary powers of leasing granted to trustees by the court under the Settled Estates Act, 1877, it is necessary, in spite of the powers given by the Settled Land Act, 1882, and of s. 56 of that act, to make an application to the court in that behalf under the Settled Estates Act, 1877, stating the advisability of the proposed course, and asking that the operation of the order may be stayed or the leave to grant leases thereunder be suspended. *Poole's Settled Estate, In re*, 50 L. T. 585; 32 W. R. 956—Pearson, J.

b. Infants.

Power of Tenant for Life.]—*See supra.*

Appointment of Persons to Exercise Powers of Tenant for Life.]—Where, in the absence of any trustees of a settlement within the meaning of the Settled Land Act, capable of exercising powers of sale over the settled land, an appointment has been made under s. 60 of persons to exercise on behalf of an infant tenant for life the powers of a tenant for life, and to sell part of the settled estate, the persons so appointed can make a good title without the necessity of appointing unders. 38 trustees of the settlement to whom notice of the intended sale can be given under s. 45. The order made under s. 60 ought in such a case to direct that the purchase-money be paid into court. *Dudley (Countess) and London and North Western Railway, In re*, 35 Ch. D. 338; 56 L. J., Ch. 478; 57 L. T. 10; 35 W. R. 492—Chitty, J.

Service of Summons—On whom.]—Service of a summons for leave to sell the mansion-house and heirlooms on the children of the tenant for

life was dispensed with, their interests being sufficiently represented by the trustees, who had been served. *Brown's Will, In re*, 27 Ch. D. 179; 53 L. J., Ch. 921; 51 L. T. 156; 32 W. R. 894—V.-C. B.

Sale by Trustees out of Court.—The court can authorise trustees who have been appointed for the purposes of the Settled Land Act, 1882, to sell property of their infant cestui que trust out of court. *Price, In re, Leighton v. Price*, 27 Ch. D. 552; 51 L. T. 497; 32 W. R. 1009—V.-C. B.

Absolute Trust for Sale—Order of Court for Sale—Concurrence of Tenant for Life not required.—A testator devised all his real and personal estate to trustees upon trust after the death of his wife absolutely to sell the whole of his property in such manner as they should think fit, and to pay one-fourteenth part of the proceeds to each of his fourteen children at twenty-one or marriage, with further provisions under which his daughters' shares were settled on them for life with remainders over. A suit having been instituted for the administration of the estate, and the wife being dead, an order was made in the suit for sale of part of the estate by the trustees:—Held, that the concurrence of the children constituting the tenant for life under the Settled Land Act, 1882, was not necessary upon the sale by the trustees; but even if such concurrence would be necessary the order of the court was sufficient to enable the trustees to sell without joining the fourteen children or any of them in the conveyance to the purchaser. *Taylor v. Poncia*, 25 Ch. D. 646; 53 L. J., Ch. 409; 50 L. T. 20; 32 W. R. 335—Pearson, J.

c. Married Women.

Separate Examination.—In the case of a woman married before the commencement of the Married Women's Property Act, 1882, s. 1 of the act applies only as to property acquired by her after the commencement of the act. Therefore, if such a woman is a petitioner, or a respondent to a petition, under the Settled Estates Act, 1877, relating to property her interest in which was acquired before the commencement of the act of 1882, she must be examined separately, as provided by s. 50 of the act of 1877. *Harris's Settled Estates, In re*, 28 Ch. D. 171; 54 L. J., Ch. 208; 51 L. T. 855; 33 W. R. 393—Pearson, J.

On an application under the Settled Estates Act, 1877, for the sanction of the court to the purchase of certain land by the trustees of a settlement out of funds in court arising from sales to the settled hereditaments, the separate examination of a married woman, the tenant for life, was directed, notwithstanding s. 32 of the Settled Land Act, 1882. *Arabin's Trusts, In re*, 52 L. T. 728—Kay, J.

A married woman consenting to a sale under the Settled Estates Act, 1877, need not be examined as to her consent as required by s. 50 of the act if she has been married since the commencement of the Married Women's Property Act, 1882. *Riddell v. Errington*, 26 Ch. D. 220; 54 L. J., Ch. 293; 50 L. T. 584; 32 W. R. 680—Pearson, J.

d. Trustees.

Who are, within s. 2, sub-s. 8, of Settled Land Act, 1882.—A trustee with power of sale

subject to the consent of another is trustee for the purposes of the Settled Land Acts. A trustee of a settlement with power of sale is trustee for the purposes of the Settled Land Acts, including the sale of heirlooms. *Constable v. Constable*, 32 Ch. D. 233; 55 L. J., Ch. 491; 54 L. T. 608; 34 W. R. 470—Pearson, J.

Trustees having a power of sale which can only be exercised with the concurrence of a person whose consent cannot be obtained, are not trustees within the meaning of the Settled Land Act, 1882. In such cases, if a sale be desirable, it is expedient to appoint such persons as trustees for the purposes of the act. *Johnstone's Settlement, In re*, 17 L. R., Ir. 172—M. R.

By settlement (a), executed upon the marriage of A. and B., it was declared that the trustees, C. and M., should stand possessed of money upon trust that they and the survivor of them, his executors, administrators, and assigns, should continue the money on the present investments, or with the consent in writing of A. and B. or the survivor, and after the death of the survivor then of the proper authority of such trustees or trustee, to sell and transfer the securities and lay out and invest the proceeds, with power from time to time, with such consent as aforesaid, to vary the securities. All after-acquired property, both real and personal, to be assured and settled upon the same trusts, &c., as the principal sum. Power to appoint new trustees, and to maintain, enlarge, or diminish the original number; every new trustee to have the power, &c., of the trustee in whose place he was appointed. By settlement (b), executed upon the marriage of C. and D. (the sister of B.), it was declared that the trustees M. and N. should stand possessed of money upon trust to continue the same upon its then present security, or with the consent in writing of C. and D. or the survivor, and after the death of the survivor, of the proper authority of such trustees or trustee, to call in the said principal money and again lay out the same in their or his names or name upon the securities therein mentioned, with power for the trustees or trustee for the time being, with such consent or at such discretion as aforesaid, to alter, vary, and transpose the stocks, funds, or investments to be from time to time made under the authority of the aforesaid power, in any other stocks, &c., of the nature or description contemplated by the trust for investment. Covenant to settle after-acquired property similar in terms to that in settlement (a). M. had died, and three new trustees of settlement (a) had been appointed by A. and B. N. was the sole present trustee of settlement (b). Real estate had descended during their coverture upon B. and D., as co-heiresses in undivided moieties. A contract for the sale of this real estate having been entered into by A. and B. and C. and D. as vendors:—Held, upon summons under the Vendor and Purchaser Act, 1874, that under the express power contained in settlement (a), and the implied power in settlement (b), the existing trustees of both settlements had full power, within the meaning of the Settled Land Act, 1882, s. 2 (8), to act as trustees under the act, and that it was not necessary to apply to the court under the Settled Land Act, 1882, s. 38, for the appointment of new trustees for the purposes of the act. *Garnett-Orme to Hargreaves*, 25 Ch. D. 595; 53 L. J.,

Ch. 196 ; 49 L. T. 655 ; 32 W. R. 313—V.-C. B. And see next case.

Appointment under s. 38.]—Residuary personal estate was subject to a trust for investment in the purchase of lands in the counties of Cork and Tyrone, to be settled to the same uses as the testator's real estate, which was devised in strict settlement. No opportunity having occurred to enable such an investment to be made, and the fund representing the residue being in court to the credit of a suit to carry out the trusts of the will, the trustees applied to the court, under s. 38 of the Settled Land Act, for leave to enter into an agreement for a transfer of a mortgage for a large amount secured upon fee simple in the counties of Cork and Kerry :—Held, that the case did not come within s. 2, sub-s. 8, but was within s. 38, and the court, in the exercise of its discretion under that section, declined to make the order, having regard to the purpose for which the trustees were sought to be appointed. *Burke v. Gore*, 13 L. R., Ir. 367—V.-C.

When Persons appointed under s. 60.]—See *Dudley (Countess) and London and North-Western Railway, In re*, ante, col. 1626.

Discretion of Court.]—Semble, in appointing trustees under s. 38, the court should require to be satisfied not only of the fitness of the proposed trustees, but also that the purposes for which their appointment is sought is such as to render their appointment safe and beneficial to all persons interested in the property. *Burke v. Gore*, supra.

Who appointed.]—The court will not in general appoint as trustees of a settlement for the purposes of the act two persons who are near relatives to each other. There ought to be two independent trustees. *Knowles' Settled Estates, In re*, 27 Ch. D. 707 ; 54 L. J., Ch. 264 ; 51 L. T. 655 ; 33 W. R. 364—Pearson, J.

Where estates in England and Ireland were devised upon similar limitations, and all the persons beneficially interested resided in England, the court appointed, as trustees of the Irish estates for the purposes of the Settled Land Act, 1882, two persons, who had been appointed by the Chancery Division in England trustees of the English estates, for the purpose of the act, notwithstanding their residence in England. *Maberly's Settled Estate, In re*, 19 L. R., Ir. 341—M. R.

Whether by Court or remaining Trustees on Retirement.]—One of two trustees appointed under s. 38 of the Settled Land Act, 1882, desired to retire. The court appointed a new trustee for the purposes of the Settled Land Acts in the place of the retiring trustee on an application made under that section :—Quære, whether s. 31 of the Conveyancing Act, 1881, applies to trustees appointed for the purposes of the Settled Land Acts. *Wilcock, In re*, 34 Ch. D. 508 ; 56 L. J., Ch. 757 ; 56 L. T. 629 ; 35 W. R. 450—North, J.

One of three trustees, appointed by the court under s. 38 of the Settled Land Act, 1882, having gone to reside abroad, the court appointed a new trustee, for the purposes of that act, in his place, under s. 38. *Wilcock, In re* (34 Ch. D.

508), followed. *Kane's Trusts, In re*, 21 L. R., Ir. 112—M. R.

Notice to Trustees—Contract by Tenant for Life to Sell.]—On a sale by a tenant for life under the Settled Land Act, 1882, a notice to the trustees given less than a month before the contract, but more than a month before the day fixed for completion :—Held, a sufficient compliance with s. 45. Semble, a purchaser cannot avail himself of a defect in such notice as a defence to an action for specific performance. *Marlborough (Duke) v. Sartoris*, 32 Ch. D. 616 ; 56 L. J., Ch. 70 ; 55 L. T. 506 ; 35 W. R. 55—Chitty, J.

Time for—Statutory Title.]—See *Hatten v. Russell, and Bentley, In re*, ante, cols. 1620, 1621.

Form of Notice—Lunatic Tenant for Life.]—A general notice by a tenant for life of an intention to sell or lease all or any part of the settled estates, at any time or times when a proper opportunity shall arise, is not a sufficient notice within s. 45 of the Settled Land Act, 1882. *Ray's Settled Estates, In re*, 25 Ch. D. 464 ; 53 L. J., Ch. 205 ; 50 L. T. 80 ; 32 W. R. 458—Pearson, J.

Costs.]—A lunatic tenant for life, by his committee, gave the trustees a general notice of his intention to sell or lease all or any part of the settled estates as a proper opportunity should arise. Upon a summons by the trustees, asking for a declaration that this was not a sufficient notice :—Held, that as the notice was insufficient within s. 45 of the act, and the committee had served it without obtaining the sanction of the court in lunacy, he must pay the costs of the summons. *Id.*

3. WHAT PROPERTY MAY BE SOLD OR LET.

Mansion-house and Heirlooms.]—A testator bequeathed to his trustees certain articles as heirlooms to be annexed to his mansion-house and held in trust for the person for the time being entitled to the mansion-house under the equitable limitations thereafter contained ; and he devised his mansion-house and estate, comprising about 360 acres, to the trustees upon trust for his son for life, with equitable remainders over in strict settlement for the benefit of the son's issue ; and the testator directed that his mansion-house and certain lands thereto belonging, comprising about thirty acres, and described on a plan indorsed on the will, should be kept up as a place of residence for the person for the time being entitled to the possession thereof under his will, and that the heirlooms should at all times be kept in the mansion-house. Powers were given to the trustees to let, sell, or exchange any part of the settled estate except the mansion-house and lands described on the plan. The testator's son, the tenant for life, being desirous of selling the whole estate under the powers of the Settled Land Act, 1882, applied to the court, under s. 15, for leave to sell the excepted mansion-house and lands, on the ground that, owing to ill health and permanent residence elsewhere, he was unable to reside in the man-

sion-house, and also that, inasmuch as the estate was in proximity to a large town, the bulk of the estate could not be sold advantageously without the mansion-house and adjoining lands. The summons did not ask for the sale of or contain any reference to the heirlooms:—Held, that, on the evidence, the case was a proper one for a sale of the mansion-house and adjoining lands, but that leave for sale would not be granted without some direction as to the disposal of the heirlooms. *Brown's Will, In re*, 27 Ch. D. 179; 53 L. J., Ch. 921; 51 L. T. 156; 32 W. R. 894—V.-C. B.

The summons was then amended, with the consent of the trustees, by asking for leave to sell the heirlooms also, under s. 37 of the Settled Land Act, 1882, by reference to an inventory verified by affidavit, whereupon an order was made for the sale of the heirlooms, with liberty for the tenant for life to bid at such sale. *Id.*

Mansion-house and Park—Assignees of Tenant for Life—Consent.—The court, in the exercise of the discretion given by s. 15 of the Settled Land Act, in respect to ordering a sale of the mansion-house and park on the settled land, where the trustees of the settlement do not consent, will not, where the tenant for life has mortgaged his life interest to its full value, make the order on his application without full information as to the proposed sale, and the consent of the mortgagees. *Sebright's Settled Estates, In re*, 33 Ch. D. 429; 56 L. J., Ch. 169; 55 L. T. 570; 35 W. R. 49—C. A.

Heirlooms—Proposed Sale—Discretion of Court.—A tenant for life of settled estates applied, under the Settled Land Act, 1882, for the sanction of the Court to a proposed sale of chattels consisting for the most part of pictures at the family mansion-house and settled as heirlooms. It was proposed that the sum arising from the sale should be applied in reduction of charges upon the settled estates. The estimated sum to arise from the sale was 7,300*l.*, and the annual income of the estate was about 7,500*l.* The estates were settled as to one-half by a settlement made in 1876, and as to the other part by the will of a testator who died in 1882. The guardians ad litem of the tenant in tail in remainder and the trustees were opposed to the proposed sale. It appeared that since the testator's death there had been no substantial depreciation in the property. The pictures were a characteristic feature of the mansion-house:—Held, that under the circumstances of the case the court would in the exercise of its discretion refuse to sanction the proposed sale. *Beaumont's Settled Estates, In re*, 58 L. T. 916—Chitty, J. See also *Houghton's Estate, In re*, post, col. 1636.

Incorporeal Hereditament—Tithes.—See *Esdaile, In re*, post, col. 1635.

— **Title of Dignity or Honour.**—A dignity or title of honour, as an incorporeal hereditament, is "land" within the meaning of the 37th section of the Settled Land Act, 1882. The Settled Land Act, 1882, does not enable a limited owner to sell any property which, when vested in a tenant in fee simple, is by law inalienable. *Rivett-Carnac's Will, In re*, 30 Ch. D. 136; 54

L. J., Ch. 1074; 53 L. T. 81; 33 W. R. 837—Chitty, J.

Lease of Mansion-house.—See *Thompson's Will, In re*, infra.

4. LEASES.

Sanction of Court—Covenant to Renew Lease at Future Time.—The court has no power under ss. 4 and 5 of the Settled Estates Act, 1877, to sanction a sub-lease of settled land (held under a renewable lease) for the unexpired residue of the term, with a covenant for the extension of the term by a further sub-lease after the renewal of the head lease. Such a lease would, as regards the further lease, not be a lease taking effect in possession. *Farnell's Settled Estates, In re*, 33 Ch. D. 599; 35 W. R. 250—North, J.

By Tenant for Life—Impeachment for Waste—Permissive Waste.—A tenant for years is liable for permissive waste, and therefore a lease by a tenant for life under 40 & 41 Vict. c. 18, s. 46, exempting the lessee from liabilities for "fair wear and tear and damage by tempest" is void as "made without impeachment of waste." In granting such a lease the tenant for life has a discretion as to what are proper covenants, and the lease will be void only when there is an outrageous omission of covenants. *Yugent v. Cuthbert* (Sugden on Real Property, 475) distinguished. *Davies v. Davies*, 38 Ch. D. 499; 57 L. J., Ch. 1093; 58 L. T. 514; 36 W. R. 399—Kekewich, J.

Building Leases for long Terms—Infant Tenant in tail.—Where an infant tenant in tail in possession was eighteen years of age, the court refused, on the application of the trustees of the settlement, who had the powers of a tenant for life under s. 60 of the Settled Land Act, to grant general authority to make building leases not exceeding 200 years, but gave such authority subject to the approval of the court to the making of each lease. *Cecil v. Langdon*, 54 L. T. 418—Pearson, J.

Mineral Lease—Setting aside part of Rent—Capital Moneys—Tenant for Life impeachable for Waste.—A person who is entitled for his life to the income of the money to arise from the sale of settled land and to the rents and profits of the settled land until sale, although to be deemed a tenant for life under s. 63 of the Settled Land Act, 1882, is not, properly speaking, "impeachable for waste in respect of minerals" within the meaning of s. 11. Nevertheless, where a lease of unopened minerals is made by such a person under the provisions of the act, three-fourths of the rents and royalties should be set aside as capital moneys arising under the act, and the residue only should go as rents and profits. *Ridge, In re, Hellard v. Moody*, 31 Ch. D. 504; 55 L. J., Ch. 265; 54 L. T. 549; 34 W. R. 159—C. A.

— **"Principal Mansion-house"—Residence Clause.**—A principal mansion-house and demesne in the county of Dublin were settled upon the same trusts as lands in the counties of Mayo and Sligo, with a condition of forfeiture

on non-residence in, selling of, or letting of the said mansion-house and demesne, which attached both to them and to the other lands settled:—Held, that they were a “principal mansion-house” and demesne within the meaning of s. 15 of the Settled Land Act, 1882; that the condition of forfeiture was void for the purposes of that act; and that the court, on the facts, would authorise a temporary letting of them to be made. *Thompson’s Will, In re*, 21 L. R., Ir. 109—M. R.

5. EFFECT OF SETTLED LAND ACT ON FORFEITURE CLAUSES.

Non-residence—No Sale of Land.]—A tenant for life under a will broke the terms of a condition of residence on pain of forfeiture contained in the will:—Held, that, no sale having been made, the forfeiture took effect, notwithstanding s. 51 of the Settled Land Act, 1882. *Haynes, In re, Kemp v. Haynes*, 37 Ch. D. 306; 57 L. J., Ch. 519; 58 L. T. 14; 36 W. R. 321—North, J.

— **Validity of.]**—See *Thompson’s Will, In re*, supra, and *Paget’s Settled Estates, In re*, ante, col. 1622.

6. CAPITAL MONEYS.

a. What are.

Mineral Lease.]—See *Ridge, In re*, supra.

Sale of Timber at Valuation—Power to cut Timber—Claim of Tenant for Life to Proceeds.]—A tenant for life of an estate in strict settlement had power to cut certain timber and other trees, to sell the same and to apply the proceeds to his own use. In 1885 the tenant for life sold the estate under conditions of sale which stated that the purchaser should in addition to the purchase-money pay for the timber according to a valuation. The tenant for life claimed, under the provisions for the settlement and under the Settled Land Act, 1882, s. 35, to be paid out of the purchase-money the value of the timber:—Held, that the amount of the valuation of the timber was an addition to the price which the purchaser agreed to pay for the estate, and must be treated as capital money payable to the trustees under s. 21 of the Settled Land Act, 1882, and that the claim by the tenant for life to be paid the sums asked for failed. *Llewellyn, In re, Llewellyn v. Williams*, 37 Ch. D. 317; 57 L. J., Ch. 316; 58 L. T. 152; 36 W. R. 347—Stirling, J.

b. Application of.

i. Costs and Incumbrances.

Payment of Costs.]—In 1881 a tenant for life contemplated a sale of the estate, but he was restrained from selling (either under the power in the will or under that contained in the Settled Land Act) by an injunction granted in an action brought by persons entitled in remainder. In 1884 the action was dismissed with costs. The tenant for life claimed to be paid the difference of his costs, as between party and party and

solicitor and client:—Held, that he was entitled, in defending the action which was dismissed with costs, to be paid his extra costs of so much of the action as related to the exercise of the powers contained in the Settled Land Act as incidental to the exercise of his power of sale under the provisions of the Settled Land Act, 1882. *Id.*

Costs irrecoverable from an insolvent company were ordered to be paid out of a fund in court to the tenant for life. *Navan and Kingscourt Railway, In re, Dyas, Ex parte*, 21 L. R., Ir. 369—M. R.

— **“Proceedings for Protection of Settled Land”—Parliamentary Proceedings.]**—Proceedings successfully prosecuted before the House of Lords Committee for Privileges to establish a claim to an earldom, the consequences of which were that the petitioner afterwards recovered estates which were subject to similar limitations, held to be “proceedings taken for the protection of settled land,” the costs of which the court directed to be paid out of property subject to the settlement, under s. 36 of the Settled Land Act, 1882. Form of order. *Carnac’s Will, In re* (30 Ch. D. 136), considered. *Aylesford’s (Earl) Settled Estates, In re*, 32 Ch. D. 162; 55 L. J., Ch. 523; 54 L. T. 414; 34 W. R. 410—V.-C. B.

Incumbrance affecting Inheritance.]—The proceeds of settled land sold by the tenant for life under the Settled Land Act, 1882, can be applied in paying off a debt secured by a mortgage of a long term. *Frewen, In re, Frewen v. James*, 32 Ch. D. 383; 57 L. J., Ch. 1052; 59 L. T. 131; 36 W. R. 840—North, J.

— **Sale of Heirlooms.]**—The money arising by the sale, on the application of the tenant for life with the sanction of the court, of chattels treated in a settlement as heirlooms, and so far as the rules of law and equity would permit annexed to the settled freehold land, may be applied in the discharge of incumbrances affecting the inheritance of the settled land, without keeping such incumbrances on foot for the benefit of the infant remainderman in whom the heirlooms would, if unsold, have vested absolutely on his attaining twenty-one. *Marlborough’s (Duke) Settlement, In re, Marlborough (Duke) v. Majoribanks*, 32 Ch. D. 1; 55 L. J., Ch. 339; 54 L. T. 914; 34 W. R. 377—C. A.

— **Mortgage affecting Part of Settled Estate.]**—Under sub-s. 2 of s. 21 of the Settled Land Act, the purchase-money could be applied in discharging a mortgage which affected part of the land sold and another mortgage which affected another part of the settled estate, and that it was not necessary that the other mortgage should be one affecting the whole of the settled estates. *Chaytor’s Settled Estate Act, In re*, 25 Ch. D. 651; 53 L. J., Ch. 312; 50 L. T. 88; 32 W. R. 517—Pearson, J.

— **Tithes subject to Annuity—Purchase with a view to discharge Incumbrance.]**—By a charter in the reign of James I. a grant was made of certain tithes issuing out of the rectory of St. Botolph Without, Aldgate, in the City of London, to persons named in the grant, their

heirs and assigns. In 1804, by a marriage settlement, it was provided that an annuity or clear yearly rentcharge of 640*l.* should issue and be payable out of the tithes in question for the term of 1,000 years. The tithes afterwards became vested in the trustees of a will, subject to the annuity created by the settlement. The trustees sold part of the tithes to certain railway companies for the sum of 30,670*l.* The tenant for life under the will contended that the trustees of the will might, under s. 33 of the Settled Land Act, 1882, invest or apply the 30,670*l.* as capital money arising under that act. By s. 21 of the same statute it is provided that capital money shall be applied (*inter alia*) in discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate subject of the settlement. The tenant for life asked that the trustees might be at liberty to apply the 30,670*l.* in the purchase of the annuity created by the settlement with a view to its discharge.—Held, that the tithes were unquestionably an incorporeal hereditament; and that, as s. 2 sub-s. (10) of the Settled Land Act, 1882, includes incorporeal hereditaments, such tithes as the tithes in question were included. Held, also, that the annuity created by a settlement was not a rent, because it did not issue out of a corporeal hereditament; but that it was an incumbrance on the tithes, and an incumbrance affecting the inheritance within the meaning of the Settled Land Act, 1882. Held, therefore, that the trustees might be at liberty to purchase the annuity with a view to its discharge. *Esdaille, In re, Esdaille v. Esdaille*, 54 L. T. 637—Chitty, J.

— **Land Drainage Charge.**—Where settled land is subject to a charge for land drainage improvements, repayable by instalments, money in the hands of the trustees of the settlement which is applicable as capital money arising under the Settled Land Act, 1882, may now, under the provisions of the Settled Land Acts (Amendment) Act, 1887, be from time to time applied in payment of such portions of the instalments as represent capital, so as to relieve the tenant for life from the payment thereof, but such money ought not to be applied in payment of such portions of the instalments as represent interest. *Sudeley's (Lord) Settled Estates, In re*, 37 Ch. D. 123; 57 L. J., Ch. 182; 58 L. T. 7; 36 W. R. 162—Kay, J.

Purchase money of settled lands may be applied, at the instance of the tenant for life, in redemption of rent charges payable for loans for the drainage and improvement of other lands settled upon the like uses. *Navan and Kingscourt Railway, In re, Dyas, Ex parte*, 21 L. R., Ir. 369—M. R.

Where a tenant for life of settled land has prior to the Settled Land Act, 1882, created charges for land drainage and improvements under the Improvement of Land Act, 1864, and other acts, which were repayable by instalments, he will not be entitled under the Settled Land Act, s. 21, sub-s. 2, to have these charges paid out of the capital of the settled estates so as to relieve him from the payment of the instalments. Trustees who purchase such charges will hold them upon trust to receive the instalments payable by the tenant for life, and to treat them as capital. *Knatchbull's Settled*

Estate, In re, 29 Ch. D. 588; 54 L. J., Ch. 1168; 53 L. T. 284; 33 W. R. 569—C. A.

ii. Improvements.

“**Silos.**”—The tenant for life of a settled estate after the passing of the Settled Land Act, constructed “silos” upon the estate, and proposed to construct others. He then applied to the court to allow payment for the work done out of capital trust money under s. 25 (xi.) of the act:—Held, that though a “silo” might come within the term “buildings” used in the act, yet, inasmuch as the construction of silos was in the nature of an experiment, the expenditure could not be sanctioned. *Broadwater Estate, In re*, 54 L. J., Ch. 1104; 53 L. T. 745; 33 W. R. 738—C. A.

Water Supply—Drainage—Rebuilding.—A tenant for life under a settlement containing a discretionary trust for sale of the settled estates, and also a power to sell certain settled heirlooms, asked leave of the court under s. 37 of the Settled Land Act, 1882, that he might be authorised to sell part of the settled estates, and also a specified portion of the heirlooms; that the money might be paid to the trustees, and that such part as might be necessary might be applied by them in paying for certain improvements, consisting of (1) a larger and better supply of water to a mansion-house; (2) a new and improved system of drainage of the mansion-house; (3) rebuilding of the stables, which were out of repair; (4) the building of an agent's house; and (5) the building of two cottages. The trustees submitted that the proposed improvements (except the cottages) were not within the 25th section of the act of 1882; and, that even if they were, the court would not supersede the power of the trustees by giving leave to the tenant for life to sell either the estate or the heirlooms:—Held, that the proposed outlay was all within s. 25 of the Settled Land Act, 1882; and would have been authorised without the statute; and leave given to the tenant for life to sell both the settled estates and the heirlooms, and for the application of the proceeds as prayed. *Houghton's Estate, In re, or Cholmondeley's (Marquis) Settled Estate, In re*, 30 Ch. D. 102; 55 L. J., Ch. 37; 53 L. T. 196; 33 W. R. 869—V.-C. B.

Extra Expenditure—Scheme—General Approval of Trustees.—In carrying out a scheme, which has been duly approved by the trustees, for improvements of permanent benefit to the settled estate, extra expenditure, not included in the contract forming part of the scheme submitted to the trustees, may be charged on capital moneys part of the settled estate in the hands of the trustees, where such extra expenditure is incidental to and has properly been incurred in a due execution of the scheme, and where the approval of the trustees has been general, and not limited to the particular amount mentioned in the contract. *Bulwer Lytton's Will, In re, Knebworth Settled Estates, In re*, 38 Ch. D. 20; 57 L. J., Ch. 340; 59 L. T. 12; 36 W. R. 420—C. A.

Approval of Scheme by Trustees before work commenced.—In order that the court may

sanction the expenditure of "capital money" under the Settled Land Act, in payment of the cost of permanent improvements to the settled estate, a scheme for the proposed works must be submitted by the tenant for life to the trustees, before the works are commenced. If the tenant for life executes the works at his own expense, without first submitting a scheme to the trustees and obtaining their approval, the court cannot then authorise the repayment of the cost out of "capital money." Whether the expense of improvements on lands which have been sold, and so are no longer comprised in the settlement, can be afterwards paid out of capital money, *quære. Hotchkin's Settled Estates, In re*, 35 Ch. D. 41; 56 L. J., Ch. 445; 56 L. T. 244; 35 W. R. 463—C. A.

Whether the court had power to sanction the payment for past expenditure, *quære. Broadwater Estate, In re*, 54 L. J., Ch. 1104; 53 L. T. 745; 33 W. R. 738—C. A.

Appearance by Trustees on Application.]—The court will not hear counsel for the trustees of a settlement in support of an application by the tenant for life when his interest is opposed to those of the remaindermen, it being the duty of the trustees to act as a check upon him. *Hotchkin's Settled Estates, In re*, *supra*. Per North, J.

On such an application, the trustees should appear separately. *Broadwater Estate, In re*, *supra*.

Right of Tenant for Life—Discretion.]—A tenant for life of settled lands is not deprived of the right of requiring capital moneys arising under the settlement to be applied in payment for permanent improvements by reason of the trustees having powers under which they might make the improvements themselves and pay for them out of the rents and profits of the settled property. The fact that the tenant for life will derive a benefit from the exercise of any power under the Settled Land Act is not in itself sufficient to prevent him from exercising the honest discretion required of him by s. 53 of the act. *Stamford's (Lord) Estate, In re*, 56 L. T. 484—Stirling, J.

Repairs and Improvements—Income or Capital.]—Lands were devised in 1861 to trustees during the lives of certain tenants for life, in trust to receive the rents and manage the estate with the powers of absolute owners. An annuity was directed to be paid to the tenant for life in possession out of the rents, and the surplus rents were to be laid out in the purchase of real estates, or accumulated for a period of twenty-one years from testator's death, and the income of the accumulations paid to the tenant for life; from the expiration of that period the whole of the surplus rents yearly accruing to be paid to the tenant for life in possession, and also the income of the accumulated surplus. The period of twenty-one years from testator's death expired in January, 1885. The trustees named in the will disclaimed, and the property had since been managed by a receiver, appointed by the court. The surplus rents accumulated during the twenty-one years amounted to 37,000*l*. Repairs and improvements amounting to between 4,000*l*. and 5,000*l*. were required to be made on the settled property:—Held, that such of the pro-

posed works as were in the nature of improvements within the description contained in s. 25 of the Settled Land Act, 1882, should be provided for out of the 37,000*l*., which was capital money within the act, and that those which were merely repairs must be paid for out of the income of the property. *Clarke v. Thornton*, 35 Ch. D. 307; 56 L. J., Ch. 302; 56 L. T. 294; 35 W. R. 603—Chitty, J.

iii. In Other Cases.

Transfer of Funds to Trustees of Settlement.]

—Lands in settlement having been purchased compulsorily under statutory powers, an order was made to transfer the funds in court representing the purchase-money to the trustees of the settlement. *Rathmines Drainage Act, In re*, 15 L. R., Ir. 576—M. R.

Option of Tenant for Life—Power of Trustees to give Receipts.]

—In 1859 a suit was instituted for the administration of the estate of a testator, who had devised land in strict settlement. In 1886 the tenant for life sold the land under the provisions of the Settled Land Act. Trustees had previously been appointed by the court for the purposes of the act. The purchaser refused to complete his contract, unless the purchase-money was paid into court, and an order was made on his application, with the consent of the tenant for life, giving him liberty to pay it in, and it was paid in accordingly:—Held, that by consenting to the order for payment of the purchase-money into court, the tenant for life had exercised the option given to him by sub-s. 1 of s. 22 of the act, of having the money paid either to the trustees of the settlement or into court, and that the money could not, therefore, be paid out to the trustees, but must remain in court, and be invested or applied under the direction of the court. Semble, that the power to give receipts, which is conferred on trustees by s. 40 of the act, extends to trustees appointed by the court under s. 38. *Cookes v. Cookes*, 34 Ch. D. 498; 56 L. J., Ch. 397; 56 L. T. 159; 35 W. R. 402—North, J.

Funds in Court—Interim Investment.]

—Lands belonging absolutely to a charity were taken by a public body, and the purchase-money paid into court under the Lands Clauses Act:—Held, that the purchase-money could be dealt with under the provisions of the 32nd section of the Settled Land Act, 1882, as "money liable to be laid out in the purchase of land to be made subject to a settlement." *Byron's Charity, In re*, 23 Ch. D. 171; 53 L. J., Ch. 152; 48 L. T. 515; 31 W. R. 517—Fry, J.

Sale of Reversion on a Lease—Application of Income.]

—S. 34 of the Settled Land Act, 1882, and s. 74 of the Lands Clauses Consolidation Act, 1845, are similar enactments, so that where the facts are similar decisions on s. 74 are authorities on s. 34. As between tenant for life and remainderman, where lands subject to a beneficial lease are sold under the Settled Land Act, 1882, the tenant for life will, during the unexpired period of the term, be entitled to so much only of the income of the invested purchase-moneys as equals the rents under the lease, and the rest of that income must be accumulated

and invested for the benefit of the inheritance until the date when the lease would have expired. *Cottrell v. Cottrell*, 28 Ch. D. 628; 54 L. J., Ch. 417; 52 L. T. 486; 33 W. R. 361—Kay, J.

Tenant in Tail restrained from Alienation—Payment out to Trustees.—Where funds of large amount were in court, representing the proceeds of sale of settled lands which were vested in a tenant in tail who was restrained by statute from alienating, the funds were, on the application of the tenant in tail, ordered to be paid out to trustees appointed for the purposes of the Settled Land Acts, 1882 and 1884; but the court declined to direct the trustees to give notice of any intended investments to the tenant in tail next in remainder. *Bolton Estates Act, In re*, 52 L. T. 728—Kay, J.

Payment of Money out of Court—Appointment of Trustees.—Where a testator's daughter was beneficial tenant for life of a fund paid into court upon the compulsory purchase of the testator's property, the daughter being one of the two trustees of the will, and both trustees being desirous of regaining their trusts, and there being no power of sale in the will, the court appointed two new trustees of the settlement effected by the will for the purposes of the Settled Land Act, 1882, and ordered the fund to be paid out to such trustees, to be held by them upon the trusts of the will. *Wright's Trusts, In re*, 24 Ch. D. 662; 53 L. J., Ch. 139—North, J.

A testator devised freehold property to trustees in trust for his grandson for life, and then for his issue in tail. There were four trustees of the will, and the testator's grandson was one of such trustees. The will contained no power of sale. Shortly after the testator's death a portion of the property comprised in the will was purchased by a railway company under their powers, and the money was paid into court. Upon petition for payment of the money out of court, an order was made appointing three of the trustees of the will, omitting the testator's grandson (the tenant for life), to be trustees of the settlement effected by the will for the purposes of the Settled Land Act, 1882; and the fund was ordered to be paid out to such three trustees to be held by them upon the trusts of the will. And it appearing that the trustees of the will had advanced a large sum of money on mortgage, including, by anticipation, a sum of money equivalent to the fund in court—it was ordered that the three trustees appointed by the court be at liberty to pay the fund to the four trustees of the will upon the execution by them of a declaration of trust in favour of the three trustees of so much of the principal sum secured by the mortgage as should be equivalent to the proceeds of the fund ordered to be paid out of court. *Harrop's Trusts, In re*, 24 Ch. D. 717; 53 L. J., Ch. 137; 48 L. T. 937—Pearson, J.

— **Settled to such uses as A. and B. should Appoint—Execution of Appointment not required.**—Lands settled to A. for life with remainder to B. in tail were sold under the Settled Estates Act, 1877, the purchase-money was paid into court and invested, and the dividends ordered to be paid to A. for life. A. and B. executed a disentailing assurance assigning the money in court to a trustee upon such trusts

as they should appoint, and discharging it of all trusts for reinvestment in land. A. and B. petitioned for the payment out of the fund to them. They had not executed an appointment to themselves:—Held, that the money might be paid out without requiring them to execute any such appointment. *Winstanley's Settled Estates, In re*, 54 L. T. 840—North, J.

Transmission of Proceeds of Sale by Trustees to America.—L. was entitled to a share of certain land in Wales, and by his will he devised the interest on the principal of all money received by his executors from Wales to his wife for life, and after her death, then his son was to have the whole of the money on attaining twenty-one. L. died domiciled in America, and his wife and son (who was a minor) were resident there. Trustees were appointed under the Settled Land Act of the share of L. in the land, and with the consent of the other beneficiaries it was sold. Application was made that L.'s share might be transmitted to his executors in America to be re-invested there:—Held, that the court had no power to allow the money to be sent to America, and that, if necessary, trustees must be appointed under the act to receive it in that country. *Lloyd, In re, Edwards v. Lloyd*, 54 L. T. 643—Pearson, J.

SEWERS.

In Metropolis.—See METROPOLIS.

In other Places.—See HEALTH.

Courts of—Presentments at.—See SEA.

SEXTON.

See ECCLESIASTICAL LAW.

SHARES.

See COMPANY.

SHERIFF.

1. *Duties and Liabilities*, 1640.
2. *Fees and Costs*, 1643.
3. *Interpleader* by.—See INTERPLEADER.
4. *What may be taken in Execution, &c.*—See EXECUTION.

1. DUTIES AND LIABILITIES.

Executing Writ of Attachment.—Where a writ of attachment has issued against a party

to an action for contempt of court in non-compliance with an order for the delivery over of deeds and documents, the officer charged with the execution of the writ may break open the outer door of the house in order to execute it. *Harvey v. Harvey*, 26 Ch. 644; 51 L. T. 508; 33 W. R. 76; 48 J. P. 468—Chitty, J.

Several Writs of Execution.—The duty of a sheriff who has several writs of execution to execute is to execute first that writ which is first delivered to him; and when he has sold enough to satisfy that writ, to sell under the next in order. Therefore, if the proceeds of the sale of the goods of a debtor are not enough to satisfy the earlier writs in the hands of the sheriff, there can be no sale under the subsequent writs. *Crosthwaite, Ex parte, Pearce, In re*, 14 Q. B. D. 966; 54 L. J., Q. B. 316; 52 L. T. 518; 33 W. R. 614; 2 M. B. R. 105—Cave, J.

Setting aside Sale—Plaintiff purchasing for Nominal Consideration.—The defendant's chattel interest in a farm of land was put up for sale under a fi. fa. at the suit of the landlord, who was the execution creditor. The sale was fully advertised, and, after two adjournments for want of bidders, the solicitor for the plaintiff, who was the only bidder at the third sale, was declared the purchaser for 1l. The interest in the farm was admittedly of value, but in the absence of collusive or improper conduct by the sheriff, the court refused to set aside the sale. *Cramer v. Murphy*, 20 L. R., Ir. 572—Q. B. D.

Removal of Goods for Sale.—Semble, a sheriff acts improvidently in removing goods for sale from the judgment debtor's establishment without his assent or other sufficient grounds. *Purcell, In re*, 13 L. R., Ir. 489—Miller, J.

Withdrawal—Power to Re-enter.—Where the sheriff has entered and then withdrawn his writ in consequence of an arrangement having been come to between the execution creditor and the execution debtor, the sheriff cannot re-enter again without fresh instructions from the execution creditor. *Shaw v. Kirby*, 52 J. P. 182—Huddleston, B.

— **Second Writ by different Judgment Creditor.**—If a second execution creditor levies a writ at a date subsequent to the first execution creditor's levy and anticipates the first execution creditor in consequence of such arrangement as aforesaid, there is no duty cast upon the sheriff to report the fact of such second writ to the first execution creditor. *Id.*

— **Seizure of Equity of Redemption.**—Where goods seized in execution by a sheriff under a fi. fa. have been previously assigned by the execution debtor to a third person as security for a debt, the sheriff is not bound to interplead and thereby enable proceedings to be taken for an order to sell being made by a judge under s. 13 of the Common Law Procedure Act, 1860, but is at liberty to withdraw, though the value of the goods seized exceed the sum secured by the bill of sale, and the execution debtor therefore has an equity of redemption which is

valuable. *Scarlett v. Hanson*, 12 Q. B. D. 213; 53 L. J., Q. B. 62; 50 L. T. 75; 32 W. R. 310—C. A.

Notice of Landlord's Claim for Rent.—There is no legal obligation upon a sheriff to give an execution creditor notice of a landlord's claim for rent. *Davidson v. Allen*, 20 L. R., Ir. 16—Q. B. D.

Non-Execution of Process—Same Under-Sheriff Acting under Successive Sheriffs.—In November, 1883, while D. was high sheriff of the county of K., civil bill decrees for money demands were delivered to his sub-sheriff, L., for execution in February, 1884. The solicitor for the plaintiff in the decrees wrote to L., complaining of their non-execution, and by letter, dated the 18th of that month, L. wrote in reply, stating that he had been unable to levy the amounts, and asking for information as to the goods of the defendant which the plaintiff alleged were available. On the 21st February, H. succeeded D. as high sheriff, and re-appointed L. sub-sheriff, who retained the decrees until July, when he returned them unexecuted. They were in force until June. It was admitted that after H.'s appointment the defendants had sufficient goods from which the amounts of the decrees might have been levied:—Held, that H. was liable in an action for negligence for not having executed the decrees; that, having regard to the fact that L. continued in office as sub-sheriff, it was immaterial that no list had been made if the decrees in question were more than two months' old; that the measure of damages was the amount of the decrees. *Simmons v. Henchy*, 16 L. R., Ir. 467—C. P. D.

Under-sheriff—Liability of, for Proceeds of Execution—Death of Sheriff—Vacancy of Shrievalty.—Where an under-sheriff (since deceased) acting as sheriff during the vacancy of the shrievalty under 3 Geo. 1, c. 15, s. 8. wrongfully retained the proceeds of an execution:—Held, that an action for money had and received was maintainable against the executor of the under-sheriff by the execution creditors to recover the sum so wrongfully retained. [See now the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 25.] *Gloucestershire Banking Company v. Edwards*, 20 Q. B. D. 107; 57 L. J., Q. B. 61; 58 L. T. 463; 36 W. R. 116—C. A.

Liability for Removal of Goods after Claim for Rent.—See LANDLORD AND TENANT, IV. 1.

Liability for Damage to Goods seized.—A sheriff is not liable for damage to goods which he has seized under a fi. fa. caused by a mob breaking in and injuring the goods, if he has used reasonable care and diligence in protecting them. *Willis v. Combe*, 1 C. & E. 353—Stephen, J.

Semble, if a sheriff is let into possession of goods, of which a receiver, appointed by the Court of Bankruptcy, is already in possession, he will not be liable in damages for not protecting the goods against third parties. *Id.*

Liability for Seizure—Interpleader Order Rescinded.—Where an interpleader order provided that no action should be brought against the sheriff, and the order was subsequently rescinded

owing to the default of the execution creditor to return the issue :—Held, that the claimant had no cause of action against the sheriff for the original seizure. *Martin v. Tritton*, 1 C. & E. 226—Lopes, J.

Liability for Non-return.]—A sheriff cannot be held liable for the non-return of a writ of *fi. fa.* until he has been called upon and has neglected to make a return, and such neglect as will give a cause of action must be specifically alleged in the statement of claim. *Shaw v. Kirby*, 52 J. P. 182—Huddleston, B.

False Return—Levy—Cheque from Debtor—Performance of Condition.]—After the death, in May, 1880, of A., a shopkeeper, his daughter B. carried on the business. Judgment was obtained against B. personally, and a *fi. fa.* issued thereon and delivered to the sheriff in March, 1881. At this time B. was in possession of shop goods of considerable value, some of which had been the property of A. in his lifetime, and the rest were purchased out of the proceeds of sale of other goods of A. The sheriff, having required and obtained an indemnity from the execution creditor before seizure, received from the execution debtor a cheque for 98*l.*, which, according to the evidence of some of the witnesses on behalf of the sheriff, was given to him as a security that the goods would be forthcoming in a short time, with the view of awaiting the result of certain proceedings in the Chancery Division then pending. The sheriff subsequently made a return of *nulla bona*, and the execution creditor having brought an action against him for a false return, and for money had and received, he repaid the amount of the cheque to the execution debtor, having retained it for a period of about ten months; and at the trial claimed to have a verdict directed in his favour on the grounds that the goods were not the goods of B., and that the giving of the cheque under the circumstances was not a levy. No evidence was given of any testamentary disposition by A. The judge having refused to give such direction, and a verdict having been found for the plaintiff :—Held, that assuming the cheque to have been given conditionally, its retention for so considerable a period by the sheriff was evidence from which the jury were at liberty to presume that the condition upon which it was to be returned to the execution debtor was not performed. *Kelly v. Browne*, 12 L. R., Ir. 348—Ex. D.

Return—Fi. Fa.—Special Bailiff.]—When a sheriff has appointed a special bailiff to execute a writ of *fi. fa.* at the request and peril of the plaintiff, he should move to set aside any rule subsequently obtained by the plaintiff upon him to return the writ. If instead of doing so he returns that he appointed a special bailiff, to whom he refers as to the execution of the writ, the return may be set aside, even on motion by the plaintiff. *Tait v. Mitchell*, 22 L. R., Ir. 327—Ex. D.

2. FEES AND COSTS.

"Costs of Execution"—Expenses of Reaping Growing Crops.]—A sheriff, having taken in execution standing corn, expended money in

having the same reaped, threshed, and dressed before sale. No authority to do this was given him either by the execution debtor or creditor, but it was done by the sheriff for the purpose of increasing, and did in fact increase, the selling value of the corn :—Held, that the sheriff had no power to incur this expense, and therefore was not entitled to the same as costs of the execution under s. 46 of the Bankruptcy Act, 1883. *Conder, Ex parte, Woodham, In re*, 20 Q. B. D. 40; 57 L. J., Q. B. 46; 58 L. T. 116; 36 W. R. 526—D.

—Poundage.]—When the bankruptcy of a judgment debtor supervenes after seizure, but before sale, by the sheriff under a writ of *fi. fa.*, the sheriff is not entitled to poundage under the words "costs of execution" in sub-s. 1 of s. 46 of the Bankruptcy Act, 1883. *Ludmore or Ludford, In re*, 13 Q. B. D. 415; 53 L. J., Q. B. 418; 51 L. T. 240; 33 W. R. 152; 1 M. B. R. 131—Cave, J.

Fees—Sale under fi. fa. partially abortive—Part of Goods Sold before Bankruptcy of Execution Debtor.]—A writ of *fi. fa.* for 283*l.* 4*s.* 1*d.* was delivered to a sheriff, under which he seized several musical instruments at the warehouse of P., the execution debtor, who was a pianoforte seller; and without receiving any directions from either P. or the execution creditor, but acting on his own responsibility, the sheriff without, as the court considered, sufficient grounds for doing so, removed the goods from P.'s premises to a sale mart situate close by, where a small part of them were sold by auction for 62*l.* 5*s.*, and in consequence of the insufficient bidding the sale of the remainder was adjourned. P. was adjudicated a bankrupt before the day to which the sale was adjourned. The sheriff claimed, as against P.'s assignees in bankruptcy, to retain out of the proceeds of the sale in his hands fees on the entire sum for which the execution was issued, together with the expenses of removing the goods to the sale mart and the hire of the mart :—Held, that the sheriff was only entitled to retain fees on the amount actually levied, and that the residue of his claim must be disallowed. *Purcell, In re*, 13 L. R., Ir. 489—Miller, J.

SHIPPING.

I. PASSENGER SHIPS, 1646.

II. BARGES, 1648.

III. OWNERS.

1. *Part Owners*, 1648.
2. *Managing Owners*, 1649.
3. *Actions of Restraint*, 1650.
4. *Liability for Necessaries*, 1651.

IV. MASTER AND SEAMAN.

1. *Master*, 1652.
2. *Seaman*, 1655.

V. SALE AND MORTGAGE

1. *Sale*, 1657.
2. *Mortgage*, 1657.

VI. BILLS OF LADING.

1. *Form of*, 1658.
2. *Effect of*, 1659.
3. *Exceptions from Liability*, 1660.
4. *Rights and Liabilities of Indorsees*, 1662.
5. *Sending with Bills of Exchange*, 1663.

VII. CHARTERPARTY.

1. *Stamping*, 1663.
2. *The Contract*, 1663.
3. *Exemptions from Liability*, 1667.

VIII. CARGO.

1. *Stowage*, 1668.
2. *Costs of Discharging — Dock Charges*, 1668.
3. *Actions for Loss and Non-delivery*, 1670.

IX. FREIGHT.

1. *When Payable*, 1673.
2. *To and by whom Payable*, 1673.
3. *Time for Payment*, 1673.
4. *Rate and Amount*, 1674.
5. *Lien*, 1674.

X. DEMURRAGE, 1675.

XI. PILOTAGE AND PILOTS.

1. *Exemptions from Employing*, 1678.
2. *Exemption of Owners from Liability*, 1679.
3. *Other Matters relating to*, 1681.

XII. COLLISION.

1. *On the High Seas.*
 - a. *Regulations Generally*, 1681.
 - b. *Lights*, 1683.
 - c. *Fog*, 1684.
 - d. *Vessels Crossing, Overtaking, and Meeting*, 1686.
 - e. *Probability of Risk*, 1688.
 - f. *Speed*, 1689.
 - g. *Narrow Channels*, 1689.
2. *In other Places.*
 - a. *Generally*, 1690.
 - b. *Danube*, 1690.
 - c. *Humber*, 1690.
 - d. *Mersey*, 1691.
 - e. *Tees*, 1691.
 - f. *Thames*, 1691.
 - g. *Tyne*, 1693.
3. *Duties after Collision*, 1693.
4. *Actions for Damage.*
 - a. *Generally*, 1694.
 - b. *What Recoverable*, 1698.
5. *Limitation of Liability.*
 - a. *In what Cases*, 1701.
 - b. *Practice*, 1701.

XIII. SALVAGE AND TOWAGE.

1. *Services entitling to Salvage*, 1703.
2. *Life Salvage*, 1704.
3. *Persons entitled to Salvage*, 1705.
4. *Rights of Salvors*, 1706.
5. *Salvage Agreements*, 1707.
6. *Right to Recover Salvage Expenses*, 1708.

7. *Amount Awardable.*

- a. *Principles on which Award made*, 1709.
- b. *Apportionment*, 1710.
- c. *Reviewing Award on Appeal*, 1711.
8. *Practice in Salvage Actions*, 1711.
9. *Agreements as to Towage*, 1712.
10. *Liability for Negligence in Towing*, 1713.

XIV. BOTTOMRY, 1714.

XV. AVERAGE, 1715.

XVI. DOCKS, HARBOURS, LIGHTHOUSES, AND WHARVES, 1717.

XVII. JURISDICTION.

1. *Admiralty Division*, 1719.
2. *County Courts*, 1720.
3. *Vice-Admiralty Courts*, 1721.

XVIII. PRACTICE.

1. *Writ and Pleadings*, 1721.
2. *Default Proceedings*, 1722.
3. *Stay and Transfer of Proceedings*, 1723.
4. *Inspection and Discovery*, 1724.
5. *Trial*, 1724.
6. *Evidence*, 1724.
7. *Damages*, 1725.
8. *Sale of Ship*, 1726.
9. *Warrant of Arrest*, 1727.
10. *Registrar's Report*, 1727.
11. *Costs*, 1728.
12. *Appeals*, 1729.

XIX. WRECKS, 1730.

XX. INQUIRIES BY BOARD OF TRADE, 1730.

XXI. DETENTION OF SHIPS BY BOARD OF TRADE, 1730.

I. PASSENGER SHIPS.

Custom as to Right to Carry—Charterparty.]

A charterparty, not amounting to a demise of the ship, provided for the carriage of a full and complete cargo of lawful produce and merchandise for payment of a lump freight, but was silent as to the use to which the passengers' cabins might be put:—Held, that the charterers were not entitled to carry passengers in the cabins. *Shaw v. Aitken*, 1 C. & E. 195—Denman, J.

No custom exists entitling the charterer under the above circumstances to carry passengers, or entitling the shipowner to have passengers carried for his benefit. *Id.*

Loss of Life—Both Ships to blame—Claim by Person not responsible for Negligence—Admiralty Rule as to Damages.]—A passenger on board the "Bushire" and one of the crew lost their lives by drowning in consequence of a collision with the "Bernina." Both vessels were to blame, but neither of the deceased had anything to do with the negligent navigation of the "Bushire":—Held, that their representatives could maintain actions under Lord Campbell's Act against the owners of the "Bernina."

and could recover the whole of the damages; s. 25, sub-s. 9, of the Judicature Act, 1873, not being applicable to such actions. *Thorogood v. Bryan* (8 C. B. 115) and *Armstrong v. Lancashire and Yorkshire Railway* (10 L. R. Ex. 47) overruled. *Mills v. Armstrong. The Bermina*, 13 App. Cas. 1; 57 L. J., P. 65; 58 L. T. 423; 36 W. R. 870; 52 J. P. 212; 6 Asp. M. C. 257—H. L. (B.)

Liability for Injury and Death caused by Collision at Sea—Meaning of Words “Loss or Damage”—Passenger’s Ticket.—The personal representatives of a deceased man cannot maintain an action under Lord Campbell’s Act (9 & 10 Vict. c. 93), where the deceased, if he had survived, would not have been entitled to recover. The defendants, a steamship company, issued a passenger’s ticket, which contained amongst others, the following condition:—“The company will not be responsible for any loss, damage, or detention of luggage under any circumstances. . . . The company will not be responsible for the maintenance of passengers, or for their loss of time or any consequence arising therefrom . . . nor for any delay arising out of accidents; nor from any loss or damage arising from the perils of the sea, or from machinery, boilers, or steam, or from any act, neglect or default whatsoever of the pilot, master or mariner:”—Held, that the words “loss or damage arising from the perils of the sea,” as contained in the above conditions, exempted the defendants from liability for injury or loss of life to a passenger occasioned on the voyage by the negligence of the defendants’ servants. *Haigh v. Royal Mail Steam Packet Company*, 52 L. J., Q. B. 640; 49 L. T. 802; 48 J. P. 230; 5 Asp. M. C. 189—C. A.

Conveyance of Passengers by Steamer—Certificate—Persons carried Gratuitously.—The Merchant Shipping Act, 1854, s. 303, defines “passenger” as including any person carried in a steamship other than the master and crew, and the owner, his family and servants; and “passenger steamer” as including every British steamship carrying passengers between places in the United Kingdom; and in s. 318 provides that no passenger steamer shall proceed to sea, or upon any voyage and excursion with passengers on board, without a certificate as therein prescribed, and a penalty is imposed for offending against the section. The Merchant Shipping Act of 1876, exempts from these provisions steamships carrying passengers not exceeding twelve in number. The owner of a tug steamer called the “Flying Hawk,” was summoned to answer a complaint that a certain passenger steamship, called the “Flying Hawk,” of which he was owner, went to sea on the 21st July, 1882, from Dublin, with more than twelve passengers on board, without any Board of Trade certificate, and without having a duplicate of such certificate put up in some conspicuous part of the ship, contrary to the provisions of the 17 & 18 Vict. c. 104, s. 318, and the 39 & 40 Vict. c. 80, s. 16. The persons on board the steamer on the occasion in question, other than the master and crew, considerably exceeded twelve in number, and had been invited for a pleasure trip in respect of which none of them paid anything. The magistrate having dismissed the summons; on a case stated:—Held, that the magistrate, if he believed the evidence,

should have convicted the defendant. *Kiddle v. Kidston*, 14 L. R., Ir. 1; 15 Cox, C. C. 379—Q. B. D.

County Court—Admiralty Jurisdiction—Carriage of Passengers’ Luggage.—Passengers’ luggage carried on board a ship is not “goods” within the meaning of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and consequently the Act does not confer jurisdiction to try a claim arising out of the loss of such luggage, as a court having Admiralty jurisdiction. *Reg. v. City of London Court (Judge)*, 12 Q. B. D. 115; 53 L. J., Q. B. 28; 51 L. T. 197; 32 W. R. 291; 5 Asp. M. C. 283—D.

II. BARGES.

Navigation—Watermen’s Act.—Under the Thames Conservancy and Watermen’s Acts, and bye-laws thereunder, if a barge under weigh exceeds 50 tons, there must be two qualified licensed watermen on board, and one is not sufficient though assisted by another unqualified man. *Perkins v. Gingell*, 50 J. P. 277—D.

Assignment of—Whether Registration required.—See *Gapp v. Bond*, post, col. 1658.

III. OWNERS.

1. PART-OWNERS.

Jurisdiction—Admiralty Court Act, 1861.—Quære, whether s. 8. of the Admiralty Court Act, 1861, giving the Admiralty Court jurisdiction to decide questions between co-owners, is not confined to questions between registered co-owners. *The Bonnie Kate*, 57 L. T. 203; 6 Asp. M. C. 149—Butt, J.

Power of Sale by Court.—The court will not exercise the power of sale conferred on it by 24 Vict. c. 10, s. 8 (2), by ordering the sale of a ship, unless a part owner—whether he be the owner of a minority or majority of shares—makes out a very strong case. Continued and embittered disagreements between two part owners were held not to constitute sufficient reason for the interference of the court. *The Marion*, 10 P. D. 4; 54 L. J., P. 8; 51 L. T. 906; 33 W. R. 432; 5 Asp. M. C. 339—Butt, J.

Transfer of Share—Bill of Sale.—The managing owners of the steamship “B. K.” in 1882 agreed to sell the defendant V. one sixty-fourth share in the “B. K.,” for which he gave them a bill of exchange for 156*l.*, and received from them a receipt for the same as “being one sixty-fourth share in the s.s. ‘B. K.’” In 1883 the managing owners sent V. 8*l.* in respect of profits on his share, and subsequently sent him a statement of accounts. No bill of sale was ever executed by the managing owners, and it appeared that their shares in the “B. K.” were mortgaged at the time of the sale to V., and that subsequently they never were in a position to redeem them. Certain of the owners having paid losses incidental to the working of the ship, now sued V. as a co-owner for his proportion of the losses:—Held, that, notwithstanding the

receipt by V. of the 8th., he was not, either in law or equity, a co-owner, that the managing owners had no authority to pledge his credit, and that therefore he was not liable. *The Bonnie Kate*, *infra*.

Charterparty when Binding.—In an action of restraint it appeared that the plaintiffs, a minority of the co-owners, had given notice to the managing owner that they declined to be bound by any new charterparty. The managing owner, who had been appointed manager with the sanction of the plaintiffs, had on the day when the above notice was given to him, concluded an arrangement for a charterparty, and had himself signed the charterparty, though it was not signed by the charterers till some days afterwards:—Held, that the charterparty was binding on the plaintiffs. *The Vindobala*, 13 P. D. 42; 57 L. J., P. 37; 58 L. T. 353—Butt, J. Reversed on the facts, 14 P. D. 50; 58 L. J., P. 51; 60 L. T. 657; 37 W. R. 409—C. A.

Liability of Purchaser.—A purchaser of shares in a ship, which at the time of the sale is on a voyage, is liable for the expenses of this voyage, and of the vessel's outfit for it, and is entitled to a share of the freight. *Ib*.

Charter.—A vessel was chartered for twelve months, and during the currency of the charter the charterers made default in certain payments and the charter lapsed. The vessel was rechartered by a voyage charter from K. to England. During the performance of this voyage the defendant purchased a share in this vessel:—Held, on objection to the registrar's report in a co-ownership action, that the defendant was not liable to bear any of the losses occasioned by the time charter. *The Meredith*, *infra*.

Liability of Trading Owners.—Part owners who do not dissent from the employment of a ship, and are aware that other part owners have dissented, are liable to bear the expenses, and are entitled to receive the profits of the ship in the proportion which their shares bear to the number of shares in the ship, after the deduction of the shares of the dissentient part owners. *The Vindobala*, *supra*.

2. MANAGING OWNERS.

Remuneration.—A part owner being the manager of a ship, is entitled to remuneration for his services, but there is no fixed rate applicable. *The Meredith*, or *White v. Ditchfield*, 10 P. D. 69; 52 L. T. 520; 5 Asp. M. C. 400—Butt, J.

Accounts—Reference—Report—Stay of Execution—Costs.—A managing owner, who had not delivered accounts for nine years, instituted a co-ownership action for settlement of accounts, and for payment of the balance found due to him, and claimed certain items in respect of materials supplied to the ship for which he had not paid, and for which the defendants were being sued in the Queen's Bench Division. The registrar in his report allowed the plaintiff these items. Upon application to confirm the report, and for judgment, the court decreed payment

of the amount found due by the registrar, but stayed execution until the defendants were protected against the claims in the Queen's Bench Division, and refused the plaintiff the costs of the action upon the ground of delay in rendering his accounts. *The Charles Jackson*, 52 L. T. 631; 5 Asp. M. C. 399—Butt, J.

Objection to Report.—Where an action is instituted in an Admiralty District Registry by part owners of a ship against the managing owner for an account, and the writ claims an account under Ord. III. r. 8, and an order for the filing of the accounts is made under Ord. XV. r. 1, and the account is proceeded with pursuant to order, and the district registrar reports thereon, such report is to be treated as the usual report in an Admiralty Court action, and if the defendant seeks to take objection thereto, he must do so according to the provisions of Ord. LVI. r. 11, otherwise the plaintiff will be entitled to judgment thereon. *Gowan v. Sprott*, 51 L. T. 266; 5 Asp. M. C. 288—Butt, J.

Objecting to—Extension of Time.—The court will not extend the time for objecting to the registrar's report in a co-ownership action without special grounds being shown by the party seeking to object. *Ib*.

Payment to—Misapplication by Him—Rights of Owner Paying.—Where a part-owner of a ship pays to the managing owner his contribution due upon the ship's accounts as agreed between the co-owners, the managing owner receives such contribution as agent for all the owners; and in the event of the managing owner misapplying such payment to his own use, and not paying the ship's accounts therewith, the contributing owner is entitled to be credited with the amount so paid, but all the owners, including himself, must make good the defalcations in proportion to their shares. *The Ida*, 55 L. T. 59; 6 Asp. M. C. 21—Butt, J. See also *The Dora Tully*, post, col. 1653.

Charges given by—Rights of Co-owners—Mortgagee.—See *The Faust*, post, col. 1658.

Authority of Master to Bind.—See *reft.*, post, col. 1652.

Duty as to Cargo on Failure of Consignee to take Delivery.—See *The Clan Macdonald*, post, col. 1669.

3. ACTIONS OF RESTRAINT.

Bail, who can obtain—Ship's Husband.—The plaintiff and all the other owners of a vessel appointed two persons as ship's husbands and managers by an agreement, which stated that they should be, and should at all times thereafter discharge the duties of, ship's husbands and managers of the said vessel and of agents for the owners, their executors and administrators. The agreement also gave the managers authority to perform all the usual duties of ship's husbands:—Held, that this agreement did not debar the plaintiff as owner of two sixty-fourth shares in the ship from obtaining

in an action of restraint bail from the other part owners in the value of his shares. *The England*, 12 P. D. 32; 56 L. J., P. 115; 56 L. T. 896; 55 W. R. 367; 6 Asp. M. C. 140—Hannen, P.

Bail Bond.—Where the defendants in an action of restraint have given a bond for the safe return of the ship they are still at liberty to dispute the plaintiff's right to bring the action, and the court, if satisfied that the plaintiffs have no such right, will set aside the bond. *The Keroula*, 11 P. D. 92; 55 L. J., P. 45; 55 L. T. 61; 35 W. R. 60; 6 Asp. M. C. 23—Hannen, P.

Release of Sureties.—In an action of restraint two sureties executed a bail bond for the safe return of the ship. No time was fixed in the bond at which the liability of the sureties should cease. After the bond had been in existence for nearly three years, and when the vessel was in this country, and the owners of the majority of shares were changed, the sureties applied to be released from the bond:—Held, that the application was reasonable, and the bond was ordered to be cancelled. *The Vivienne*, 12 P. D. 185; 56 L. J., P. 107; 57 L. T. 316; 36 W. R. 110; 6 Asp. M. C. 178—Butt, J.

How long it Continues—Second Action.—Where minority owners have instituted an action of restraint, claiming security for the safe return of the ship to a named port within the jurisdiction, and a bond is given by the defendants for that purpose, such bond remains in force until the ship returns to that port, and the plaintiffs are not entitled to institute another action for further security upon the ship's return to another port within the jurisdiction, and if such second action is instituted, it will be dismissed with costs. *The Regalia*, 51 L. T. 904; 5 Asp. M. C. 338—Butt, J.

Form.—In an action of restraint the bail bond should not be given to pay what may be adjudged against the defendant in an action, but simply for the appraised or agreed value of the plaintiff's shares, in case the ship does not return to the particular port named in the bond. *The Robert Dickinson*, 10 P. D. 15; 54 L. J., P. 5; 52 L. T. 55; 33 W. R. 400; 5 Asp. M. C. 341—Butt, J.

4. LIABILITY FOR NECESSARIES.

Lien for.—No maritime lien attaches to a ship in respect of costs or other necessities supplied to it. *Laws v. Smith*, or *The Rio Tinto*, 9 App. Cas. 356; 50 L. T. 461; 5 Asp. M. C. 224—P. C.

Action in rem—Time of Attachment of Claim.—The lien of the plaintiff in an action in rem under s. 4 of the Admiralty Court Act, 1861, takes effect from the moment of the arrest of the ship. Where, therefore, such an action was commenced against a vessel belonging to a limited company, and the company after a warrant of arrest had been served was ordered to be wound up:—Held, that the official liquidator had no claim to the proceeds of the vessel in the

hands of the court as against the plaintiff. *The Cella*, 13 P. D. 82; 57 L. J., P. 55; 59 L. T. 125; 36 W. R. 540; 6 Asp. M. C. 293—C. A.

Supplied to Foreign Vessel in English Port.—The statute 3 & 4 Vict. c. 65, s. 6, does not give a maritime lien in respect of necessities supplied to a foreign ship in an English port. *Northcote v. Heinrich Björn (Owners)*, 11 App. Cas. 270; 55 L. J., P. 80; 55 L. T. 66; 6 Asp. M. C. 1—H. L. (E.). Affirming 33 W. R. 719—C. A.

The plaintiffs advanced to the part-owner of a foreign ship then at Liverpool money for necessities for the ship. The part-owner having sold his interest in the ship to the defendants, the plaintiffs brought an action in rem for the amount of the advances:—Held, that the action could not be maintained. *Id.*

Priority—Mortgage Action.—A claim by the plaintiff in an action for necessities brought under s. 4 (or, semble, under s. 5) of the Admiralty Court Act, 1861, even though it includes wages paid to the ship's crew at the request of the owner, is not entitled to precedence of a mortgagee's claim. Semble, precedence might have been gained by obtaining prior permission from the court to make the payment. *The Lyons*, 57 L. T. 818; 6 Asp. M. C. 199—Butt, J.

IV. MASTER AND SEAMEN.

1. MASTER.

Duty as to Repair.—If a vessel after she has started on her voyage receive damage, the master, in considering what steps he shall take in regard to carrying on the cargo or first repairing the ship, is bound to consider not one individual interest, but the interests of all concerned; whether it be to return to his port of loading and repair, or repair at the nearest possible place before proceeding, or go on without repairing; but if it be in his power to effect the repairs without any great delay or expense to the interests intrusted to his charge, it is his duty to repair before proceeding. *The Rona*, 51 L. T. 28; 5 Asp. M. C. 259—D.

Authority to make Salvage Agreements.—*See The Renpor*, post, col. 1707.

Authority to make Towage Agreements.—*See Wellfield (Owners) v. Adamson*, post, col. 1712.

Liability of, Error in Date of Bill of Lading—Ship's Brokers.—The mere employment of ship's brokers at a foreign port to find a cargo for a ship and adjust the terms upon which it is carried does not give them implied power to relieve the master, when he signs bills of lading presented to him, from the duty of seeing that the dates of shipment are correctly stated in the bills. In breach of that duty the master is liable to his owners. *Stumore v. Breen*, 12 App. Cas. 698; 56 L. J., Q. B. 401—H. L. (E.).

Wages and Disbursements—Managing Owner,

Fraud of.]—A master on his appointment agreed with the managing owner that he, the master, should find the provisions for the officers and crew at a certain rate per day. The master subsequently agreed with the managing owner, who was also a ship's store dealer, that the managing owner should supply the provisions and should charge them against moneys of the master which he held in his hands. The managing owner, however, debited his co-owners with the costs of the provisions, and fraudulently applied the master's money to his own purposes:—Held, in an action in rem against the owners by the master to recover wages and disbursements, that the master was entitled to credit for such an amount in the settlement of his accounts with the owners, the fraudulent application of his money by the managing owner being a wrong done to the co-owners for which he was not responsible. *The Dora Tully*, 54 L. T. 467; 5 Asp. M. C. 550—Hannen, P.

— **Action in rem.]**—A master who has incurred liabilities in respect of necessities for the ship can maintain an action in rem for "disbursements," though he has made no payment in respect of such liabilities at the time the action is brought. *The Fevonia* (2 L. R., Adm. 65) and *The Fairport* (8 P. D. 48) approved; *The Chieftain* (Br. & L. 104) and *The Edwin* (Br. & L. 281) overruled. *The Sara*, infra.

— **Lien.]**—Under the Admiralty Court Act, 1861, s. 10, and the Merchant Shipping Act, 1854, s. 191, the master has a maritime lien on the ship for disbursements. *The Mary Ann* (1 L. R., Adm. 8) and *The Glentanner* (Swa. 415) approved. *The Sara*, 12 P. D. 158; 56 L. J., P. 160; 57 L. T. 328; 35 W. R. 826; 6 Asp. M. C. 163—C. A. Reversed 14 App. Cas. 209—H. L. (E.).

Quære, has a master under s. 10 of the Admiralty Court Act, 1861, a maritime lien for his wages and disbursements? *The Beeswing*, infra.

— **Priority of Lien.]**—Under the Admiralty Court Act, 1861, s. 6, the master of a ship has a maritime lien on it for disbursements, and his claim has priority over that of a purchaser. *The Mary Ann* (1 L. R., Adm. 8) followed. *The Ringdove*, 11 P. D. 120; 55 L. J., P. 56; 55 L. T. 552; 34 W. R. 744; 6 Asp. M. C. 28—Hannen, P.

— **Maritime Lien—Right against Ship-owners or Charterers—Authority.]**—Where a ship is chartered under a charter providing that the master shall be appointed by the charterers, that the owners are to provide and pay for all provisions and wages of captain and crew, and for the necessary equipment and efficient working of the ship, that the captain is to be dismissed by the owners if he fails to give satisfaction, and that the charterers shall provide and pay for all coals, pilotages, port charges, &c., the master is the servant of the shipowners, and hence he has a right in rem for his wages and such disbursements as are necessary for the navigation of the ship, and which the charterers had not by the provisions of the charterparty undertaken to pay; and semble, per Lord Esher, M.R., if the charterers had refused to make these disburse-

ments, and without them the ship could not be navigated, the master would be entitled to charge them against the shipowners. Semble, where the master is the servant of the charterers and not of the shipowners, he has no right against the owners in respect of wages and disbursements. *The Beeswing*, 53 L. T. 554; 5 Asp. M. C. 484—C. A.

By charterparty it was agreed that the owners of the ship should provide and pay for provisions and wages, and that the charterer should provide and pay for coals and other expenses. The master was to be appointed by and was to follow the instructions of the charterer. The master, with notice of the charterparty, ordered and made himself liable for provisions and coals for the vessel at a foreign port. These provisions and coals were necessary to enable the vessel to perform her voyage:—Held, in an action by the master against the vessel, that he was entitled to recover for the provisions but not for the coals, as by the terms of the charterparty he had no power to pledge the owner's credit in respect of them. *The Turgot*, 11 P. D. 21; 54 L. T. 276; 34 W. R. 552; 5 Asp. M. C. 548—Hannen, P.

— **Agreement with Owners—Loss of Lien—Non-payment.]**—A master, who after receiving a portion of his wages from the managing owners, elects to allow the balance to remain in their hands at interest, by so doing loses his lien, and cannot recover the balance in rem, but if he has had no opportunity of receiving his wages, or has been refused payment of them on demand, the mere fact of his allowing them to remain in the managing owner's hands after they become due will not deprive him of his remedy. *The Rainbow*, 53 L. T. 91; 5 Asp. M. C. 479—Butt, J.

Where shipowners, in answer to a claim for wages, plead an agreement between the managing owner and the plaintiff, that the plaintiff shall, instead of receiving his wages, allow it to remain in the hands of the managing owner, and has thereby foregone his right against the ship, the onus is upon the defendants to clearly prove that there was an express arrangement to that effect, before the court will deprive the plaintiff of his right. *Id.*

— **Wages—Misconduct—Mortgage.]**—A mortgagee took possession of a ship by putting a man on board and giving notice to the master. The latter, by order of the mortgagor, took the vessel to sea with the man in possession on board. In an action by the master for wages, and for compensation for wrongful dismissal, the registrar awarded him a sum as compensation, being the amount of wages payable for two months after the mortgagee took possession:—Held, on appeal, that the master had been guilty of misconduct in taking the vessel to sea, and could not as against the mortgagee be properly awarded any sum as compensation for wrongful dismissal. *The Fairport*, 10 P. D. 13; 54 L. J., P. 3; 52 L. T. 62; 33 W. R. 448; 5 Asp. M. C. 348—Butt, J.

— **Right to Wages up to Final Settlement of Claim.]**—A master is not entitled under the Merchant Seamen (Payment of Wages) Act, 1880, s. 4, to wages up to the final settlement of his claim. *The Arina*, 12 P. D. 118; 56 L. J., P.

57; 57 L. T. 121; 35 W. R. 654; 6 Asp. M. C. 141—D.

Right to Ten Days' Double Pay.—A master is not entitled under ss. 187 & 191 of the Merchant Shipping Act, 1854, to the double pay for delay in the payment of wages recoverable by "seamen" under the former section. *The Princess Helena* (Lush. 190) overruled. *Ib.*

Sufficient Cause.—Where, in an action for master's wages, it appears that, at the institution of the suit, accounts are outstanding between the owners and the plaintiff, and that the same have not been taken or settled, and that within two days of the institution of the suit the wages are paid, the owners have not refused to pay "without sufficient cause" within the meaning of s. 187 of the Merchant Shipping Act, 1854, and therefore the plaintiff is not entitled to recover ten days' double pay. *The Turgot*, supra.

Under the provisions of s. 187 of the Merchant Shipping Act, 1854, and s. 4 of the Merchant Shipping Act, 1880, as to non-payment of wages, the right to recover ten days' double pay and wages to the time of final settlement is not enforceable where there is a bona fide question as to liability. *The Rainbow*, 53 L. T. 91; 5 Asp. M. C. 479—Butt, J.

2. SEAMEN.

Expenses of Sending Home—Solicitor's Lien—Priority.—Solicitors for defendants in a salvage action against a foreign ship, who are entitled to a charge upon the ship, or the proceeds thereof, for their costs and expenses incurred in the preservation of the property, do not take priority of the claim of the foreign government, who, on the abandonment of the ship by her owners, are entitled, by the provisions of their code, to a lien upon the ship, or the proceeds, for the expenses of sending back the ship's crew to their own country. An Italian ship was brought into a British port by salvors. A salvage action having been instituted, the ship was sold by order of the court, and a sum was awarded out of the proceeds to the salvors. After payment of that sum, and the costs of the plaintiffs, a balance of 60*l.* 10*s.* 3*d.* remained in court. The defendants' solicitors had incurred expenses in pumping the ship, paying the marshal's possession fees, &c., and claimed a charging order upon the sum in court for such expenses, and sought payment out of such balance to them. The Italian Government, through their consul in this country, had sent home the crew of the ship, and had incurred expenses by so doing. By Italian law such last-mentioned expenses are a lien upon the ship. The Italian consul opposed payment out to the defendants' solicitors, and claimed priority for the lien of the Italian Government:—Held, that the Italian Government was entitled to such priority. *The Lavette*, 8 P. D. 209; 52 L. J., P. 81; 49 L. T. 411; 5 Asp. M. C. 151—Hannen, P.

Wages—Action for—Vice-Admiralty Jurisdiction.—*See The Ferret*, post, col. 1721.

"Dispute as to Liability"—Counterclaim.—A counterclaim in respect of a separate

cause of action is not "a reasonable dispute as to liability" within the meaning of s. 4, sub-s. 4, of the Merchant Seamen (Payment of Wages) Act, 1880. *Delarogue v. Owenholme Steamship Company*, 1 C. & E. 122—Stephen, J.

Priority of Claims.—The owners of a vessel who have recovered judgment against another ship in an action for damage by collision have a prior right against the proceeds of such ship to seamen who have recovered judgment against the same ship for wages earned before and after the collision. *The Elvin*, 8 P. D. 129; 52 L. J., P. 55; 49 L. T. 87; 31 W. R. 736; 5 Asp. M. C. 120—C. A.

Mariners have priority for wages over persons with a possessory common law lien up to the time of the beginning of such lien, and they are entitled to subsistence money from the time they leave the ship to the time they return home; this and the expenses of the journey home, and the costs of the action, rank with their prior wages. *The Immacolata Concezione*, 9 P. D. 37; 53 L. J., P. 19; 50 L. T. 539; 32 W. R. 705; 5 Asp. M. C. 208—Butt, J.

The lien of seamen for wages ranks before a claim in respect of payments for the towage of the ship from sea to an inland port, and the light dues and dock dues. *The Andolina*, 12 P. D. 1; 56 L. T. 171; 35 W. R. 336; 6 Asp. M. C. 62—Butt, J.

Lien for—Foreign-going Ship—Voyage not Proceeded upon.—Seamen engaged by the owners or their agent for a voyage upon a foreign-going ship, which does not proceed upon the voyage, are entitled to a lien for their wages upon the ship, and the proceeds of sale thereof, although the engagement of the seamen has not been in writing. *Great Eastern Steamship Company, In re, Williams' Claim*, 53 L. T. 594; 5 Asp. M. C. 511—Chitty, J.

Lien on Freight—Sub-Charter.—Seamen have a maritime lien on freight due from sub-charterers to the charterers of a ship, and can arrest the cargo for the purpose of enforcing such lien. *The Andolina*, supra.

Agreement for Service—Breach by Shipowner—Damages.—In an action by a seaman for breach of the stipulations in his agreement for service, the court, in addition to the compensation provided by the Merchant Shipping Act, 1854, can award general damages for breach of the agreement, and for hardships incurred by the seaman through the vessel being employed for purposes other than those contemplated by the agreement. *The Justitia*, 12 P. D. 145; 56 L. J., P. 111; 57 L. T. 816; 6 Asp. M. C. 198—Hannen, P.

Supplying, without Licence—Evidence—Onus of Proof of Licence on Defendant.—A defendant having been charged under the 147th section of the Merchant Shipping Act, 1854, with supplying a seaman to a merchant ship in the United Kingdom, he not being a person holding a licence from the Board of Trade for that purpose:—Held, on a case stated, that proof having been given of the supply of the seaman by the defendant, the onus of proving that he held a licence from the Board of Trade rested with him. *Reg. v. Johnston*, 55

L. T. 265; 51 J. P. 22; 16 Cox, C. C. 221; 6 Asp. M. C. 14—D.

Refusal to give Certificate of Discharge—Penalty.—An action will not lie for the refusal to give to a seaman the certificate of discharge directed to be given by the 172nd section of the Merchant Shipping Act, 1854, the only remedy for such refusal being the penalty provided by that section. *Vallance v. Falle*, 13 Q. B. D. 109; 53 L. J., Q. B. 459; 51 L. T. 158; 32 W. R. 769; 48 J. P. 519; 5 Asp. M. C. 280—D.

V. SALE AND MORTGAGE.

1. SALE.

Sale by Court—At instance of Part Owners.]
See The Marion, ante, col. 1648.

Sale of Ships by Court.]*—See post*, XVIII. 8.

2. MORTGAGE.

Action to Realise Security—Costs—Material Men.]*—Where a mortgagee brings an action to realise his security, and material men with a common law possessory lien on the ship intervene, and the ship, by order of the court, is sold, and the proceeds are only sufficient to satisfy the claim of the material men, the mortgagee is still entitled to be paid his taxed costs, up to the date of the sale, out of the proceeds of the sale of the ship in priority to the material men. The Sherbro*, 52 L. J., P. 28; 48 L. T. 767; 5 Asp. M. C. 88—Sir R. Phillimore.

Mortgagee in Possession—Right to Freight.]*—In October, 1883, W. mortgaged to the plaintiffs certain shares in a ship. Subsequently W., who was captain and ship's husband of the ship, incurred liabilities to the defendants for goods supplied to and disbursements made for the ship. In March, 1886, the ship was chartered for a voyage from Montreal to Liverpool, the freight being payable one-third at Quebec and two-thirds on right delivery of the cargo in Liverpool. Immediately upon arrival of the ship in Liverpool, the plaintiffs took possession and gave notice to the owners of the cargo to pay the freight to them. The defendants afterwards obtained judgment against W., and obtained garnishee orders upon the receivers of the cargo attaching the freight due from them:—Held, that the defendants had no right to the freight as against the plaintiffs. Japp v. Campbell*, 57 L. J., Q. B. 79—A. L. Smith, J.

Arrest—Release of Ship.]*—Where the registered mortgagees of a ship instituted an action in rem as mortgagees for possession, and the ship was arrested therein before the mortgage money became due, and without any default on the part of the mortgagor, the court, being of opinion upon the fact that the ship was not being dealt with so as to impair the mortgagee's security, ordered her release. The Blanche*, 58 L. T. 592; 6 Asp. M. C. 272—Butt, J.

Fishing Boats—Nets not "Appurtenances."]
—In a case where certain fishing boats had been mortgaged by the bankrupts, and the mortgagees

laid claim to the nets and the fishing gear which had been used on board the said vessels (but of which no particular nets were appropriated to or specially belonging to any particular vessel) on the ground that such nets and fishing gear came within the word "ship" in s. 72 of the Merchant Shipping Act, 1854, and the word "appurtenances" in the form of mortgage of a ship now in use and substituted for Form I, given in the Merchant Shipping Act, 1854:—Held, that in order to make a thing an appurtenance it must be specified; that in the present case there was no evidence to show that any specific nets were appropriated to any particular ship, but that they were used indiscriminately, and that they could not in consequence be considered "appurtenances" within the meaning of the act. Gould, Ex parte, Salmon, In re, 2 M. B. R. 137—D.

Master taking Man in Possession to Sea—Wages.]*—See The Fairport*, ante, col. 1654.

Mortgage Action—Charge by Managing Owner—Appointment of Receiver—Rights of Co-owners.]*—In an action in personam by a plaintiff claiming to be equitable mortgagee of the foreign ship F. and her freight, to secure a liability incurred by him in accepting bills of exchange which had been drawn by the managing owner, it appeared that the alleged mortgage was given to the plaintiff by the managing owner; that the plaintiff, when he accepted the bills, thought the managing owner was sole owner, and that it was subsequently sworn on affidavit that the managing owner was only a part owner, but it did not appear whether the amount of the bills was in fact expended on the purposes of the ship. The F. was in an English port under charter to carry cargo to a foreign port, when, on application by the plaintiff, an order was made appointing a receiver and authorising him to proceed with the ship to the foreign port and there receive the ship and all the freight due upon the voyage. The defendants appealed:—Held, that, even assuming the managing owner to be only a part owner, yet that, as it did not appear that the amount of the bills was not expended solely for the purposes of the ship, the court had authority to appoint a receiver to receive the whole of the freight, and that, in the circumstances, it was expedient that the order should stand. Burn v. Herlofson, or The Faust*, 56 L. T. 722; 6 Asp. M. C. 126—C. A.

Assignment of Ship or Vessel—Dumb Barge—Bill of Sale.]*—A dumb barge, propelled by oars, plying on the River Thames and carrying goods, wares, and merchandise (without passengers) is a vessel within the exception of the Bills of Sale Acts, 1878 and 1882, which excepts from registration as a bill of sale transfers or assignments of a ship or vessel or any share thereof. Gapp v. Bond*, 18 Q. B. D. 200; 56 L. J., Q. B. 438; 57 L. T. 437; 35 W. R. 683—C. A.

VI. BILLS OF LADING.

1. FORM OF.

Date of Shipment wrongly stated—Liability of Master—Authority of Ship's Brokers.]*—Ship's brokers at a foreign port have not, as*

such, authority to relieve the captain from the duty of seeing to the accuracy of statements contained in bills of lading which they present to him for signature. *Stumore v. Breen*, 12 App. Cas. 698; 56 L. J., Q. B. 401—H. L. (E.)

"Shipped on Board"—Goods Floated to Ship.]—Timber sleepers were floated alongside a vessel on rafts and there delivered to the mate, who gave a receipt for them:—Held, that the goods were not "shipped on board" within the meaning of a bill of lading. *Thorman v. Burt*, 1 C. & E. 596—Grove, J.

2. EFFECT OF.

Shipowner Estopped from denying that Contract made with him.]—A company owned a line of steamers called the "Monarch Line," running between New York and London. A. was in the habit of shipping goods on steamers running on this line. A. shipped goods on a steamer at New York and received a bill of lading made out in the ordinary form given by the company for goods shipped on their steamers, save that it had the words "extra steamer" added after the words "Monarch Line of Steamships." At London an overside release for the goods was signed and given by the company's agent to A., and the freight received by them from A.:—Held, in an action by A. against the company for non-delivery of the goods that the company were estopped from saying that the contract of shipment was not made with them. *Herman v. Royal Exchange Shipping Company*, 1 C. & E. 413—Huddleston, B. Affirmed in C. A.

Reading with Charterparty.]—See post, col. 1665.

Whether conclusive as to amount Shipped.]—A charterparty provided that the bill of lading should be conclusive evidence against the owners of the quantity of cargo received. The cargo (timber) was floated alongside the vessel, and receipts by the mate were then given for the same. Part of the cargo was lost by perils of the sea before shipment. The loss was notified by the master to the agent of the charterer, but, at the latter's request, the master was induced to sign bills of lading for the whole quantity received alongside:—Held, that the charterer had no claim against the shipowners in respect of the difference between the amount of cargo received alongside, and the amount shipped on board. *Pyman v. Burt*, 1 C. & E. 207—Hawkins, J.

The defendants chartered the plaintiff's ship for the carriage of a cargo of timber from Memel. The charterparty provided that the ship should there load from the agents of the said affreighters as customary a full cargo of fir sleepers, that the cargo should be brought to and taken from alongside the ship at merchants' risk and expense, and that the bill of lading should be conclusive evidence against the owners of the quantity of cargo received as stated therein. There was a custom at Memel, which, however, did not apply to charterparties in the form of the above-mentioned charterparty, that the captain should take delivery of the timber to be shipped at timber ponds up the river at some distance from the ship, the timber being then rafted down by fishermen to the ship, but being at the ship-

owner's risk during the process. The captain of the plaintiff's ship, on her arrival at Memel, not being aware of the provisions of the charterparty, allowed the mate to give receipts for the cargo at the timber ponds. Part of the timber included in such receipts was lost during the process of rafting the timber down to the ship, owing to the force of the current. The captain, having become aware of such loss and of the provisions of the charterparty, stated to the agent at Memel of the shippers, who had sold the timber to the defendants, that he did not see his way to signing clean bills of lading for the full quantity mentioned in the mate's receipt, a portion of the timber having been lost; but, on being told by such agent and a clerk of the ship's brokers that he was bound to sign clean bills of lading for the full quantity, he did so. The bills of lading stated that such quantity was shipped in good order and well conditioned to be delivered on payment of freight and all other conditions as per charterparty. In an action for balance of chartered freight the defendants counterclaimed in respect of short delivery of cargo:—Held, that the bills of lading estopped the plaintiff from denying that the full amount of cargo stated therein was shipped. *Lishman v. Christie*, 19 Q. B. D. 333; 56 L. J., Q. B. 538; 57 L. T. 552; 35 W. R. 744; 6 Asp. M. C. 186—C. A.

—Signature of Master's Agent.]—To an action for freight by a shipowner against the indorsees of the bill of lading, the defendants counterclaimed in respect of short delivery. All the goods that were actually put on board had been delivered to them; but the bill of lading acknowledged the receipt of a larger quantity. All the goods mentioned in the bill of lading had been floated alongside the ship in rafts, and mate's receipts given for them; but some of them were lost before they were shipped. The bill of lading was signed, "By authority of the captain, Wilh. Ganswindt as agent." Ganswindt was the ship's broker at the shipping port:—Held, that apart from the Bills of Lading Act, a bill of lading is not conclusive against a shipowner, and he is not liable in respect of any goods not actually shipped; and that in the present case, he was not liable under that act, as the bill of lading was not signed by or for him. *Thorman v. Burt*, 54 L. T. 349; 5 Asp. M. C. 563—C. A.

3. EXCEPTIONS FROM LIABILITY.

Perils of the Sea—Evidence to vary Terms—Deviation.]—The plaintiffs having purchased goods to be shipped from a foreign port on the terms that payment of the price was to be made in exchange for shipping documents, the bill of lading signed upon the shipment of the goods was, upon payment of the price, indorsed to them. The bill of lading, which contained the usual exception of sea perils, stated that the goods were shipped for delivery at Dunkirk on board a vessel lying at Fiume and bound for Dunkirk, with liberty to call at any ports in any order. The ship, instead of proceeding direct for Dunkirk, sailed for Glasgow, and was lost, with her cargo, off the mouth of the Clyde, by perils of the sea. In an action brought by the plaintiffs against the shipowners for non-delivery of the goods, evidence was given to show that the shippers of the goods, at the time when the bill of lading

was given, knew that the vessel was intended to proceed via Glasgow:—Held, that such evidence was not admissible to vary the terms of the bill of lading, which imported a voyage direct from Fiume to Dunkirk, subject to the liberty to call at any ports of call substantially within the course of such voyage; that Glasgow, being altogether out of the course of such voyage, was not such a port; and that the vessel was therefore lost while deviating from the voyage contracted for, and the excepted perils clause did not exonerate the defendants from liability in respect of non-delivery of the goods. *Leduc v. Ward*, 20 Q. B. D. 475; 57 L. J., Q. B. 379; 58 L. T. 908; 36 W. R. 537—C. A.

— **Collision — Negligence.** — Foundering caused by collision with another vessel is within the exception “dangers and accidents of the sea” in a bill of lading; and excuses the shipowner for non-delivery of the goods if it occurs without fault in the carrying ship. *Woodley v. Michell* (11 Q. B. D. 47) overruled. *Wilson v. The Xantho*, 12 App. Cas. 503; 56 L. J., P. 116; 57 L. T. 701; 36 W. R. 353; 6 Asp. M. C. 207—H. L. (E.).

Exceptions limiting Implied Warranty of Seaworthiness. — A steamship which had broken her main shaft was salvaged by another steamship belonging to the same line. The breakdown was caused by a latent defect in the shaft without negligence on the part of the owners or their servants. In a salvage action brought by the owners, master, and crew of the salvaging ship against the owners of cargo on board the salvaged ship:—Held, first, that the ship was unseaworthy when she started on the voyage. Secondly, that the implied warranty of seaworthiness in the bill of lading was an absolute warranty that the ship should be reasonably fit to perform the voyage, and not merely that the shipowner would do his best to make her so. Thirdly, that the exceptions in the bill of lading, “all and every the dangers and accidents of the seas, rivers, and canal, and of navigation of whatever nature or kind,” had not the effect of limiting the warranty of seaworthiness, but that such exceptions only protected the shipowner from liability to the owners of cargo for loss or damage sustained by the latter through “danger or accidents” happening to a seaworthy vessel. *The Glenfruin*, 10 P. D. 103; 54 L. J., P. 49; 52 L. T. 769; 33 W. R. 826; 5 Asp. M. C. 413—Butt, J.

A steamship became disabled at sea owing to the breaking of her fly-wheel shaft, through a flaw in the welding existing at the commencement of the voyage, but not discoverable by the exercise of any reasonable care. The cargo on board her was shipped under three bills of lading, the first of which contained, amongst other excepted perils, the clause:—“warranted seaworthy only so far as ordinary care can provide:” the second: “warranted seaworthy only as far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers, and crew can ensure it;” and the third: “owners not to be liable for loss, detention, or damage . . . if arising directly or indirectly . . . from latent defects in boilers, machinery, or any part of the vessel in which steam is used, even existing at the time of shipment, provided all reasonable means have been

taken to secure efficiency.” A vessel belonging to the same owners towed the disabled vessel to a place of safety. In an action of salvage brought by the owners, master and crew of the salvaging vessel against the owners of cargo in the salvaged vessel:—Held, that the owners of the cargo had no remedy for breach of the contract of carriage, for the exceptions in the bills of lading were such as to constitute a limited warranty of seaworthiness at the commencement of the voyage, which limited warranty had been complied with by the shipowners. *Cargo ex Laertes*, 12 P. D. 187; 56 L. J., P. 108; 57 L. T. 502; 36 W. R. 111; 6 Asp. M. C. 174—Butt, J.

— **Cattle—Limit of Value.** —The plaintiff shipped certain cattle on board the defendant's ship for carriage from London to New York under a bill of lading which provided as follows:—“These animals being in sole charge of shipper's servants, it is hereby expressly agreed that the shipowners, or their agents or servants, are, as respects these animals, in no way responsible either for their escape from the steamer or for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than 5*l.* for each of the animals.” The ship had on her previous voyage carried cattle suffering from foot and mouth disease. Some of the cattle shipped under the bill of lading were during the voyage infected with that disease, owing to the negligence of the defendants' servants in not cleansing and disinfecting the ship before receiving the plaintiff's cattle on board and signing the bill of lading, and the plaintiff in consequence suffered damage amounting to more than 5*l.* for each of the said cattle:—Held, that the provision in the bill of lading limiting liability to 5*l.* for each of the cattle did not apply to damage occasioned by the defendants not providing a ship reasonably fit for the purposes of the carriage of the cattle which they had contracted to carry. *Tattersall v. National Steamship Company*, 12 Q. B. D. 297; 53 L. J., Q. B. 332; 50 L. T. 299; 32 W. R. 566; 5 Asp. M. C. 206—D.

4. RIGHTS AND LIABILITIES OF INDORSEES.

“Passing of Property” in Goods—Indorsement by way of Pledge. —The mere indorsement and delivery of a bill of lading by way of pledge for a loan does not pass “the property in the goods” to the indorsee, so as to transfer to him all liabilities in respect of the goods within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), s. 1. *Sewell v. Burdick*, 10 App. Cas. 74; 54 L. J., Q. B. 156; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376—H. L. (E.).

Goods were shipped to a foreign port under bills of lading making the goods deliverable to the shipper or assigns. After the goods had arrived, and been warehoused, the shipper indorsed the bills of lading in blank and deposited them with the indorsee as security for a loan. The indorsee never took possession of or dealt with the goods:—Held, that “the property” in the goods did not “pass” to the indorsee within the meaning of the Bills of Lading Act so as to make them liable in an action by the shipowner for the freight. *Id.*

Liability for demurrage under a bill of lading is imposed on the holder by way of security only who presented the bill and demanded the delivery. *Allen v. Coltart*, 11 Q. B. D. 782; 52 L. J., Q. B. 686; 48 L. T. 944; 31 W. R. 841; 5 Asp. M. C. 104—Cave, J.

Action against Shipowner—Quality Marks—Representation—Estoppel—Authority of Master.—A bill of lading signed by the captain of a ship in respect of a shipment of bales of jute contained the following provision:—"If quality marks are used, they are to be of the same size as the leading marks and contiguous thereto, and, if such quality marks are inserted in the shipping notes and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain, and the ship shall be responsible for the correct delivery of the goods." The bill of lading described the bales as marked in proportions specified with different quality marks, indicating different qualities of jute, which marks corresponded with those inserted in the shipping notes made out by the shippers. When the ship was discharged, however, it was found that there had in fact been shipped fewer bales marked with one of such quality marks and more marked with another of such marks indicating an inferior quality than stated in the bill of lading.—Held, on the above facts, that an indorsee of the bill of lading for value, without notice of the incorrectness of the description of the marks therein, had no right of action against the shipowners either for breach of contract or upon the ground that they were estopped by the representation contained in the bill of lading. *Grant v. Norway* (10 C. B. 665) followed. *Cox v. Bruce*, 18 Q. B. D. 147; 56 L. J., Q. B. 121; 57 L. T. 128; 35 W. R. 207; 6 Asp. M. C. 152—C. A.

5. SENDING WITH BILLS OF EXCHANGE.

Duties arising from.—See ante, col. 1581.

VII. CHARTERPARTY.

1. STAMPING.

Executed Abroad—Evidence.—A charterparty executed entirely abroad, and stamped within two months after it has been received in this country, can be received in evidence, since it falls within the provisions of 33 & 34 Vict. c. 97, s. 15, and not of ss. 67 & 68 of that act. *The Belfort*, 9 P. D. 215; 53 L. J., P. 88; 51 L. T. 271; 33 W. R. 171; 5 Asp. M. C. 291—D.

2. THE CONTRACT.

Passengers, right to Carry—Custom.—A charterparty, not amounting to a demise of the ship, provided for the carriage of a full and complete cargo of lawful produce and merchandise for payment of a lump freight, but was silent as to the use to which the passengers' cabins might be put.—Held, that the charterers were not entitled to carry passengers in the cabins. *Shaw v. Aithen*, 1 C. & E. 195—Denman, J.

No custom exists entitling the charterer under the above circumstances to carry passengers, or entitling the shipowner to have passengers carried for his benefit. *Ib.*

Deck Cargo jettisoned—"At Merchant's Risk."—It was stipulated in a charterparty that the "ship should be provided with a deck cargo, if required, at full freight, but at merchant's risk:—Held, that the words "at merchant's risk" did not exclude the right of the charterers to general average contribution from the shipowners in respect of deck cargo shipped by the charterers, and necessarily jettisoned to save the ship and the rest of the cargo. *Burton v. English*, 12 Q. B. D. 218; 53 L. J., Q. B. 133; 49 L. T. 768; 32 W. R. 655; 5 Asp. M. C. 187—C. A.

Quantity of Cargo—"About."—Under a charterparty providing that the ship shall load empty petroleum barrels, as many as may be required by the master, say about 5,000; the word "about" entitles the master to require at his option the shipment of 10 per cent. more or less than the amount specified. *Alcock v. Leeson*, 1 C. & E. 98—Mathew, J.

Cargo to be loaded from Shore "at Ship's Risk"—Loss after delivery and before loading.—By a charterparty a vessel was to proceed to a port, and there to load a cargo from the shore by the ship's boats and crew at ship's risk and expense. A part of the cargo was lost, after delivery from the shore and before it was loaded on board, through one of the perils enumerated in the exceptions in the charterparty. In an action by the charterer for the non-delivery of this part of the cargo:—Held, that the expression "at ship's risk" did not mean at the absolute risk of the shipowner, but at such risk as would attach if the goods were loaded on board, and that consequently the exceptions applied, and the shipowner was not liable for the non-delivery. *Nottebohm v. Richter*, 18 Q. B. D. 63; 56 L. J., Q. B. 33; 35 W. R. 300—C. A.

Loss of Vessel after Expiration—Liability of Charterer—Act of God.—A vessel was lost, through stress of weather and without negligence, after the expiration of a charterparty:—Held, in an action by the representative of the owner against the charterer, in the absence of express stipulation, that there was no liability implied by law on the part of the person in possession for loss so occasioned. *Smith v. Drummond*, 1 C. & E. 160—Cave, J.

Option to Cancel—"Excepted Dangers."—By a charterparty of a steamship it was agreed that she should go to "three safe loading places" between two named ports, and there load from the charterers a cargo of oranges, and being so loaded proceed to London . . . and deliver the same pursuant to bills of lading . . . (the act of God . . . and all dangers of the seas, rivers, and steam navigation of what nature and kind soever during the said voyage, always excepted), and the charterers thereby promised to load the cargo, and stipulated, after a provision for working and lay days, that "should the steamer not be arrived at first loading port free of pratique, and ready to load on or before the 15th of

December next, charterers have the option of cancelling or confirming this charterparty."—By dangers of the seas, the steamer, although arrived at the first loading port, was not free of pratique and ready to load on the 15th of December, and the charterers therefore cancelled the charterparty.—At the trial of an action against them for not loading the cargo, the judge left to the jury the disputed question whether the port was a "safe loading place," and they found in the affirmative:—Held, that the excepted dangers clause applied only to the voyage and not to the clause giving the option to cancel the charterparty if the ship was not ready to load on the day fixed, and therefore the cancellation was justified. *Smith v. Dart*, 14 Q. B. D. 105; 54 L. J., Q. B. 121; 52 L. T. 218; 33 W. R. 455; 5 Asp. M. C. 360—D.

— "Ready to Load."—A charterparty provided, that should the steamer not be ready to load on or before the 31st May, 1882, the charterer should have the option of cancelling the charter. On that day the vessel had discharged two holds only of its outward cargo, and was not completely discharged till the middle of the following day:—Held, that the charterers were entitled to cancel the charter. *Groves v. Volkart*, 1 C. & E. 309—Lopes, J. Affirmed in C. A.

Cesser Clause—Incorporation of Conditions of Charterparty in Bill of Lading.—A charterparty contained stipulations in the usual form for payment of freight and demurrage, and also a stipulation that "as this charterparty is entered into by the charterers on account of another party, their liability ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage." The charterers having placed the cargo on board at the port of loading, a bill of lading was signed whereby the goods were made deliverable to themselves at the port of discharge, "they paying freight, and all other conditions as per charterparty." In an action by the shipowner against them as consignees of the cargo, for demurrage in respect of delay at the port of discharge:—Held, that the cesser clause in the charterparty must be rejected as inapplicable in reading the bill of lading, which incorporated all the conditions of the charterparty applicable to the reception of the goods at the port of discharge, and, therefore, that the plaintiff was entitled to maintain the action. *Gullischen v. Stewart*, 13 Q. B. D. 317; 53 L. J., Q. B. 173; 50 L. T. 47; 32 W. R. 763; 5 Asp. M. C. 200—C. A.

A clause in a charterparty providing for the cesser of the charterer's liability on the goods being loaded, does not absolve the charterer, if he be also the indorsee and holder of a bill of lading, incorporating the conditions of the charterparty, from liability for damage incurred at an intermediate port. *Bryden v. Niebuhr*, 1 C. & E. 241—Stephen, J.

Bill of Lading differing from Terms of Charterparty.—The plaintiffs chartered the defendant's ship for carriage of a cargo of cotton-seed from Alexandria to the United Kingdom. The charterparty provided that the master was to sign bills of lading at any rate of freight and as customary at port of lading without prejudice to

the stipulation of the charterparty. There was also a cesser of liability clause. A cargo was shipped under the charterparty at Alexandria by and on account of the charterers, and a bill of lading was given containing an exception, which was not in the charterparty, protecting the shipowners from liability for damage arising from any act, neglect, or default of the pilot, master, or mariners. The cargo was lost by the negligence of the master. In an action for non-delivery of the cargo, the jury found that there was no special custom at Alexandria with regard to the form of bill of lading in use there:—Held, that, whether such finding were right or wrong, the terms of the charterparty did not authorise the giving of a bill of lading containing the before-mentioned exception; and that, even if they did, in the absence of express provision to the contrary, as between the shipowners and the charterers only the charterparty could be regarded as constituting the contract, and the bill of lading must be looked on as a mere receipt for the goods; and consequently that the defendants were liable for non-delivery of the cargo. *Rodocanachi v. Milburn*, 18 Q. B. D. 67; 56 L. J., Q. B. 202; 56 L. T. 594; 35 W. R. 241; 6 Asp. M. C. 100—C. A. See *Gardner v. Trechmann*, post, col. 1675.

By what Law governed—Law of the Flag—"Lex loci contractus."—A claim was made by an American citizen in the winding-up of a British steamship company for damages for the loss of his cattle arising through the negligence of the master and crew. The ship in which the cattle were carried was a British ship trading between Boston and Liverpool. The charterparty contained express stipulations exempting the company from liability caused by the negligence of the master and crew. The cattle were shipped at Boston, and bills of lading were given there, in conformity with the contract. The ship stranded on the coast of North Wales, owing, as was admitted, to the negligence of the master and crew. According to the law of the State of Massachusetts, as at present ascertained, the stipulations exempting the owners from liability through negligent navigation were void; but according to English law such stipulations were good, and were usually inserted in English bills of lading. The question was whether the law of the flag (that is to say, the personal law of the shipowner) or the *lex loci contractus* should govern the contract of affreightment:—Held, on the authority of *Lloyd v. Guibert* (1 L. R., Q. B. 115), that the stipulations were valid, first on the general ground that the contract was governed by the law of the flag; and, secondly, on the particular ground that from the special provisions of the contract itself it appeared that the parties were contracting with a view to the law of England. *Missouri Steamship Company, Monroe's Claim, In re*, 58 L. T. 377; 6 Asp. M. C. 264—Chitty, J. Affirmed 37 W. R. 696—C. A.

"Ready Quay Berth as ordered by Charterer."—By a charterparty it was agreed that the plaintiff's vessel after loading a certain cargo should proceed to "London or Tyne dock to such ready quay berth as ordered by the charterers," "demurrage to be at the rate of 30% per running day," in no case unless in berth before noon were the lay days to count before the day following that on which the vessel was in berth,

and the captain or owners were to have an absolute lien on the cargo for all freight and demurrage in respect thereof. The vessel was ordered by the charterers to a certain London dock, but when the vessel arrived at such dock there was no quay berth ready for her, and she was consequently detained one day beyond the time required for discharging her, had she been able to have got alongside a quay berth on her arrival in the dock:—Held, on the construction of this charterparty, that the charterers were bound to name such quay berth as was ready, and that for the detention caused by the charterers neglecting to do so the plaintiffs were entitled to a lien on the cargo for demurrage, the damage for the detention being sufficiently in the nature of demurrage to come within the demurrage clause. *Harris v. Marcus Jacobs*, 15 Q. B. D. 247; 54 L. J., Q. B. 492; 54 L. T. 61; 5 Asp. M. C. 530—C. A.

“So near thereto as she may safely get at all times of Tide and always Afloat.”—A ship was chartered to unload at S. or “as near thereto as she might safely get at all times of tide and always afloat,” and for delay in unloading the charterers were to pay demurrage. The state of the tide prevented the ship from reaching S. for four days after she arrived at the nearest point where she was able to float:—Held, that, according to the terms of the charterparty, this was a sufficient arrival of the ship at S. to found a claim for demurrage. *Horsley v. Price*, 11 Q. B. D. 244; 52 L. J., Q. B. 603; 49 L. T. 101; 31 W. R. 786; 5 Asp. M. C. 106—North, J.

—“If sufficient Water.”—A condition in a charterparty that the ship shall “discharge in a dock as ordered on arriving, if sufficient water, or so near thereunto as she may safely get, always afloat,” means that she is to discharge in the dock ordered, if there is sufficient water at the time of giving the order. *Allen v. Coltart*, 11 Q. B. D. 782; 52 L. J., Q. B. 686; 48 L. T. 944; 31 W. R. 841; 5 Asp. M. C. 104—Cave, J.

—Blockade of Port of Loading—Delivery elsewhere.]—Under a charterparty that a ship should proceed to Taganrog, or “so near thereto as she may safely get,” and there deliver cargo:—Held, that this port being under blockade, it was not a fulfilment of the contract for the vessel to discharge at Constantinople, even though that might be a reasonable course to adopt. *Castel v. Trechman*, 1 C. & E. 276—Stephen, J.

3. EXEMPTIONS FROM LIABILITY.

“Dangers and Accidents of Navigation.”—A charterparty provided that the ship should load a cargo of coal and deliver the same at the port of discharge at a freight of so much per ton on the quantity delivered (the act of God, &c., and all and every other dangers and accidents of the seas, rivers, and navigation always excepted), the freight to be paid two-thirds in cash ten days after the vessel's sailing, and the remainder in cash on the right and true delivery of the cargo agreeably to bills of lading, less cost of coal delivered short of bill of lading quantity:—Held, that a collision attributable solely to the negligence of those in charge of the other vessel was a “danger or accident of navigation” within the meaning of the charterparty and therefore that the shipowners were not liable in respect of non-delivery of part of the cargo shipped caused by such a collision; but that the charterers were entitled nevertheless under the charterparty to set off the cost of the coal so undelivered against the balance of freight payable on delivery of the remainder of the cargo at the port of discharge. *Woodley v. Michell* (11 Q. B. D. 47) distinguished. “*Garston*” *Sailing Ship Company v. Hickie*, 18 Q. B. D. 17; 56 L. J., Q. B. 38; 55 L. T. 879; 35 W. R. 33; 6 Asp. M. C. 71—C. A.

“Dangers and Accidents of the Seas.”—Rice was shipped under a charterparty and bills of lading which excepted “dangers and accidents of the seas.” During the voyage rats gnawed a hole in a pipe on board the ship, whereby sea-water escaped and damaged the rice, without neglect or default on the part of the shipowners or their servants:—Held, that the damage was within the exception, and that the shipowners were not liable. *Hamilton v. Pandorf*, 12 App. Cas. 518; 57 L. J., Q. B. 24; 57 L. T. 726; 36 W. R. 369; 52 J. P. 196; 6 Asp. M. C. 212—H. L. (E.).

“Dangers of the Seas and Rivers.”—Timber had been towed alongside a vessel lying in a river for shipment, and the master's receipts for the quantity delivered had been received, and owing to a rapid current and strong wind then prevailing the usual means for securing the timber proved inefficient and a large amount was lost:—Held, that the loss was a loss within the exception of a charterparty excluding all “dangers and accidents of seas and rivers.” *Pyman v. Burt*, 1 C. & E. 207—Hawkins, J.

Effect of, on Option to Cancel.]—See *Smith v. Dart*, ante, col. 1665.

VIII. CARGO.

1. STOWAGE.

Carriage of Grain—Two-deck Ship—Shifting-boards in Lower Hold—Feeders.]—A ship having two decks and loaded with a cargo of barley in bulk at a port in the Mediterranean must, upon the proper construction of s. 4, sub-s. (c), of the Merchant Shipping (Carriage of Grain) Act, 1880, and the Board of Trade Regulations of August, 1881, be provided with shifting-boards in the lower hold. By paragraph 4 (b) of these regulations—which directs that feeders shall be fitted to feed the grain carried in the between-decks, such feeders to contain not less than 2 per cent. of the compartments they feed—it is intended that the feeders feeding the grain carried in the between-decks, shall contain not less than 2 per cent. of the grain in the compartments in the between-decks which they feed, and of the grain in the hold below which is fed by such compartments. *The Rothbury*, 13 P. D. 119; 57 L. J., P. 99; 59 L. T. 672; 37 W. R. 158—Butt, J.

2. COSTS OF DISCHARGING—DOCK CHARGES.

Failure of Cargo Owner to take Goods.—Duty of Shipowner—Notice to Lighterman.]—

When goods are landed under sub-s. 6, 25 & 26 Vict. c. 63, s. 67, sub-s. 7 does not apply, for the latter refers only to the discharging of cargo overside, and not to the landing of it for the purposes of assortment on the wharf, and the written notice referred to in sub-s. 7 applies, therefore, to cases arising under that sub-section only. It is the duty of the owner of goods who receives either a written or a verbal notice that he can have them to take them away within a reasonable time, and that whether sub-s. 6 or 7 applies to the case. Notice to the lighterman employed by the owner of the goods is notice to the owner himself. *The Clan Macdonald*, 8 P. D. 178; 52 L. J., P. 89; 49 L. T. 408; 32 W. R. 154; 5 Asp. M. C. 148—Hannen, P.

A ship arrived in dock with a general cargo on the 12th of December, and began to unload on the quay on the 13th. The plaintiffs (owners of some of the goods), sent a lighterman and barge to receive their portion of the cargo on the 13th. It was not then ready. On the 14th the lighterman again attended, but could obtain no information. On the 14th the firm of lightermen wrote to the defendants (the shipowners), stating they had made application for the goods, and enclosing a notice requiring twenty-four hours' notice of the defendants' readiness to deliver the goods, and stating that they would not be responsible for any landing charges. On the 15th the landing of the cargo was completed, and the lighterman was that day verbally informed he could have the goods on the morning of the 16th. He did not attend, and the goods were not taken away till the 29th. The plaintiffs paid the dock charges under protest, and brought an action to recover them back:—Held, that they could not recover them. *Id.*

Custom of Port of London.—A bill of lading stipulated (inter alia) that "the merchandise shipped thereunder was to be received on the quay at London, and delivered therefrom by the person appointed by the steamship's agents, &c., the merchandise to be received and delivered according to the customs and usages of the respective ports." A custom was proved with regard to grain cargoes coming to London, that if the merchant does not demand delivery of the grain within twenty-four hours after the ship's arrival, the ship is entitled to discharge the goods on the quay. The merchant did not demand delivery of the cargo within the twenty-four hours, and it was landed on the quay:—Held, that the custom was not inconsistent with the terms of the bill of lading, and that therefore the merchant was bound to pay the expenses incurred in weighing out the cargo and the quay rates. *Aste v. Stumore*, 1 C. & E. 319—C. A.

Goods were shipped under a bill of lading at Calcutta to be delivered in like good order and condition from the ship's tackles at the port of London. On arrival in the port of London the consignees demanded overside delivery into lighters immediately from the ship's tackles. The shipowner landed them on the dock wharf, and was ready to deliver them thence into the consignee's lighters, but the consignee carted them away, thereby becoming liable to certain dock charges which he paid. In an action by the consignee to recover the amount so paid, the jury found that there was a custom for steamships having a general cargo (the defendants'

ship being such) coming into the port of London and using the docks, to discharge the goods on to the quay, and thence into lighters:—Held, that the custom found was not inconsistent with the terms of the bill of lading, and that the shipowner was entitled to discharge the goods on to the quay, and was not liable for the charge sought to be recovered. *Marzetti v. Smith*, 49 L. T. 580; 5 Asp. M. C. 166—C. A. Affirming 1 C. & E. 6—Cave, J.

3. ACTIONS FOR LOSS AND NON-DELIVERY.

Deck Cargo—Jettison of—Proximate Cause of Damage.—On a ship carrying a general cargo from New Orleans to Liverpool cotton was shipped on deck, under a practice by which owners of vessels trading between those ports were in the habit of stowing goods on deck in violation of their contract with the shipper, the shipowners accepting full responsibility for the consequences. The bills of lading for part of the cotton contained the words "under deck." All the bills of lading contained exceptions (inter alia) in favour of "jettison." On the voyage the ship took ground, and in order to get her off the master properly jettisoned the cotton. The indorsees of the bills of lading having brought an action against the shipowners to recover the value of the cotton:—Held, that (whether the bills of lading did or did not contain the words "under deck") the cotton was carried in breach of the contract and was not within the exceptions specified in the bills of lading, which had exclusive reference to goods safely stowed under hatches; that the shipowners had therefore no legal excuse for their failure to deliver; that the cause of damage was not too remote, and that the shipowners were liable to the indorsees for the value of the cotton. *Royal Exchange Shipping Company v. Dixon*, 12 App. Cas. 11; 56 L. J., Q. B. 266; 56 L. T. 206; 35 W. R. 461; 6 Asp. M. C. 92—H. L. (E.).

Collision—Transshipment—Loss by Perils not previously excepted—Limitation Action.—A cargo was shipped by the plaintiff on the defendants' vessel under a charterparty and bill of lading, not excepting the negligence of the master and crew. During the voyage, and through the negligence of the masters and crews of both ships, the vessel came into collision with another, and was so much damaged as to render it necessary to discharge her cargo at a port of refuge, and, after temporary repairs, to complete the voyage in ballast. The master transhipped the cargo with the knowledge, but without the assent or dissent of the plaintiff, into three other vessels, under bills of lading excepting the negligence of the masters and crews. Two of these vessels with their cargoes were, through the negligence of their masters and crews, lost before reaching the port of discharge. The defendants obtained a decree limiting their liability arising out of the collision to 8*l.* per ton, and the proceeds were distributed to the claimants, of whom the plaintiff was not one. In an action for non-delivery of the portion of the cargo lost:—Held, that the defendants were liable; for the loss did not arise from an excepted peril, and the

transshipment, though justifiable, was for the purpose of earning the freight under the charter-party; and that the judgment in the limitation action was no bar to the present claim, as the loss of the portion of the cargo, the subject of this action, was not caused by the collision in respect of which the defendants had limited their liability. *The Bernina*, 12 P. D. 36; 56 L. J., P. 38; 56 L. T. 450; 35 W. R. 214; 6 Asp. M. C. 112—Hannen, P.

— **Both Ships to Blame—Damage to Cargo.**]

—The Admiralty Court rule that in cases of collision the damages are to be equally divided where both ships are to blame, does not apply to actions for breach of contract of carriage brought by owners of cargo against the carrying ship to recover damages for loss of, or injury to, their goods, and hence the plaintiffs in such actions are entitled to recover their full damages from the owners of the carrying ship. *The Bushire*, 52 L. T. 740; 5 Asp. M. C. 416—Butt, J.

Measure of Damages—Loss of Market.]

The defendant, the master of the steamer "Carbis Bay," lying at Wilmington, signed bills of lading for 400 bales of cotton "shipped on board the 'Carbis Bay'" for Liverpool. In consequence of insufficient room only 165 bales could be shipped, and the defendant directed the remaining 235 bales to be shipped on board the steamer "Wylo," then lying in the same port, bound for Liverpool. The "Carbis Bay" arrived at Liverpool on the 26th of October, and the "Wylo" on the 29th of October, and both cargoes were delivered to the plaintiffs, who were indorsees of the bills of lading. Between the 26th and the 29th of October a fall in the price of cotton took place, and the plaintiffs sued the defendant for the loss thereby occasioned. —Held, that on the 26th of October the plaintiffs had a right of action against the defendant for non-delivery, that the measure of damages was the market price of cotton on that day, and that the subsequent delivery of the cotton ex "Wylo" could only be taken into account in reduction of damages. *Smith v. Tregarthen*, 56 L. J., Q. B. 437; 57 L. T. 58; 35 W. R. 665; 6 Asp. M. C. 137—D.

— **Freight Payable in Advance.**]

A stipulation in a charterparty that four-fifths of the freight should be paid in advance—"vessel lost or not lost"—does not prevent the charterer from recovering that amount as damages from the shipowner upon a loss of the vessel owing to negligence. *Great Indian Peninsular Railway v. Turnbull*, 53 L. T. 325; 33 W. R. 874; 1 C. & E. 595; 5 Asp. M. C. 465—Denman, J.

— **Circumstances peculiar to Plaintiff—**

Advanced Freight "subject to insurance."]

The plaintiffs having sold the cargo "to arrive," at a price less than the market value of the goods at the port of discharge at the time when the cargo should have arrived:—Held, that in estimating the damages such market value must be looked to, and not the price at which the plaintiffs had sold the cargo. The charterparty provided that sufficient cash for ship's disbursements should be advanced, if required, to the

captain by the charterers on account of freight, subject to insurance only. The plaintiffs having advanced sums for ship's disbursements on account of freight as provided for in the charter-party:—Held, that, in estimating the damages for non-delivery of the cargo, only the unpaid freight must be deducted from the market value of the goods, not the advanced freight as well. *Rodocanachi v. Milburn*, 18 Q. B. D. 67; 56 L. J., Q. B. 202; 56 L. T. 594; 35 W. R. 241; 6 Asp. M. C. 100—C. A.

— **Advanced Freight insured—Subrogation of Insurer to Rights of Assured.**]

—Goods were shipped by the plaintiffs on the defendants' ship under a charterparty, which provided that if required the whole freight should be advanced subject to a deduction for interest and insurance. The freight was paid in advance, and the amount was insured. The charterers sold the goods to the plaintiffs at a price covering cost, freight, and insurance. The cargo was lost by the negligence of the defendants. In an action for the loss of the goods:—Held, that the plaintiffs were entitled to recover as part of the damages sustained by them the amount of the advanced freight, which was included in the price paid by them for the goods, for the insurers of the freight who had indemnified the plaintiffs were entitled to be subrogated to the rights of the plaintiffs in respect of the advanced freight, and to have the action maintained for their benefit for the amount insured, as it would, but for the insurance, have formed part of the damages to which the plaintiffs would have been entitled. *Dufourcet v. Bishop*, 18 Q. B. D. 373; 56 L. J., Q. B. 497; 56 L. T. 633; 6 Asp. M. C. 109—Denman, J.

Right of Owner of Cargo to recover Salvage Expenses from Shipowner.]

—The plaintiffs under a charterparty shipped a large quantity of rye on board one of the defendants' ships, to be carried from the port of T. to the port of A. Owing to the negligent navigation of the defendants' servants the ship was cast ashore, and a large quantity of the rye was lost; but a considerable quantity was saved by the Salvage Association, who were employed by the underwriters of the cargo with the assent of the defendants. The average statement was prepared, and the sum assessed was agreed to by the plaintiffs, and the Salvage Association were paid by the underwriters the expenses claimed by them. The plaintiffs brought their action to recover the amount of the salvage expenses so paid by the underwriters. The plaintiffs recovered a verdict for an amount to be settled out of court. The question of law involved in the case was reserved for further consideration. The defendants contended that they were not liable because the plaintiffs themselves had not paid the expenses, and the payment under the circumstances was voluntary:—Held, that the plaintiffs were entitled to recover the amount of the salvage expenses, as, without their being incurred, the remainder of the cargo could not have been sent to its destination, which was for the benefit of the defendants, and that the payment under the circumstances was not voluntary. *Scaramanga v. Marquand*, 53 L. T. 810; 5 Asp. M. C. 506—C. A. Affirming 1 C. & E. 500—Huddleston, B.

IX. FREIGHT.

1. WHEN PAYABLE.

Pro Ratâ—Abandonment—Salvage.—Where a salving ship takes a crew off a vessel in distress and puts men on board of her, refusing to allow her own crew to return, and the two vessels are in company navigated into port, there is no such abandonment of the ship as to put an end to the contract of carriage, and consequently there will be freight due upon the consignees requiring delivery of the cargo, such freight being pro ratâ, assuming the port not to be the port to which the cargo ought to have been taken under the contract of carriage. *The Leptir*, 52 L. T. 768 ; 5 Asp. M. C. 411—Butt, J.

— **Blockade of Port of Loading—Delivery elsewhere.**—Under a charterparty that a ship should proceed to Taganrog, or “so near thereto as she may safely get,” and there deliver cargo :—Held, that this port being under blockade, it was not a fulfilment of the contract for the vessel to discharge at Constantinople, even though that might be a reasonable course to adopt, and that no contract to pay freight pro ratâ could be implied, and that the charterers having paid the freight at Constantinople, under protest, were entitled to recover it back. *Castel v. Trechman*, 1 C. & E. 276—Stephen, J.

2. TO AND BY WHOM PAYABLE.

Right of Mortgagee in Possession of Freight.—*See Japp v. Campbell*, ante, col. 1657.

Liability for—Bill of Lading.—*See Sewell v. Burdick*, ante, col. 1662.

3. TIME FOR PAYMENT.

“Port” — Final Sailing of Ship from last Port.—By the terms of a charterparty the owners were entitled to an advance of one-third of the freight within eight days “from final sailing of the vessel from her last port in United Kingdom.” The vessel was loaded at Penarth dock, and was towed by a steam-tug seven or eight miles, bringing her out about three miles into the Bristol channel. She there cast anchor, as the weather was threatening. While she was lying at anchor a storm broke her cables, and she ultimately ran ashore on Penarth beach, and the cargo was spoiled. The vessel had never been beyond the limits of the port of Cardiff as defined for fiscal purposes, but she had left what, for commercial purposes, is considered the port, and had been out at sea. She went ashore within the limits of the port in its commercial sense. The owners sued for one-third of the freight, and the charterers resisted the claim on the ground that the vessel had never sailed from her last port in the United Kingdom :—Held, that the word “port” must be taken in its ordinary commercial sense, and that as the vessel had got out to sea without any intention of returning, she must be taken to have finally sailed from her last port, that her being driven back into it by the weather made no difference, and that the one-third of the freight was payable. *Price v.*

Livingstone, 9 Q. B. D. 679 ; 53 L. J., Q. B. 118 ; 47 L. T. 629 ; 5 Asp. M. C. 13—C. A.

The word “port” in a charterparty is to be understood in its popular, or business, or commercial sense ; it does not in such a document necessarily mean the port as defined for revenue or pilotage purposes. Tests for determining the business meaning of the word “port” considered. *“Garston” Sailing-ship Company v. Hickie*, 15 Q. B. D. 580 ; 53 L. T. 795 ; 5 Asp. M. C. 499—C. A.

A charterparty provided that a ship should load a cargo of coals at Cardiff, and then proceed to Bombay, the freight to be paid two-thirds in cash “ten days after the final sailing of the vessel from her last port in Great Britain,” and the remainder in cash on delivery of the cargo. The ship loaded the coals in the Bute Docks, at Cardiff, and, having cleared at the Custom House, started on her voyage to Bombay. She proceeded down the artificial channel leading from the docks to the river Taff, and, when about 300 yards beyond the junction of the channel with the river, she came into collision with a steamer, and was so much injured that she was compelled to return the next day to the docks for repairs :—Held, that at the time of the collision the ship was not outside the limits of the port, in the popular, business, or commercial sense of the word ; that, consequently, she had not finally sailed from her last port ; and that no freight was payable. *Id.*

4. RATE AND AMOUNT.

Measurement.—Timber was consigned to the Surrey Commercial Docks under a charterparty, by which freight was made payable “for deals and battens, per St. Petersburg standard hundred :”—Held, that freight was payable only upon the number of such hundreds as ascertained by the customary mode of measurement adopted by the dock company for timber cargoes. *Neilsen v. Neame*, 1 C. & E. 288—Mathew, J.

Goods were shipped from Wilmington in the United States for Liverpool under a charterparty, which provided that freight was to be paid on the “Wilmington gross intake weight :”—Held, that the freight was to be paid according to the method of weighing adopted at Wilmington. *Fullagsen v. Walford*, 1 C. & E. 198—Williams, J.

Whether Payable for Whole Day.—A charterparty provided that the hire of a vessel should commence at noon of a certain day, and freight was payable at so much per calendar month ; and “at and after the same rates for any part of the month” until her delivery to owners. On the day the hiring terminated she was delivered to her owners at 5.30 p.m. :—Held, that the charterers were liable for freight for the whole day, commencing at noon of the day of her delivery. *Angier v. Stewart*, 1 C. & E. 357—Denman, J.

5. LIEN.

Incorporation of Conditions of Charterparty.—A charterparty contained a stipulation in the usual form for payment of freight at the rate of

17. 11s. 3d. per ton; it also contained a clause that the shipowner should have an "absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge and average;" and a further clause that the captain was to sign bills of lading at any rate of freight; "but should the total freight as per bills of lading be under the amount estimated to be earned by this charter, the captain to demand payment of any difference in advance." Certain goods were put on board the chartered ship, and were made deliverable to the plaintiffs (who were not the charterers) by a bill of lading, whereby freight was made payable at 22s. 6d. per ton; the bill of lading contained also a clause, whereby it was provided that extra expenses should be borne by the receivers and "other conditions as per charterparty." Upon the arrival of the ship at the port of discharge the defendant, who was the shipowner, claimed and compelled payment of freight at the rate mentioned in the charterparty. The plaintiffs having sued to recover back the difference between the freight as specified in the charterparty and the freight as specified in the bill of lading:—Held, that the bill of lading did not incorporate the stipulation in the charterparty as to the payment of freight, that no right of lien existed for the freight mentioned in the charterparty, and that the plaintiffs were entitled to delivery of the goods upon payment of the freight specified in the bill of lading. *Gardner v. Trechmann*, 15 Q. B. D. 154; 54 L. J. Q. B. 515; 53 L. T. 518; 5 Asp. M. C. 558—C. A.

Collision—Re-shipment.—The *K.*, which was on a voyage under charter from Cardiff to Bombay with coals, was run into by the *B.*, shortly after leaving Penarth Docks. The *K.*, which was considerably damaged, returned to Cardiff, where her cargo was taken out of her in order that she might be repaired. The owners of the cargo proposed that the coals, which were also damaged, should be sold and a fresh cargo shipped. The shipowner, however, refused to ship a fresh cargo except "on fresh terms as to freight, &c.," and the charterer, without inquiring what the fresh terms would be, reshipped the damaged cargo, which was carried to Bombay:—Held, that the shipowner, having a lien on the cargo for freight, was entitled to insist on the original cargo being reshipped if it was capable of being carried to its destination, and that the cargo-owner was not entitled to insist on its delivery without payment of freight. *The Blenheim*, 10 P. D. 167; 54 L. J. P. 81; 53 L. T. 916; 34 W. R. 154; 5 Asp. M. C. 522—Hannen, P.

X. DEMURRAGE.

Effect of Bill of Lading.—See *Gullichsen v. Stewart*, ante, col. 1665.

Liability of Indorsee of Bill of Lading.—See *Allen v. Coltart*, ante, col. 1663.

Lay Days—Usual Place of Discharge—Custom to Lighten Vessel.—By a charterparty it was agreed that the plaintiff's steamship should proceed to Cronstadt and load a cargo of wheat, and therewith proceed to a port in the English or Bristol Channel as ordered, "or so near

thereto as she may safely get at all times of tide and always afloat, and deliver the same. Eight running days, Sunday excepted, to be allowed the merchants, if the ship be not sooner despatched, for loading and discharging the steamer, and ten days on demurrage if required over and above the laying days at 25s. per day." The steamer arrived at Cronstadt, occupied six running days in loading a cargo of 4,325 quarters of wheat, and was ordered to Gloucester, Bristol Channel, for discharge. She arrived at Sharpness Dock in the Bristol Channel on the 13th of November. Sharpness Dock is within the port of Gloucester, and about seventeen miles from the basin within the city of Gloucester where grain cargoes are usually discharged if the burthen of the ship will admit. The steamer was ready to commence the discharge of her cargo on the 13th, but could not get nearer to Gloucester than Sharpness, until part of her cargo was first discharged at Sharpness. On the 14th and 15th of November the consignees discharged into lighters 1,585 quarters of the cargo, and then required the master to take the steamer through the canal to a place of discharge within the basin at Gloucester. The master proceeded, and arrived in the basin on the 17th. On the 18th the residue of the cargo was discharged and the vessel returned to Sharpness, where she arrived on the 19th. In an action for demurrage, evidence was given of a custom of the port of Gloucester, according to which the usual place of discharging grain-cargoes was at the basin within the city, and when vessels with grain-cargoes destined for Gloucester were of too heavy a burthen to come up the canal they were lightened at Sharpness, and during the discharge at Sharpness of so much of the cargo as it was necessary to discharge in order to enable the vessel to proceed by the canal to Gloucester basin, the lay days counted, but the time occupied by coming up the canal to discharge at Gloucester basin and by returning to Sharpness was not counted:—Held, first, that the custom was reasonable; secondly, that it was not inconsistent with the express provision in the charterparty as to "running days," and that the time occupied by the vessel in going from Sharpness to the basin and in returning to Sharpness ought to be excluded from the lay days, and the plaintiffs were entitled to one day's demurrage only. *Brown v. Johnson* (10 M. & W. 331) discussed. *Nielsen v. Wait*, 16 Q. B. D. 67; 55 L. J. Q. B. 87; 54 L. T. 344; 34 W. R. 33; 5 Asp. M. C. 553—C. A.

Neglect by Charterer to Name Ready Quay Berth.—By a charterparty it was agreed that the plaintiff's vessel after loading a certain cargo should proceed "to London or Tyne dock to such ready quay berth as ordered by the charterers," "demurrage to be at the rate of 30s. per running day," in no case unless in berth before noon were the lay days to count before the day following that on which the vessel was in berth, and the captain or owners were to have an absolute lien on the cargo for all freight and demurrage in respect thereof.—The vessel was ordered by the charterers to a certain London dock, but when the vessel arrived at such dock there was no quay berth ready for her, and she was consequently detained one day beyond the time required for discharging her, had she

been able to have got alongside a quay berth on her arrival in the dock:—Held, on the construction of this charterparty, that the charterers were bound to name such quay berth as was ready, and that for the detention caused by the charterers neglecting to do so the plaintiffs were entitled to a lien on the cargo for demurrage, the damage for the detention being sufficiently in the nature of demurrage to come within the demurrage clause. *Harris v. Marcus Jacobs*, 15 Q. B. D. 247; 54 L. J., Q. B. 492; 54 L. T. 61; 5 Asp. M. C. 530—C. A.

Charterer's Option to order Ship to one of several Places in Dock—Discharge of Cargo.]—

By the terms of a charterparty the ship was to load from the charterer's agents at Cardiff a cargo of coals, "and therewith proceed to Dieppe and deliver the same alongside consignee's or railway wharf, or into lighters, or any vessel or wharf where she may safely deliver, as ordered, cargo to be loaded and discharged in forty-eight running hours, &c. Demurrage over and above the said lying time at 10s. per hour." The ship arrived in the dock at Dieppe, and was ordered to discharge at the railway wharf, but in consequence of all the discharging berths being occupied, she was not berthed at the railway wharf until twenty-four hours after her arrival in the dock. In an action by shipowner against charterers for demurrage:—Held, that the voyage was not completed, and the lay-days did not commence under the charterparty until the ship was berthed at the railway wharf, and therefore that the defendants were not liable to pay demurrage for delay in respect of the period which elapsed between the ship's arrival in the dock at Dieppe and her being berthed at the railway wharf. *Murphy v. Coffin*, 12 Q. B. D. 87; 32 W. R. 616—D.

Lay-days — Computation.]—A charterparty provided that the vessel should proceed to Malta for orders, which were to be given from London within twenty-four hours after receipt of notice, or lay-days to count:—Held, that orders not having been given within the prescribed time, the lay-days did not begin to count till the expiration of the twenty-four hours. *Bryden v. Niebuhr*, 1 C. & E. 241—Stephen, J.

"Frost preventing Loading."]—By a charterparty a ship was to proceed to Cardiff, East Bute dock, and there load in the customary manner from the agents of the freighters a cargo of iron. "Cargo to be supplied as fast as steamer can receive. . . . Time to commence from the vessel being ready to load and unload and ten days, on demurrage, over and above the said lay days, at 40l. per day. (Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading. . . . ; in which case owners to have the option of employing the steamer in some short voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship.)" The ship arrived at the East Bute dock, and loaded part of her cargo. A frost then set in, and made a canal which communicated with the dock impassable, so that the remainder of the cargo which was ready at a wharf on the canal could not for several days be brought in lighters to the dock. The cargo could not have been brought into the dock by carting

or otherwise at any reasonable expense. The dock itself was not frozen over, and if the cargo had been in the dock the loading might have proceeded:—Held, that the frost did not "prevent the loading" within the meaning of the exception. *Grant v. Coverdale*, 9 App. Cas. 470; 53 L. J., Q. B. 462; 51 L. T. 472; 32 W. R. 831; 5 Asp. M. C. 353—H. L. (E.).

"Strike" — "Hands striking work."]—The term "strike" in a charterparty must be used in the ordinary sense of strike against employers. The abandonment of their work by miners through dread of cholera does not bring the charter of a ship within the exception in a charterparty against "hands striking work" so as to relieve him from payment of demurrage. *Stephens v. Harris*, 56 L. J., Q. B. 516; 57 L. T. 618; 6 Asp. M. C. 192—D. Affirmed on other grounds, *infra*.

Customary Manner of Loading—Construction of Charterparty with reference to Port of Loading.]—

By a charterparty the ship was to proceed to Bilbao, and there load in the customary manner in regular steamer turn, where and as ordered by the agent of the freighter, a cargo of iron ore; four hundred tons per working day, weather permitting, to be allowed for loading, and all demurrage over and above the said days at the rate of 12s. 6d. per hour, no demurrage to be paid in case of any hands striking work, frosts, or floods, which might hinder the loading of the vessel. The port of Bilbao was on a river where there were a number of wharves, and the iron ore was brought down to the wharves by railways from storing places five miles off, and loaded direct from the railway trucks into the ship by means of shoots, there being no storing-places at the wharves. Ships, however, were sometimes loaded while lying out in the river from barges which brought the ore from storing-places higher up the river. The ship was ordered to San Nicolas wharf to load, and she was there loaded under a shoot with ore brought down by rail as above-mentioned. In consequence of heavy rains at the storing-places, and in consequence of the men who were loading the ore into the railway trucks there refusing to work from fear of the cholera, delay occurred and the ship was detained waiting for her cargo:—Held, without deciding whether the refusal of the men to work came within the exception in the demurrage clause of "hands striking work," that neither the state of the weather nor the refusal of the men to work hindered the "loading" inasmuch as both those causes of delay operated before the ore arrived at the place of loading, and the nature of the port was not such that the only possible mode of loading the ship was by bringing the ore by railway from the storing-places five miles off, so as to bring the case within the decision in *Hudson v. Ede* (3 L. R., Q. B. 412). *Stephens v. Harris*, 57 L. J., Q. B. 203—C. A.

XI. PILOTAGE AND PILOTS.

1. EXEMPTIONS FROM EMPLOYING.

"Loading"—25 & 26 Vict. c. 63, s. 41.]—The word "loading" in 25 & 26 Vict. c. 63

s. 41, does not refer to the taking on board of cargo only. Therefore when a steamer anchored in Dartmouth Harbour, and took on board 20 tons of coal for the purposes of the voyage, and was bound from a place out of the outport district to a destination also out of it:—Held, that she was not exempt from the obligation to employ a pilot. *The Winston*, 9 P. D. 85; 53 L. J., P. 69; 51 L. T. 183; 5 Asp. M. C. 274—C. A. Affirming 31 W. R. 892—Hannen, P.

Humber Dock.—A collision occurred in the Humber Dock, Hull, between a fly-boat and a foreign schooner bound to the Prince's Dock. The schooner was in charge of a duly licensed Humber pilot, who had taken over the charge of the schooner while she was moored at a pier in the Humber from the pilot who had brought her in from sea. One sum was paid for the services of the two pilots:—Held, that the schooner was in charge of a pilot whose employment was compulsory by law. *The Rigborgs Minde*, 8 P. D. 132; 52 L. J., P. 74; 49 L. T. 232; 5 Asp. M. C. 123—C. A.

River Tyne—Foreign Vessels.—Under the Tyne Pilotage Order Confirmation Act, 1865, Sched., s. 16, pilotage is not compulsory on foreign vessels entering the Tyne. *The Johann Sverdrup*, 12 P. D. 43; 56 L. J., P. 63; 56 L. T. 256; 35 W. R. 300; 6 Asp. M. C. 73—C. A.

London District—"Ship trading" to Place North of Boulogne.—By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 379, ships trading to any place in Europe north of Boulogne are, when not carrying passengers, exempted from compulsory pilotage in the London district. A British ship was one of a line of vessels making regular voyages from London to Japan and ports in the East, and back to London, and thence to ports in Europe north of Boulogne and back to London. On a return voyage from the East she went, as usual, to London. She there discharged part of her cargo and her crew, and then, with the bulk of the cargo and a crew of runners, but without passengers, proceeded to Holland:—Held, that she was a ship "trading to" a place north of Boulogne, and therefore exempted from compulsory pilotage in the London district. *Courtney v. Cole*, 19 Q. B. D. 447; 56 L. J., M. C. 141; 57 L. T. 409; 36 W. R. 8; 52 J. P. 20; 6 Asp. M. C. 169—D.

By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 379, sub-s. 3, the following ships when not carrying passengers shall be exempted from compulsory pilotage in the London district—that is to say, ships trading to Boulogne, or to any place in Europe north of Boulogne. A vessel while on a voyage from Liverpool to Hamburg was obliged by an accident to put into the Thames for repairs:—Held, that she was exempted by s. 379 from taking a pilot in the London district. *The Sutherland*, 12 P. D. 154; 56 L. J., P. 94; 57 L. T. 631; 36 W. R. 13; 6 Asp. M. C. 181—D.

2. EXEMPTION OF OWNERS FROM LIABILITY.

Collision—Rules for Navigation of Danube.]

—By arts. 85, 89, and 92 of the International

Rules for the Navigation of the Danube, pilotage is compulsory in the case of a vessel navigating the Danube, but the master of such a vessel is not required to give up the navigation of it to the pilot. Where, therefore, the master of such a vessel has in fact given up the navigation of it to a pilot, the owners remain answerable for damage caused by the improper navigation of the pilot. *The Agnes Otto*, 12 P. D. 56; 56 L. J., P. 45; 56 L. T. 746; 35 W. R. 550; 6 Asp. M. C. 119—Butt, J.

Pilotage Regulations for River Seine—Port of Havre.—Although the employment of a pilot by a vessel entering the port of Havre is by French law compulsory, such pilot does not as of right, as is the case in England, supersede the master and take charge of the ship, but according to French decisions the master remains in charge, the pilot being merely his adviser. Hence, though the master may allow such pilot to take charge in fact, the owners are not exempted from liability for damage done to another ship by the negligence of the pilot. *The Augusta*, 57 L. T. 326; 6 Asp. M. C. 161—C. A.

Default of Pilot, what is.—Damage was done by the duke of a schooner's anchor piercing the side of the fly-boat. The court found that there was no want of care in the crew in lowering the anchor. The other allegations against the schooner were that the anchor was improperly slung; that she came too fast up the dock and without a check rope:—Held, that the damage was caused by the fault of the pilot in the course of his duty. *The Rigborgs Minde*, *supra*.

Light Exhibited by Pilot's Orders.—The steamship R., in tow of a steamtug which was turning her in the river Humber, was, under the directions of a pilot, who was on board her by compulsion of law, exhibiting, in addition to her masthead light and red and green side lights, an anchor light which was hoisted at the main peak. In these circumstances she was run into by the steamship E.:—Held, that the exhibition of the anchor light was a breach of the Humber rules which might by possibility have contributed to the collision; that the master of the R. was responsible for such breach of a statutory regulation as to lights, and that the owners could not therefore escape liability on the ground of compulsory pilotage. *The Ripon*, 10 P. D. 65; 54 L. J., P. 56; 52 L. T. 438; 33 W. R. 659; 5 Asp. M. C. 365—Butt, J.

Responsibility of Pilot for getting under Way—Suggestions by Master.—Where a vessel is in charge of a pilot by compulsion of law, there is no duty on the master to prevent her from being got under way in obedience to an order of the pilot, unless such a proceeding is manifestly dangerous. The defendants' vessel was compulsorily in charge of a duly licensed pilot, and was got under way when the weather was thick and hazy, but vessels could be seen at 300 yards' distance:—Held, that the defendants were not responsible for damage caused by the vessel being under way. While the defendants' vessel was approaching that of the plaintiffs, the master expressed his opinion that her helm should be starboarded. The pilot gave the order, and in consequence of it a collision

occurred:—Held, that the defendants were not responsible for the damage caused by the collision. *The Loch Libo* (3 W. Rob. 310) approved. *The Oakfield*, 11 P. D. 34; 55 L. J., P. 11; 54 L. T. 578; 34 W. R. 687; 5 Asp. M. C. 575—Hannen, P.

Damage to Oyster Beds.—A ship in charge of a compulsory pilot was at high water brought into and anchored by the pilot in a river in which there were oyster beds, the existence of which was known to the pilot. The place where she was anchored was not the usual and customary place for vessels of her size and draught to anchor in. At low water she grounded, and thereby did damage to an oyster bed. On notice of the existence of the oyster bed being given to the master, he took all reasonable means to remove the ship as speedily as possible. In an action by the lessee of the oyster bed against the shipowner and the pilot:—Held, that the act of the pilot in anchoring the ship where he did was negligence which made him liable, but that the ship was not liable because the master's duty on receiving notice of the existence of the oyster bed was to take all reasonable measures—not extraordinary measures—to remove his ship, and this he had done. *The Octavia Stella*, 57 L. T. 632; 6 Asp. M. C. 182—Hannen, P.

3. OTHER MATTERS RELATING TO.

Pilotage or Salvage.—See *The Monarch* and *The Aglaia*, post, col. 1703.

Charges—Rates on River Thames.—A pilot who brings a ship from Gravesend to the entrance of the Tilbury Docks, and thence into the docks, is not entitled under the Order in Council of May 17, 1882, to the special charge "for removing a vessel from moorings into a dry or wet dock," or to charge any sum other than the rate from Gravesend to Northfleet. *The Clan Grant*, 12 P. D. 139; 56 L. J., P. 62; 57 L. T. 124; 35 W. R. 670; 6 Asp. M. C. 144—Butt, J.

Certificate—Refusal of Pilotage Authority to Renew.—A pilotage authority has an absolute discretion under the Merchant Shipping Act, 1854, s. 341, to refuse to renew a pilotage certificate granted to the master or mate of a ship under s. 340. *Reg. v. Trinity House Corporation*, 35 W. R. 835—D.

Liability of Pilot for Negligence.—See *The Octavia Stella*, supra.

XII. COLLISION.

1. ON THE HIGH SEAS.

a. Regulations generally.

Infringement of—Presumption of Culpability.—By the true construction of the Merchant Shipping Act, 1873, s. 17, a British ship cannot be pronounced in fault merely by reason of its non-observance of a maritime regulation. A presumption of culpability in case of collision thence arises, but such presumption may be met by proof that the infringement could not by any

possibility have contributed thereto. *The Fanny M. Carvill*, 13 App. Cas. 455, n.; 32 L. T. 646; 2 Asp. M. C. 565—P. C.

Where a ship infringing art. 3 of the Sailing Regulations by carrying her side-lights with screens shorter than the length prescribed thereby, but it was proved that such breach of the regulation could not possibly have contributed to the collision:—Held, that the ship could not be deemed to be in fault. *Id.*

Where a ship carried a bright light of such a character as to be visible at three miles' distance, which though fixed in the rigging was not shown to have been intercepted by the clew of the fore-sail or otherwise:—Held, there was no breach of maritime regulations, art. 3 (b) and s. 3, and therefore no presumption of culpability on the part of such ship, according to the principle laid down in *The Fanny M. Carvill* (13 App. Cas. 455, n.), as contributing to the collision in respect of which she sued. *The Glamorganshire*, 13 App. Cas. 454; 59 L. T. 572—P. C.

Where there has been a departure from an important rule of navigation, if the absence of due observance of the rule can by any possibility have contributed to the accident, then the party in default cannot be excused. Where the lights of the complaining vessel were not properly burning, and were not visible on board the other vessel:—Held, that in the absence of proof that this latter was also to blame, the suit must be dismissed. *Emery v. Cichero, The Arklow*, 9 App. Cas. 136; 53 L. J., P. C. 9; 50 L. T. 305; 5 Asp. M. C. 219—P. C.

Art. 10 (a) of the Regulations for Preventing Collisions at Sea, 1884, requiring all fishing vessels of 20 tons net and upwards, "when under way," to carry the ordinary lights of a vessel under way, unless required by other regulations to carry the lights therein prescribed, is applicable to trawlers whilst engaged in trawling and in motion. Where a steamship having come into collision with a trawler, which, in violation of the regulations for preventing collisions at sea, was carrying a white masthead light in addition to side-lights, and it appeared that those on board the steamship had not seen the white light, the court refused to hold the trawler to blame for the breach of the regulations, on the ground that it could not possibly have contributed to the collision. *The Chusan*, 53 L. T. 60; 5 Asp. M. C. 476—Butt, J.

Competent Seaman—Discovery that Regulations applicable.—A ship failing to obey one of the regulations for preventing collisions whereby a collision occurs, is not to be deemed to be in fault within the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), s. 17, if the circumstances were such that a competent seaman exercising reasonable care could not have discovered that the regulation was in fact applicable. *Baker v. The Theodore H. Rand. The Theodore H. Rand*, 12 App. Cas. 247; 56 L. J., P. 65; 56 L. T. 343; 55 W. R. 781; 6 Asp. M. C. 122—H. L. (E.).

Of two sailing ships approaching one another, the S. was running free and the T. was close-hauled on the port tack. It was therefore the duty of the T. to keep her course in accordance with arts. 14, 22, of the Regulations for Preventing Collisions at Sea (1884), but those navigating the T. in the belief that the S. was close-hauled on the starboard tack, ported, whereby a collision occurred:—Held, that since with ordinary skill

and by the exercise of reasonable care those navigating the T. could not have ascertained that the S. was running free, the T. was not to be deemed to be in fault within the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), s. 17. *Id.*

b. Lights.

Overtaking and Overtaken Ships—Stern Light.—Where one of two ships is abaft the beam of the other in such a position that the hinder ship cannot see the side-lights of the leading ship, and the former is going at a greater speed than the latter, and getting nearer to her, the latter is a "ship which is being overtaken by another" within the meaning of art. 11 of the Regulations for Preventing Collisions at Sea, even though the hinder ship broadens on her quarter; and she is in such circumstances bound to show a stern-light in sufficient time to enable the other, by the exercise of reasonable precautions, to avoid risk of collision. *The Main*, 11 P. D. 182; 55 L. J., P. 70; 55 L. T. 15; 34 W. R. 678; 6 Asp. M. C. 37—C. A.

— **Stern Light—Character and Position.**—Art. 11 of the Regulations for Preventing Collisions at Sea—which directs that a ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light—is infringed if such light is carried in any way other than is necessary to warn overtaking vessels. Where therefore such light is so placed or carried as to be visible over part of the area of a side-light it must be taken that there is a breach of art. 11. *The Palmyrus*, 13 P. D. 14; 57 L. J., P. 21; 58 L. T. 533; 36 W. R. 768—Hannen, P. Affirmed 37 W. R. 266—C. A.

In an action for collision it appeared that one of a pair of ordinary binnacle lamps in the plaintiffs' vessel was temporarily removed from its place and used as a stern-light:—Held, that in the absence of affirmative evidence of its efficiency on the particular occasion it could not be deemed to be such a light as is required by art. 11 of the Regulations for Preventing Collisions at Sea. *The Patroclus*, 13 P. D. 54; 58 L. T. 774; 36 W. R. 928; 6 Asp. M. C. 285—Hannen, P.

A smack with her trawl down had a globular white light exhibited from her weather cross-tree partially hidden from overtaking vessels by her sails, and did not exhibit any other white light or flare-up to an overtaking steamer:—Held, that this was an infringement of art. 11. *The Pacific*, 9 P. D. 124; 53 L. J., P. 66; 51 L. T. 127; 33 W. R. 124; 5 Asp. M. C. 263—Butt, J.

— **Stern Light—Length of Time visible.**—By art. 11 a ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light:—Held, that such light must be shown not once and for a short time only, but from time to time while the ship is "being overtaken" within the meaning of the article. *The Essequibo*, 13 P. D. 51; 57 L. J., P. 29; 58 L. T. 596; 6 Asp. M. C. 276—Hannen, P.

Vessel under Way—Stationary Vessel.—A

steam trawler, whilst engaged in trawling at the rate of $2\frac{1}{2}$ knots an hour through the water and $4\frac{1}{2}$ knots an hour over the ground, carrying a single white light, was run down by the D.; it being admitted that the D. was to blame, the question arose whether the trawler was not also to blame for not carrying side-lights:—Held, that the trawler was also to blame, since she was a vessel under way, and therefore subject to art. 3 of the Regulations for Preventing Collisions at Sea, 1880, and not to art. 9 of the Regulations for Preventing Collisions at Sea, 1863, substituted by Order in Council, 1880, for art. 10 of the Regulations of 1880:—Held, on appeal, that the decision was right; but on the ground that though the trawler was one of a class of vessels within art. 9 of the Regulations of 1863, she, in order to be "stationary" within the meaning of that article, was bound not to go faster than was necessary to keep herself under command whilst fishing, and that as her speed was greater than was necessary for so doing, she was, at the time of the collision, within art. 3 of the Regulations of 1880. *The Dunelm*, 9 P. D. 164; 53 L. J., P. 81; 51 L. T. 214; 32 W. R. 970; 5 Asp. M. C. 304—C. A.

— **Light partially Obscured.**—At the trial of an action for damage by collision, it appeared that the starboard light of the plaintiffs' vessel was obscured by the cathead to an extent of from $2\frac{1}{2}$ to 3 degrees; but that with this exception her side-lights showed an unbroken light over 10 points of the horizon:—Held, that there was no such infringement of art. 3 of the Regulations for Preventing Collisions at Sea as to oblige the court, under the Merchant Shipping Act, 1873, s. 17, to hold the vessel to blame for the collision. *The Fire Queen*, 12 P. D. 147; 56 L. J., P. 90; 57 L. T. 312; 36 W. R. 15; 6 Asp. M. C. 146—Butt, J.

Approaching Vessel—Flare-up Lights.—A sailing vessel having a steamship approaching on her starboard bow at night, burnt flare-up lights to attract her attention:—Held, that the burning of a flare is not forbidden by art. 2 of the regulations. Held further, that whether a vessel is to blame or not for showing a flare-up light must depend upon whether or not the exhibition of the flare is calculated to mislead. *The Merchant Prince*, 10 P. D. 139; 54 L. J., P. 79; 53 L. T. 914; 34 W. R. 231; 5 Asp. M. C. 520—Hannen, P.

c. Fog.

Whistle heard ahead—Duty of Steamer—Speed.—A steamship, the D., in a dense fog off Ushant, proceeding at slow speed, heard a whistle about three points on her starboard bow; the whistle was repeated several times and answered by the D. In about a quarter of an hour from the first sound of the whistle the steamship E. appeared about a length from the D. crossing from starboard to port. The engines of the D. were reversed full speed, but a collision occurred. The court having held both ships to blame, the owners of the D. appealed:—Held, by the Court of Appeal, that the D. was also to blame, for she should have been brought to as complete a standstill as possible, without getting out of command, at an early period after the first sound of the whistle, and should have also stopped and re-

versed sooner. *The Dordogne*, 10 P. D. 6; 54 L. J., P. 29; 51 L. T. 650; 33 W. R. 360; 5 Asp. M. C. 328—C. A.

Where an officer in charge of a steamship in a dense fog hears a whistle apparently two or three points on the bow, but cannot be sure of the bearing within a point or two, and does not know the heading of the vessel whistling, it is his duty to diminish the speed of his vessel to the utmost to give him time to ascertain the manœuvres of the other vessel, and for that purpose he must either reduce the speed until the engines are only just moving, or he must stop them, but he need not necessarily continue to keep them stopped, but only sufficiently to diminish his way, and when he is beginning to lose steerage way, then and only then, may put them on again, but as slowly as is possible. *The Rosetta*, 59 L. T. 342; 6 Asp. M. C. 310—Hannen, P.

A collision happened between the steamship I. and the barque Z. in a fog. It was proved that the I. had reduced her speed so far as was possible without stopping her way altogether:—Held, that she had not infringed art. 13 of the Regulations for Preventing Collisions at Sea. *The Zadok*, 9 P. D. 114; 53 L. J., P. 72; 50 L. T. 695; 32 W. R. 1003; 5 Asp. M. C. 252—Hannen, P.

It is the duty of those who have charge of a steamship in motion during a dense fog on first hearing the whistle of a steamship in such close proximity to them that risk of collision between the two vessels is involved, to bring their vessel immediately to a standstill on the water, and not execute any manœuvre with their helm until they have definitely ascertained the position and course of the other ship. *The Kirby Hall*, 8 P. D. 71; 52 L. J., P. 31; 48 L. T. 797; 31 W. R. 658; 5 Asp. M. C. 90—Sir R. Phillimore.

If an officer in charge of a vessel in a fog hears a whistle ahead, he must act sooner than if it is heard from any other quarter, and on the probability that the vessel which is sounding the whistle is coming towards him. *The Ebor*, infra—Per Lord Esher, M. R.

—**Probability of Risk—Art. 18.**—A steamer heard a whistle on her port bow in a dense fog, and it was repeated, showing that the vessel from which it was sounded was approaching and was in her vicinity:—Held, that under such circumstances it is a general rule of conduct that there is a necessity to stop and reverse, and that she had disobeyed art. 18 by not so doing. *The John McIntyre*, 9 P. D. 135; 53 L. J., P. 114; 51 L. T. 185; 33 W. R. 190; 5 Asp. M. C. 278—C. A.

Under art. 18 as soon as it is perceived by those on a steamer in a dense fog that a vessel is coming substantially nearer, the steamer should stop and reverse. *The Dordogne*, supra.

The plaintiff's steamer, in a fog off Cromer, heard a whistle almost right ahead; she was then going slowly, about three knots an hour, and she continued at this speed for about a minute, until a second whistle was heard, when the order was given to stop and reverse; but the defendants' steamer coming into sight, a collision occurred. The defendants admitted at the trial that they were to blame:—Held, that the plaintiffs were also to blame, for they had infringed art. 18 by going on at the same speed after they heard the

first whistle as before. *The Ebor*, 11 P. D. 25; 54 L. T. 200; 34 W. R. 448; 5 Asp. M. C. 560—C. A.

Probability of Risk—Sailing Vessel.—Semble, though art. 18 does not apply to a sailing ship, yet she ought in similar circumstances to take off sail so as to come to as complete a standstill as possible, without getting out of command. *The Dordogne*, supra.

"Moderate Speed."—The officer in charge of a steamer, on hearing a whistle almost right ahead, should reduce her speed to as slow a rate as possible, only keeping her under command; by omitting to do so he had not gone at a "moderate" speed within the meaning of art. 13. *The Dordogne* (10 P. D. 6) commented on. *The Ebor*, supra—Per Lord Esher, M. R.

Under art. 13 "a moderate speed"—in a river of narrow channel—means that a vessel shall be brought nearly to a standstill, whether the whistle or fog-horn of another vessel is heard or not, but in the open sea the article need not be so strictly construed, unless a whistle or fog-horn is heard. *The Dordogne*, supra—Per Brett, M. R.

The term "moderate speed" used in art. 13 of the Regulations for Preventing Collisions at Sea is a relative term, depending upon the circumstances. When a sailing ship was going in a dense fog at a speed greater than was enough to keep her under control:—Held, that she had infringed art. 13. *The Beta*, 9 P. D. 134; 51 L. T. 154; 33 W. R. 190; 5 Asp. M. C. 276—C. A.

A collision happened between the steamship I. and the barque Z. in a fog. It was proved that the Z. was proceeding at more than four knots an hour:—Held, an infringement of art. 13, for the term "moderate speed" means that a vessel is to reduce her speed so far as she can consistently with keeping steerage way. *The Zadok*, 9 P. D. 114; 53 L. J., P. 72; 50 L. T. 695; 32 W. R. 1003; 5 Asp. M. C. 252—Hannen, P.

Whistle not heard—Evidence of Negligence.—It was proved at the trial that a fog-horn was blown on the Z. but not heard on the I.:—Held, that this was not *prima facie* evidence of negligence of those on the I. *Id.*

The fact of a steam-whistle alleged to have been blown in a fog not being heard by those on an approaching ship is not necessarily proof that there was a bad look-out on the approaching ship, as the direction in which and the distance from which the sound would be heard is uncertain. *The Rosetta*, 59 L. T. 342; 6 Asp. M. C. 310—Hannen, P.

d. Vessels Crossing, Overtaking and Meeting.

Application of Regulations.—The Regulations for Preventing Collisions at Sea only apply at a time when two vessels have approached so near to one another that, if either of them does anything contrary to the regulations, risk of collision will be involved. *The Banshee*, 57 L. T. 841; 6 Asp. M. C. 221—C. A.

Crossing or Overtaking.—When a vessel is at

the same time overtaking and crossing the course of another vessel, she is to be deemed an overtaking, and not a crossing ship under art. 16, and is bound therefore to obey the directions of art. 20, and keep out of the way of the other vessel. *The Seaton*, 9 P. D. 1; 53 L. J., P. 15; 49 L. T. 747; 32 W. R. 600; 5 Asp. M. C. 191—D.

Vessels Crossing—Docking Signal—"Special Circumstances."—Where a steamship in charge of a pilot, bound for Penarth Dock, and carrying the usual docking signal of two bright lights aft, saw, when crossing Cardiff East Flat, the red and masthead lights of a steamship coming down Cardiff Drain, bearing on her starboard bow, and distant from three to four cables' length; but the pilot in charge took no steps to get out of the way of the other vessel until a collision was inevitable, because he was of opinion that, as he was bound for the dock, he was entitled to hold on:—The court held that his vessel was to blame for breach of art. 16 of the Regulations for Preventing Collisions, there being no "special circumstances" warranting a departure from the regulations. *The St. Andries*, 54 L. T. 278; 5 Asp. M. C. 552—Hannen, P.

Duty to Stop and Reverse—Risk of Collision.]—The A. and B. were crossing within the meaning of art. 16, and it was the duty of the A. to keep out of the way of the B., but she did not do so. The B., when from a quarter to half a mile distant, slackened her speed and continued with slackened speed to within 300 yards of the A., and then stopped and reversed, but not in time to prevent a collision:—Held, that the B. must be held, for not stopping and reversing sooner, to blame as well as the A. Arts. 16 and 18 are intended to be applicable according to the circumstances as they would present themselves to the mind of a prudent sailor, and come into force before the risk of collision is fixed and determined. *The Beryl*, 9 P. D. 137; 53 L. J., P. 75; 51 L. T. 554; 33 W. R. 191; 5 Asp. M. C. 321—C. A.

A steamer, the G., saw a green light at some distance and starboarded her helm, soon after the port side of the B., without a red light, came into view, so close that the only chance of avoiding a collision was for the G. to continue at full speed ahead and starboard her helm, which she did. The B. struck the G. on her starboard side:—Held, that the B. was alone to blame for the collision, and that art. 18 of the Regulations did not apply under the circumstances to the G., and that art. 23 was applicable. *The Benares*, 9 P. D. 16; 53 L. J., P. 2; 49 L. T. 702; 32 W. R. 268; 5 Asp. M. C. 171—C. A.

Where two steamships are approaching so as to involve risk of collision, and it is the duty of one to keep out of the way and of the other to keep her course, the latter is bound to comply with art. 18 of the regulations as to slackening her speed or stopping and reversing, notwithstanding the fact that continuing her speed may be the best and most seamanlike manoeuvre for the purpose of avoiding a collision. The steamship M. sighted the masthead and green lights of the steamship S., distant about three miles, and bearing about two and a half points on the port bow. When the S. got within three ship-lengths of the M., still showing her masthead and green lights at a bearing of four points on

the port bow, she suddenly starboarded, and although the M. immediately stopped her engines, a collision occurred. The court, having held that the S. was to blame, further found that the respective courses of the vessels was such that had the S. kept her course and not starboarded she would have passed one and a half ship-lengths astern of the M., and that the best and most seamanlike manoeuvre for the M. was to continue her speed as she did, but that there was in fact risk of collision before the S. starboarded, and that the M. was to blame for breach of art. 18 in not stopping sooner. *The Memnon*, 59 L. T. 289; 6 Asp. M. C. 317—C. A.

"Course."—The word "course," in art. 22 refers to the direction of the vessel's head and not to her speed. *The Beryl*, 9 P. D. 137; 53 L. J., P. 75; 51 L. T. 554; 33 W. R. 191; 5 Asp. M. C. 321—C. A.

Overtaken Vessel altering Course.]—Semble, that a vessel, which is being overtaken by another, is not to blame within art. 22 of the Regulations if she alters her course at such a distance ahead of the overtaking vessel that the latter can, by the exercise of reasonable care, keep out of the way of the former. *The Banshee*, 57 L. T. 841; 6 Asp. M. C. 221—C. A.

e. Probability of Risk.

In what Cases.]—The S. and C. were approaching each other at night on opposite courses, so as to pass starboard to starboard. The master of the C. saw the green and white lights of the S. somewhat more than a quarter of a mile distant, coming into line. This indicated a probability that the S. was porting, which would cause a risk of collision; soon after the red light of the S. was seen. The engines of the C. had been previously stopped, but the master did not reverse her engines till the red light of the S. was seen; the vessels soon after came into collision:—Held, that the C. was to blame for infringing art. 18 of the Regulations for Preventing Collisions at Sea, because as there was a probability of risk of collision when the master of the C. saw the green and white lights of the S. coming into line, he should, being aware of such probability, have then reversed the engines of the C. *The Stanmore*, 10 P. D. 134; 54 L. J., P. 89; 53 L. T. 10; 5 Asp. M. C. 441—C. A.

In accordance with the 18th sailing rule, under Order in Council, 14th of August, 1879, it is the duty of those in charge of a steamship in motion, when they perceive that a risk of collision is involved, to reverse their engines and bring their ship to a standstill on the water. A collision occurred between the steamship A. and the steamship B. The evidence was most contradictory. It was, however, satisfactorily proved that although the crew of the ship B. had been until a few minutes before the collision engaged in getting the anchors on board in ship-shape order, and that the captain had left the deck when he ought to have been there, yet that when it was perceived that two vessels were approaching in such a manner as to involve risk of collision the engines were reversed, and the ship stopped. On board the ship A. everything was proved to have been in good order at the time of the collision. But her captain did not stop his

engines until almost the moment of collision, and consequently the ship A. cut into the ship B. to the water's edge :—Held, that there was fault on both sides, contributing to the damage and loss which had been suffered, and therefore neither were entitled to costs. *Maclaren v. Compagnie Française de Navigation à Vapeur*, 9 App. Cas. 640—H. L. (Sc.).

Instantaneous Compliance.—A steamship did not stop and reverse under art. 18 as soon as she might have done :—Held, that she was to blame, but that instantaneous compliance with art. 18 is not necessary. *The Emmy Haase*, 9 P. D. 81; 53 L. J., P. 43; 50 L. T. 372; 32 W. R. 880; 5 Asp. M. C. 216—Butt, J.

In Case of Fog.—See ante, cols. 1685, 1686.

In Case of Vessels Crossing, Overtaking, and Meeting.—See ante, col. 1687.

f. Speed.

Clear Weather—North Sea.—A steamer being in the North Sea, and the weather fine and clear, though the night was dark, was proceeding at the rate of eight to nine knots an hour :—Held, that she was not, under the circumstances, going at too high a rate of speed. *The Pacific*, 9 P. D. 124; 53 L. J., P. 66; 51 L. T. 127; 33 W. R. 124; 5 Asp. M. C. 263—Butt, J.

In Fog.—See ante, col. 1686.

g. Narrow Channels.

What are—Strait of Messina.—The Strait of Messina is a narrow channel within the meaning of Article 21 of the Admiralty Regulations for Preventing Collisions at Sea; as to what particular width or length will constitute a narrow channel, quære :—Held, that the A. L., by infringing the said article, occasioned the collision which afterwards happened, and failed to establish that the R., by anything which she did, contributed to it or could in any way have avoided it. *Scicluna v. Stevenson, The Rhondda*, 8 App. Cas. 549; 49 L. T. 210; 5 Asp. M. C. 114—P. C.

Held, that the R.'s helm having been put hard-a-port in a way which, if successful, would have put her on such a course as would have determined the risk of collision, the duty of reversing her engines did not arise till it was discovered that the vessel, owing to the action of a current, was not obeying her helm. *Id.*

Falmouth Harbour.—Art. 21 of the Regulations for Preventing Collisions at Sea, 1880, providing that "in narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship," applies to a steamship entering and passing up Falmouth Harbour, and if a steamer going into that harbour keeps to the side of the channel which lies on her port hand, she violates the regulations. *The Clydeach*, 51 L. T. 668; 5 Asp. M. C. 336—Butt, J.

Cardiff Docks.—A collision occurred at the junction of the main channel leading to Cardiff Docks and the channel to the Roath Basin, between a steamer going up the former and another coming down the latter :—Held, that the place of collision was a "narrow channel" within art. 21 of the Regulations for Preventing Collisions at Sea, and that arts. 16 and 22 were also applicable, there being no special or local rules to supersede the general rules of navigation. *The Leverington*, 11 P. D. 117; 55 L. J., P. 78; 55 L. T. 386; 6 Asp. M. C. 7—C. A.

2. IN OTHER PLACES.

a. Generally.

Duty of Steamship Navigating Reach.—Where a steamer is navigating a reach in which there is a risk of her smelling the ground, it is her duty to be under such control by occasionally stopping her engines or otherwise, so that she may be able to avoid collision with other craft in case she does smell the ground and fails to answer her helm. *The Ralph Creyke*, 55 L. T. 155; 6 Asp. M. C. 19—Hannen, P.

Duty of Keel—Keels lashed together.—In the absence of any rule of the road, regulation, or custom, there is no duty on the part of a keel or barge drifting up river to keep out of the deep water navigation and navigate in the shallow water, even though by remaining in the deep water she obstructs the passage of steamships which can only navigate in the deep water. A keel with her mast lowered may drive up on a flood tide in any part of a river lashed to another keel, but it is her duty in such circumstances to go up dredging with her anchor down, in order that she may thereby have the means in an emergency of bringing herself up if necessary; and whilst two keels may drive up lashed together there is no less duty imposed on them to dredge. *Id.*

b. Danube.

Keeping to Right Bank going down.—Under r. 34, c. 2, of the Danube Commission Rules, vessels going down the Danube should keep to the right bank. Where a vessel going down the Danube, when there was a fog and approaching night, went to the left bank :—Held, that according to the true construction of the rule, that was neglect of duty; and that such negligence was the cause of a collision which occurred with a vessel coming up, although the absence of lights on the latter vessel might have partly contributed to the accident. *The Fourri, The Spearman*, 10 App. Cas. 276; 53 L. T. 29; 5 Asp. M. C. 458—P. C.

c. Humber.

Stern Light—Compulsory Pilotage.—The R. in charge of a tug was dropping stern foremost up the Humber with the tide, and was eventually brought athwart the tide to go into dock. The R. was exhibiting, in addition to the mast-head and side lights, a white light from the main peak showing astern, which had been placed

there by the order of the pilot, who was by compulsion of law in charge of the R. The Rules for the Navigation of the River Humber, made by Order in Council in pursuance of 25 & 26 Vict. c. 63, s. 32, incorporate the Regulations for Preventing Collisions at Sea. The E., coming down the Humber, and the R. came into collision. At the hearing it was admitted that the E. was to blame:—Held, that the R. was also to blame, for that as the Humber Rules were within the purview of 36 & 37 Vict. c. 85, s. 17, there had been, by the exhibition of a stern light, a breach of statutory regulation, namely of art. 2, which it was impossible to say might not have contributed to the collision, and there was no circumstance to make a departure from the regulation necessary. *The Ripon*, 10 P. D. 65; 54 L. J., P. 56; 52 L. T. 438; 33 W. R. 659; 5 Asp. M. C. 365—Butt, J.

d. Mersey.

Stern Light.—At the trial of an action for damage by collision it appeared that the stern light of the plaintiffs' vessel was placed on deck abaft a house on the after part of the deck:—Held, that this was an infringement of rule 5 of the Mersey Rules, but the court having regard to the position of the plaintiffs' and the defendant's vessels, held, that the infringement could not have contributed to the collision. *The Fire Queen*, 12 P. D. 147; 56 L. J., P. 90; 57 L. T. 312; 36 W. R. 15; 6 Asp. M. C. 146—Butt, J.

Launch—Duty of Tug.—Persons in charge of a launch are bound to take the utmost precautions to avoid injury to passing vessels, such precautions being, in the circumstances, no more than reasonable. It is their duty to have a tug in attendance on a launch in the Mersey, decorated so as to indicate that a launch is imminent, and, if necessary, to warn approaching vessels. *The George Roper*, or *Bentinck Steamship Company v. Potter*, 8 P. D. 119; 52 L. J., P. 69; 49 L. T. 185; 31 W. R. 953; 5 Asp. M. C. 134—Butt, J.

e. Tees.

Starboard side of River—Steamship.—Arts. 17 and 18 of the River Tees Conservancy Bye-laws, providing that ships shall keep "the starboard side of the river, so that the port helm may always be applied," and that a "steamship, when approaching another ship on an opposite course or from an opposite direction, shall before approaching within thirty yards slacken her speed, and keep as near as possible to the starboard side of the river," are to be observed even when vessels are approaching one another so as to show each other their green lights, and nothing will excuse the non-observance of these rules but extreme necessity. *The Mary Lohden*, 58 L. T. 461; 6 Asp. M. C. 262—C. A.

f. Thames.

Duty of Sailing Vessel—Steamship.—Where a steamship navigating the River Thames is in such a position, through no fault of those in charge of her, that it is unsafe or impracticable for her to keep out of the way of a sailing vessel,

it is the duty of the sailing vessel under art. 21 of the Rules and Bye-laws for the navigation of the River Thames, on hearing the steamer's whistle sounded as therein provided, to keep out of the way of the steamer. *The Longnewton*, 59 L. T. 260; 6 Asp. M. C. 302—Hannen, P.

Stopping and Reversing.—A steamer having stopped but not having, as she should have done, reversed immediately before a collision, though the court found as a fact that her not having done so did not affect the collision, and having thus infringed r. 14 of the Thames Rules:—Held, that she was nevertheless not to blame, for the Thames Rules do not fall within the operation of s. 17 of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85). *The Harton*, 9 P. D. 44; 53 L. J., P. 25; 50 L. T. 370; 32 W. R. 597; 5 Asp. M. C. 213—Butt, J.

Steamships Meeting—Rounding Points of River.—Rule 23 of the Thames Rules is not confined to the seaward side of "a line drawn from Blackwall Point to Bow Creek." A steamship, the C. S., left the South-West India Docks nearly opposite the curve of Blackwall Point, and proceeded down stream at easy speed against a flood tide. In a few minutes, as she was about to round Blackwall Point, she perceived the steamship M. in Bugsby's Reach, and preparing to round the point; the C. S. stopped and reversed her engines, but a collision between the C. S. and the M. took place:—Held, that Rule 23 of the Thames Rules did not apply, under the circumstances, to the C. S.; that ordinary care on the part of the M. would have enabled her to avoid the collision, and that she alone was to blame. *Cayzer v. Carron Company*, 9 App. Cas. 873; 54 L. J., P. 18; 52 L. T. 361; 33 W. R. 281; 5 Asp. M. C. 371—H. L. (E.).

Fog—Sailing and Dumb Barges.—Dumb barges in the Thames do not carry anchors, and have no means of bringing themselves up except by going ashore or fastening on to anything they may come in contact with, and hence a dumb barge starting on her voyage in clear weather and getting into a fog, is not guilty of negligence if she comes into contact with a vessel moored in the river, and if that vessel in breach of the Rules and Bye-laws for the navigation of the River Thames has her anchor not stock-a-wash, and the barge is thereby injured, the vessel so moored is solely responsible for such damage. *The Rose of England*, 59 L. T. 262; 6 Asp. M. C. 304—Hannen, P.

Tug and Tow—Anchorage Ground—Position of Anchor.—Where a vessel, intending either to moor at one of the buoys or anchor in the anchorage ground in Gravesend Reach, moves from buoy to buoy to select one, and, finding them all occupied, anchors a short distance above the last of the buoys, she does not navigate within the anchorage ground in contravention of art. 15 of the Rules and Bye-laws for the Navigation of the River Thames, 1872. *The City of Delhi*, 58 L. T. 531; 6 Asp. M. C. 269—Butt, J.

Where a vessel, intending either to moor at one of the buoys or anchor in the anchorage ground in Gravesend Reach, finds all the buoys occupied, and, on passing the last buoy, gets her anchor a-cockbill for the purpose of bringing

herself to anchor on finding a suitable place, and, after she has got a short distance above the buoys, a collision occurs and damage is done by the anchor, such anchor is only a-cockbill during such time as is "absolutely necessary" for bringing her to anchor within the meaning of art. 19 of the Rules and Bye-laws for the navigation of the River Thames, 1872. *Id.*

g. Tyne.

Crossing River—Duty of Vessels going up or down.—The duty imposed by art. 22 of the rules for the navigation of the River Tyne upon vessels crossing the river not to cause obstruction, injury, or damage to other vessels, does not require them in any event to get out of the way of vessels going up or down, and they are at liberty when crossing at a proper time and in a proper manner to do so at such times as may be convenient to themselves, and vessels proceeding up and down must take the ordinary precautions to avoid collision with crossing ships. *The Thetford*, 57 L. T. 455; 6 Asp. M. C. 179—Hannen, P.

Crossing near Pier-heads.—Bye-law 20 of the regulations of the River Tyne, 1884, must be taken to mean that a vessel is not to cross from north to south, or from south to north, close up to the pier-heads, but is to get on a proper course when at some considerable distance outside the pier-heads. *The Harvest*, 11 P. D. 90; 55 L. T. 202; 6 Asp. M. C. 5—C. A. Affirming 55 L. J., P. 35; 34 W. R. 491—Butt, J.

3. DUTIES AFTER COLLISION.

Standing by.—The *E. H.*, after a collision with the *M.*, burnt rockets and blue lights as signals of distress, but the *M.* did not, as she might have done, reply to these signals:—Held, a breach of the statutory duty of rendering assistance under 36 & 37 Vict. c. 85, s. 16, and that the *M.* was therefore to be deemed to blame. *The Emmy Haase*, 9 P. D. 81; 53 L. J., P. 43; 50 L. T. 372; 32 W. R. 880; 5 Asp. M. C. 216—Butt, J.

Measure of Damages—Cargo.—The *K.*, which was on a voyage under charter from Cardiff to Bombay with coals, was run into by the *B.*, shortly after leaving Penarth Docks. The *K.*, which was considerably damaged, returned to Cardiff, where her cargo was taken out of her in order that she might be repaired. The owners of the cargo proposed that the coals, which were also damaged, should be sold and a fresh cargo shipped. The shipowner, however, refused to ship a fresh cargo except "on fresh terms as to freight, &c.," and the charterer, without inquiring what the fresh terms would be, reshipped the damaged cargo, which was carried to Bombay:—Held, that it was the duty of the cargo-owner to have ascertained on what "terms as to freight, &c.," the shipowner would consent to ship a fresh cargo in lieu of that which had been damaged, so as to be able to form a judgment as to which would be the best course to diminish the loss for whomever it might concern. *The Blenheim*, 10 P. D. 167; 54 L. J., P. 81; 53 L. T. 916; 34 W. R. 154; 5 Asp. M. C. 522—Hannen, P.

4. ACTIONS FOR DAMAGE.

a. Generally.

Interest to maintain Action.—Where the plaintiffs in an action for damage to cargo had indorsed their bills of lading to a bank to secure advances:—Held, that they retained an interest in the cargo sufficient to enable them to maintain their suit, the money recovered to be for the benefit of the parties shown to be entitled thereto. *The Glamorganshire*, 13 App. Cas. 454; 59 L. T. 572—P. C.

Jurisdiction of County Court.—See post, col. 1720.

Claim when Barred—Contract of Towage—Implied Agreement.—A tug while towing the plaintiff's vessel came into collision with and sank her. The tug was chartered by the defendants, a company, to work with their own tugs, and one of the terms on which the company towed vessels was that they would not be answerable for loss or damage to any vessel in tow of their tugs (which were specified by name) whether occasioned by the negligence of their servants or otherwise. The tug in question was not one of those specified, but the plaintiff was a director of the defendant company, and was aware of the chartering of the tug:—Held, that the plaintiff must be taken to have impliedly agreed to employ the tug on the same terms as the other tugs of the company, and that his claim was therefore barred by the condition. *The Tasmania*, 13 P. D. 110; 57 L. J., P. 49; 59 L. T. 263; 6 Asp. M. C. 305—Hannen, P.

—**Collision caused by Tug—Payment of Sum by Tow.**—The schooner *J. M. S.* having come into collision with a tug and her tow, a damage action in rem was instituted by the owners of the schooner against the tug to recover all the damages occasioned by the collision. Subsequently to the collision the plaintiffs received from the owners of the tow a sum of money described in an agreement entered into between these parties "as an advance on account of the damages to be recovered from the owners of the tug." By the agreement it was agreed that the owners of the tow should give the plaintiffs all information and assistance necessary to bring the action to a successful issue; that if the schooner and the tug should both be held to blame, the plaintiffs should repay any sum by which the money already paid exceeded the moiety of damages recoverable against the tug; and that, as a basis of the arrangement, it was understood that the schooner should be found blameless for the collision. The court, having found the tug alone to blame, held that the above payment was not such a payment by the tow in satisfaction of the damages occasioned by the collision as amounted to a settlement in discharge of the action, and was consequently no bar to the action; and that, notwithstanding the advance paid by the tow, the plaintiffs were entitled to recover from the defendants all the damages occasioned by the collision. *The Stormcock*, 53 L. T. 53; 5 Asp. M. C. 470—Hannen, J.

By Shipowner and Cargo-owner—Compromise by Shipowner—Limitation of Liability—Right of Cargo-owner.—The defendants' vessel came

into collision with and sank another vessel carrying cargo belonging to the plaintiffs. Actions were commenced by the plaintiffs and by the owners of the carrying vessel, but in the action between the latter and the defendants' vessel, the parties filed in the registry an agreement to a decree that both vessels were to blame, and for the usual reference as to the damages. The defendants then brought an action for the limitation of their liability, and paid into court the amount of their liability under the Merchant Shipping Acts. In their statement of claim they referred to the above-mentioned agreement, and in terms admitted that the collision was "in part caused by the improper navigation of their vessel." The plaintiffs, in their defence, did not notice this admission, or otherwise refer to the cause of the collision. The usual decree was made for limitation of liability, and the staying of the plaintiffs' action:—Held, first, that the agreement between the owners of the two vessels having been filed in the registry was, under Ord. LII. r. 23, equivalent to a decree of the court, and that the owners of the carrying vessel were not entitled to have such agreement rescinded for the purpose of proving against the fund in court for more than half the damage sustained by them. Secondly, that there was no admission on the pleadings by the plaintiffs as defendants in the limitation action which precluded them from claiming to prove against the fund for the whole amount of the damage sustained by them, and that in support of their proof an issue might be directed between them and the owners of the carrying vessel to determine whether the defendants' vessel was alone to blame for the collision. *The Karo*, 13 P. D. 24; 57 L. J., P. 8; 58 L. T. 188; 6 Asp. M. C. 245—Butt, J.

Preliminary Act—Amendment.—Art. IX. of the preliminary act on behalf of the defendants was ordered to be amended, as it did not contain a proper statement of the distance and bearing of the other vessel in accordance with Ord. XIX. r. 28 (i). *The Godiva*, 11 P. D. 20; 55 L. J., P. 13; 54 L. T. 55; 34 W. R. 551; 5 Asp. M. C. 524—Butt, J.

Bail to Answer Counter-claim.—The power of the Admiralty Division under s. 34 of the Admiralty Court Act, 1861, to order an action to be stayed until bail has been given to answer a cross-action or counter-claim, does not extend to making an absolute order to give bail; and in a damage action in which the plaintiffs had discontinued after the defendants had counter-claimed, the court refused to enforce an order, made by the registrar, to give bail to answer such counter-claim. *The Alexander*, 48 L. T. 797; 5 Asp. M. C. 89—Butt, J.

The court has jurisdiction by 24 Vict. c. 10, s. 34, to order a plaintiff in an action for damages by collision to give security for damages to a defendant who brings a counter-claim. The court can exercise this power when such plaintiff is a foreign sovereign whose ship cannot be arrested. *The Newbattle*, 10 P. D. 33; 54 L. J., P. 16; 52 L. T. 15; 33 W. R. 318; 5 Asp. M. C. 356—C. A.

Burden of Proof—Ship at Anchor.—In an action founded upon a collision between a vessel

at anchor and one in motion, the burden of proof is upon the owners of the latter to prove that the collision was not occasioned by any negligence on their part. *The Annot Lyle*, 11 P. D. 114; 55 L. J., P. 62; 55 L. T. 576; 34 W. R. 647; 6 Asp. M. C. 60—C. A.

In an action for damage by collision it appeared that the defendants' vessel while in motion came into collision with the plaintiffs' vessel which was at anchor:—Held, that the fact that the plaintiffs' vessel at the time of the collision was at anchor and could be seen was *prima facie* evidence of negligence on the part of the defendants, and that the burden of proof was then upon them to rebut the presumption of liability, by showing either that the collision was occasioned by no fault on their part, or that it was due to inevitable accident, or that it was solely the fault of a pilot who was on board their vessel by compulsion of law. *Clyde Navigation Company v. Barclay* (1 App. Cas. 790) considered. *The Indus*, 12 P. D. 46; 56 L. J., P. 88; 56 L. T. 376; 35 W. R. 490; 6 Asp. M. C. 105—C. A.

Evidence of Negligence—Steam Steering-gear.—A steamship fitted with a patent steam steering-gear ran into a vessel at anchor in the Thames, owing to the steering-gear suddenly not acting; every effort was unavailingly made to avoid the collision. A few days before, on the previous voyage of the same steamship, the same apparatus had similarly refused to act, but no cause for it so doing could be seen on examination. Large numbers of the gears were in use on steamers. In an action of damage:—Held, first, that the defendants were not liable for damage caused by the use of this apparatus without negligence. Secondly, that the use of this apparatus on the Thames after it had acted wrongly on a previous occasion, was evidence of negligence, and that the defendants were liable for the damage caused thereby. *The European*, 10 P. D. 99; 54 L. J., P. 61; 52 L. T. 868; 33 W. R. 937; 5 Asp. M. C. 417—Butt, J.

Discontinuance—Limitation of Liability—Claim against Fund in Court—Estoppel.—An action having been brought by the owners of the ship K. against the owners of ship A. for damages arising out of a collision, an agreement was drawn up between the parties that the action be "discontinued without costs on the ground of inevitable accident," and an order in those terms was drawn up in the Admiralty Registry. The owners of the cargo of ship K. having afterwards brought an action against the owners of ship A. for damages arising out of the same collision, both ships were held to blame, and the cargo-owners were held entitled to half their damages. The owners of ship A. having obtained a decree limiting their liability and having paid a sum into court, the cargo-owners filed their claim in the limitation action. The owners of ship K. having afterwards with the consent of the owners of ship A. obtained a rescission of the order for discontinuance, claimed against the fund in the limitation action. The cargo-owners having objected to this claim:—Held, that the agreement and order for discontinuance (upon their true construction) did not amount to a release of all claims, and that the owners of ship K. were not precluded from claiming against the fund. *The Bellicairn* (10 P. D. 161) distinguished. *The Ardandhu* or *The Kronprinz*,

12 App. Cas. 256; 56 L. J., P. 49; 56 L. T. 345; 35 W. R. 783; 6 Asp. M. C. 124—H. L. (E.)

Judgment by Consent—Setting aside by Consent.—In an action by the owners of the "Britannia" against the owners of the "Bellcairn" for collision, a judgment dismissing claim and counter-claim was taken by consent. Subsequently, the owners of cargo on board the "Britannia" brought an action against the owners of the "Bellcairn," and obtained a judgment that both ships were to blame. The owners of the "Bellcairn" then limited their liability and paid the money into court, and the owners of the "Britannia," having, with the consent of the owners of the "Bellcairn," obtained an order in the registry setting aside the judgment in the first action, brought in a claim against the fund in court:—Held, that the order setting aside the judgment of the court was void, and that the owners of the "Britannia" could not claim against the fund in court. *The Bellcairn*, 10 P. D. 161; 55 L. J., P. 3; 53 L. T. 686; 34 W. R. 55; 5 Asp. M. C. 503—C. A.

Sale of Ship and Cargo—Freight.—Where in an action in rem for collision against ship and freight, in which the defendants' ship was held solely to blame, the ship being still under arrest with the cargo on board, was ordered to be sold; the court on motion directed the marshal to discharge the cargo, to retain the same in his custody as security for the payment of the landing and other charges and freight, if any, due from the owners or consignees of the cargo in respect of the same, and that in default of any application for the delivery of the cargo within fourteen days, the marshal should be authorised to sell such part of the cargo as might be necessary to pay the said charges and freight, if any, due. *The Gettysburg*, 52 L. T. 60; 5 Asp. M. C. 347—Butt, J.

Reference—Evidence.—On a reference in a collision action the registrar and merchants are not bound by uncontradicted evidence as to the amount of damage done, but are entitled to use their own judgment and experience, and find in accordance therewith. *The Bernina*, 55 L. T. 781; 6 Asp. M. C. 65—Hannen, P.

Costs—Inevitable Accident—Admission in Pleadings.—The plaintiffs in an action for damage by collision admitted on the pleadings that the collision was the result of an inevitable accident:—Held, that the defendants were entitled to judgment with costs. Unless there are special circumstances to induce the court to depart from this rule, costs will be given against the plaintiffs in an action of damage, whenever the defendants prove that the collision is the result of an inevitable accident. *The Naples*, 11 P. D. 124; 55 L. J., P. 64; 55 L. T. 584; 35 W. R. 59; 6 Asp. M. C. 30—Butt, J.

Co-defendants—Costs of Successful Defendant.—The dumb barge E., while in tow of the steam tug S., was damaged by a collision with the steamship R. L. The owners of the E. commenced an action joining the owners of both vessels as defendants. At the trial R. L. was found alone to blame:—Held, that the owners of the R. L., having endeavoured to throw the blame on the S., must pay her costs as well as those of

the plaintiffs. *The River Lagan*, 57 L. J., P. 28; 58 L. T. 773; 6 Asp. M. C. 281—Hannen, P.

Discontinuance—Compulsory Pilotage.—In an action of damage by collision, the defendants pleaded, *inter alia*, that their vessel at the time of the collision was compulsorily in charge of a licensed pilot, and that the negligence, if any, which caused the collision was solely that of the pilot:—Held, that on the plaintiffs discontinuing their action, they must pay the defendants' costs. *The J. H. Henkes*, 12 P. D. 106; 56 L. J., P. 69; 56 L. T. 581; 35 W. R. 412; 6 Asp. M. C. 121—Butt, J.

b. What Recoverable.

Cost of Repairs—Restitutio in integrum—Lloyd's Survey.—A successful plaintiff in a collision action is entitled to have his ship put into the same condition in which it was previous to the collision at the cost of the wrongdoer, irrespective of the fact that some of the repairs necessitated by the collision would shortly have been necessary to enable the ship to pass her classification survey, and in estimating the amount of the wrong-doer's liability no deduction can be made on this account. *The Bernina*, 55 L. T. 781; 6 Asp. M. C. 65—Hannen, P.

Consequential Damage—Rotten Wood.—Where a ship is damaged by collision, and on opening her up to effect the repairs rendered necessary by the collision certain parts of her not injured by the collision are found to be rotten, and to require renewing, the cost of such renewal cannot be charged to the collision damage, although such parts but for such opening up would have lasted for some years. *The Princess*, 52 L. T. 932; 5 Asp. M. C. 451—D.

Improper Abandonment.—Where in a collision action for which the defendants were held to blame, the court found that after the collision the plaintiffs' vessel had been improperly abandoned, and it appeared that in consequence thereof she sank and was afterwards raised by the plaintiffs, whereas she might have been beached, the court directed the registrar in assessing the damages, that, as the only ascertainable extra cost arising from the abandonment was the cost of raising, he was to disallow that amount. *The Hansa*, 58 L. T. 530; 6 Asp. M. C. 268—Butt, J.

Fishing Boat—Fishing Interrupted.—A French fishing brig of 142 tons, employed in the cod fishery off the banks of Newfoundland, came into collision on the 6th of July, 1881, with an Italian barque, and in consequence of the collision was compelled to put into port for repairs, but her repairs having been completed, returned to the fishing ground before the close of the fishing season. In an action for damage instituted on behalf of the owners of the brig against the barque, the court pronounced the barque solely to blame for the collision, and referred the question of damages to the registrar and merchants. At the reference the plaintiffs claimed 1,200*l.* for demurrage of their vessel from the date of the collision to the 26th of August, 1881, the date of her return to the fishing ground; and of the amount so claimed,

the registrar, by his report, allowed the plaintiffs 880*l.* as the loss sustained by the interruption of their fishing. The defendants moved the court in objection to the report:—Held, that the motion must be dismissed. *The Risoluto*, 8 P. D. 109; 52 L. J., P. 46; 48 L. T. 909; 31 W. R. 657; 5 Asp. M. C. 93—Sir R. Phillimore.

Commission on Bail—Salvage Action.]—Commission paid for bail in a salvage action will not be allowed as part of the damages recoverable by the salvaged vessel in an action of damage. *The British Commerce*, 9 P. D. 128; 53 L. J., P. 72; 51 L. T. 604; 33 W. R. 200; 5 Asp. M. C. 335—Butt, J.

Limitation of Liability—Compulsory Pilotage—Admiralty Rule.]—Sect. 54 of the Merchant Shipping Amendment Act, 1862, which limits the liability of a shipowner to a certain amount per ton, does not apply to a case where two ships are to blame for a collision, and where the owners of one ship are relieved from all liability by the owners of the other, under s. 388 of the Merchant Shipping Act, 1854, on the ground that the damage done to the other ship was caused by the fault of a compulsory pilot; but under the Admiralty rules, inasmuch as both ships are to blame, the owners of the ship so relieved from liability are only entitled to be paid by the owners of the other ship a moiety of the damage caused to their ship. *The Hector*, 8 P. D. 218; 52 L. J., P. 51; 48 L. T. 890; 31 W. R. 881; 5 Asp. M. C. 101—C. A.

Sum in the nature of Freight—Bill of Lading.]—A ship A., and her cargo, belonged to the same owners, and the plaintiffs advanced 1,000*l.* as a loan to such owners, and received as security, in conformity with the agreement made between them and the borrowers, the bill of lading, on which the master indorsed the receipt for 1,000*l.* as advanced freight, and also a policy of insurance on advanced freight. Ship A. was lost through a collision with the defendant's vessel, whose negligence was admitted. It was proved that the difference between the value of the cargo at the port of destination and at the port of loading would have considerably exceeded 1,000*l.* In an action by the holders of the bill of lading for 1,000*l.* against the defendant's ship:—Held, that the plaintiffs were entitled to recover the sum, though it was not, strictly speaking, advanced freight, but a prospective increase in the value of the cargo, and that the insurers were subrogated to the rights of the plaintiffs. *The Thyatira*, 8 P. D. 155; 52 L. J., P. 85; 49 L. T. 406; 32 W. R. 276; 5 Asp. M. C. 147—Hannen, P.

Increase of Freight.]—The K., which was on a voyage under charter from Cardiff to Bombay with coals, was run into by the B., shortly after leaving Penarth Docks. The K., which was considerably damaged, returned to Cardiff, where her cargo was taken out of her in order that she might be repaired. The owners of the cargo proposed that the coals, which were also damaged, should be sold and a fresh cargo shipped. The shipowner, however, refused to ship a fresh cargo except "on fresh terms as to freight, &c.," and the charterer, without inquiring what the fresh terms would be, reshipped the damaged cargo, which was carried to Bombay:—Held, that the shipowner, having a lien

on the cargo for freight, was entitled to insist on the original cargo being reshipped if it was capable of being carried to its destination, and that the cargo-owner was not entitled to insist on its delivery without payment of freight:—Held, further, that in order to ascertain the amount to be paid by the owners of the wrong-doing ship, it was necessary to estimate what the increased freight would have been, before comparing the loss on the damaged cargo at Bombay with the loss which would have arisen on the sale of the cargo at Cardiff and shipping a fresh one. *The Blenheim*, 10 P. D. 167; 54 L. J., P. 81; 53 L. T. 916; 34 W. R. 154; 5 Asp. M. C. 522—Hannen, P.

Remoteness of Damage—Agreement to provide Vessel for particular Voyage—Absence of definite Charterparty.]—Previous to a collision between two vessels, the owners of one of them had made an oral arrangement with a firm of shipbrokers that the vessel upon the completion of the voyage upon which she was then engaged should go to Antwerp, and there load a cargo in turn as one of a line of steamers, and proceed by a particular route to the Black Sea. In consequence of repairs necessitated by the collision, the vessel was not ready to start for Antwerp so as to load in turn, and, by arrangement, another smaller vessel was substituted for the injured vessel, the latter vessel shortly afterwards taking the place of the substituted vessel on a less remunerative route. In an action of damage the owners of the injured vessel sought to recover against the owners of the other colliding vessel a sum representing (1) the additional profit (calculated on the basis of the profits actually made by the substituted vessel) which would have been earned but for the substitution; (2) the loss of profit due to the difference in size of the two vessels; (3) the loss of time in loading the injured vessel for the substituted route:—Held (Lord Esher, M.R., dissenting), that evidence of the profits made by the substituted vessel was inadmissible, and that the damages must be assessed at such a sum as would represent what a vessel of the description of the injured vessel might ordinarily and fairly be expected to earn, having regard to the fact that a contract had been entered into for her profitable employment:—By Lord Esher, M.R., that damages in respect of the loss of the agreement for the future hiring of the vessel were too remote to be recovered. *The Argentine*, 13 P. D. 191; 58 L. J., P. 1; 59 L. T. 914; 37 W. R. 210—C. A. Affirmed in H. L., W. N., 1889, p. 167.

—Loss of Market.]—A ship having been damaged by a collision with another ship, the owners of cargo on the former claimed damages from the owners of the latter ship. The cargo-owners claimed, inter alia, for damages in respect of the loss of market in consequence of a portion of the cargo having been delayed in its arrival at the port of destination:—Held, that loss of market was too remote a consequence to be considered as an element of damage, and that there was no difference in the principles which regulate the measure of damages in an action of collision, and an action for a breach of duty under a shipping contract. *The Notting Hill*, 9 P. D. 105; 53 L. J., P. 56; 51 L. T. 66; 32 W. R. 764; 5 Asp. M. C. 241—C. A. Cp. cases sub tit. DAMAGES.

5. LIMITATION OF LIABILITY.

a. In what Cases.

Collision with Two Ships—Separate Acts of Negligence.—Where a ship comes into collision with two vessels one after the other, there being a short interval between the two collisions, the shipowner will be entitled to limit his liability to 8*l.* per ton (there being no loss of life) if the first collision is the substantial cause of the second, and there is no separate act of negligence on the part of those in charge of the plaintiff's ship in respect of the second collision. *The Creadon*, 54 L. T. 880; 5 Asp. M. C. 585—Butt, J.

"Improper Navigation."—The words "improper navigation" in 25 & 26 Vict. c. 63, s. 54, sub-s. 4, are not to be restricted to the negligent navigation of a vessel by her master and crew, for the statute includes all damage wrongfully done by a ship to another whilst it is being navigated, where the wrongful action is due to the negligence of a person for whom the owner is responsible. Therefore, when a vessel, owing to the negligence of a person on shore in overlooking the machinery, steered so badly that she came into collision with another vessel, in an action for limitation of liability, the court gave a decree in her favour on the ground that the statute applied to such a case. *The Warwick*, 9 P. D. 145; 53 L. J., P. 65; 51 L. T. 558; 33 W. R. 112; 5 Asp. M. C. 326—C. A.

Claims for Loss of Life Settled.—In an action for limitation of liability, where it appeared that all the claims in respect of loss of life had been settled, the court ordered that upon payment in of 8*l.* per ton, all persons having any claim, either in respect of loss of life or damage to ship, goods, or merchandise, should be restrained from bringing any action in respect of the collision. *The Foscolino*, 52 L. T. 866; 5 Asp. M. C. 420—Butt, J.

Two Ships to Blame.—Sect. 54 of the Merchant Shipping Amendment Act, 1862, which limits the liability of a shipowner to a certain amount per ton, does not apply to a case where two ships are to blame for a collision, and where the owners of one ship are relieved from all liability by the owners of the other, under s. 388 of the Merchant Shipping Act, 1854, on the ground that the damage done to the other ship was caused by the fault of a compulsory pilot. *The Hector*, 8 P. D. 218; 52 L. J., P. 51; 48 L. T. 890; 31 W. R. 881; 5 Asp. M. C. 101—C. A.

b. Practice.

Claim against Fund—Right of Crown—Time.—The Crown may claim against a fund paid into court by the owners of a ship in order to limit their liability under the Merchant Shipping Acts, 1854 and 1862, by the general law, and also under the Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78), s. 3. A claim against a fund paid into court in a suit for limitation of liability under the Merchant Shipping Acts, 1854 and 1862, is not necessarily excluded by the fact that the time fixed by the order of the court for entering claims has elapsed. *The Zoe*, 11 P. D.

72; 55 L. J., P. 52; 54 L. T. 879; 35 W. R. 61; 5 Asp. M. C. 583—Butt, J.

Discontinuance.—See *The Ardandhu* or *The Kronprinz*, ante, col. 1696.

Priorities of Claimants.—The plaintiffs in an action to limit their liability paid into court the sum of 7,862*l.* 0*s.* 10*d.*, being the amount of their statutory liability at the rate of 15*l.* per ton. The amount so paid into court being insufficient to satisfy in full claims against the plaintiffs in respect of loss of life and loss of goods, the registrar, by his report, found that the claimants in respect of loss of life were entitled to be paid out of the sum in court an amount equal to 7*l.* per ton, and that they and the claimants in respect of loss of goods should rank *pari passu* against the balance representing 8*l.* per ton. On objection to the report:—Held, that the report was right, as the court had power to marshal the assets, and that the claimants in respect of loss of goods had no right in priority to the claimants in respect of loss of life against the sum representing 8*l.* per ton. *The Victoria*, 13 P. D. 125; 57 L. J., P. 103; 59 L. T. 728; 37 W. R. 62—Butt, J.

Admissions in Pleadings.—See *The Karo*, ante, col. 1695.

Registered Tonnage.—The tonnage in respect of which shipowners are entitled to limit their liability under s. 54 of the Merchant Shipping Act Amendment Act, 1862, is the tonnage appearing on the ship's register which was in force at the time of the collision. *The Dione*, infra.

Foreign Ship—Crew Space.—The owners of a foreign ship with a closed-in space on the upper deck solely appropriated to the berthing of the crew, are entitled, in limiting their liability, to deduct such space under the Merchant Shipping Act, 1854, s. 21, sub-s. 4, though the provisions of the Merchant Shipping Act, 1867, s. 9, have not been complied with. *The Franconia* (3 P. D. 164) explained. *The Palermo*, 10 P. D. 21; 54 L. J., P. 46; 52 L. T. 390; 33 W. R. 643; 5 Asp. M. C. 369—Butt, J.

Life Claims—Payment into Court.—In an action of limitation of liability, where the plaintiffs have paid into court, or are willing to pay in 8*l.* per ton in respect of damage to ship, goods, and merchandise, but seek in respect of the life claims to pay into court, or give bail for an amount less than their total liability under the Merchant Shipping Act, the court, before fixing such amount, will require the plaintiffs to state on affidavit the names of the persons killed and injured, their condition in life, the number of those who are legally entitled to claim, the number of claims that have been settled, and the amounts paid in settlement. *The Dione*, 52 L. T. 61; 5 Asp. M. C. 347—Butt, J.

Jurisdiction of Chancery and Admiralty Divisions.—An action in rem against a foreign ship under Lord Campbell's Act (9 & 10 Vict. c. 93, s. 2), is not within the Admiralty Court Act, 1861 (24 Vict. c. 10, s. 7), and therefore the Admiralty Division has not jurisdiction over

such an action. The Chancery and Admiralty Divisions may entertain such a claim in an action for limitation of liability, under their general statutory jurisdiction as to limitation of liability. Per Brett, M. R. *The Vera Cruz*, 9 P. D. 96; 53 L. J., P. 33; 51 L. T. 104; 32 W. R. 783; 5 Asp. M. C. 270—C. A. See *S. C.*, in H. L., post, col. 1720.

XIII. SALVAGE AND TOWAGE.

1. SERVICES ENTITLING TO SALVAGE.

Dependent on Success.—The C. broke down in the English Channel ten miles from Anvil Point, and was then in a position of risk, but not of imminent danger. The H. at her request took the C. in tow; near the Shambles the hawsers parted, and the C. then anchored and was in a position of considerable danger, greater than when the H. took her in tow. The H. was unable to make fast a hawser again, and in trying to do so, came into collision with the C. The H. then left the C., which was soon after taken in tow by two tugs and brought in safety to Portland:—Held, that the H. was not entitled to salvage. *The India* (1 W. Rob. 406) followed. *The Cheerful*, 11 P. D. 3; 55 L. J., P. 5; 54 L. T. 56; 34 W. R. 307; 5 Asp. M. C. 525—Butt, J.

Distinction between Salvage and Pilotage.—A pilot on a salved ship who rendered trifling assistance by helping at the wheel and windlass, held not entitled to salvage. *The Monarch*, 12 P. D. 5; 56 L. J., P. 114; 56 L. T. 204; 35 W. R. 292; 6 Asp. M. C. 90—Hannen, P.

In an action for salvage it appeared that on March 20, about 11 A.M., the plaintiffs' fishing-smack fell in with the defendants' vessel which was showing an English Jack flag in her rigging, in the North Sea, forty miles from Lowestoft. The crew of the vessel were suffering from frost-bite, the helmsman in consequence steering with one hand. They were also short of provisions. They told the master of the smack that they wished to be piloted to the nearest port, the vessel being at this time out of pilotage waters, and he agreed to take and took the vessel to Great Yarmouth:—Held, that even assuming that the signal exhibited by the defendants' vessel was ambiguous, the assistance rendered to her was in the circumstances a salvage service, and that the plaintiffs were entitled to remuneration accordingly. *The Aglaia*, 13 P. D. 160; 57 L. J., P. 106; 59 L. T. 528; 37 W. R. 255—D.

Distinction between Salvage and Towage.—Where a steamship, disabled by the breaking of her crank-shaft, was towed a distance of about thirty miles without danger or risk by another steamship belonging to the same owners as the disabled vessel, and fifteen of the crew of the towing vessel instituted a salvage action in the sum of 5,000*l.* against the vessel towed, and arrested the vessel, cargo, and freight therein, the court held such services to be salvage services, but of so slight a character that on a value of 105,500*l.* it awarded 15*l.*, and ordered the salvors to pay all the costs of the action, expressing disapprobation both at the institution of the action in the High Court, and at the arrest of the vessel for such an amount. *The Agamemnon*, 48 L. T. 880; 5 Asp. M. C. 92—Butt, J.

The V. fell in with the C., shewing signals of distress, with her propeller shaft broken, about thirty miles out of her usual course from America to England, and took her in tow. After the V. had towed the C. from 8.10 P.M. to 7.45 the hawser broke, and owing to the danger to the cattle on board, the V. would not take the C. again in tow. By the services of the V. the C. was brought ten to fourteen miles nearer her proper track, and towed eighty-five miles on her course, and thus brought into greater comparative safety. The C. subsequently arrived safely at Queenstown:—Held, that the V. was entitled to some salvage reward, and she was accordingly awarded 200*l.* *The Camellia*, 9 P. D. 27; 53 L. J., P. 12; 50 L. T. 126; 32 W. R. 495; 5 Asp. M. C. 197—Hannen, P.

2. LIFE SALVAGE.

No Property saved.—A steamship was requested by another steamship in distress to stand by her. An agreement was accordingly made between the two masters for a fixed sum that the sound vessel would remain by the damaged one until she was in a safe position to get to port. The sound vessel remained by the damaged one until the latter was about to sink, when she took her crew on board, and the damaged steamer immediately afterwards sank. The owners, master and crew of the salving ship, brought an action for life salvage:—Held, that as no res was saved the action would not lie either as a salvage action simply or on the agreement. *The Renpor*, 8 P. D. 115; 52 L. J., P. 49; 48 L. T. 887; 31 W. R. 640; 5 Asp. M. C. 98—C. A.

Wreck raised by Thames Conservators—Damages recovered from wrongdoing Ship.—The defendants' vessel having been sunk in the River Thames by a collision occasioned by the fault of another vessel, the conservators, acting under 20 & 21 Vict. c. cxlvii. s. 86, caused it to be raised and sold, and the proceeds of the sale being insufficient to defray the expenses of raising it, they recovered, under s. 86, the amount of the deficiency from the defendants. The defendants on their part recovered the full value of their vessel from the owners of the vessel which was to blame for the collision. In an action for salvage in respect of the preservation of the lives of the crew of the defendants' vessel at the time of the collision:—Held, that the salvors could not recover; that the defendants' vessel not having been saved there was nothing to which the claim for life salvage could attach; and that it could not be preferred against the defendants in respect of the amount recovered as damages from the vessel to blame for the collision. *The Annie*, 12 P. D. 50; 56 L. J., P. 70; 56 L. T. 500; 35 W. R. 366; 6 Asp. M. C. 117—Hannen, P.

Amount.—In a case of salvage the court, having out of the proceeds of ship and cargo, amounting to 608*l.*, awarded one-half to salvors of property, awarded 150*l.* to life salvors taking off the crew, together with costs to both plaintiffs. *The Anna Helena*, 49 L. T. 204; 5 Asp. M. C. 142—Hannen, P.

3. PERSONS ENTITLED TO SALVAGE.

Salving and Salvaged Ships belonging to same Owners—Master and Crew.—A steamship laden with cargo became disabled at sea in consequence of the breaking of her crank shaft. Such breakage was caused by a latent defect in the shaft, arising from a flaw in the welding, which it was impossible to discover. Her cargo was shipped under bills of lading which contained among the excepted perils "all and every the dangers and accidents of the seas and of navigation of whatsoever nature or kind." Another vessel belonging to the same owners towed the disabled vessel to a place of safety. In an action of salvage brought by the owners, masters, and crew of the salving vessel against the owners of cargo on the salvaged ship:—Held, that the master and crew were entitled to salvage, but that the owners were not, for that there was an implied warranty by them that the vessel was seaworthy at the beginning of the voyage. *The Glenfruin*, 10 P. D. 103; 54 L. J., P. 49; 52 L. T. 769; 33 W. R. 826; 5 Asp. M. C. 413—Butt, J.

A steamship became disabled at sea owing to the breaking of her fly-wheel shaft, through a flaw in the welding existing at the commencement of the voyage, but not discoverable by the exercise of any reasonable care. The cargo on board her was shipped under three bills of lading, the first of which contained, amongst other excepted perils, the clause:—"warranted seaworthy only so far as ordinary care can provide;" the second:—"warranted seaworthy only as far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers, and crew can ensure it;" and the third: "owners not to be liable for loss, detention, or damage . . . if arising directly or indirectly . . . from latent defects in boilers, machinery, or any part of the vessel in which steam is used, even existing at time of shipment, provided all reasonable means have been taken to secure efficiency." A vessel belonging to the same owners towed the disabled vessel to a place of safety. In an action of salvage brought by the owners, master and crew of the salving vessel against the owners of cargo in the salvaged vessel:—Held, that the owners of the salving vessel (though at the same time owners of the salvaged vessel) were entitled to salvage, and that the owners of the cargo had no remedy for breach of the contract of carriage, for the exceptions in the bills of lading were such as to constitute a limited warranty of seaworthiness at the commencement of the voyage, which limited warranty had been complied with by the ship-owners. *Cargo ex Lævities*, 12 P. D. 187; 56 L. J., P. 108; 57 L. T. 502; 36 W. R. 111; 6 Asp. M. C. 174—Butt, J. See also *The Agamemnon*, ante, col. 1703.

Government Transport—Regulations for Transport Service—Government Stores.—The owners, master, and crew of a steamship chartered to the Government as a transport under the ordinary form of Government charter, incorporating the transport regulations (by which it is provided that "when necessary, steam transports will be required to tow other vessels") are entitled to recover for salvage services rendered to a ship and her freight, even though the services be rendered with the assistance of a naval officer and naval seamen, and the salvaged vessel be laden (inter alia) with government stores. *The Bertie*, 55 L. T. 520; 6 Asp. M. C. 26—Hannen, P.

Queen's Ship.—A vessel with a valuable cargo on board, struck on a reef on an uninhabited island in the Red Sea near the mainland; and the crew began to jettison part of the cargo, which they threw into shallow water. Armed Arabs then crossed over from the mainland and began to plunder the jettisoned cargo. A Queen's ship having come up, her commander anchored near the wrecked vessel, and sent a number of his crew to act as sentinels on the beach of the mainland, who were posted for about a mile along the beach, and were exposed to severe heat. Others of the crew were employed in discharging the cargo, working up to their waists in water in the hold, which was greatly fouled. They threw out the cargo and hauled it across the reef to the mainland, where it was collected by the sentinels and labourers. In an action of salvage by the commander and crew of the Queen's ship:—Held, that the services rendered by them being beyond the scope of their public duty were salvage services, and that they were entitled to remuneration accordingly. *Cargo ex Ulysses*, 13 P. D. 205; 58 L. J., P. 11; 60 L. T. 111; 37 W. R. 270—Hannen, P.

Intention of Salvor—Mistake of Fact.—Where a person renders services in a nature of salvage to a vessel which he at the time bona fide believes to be his own by purchase or otherwise, he is not precluded from recovering salvage reward in respect of such services because it turns out in fact that the vessel was not his property. The provisions of s. 450 of the Merchant Shipping Act, 1854, requiring a person who finds or takes possession of a wreck to give notice to the receiver, are not applicable to the case of a person who takes possession of a stranded vessel under the belief that he is the purchaser thereof, and in such a case these provisions do not operate to deprive him of his right to recover salvage. *The Liffey*, 58 L. T. 351; 6 Asp. M. C. 255—Hannen, P.

4. RIGHTS OF SALVORS.

To retain Possession of Vessel.—Where salvors have brought a vessel into a position of safety they are bound, on demand by the owners, to deliver up possession of the salvaged property, and have no right to retain it for the alleged purpose of completing the repairs. If the vessel is at the time of the demand in such a critical position that there may be risk of loss or damage to her unless the salvors are allowed to complete their operations, semble, that the salvors may retain possession pending their completion. *The Pinnaas*, 59 L. T. 526; 6 Asp. M. C. 313—Hannen, P.

Misconduct of Salvors.—The master and crew of the Y., a vessel in distress, got on board the K., a steamer standing by her. The mate and two of the crew of the K. afterwards went on board the Y. but refused to take her master back with them. The mate subsequently also refused the services of a steam-tug, and finally having from want of local knowledge anchored the Y. in an insecure place, she began to drift, was forsaken by the salvors, and sank. She was subsequently raised by her owners at considerable expense. In an action for salvage the owners of the Y. denied that a reward was due

and counter-claimed for damages:—Held, that the mate was guilty of misconduct in refusing to take the master of the Y. on board of her, and to engage the services of the tug; but that if the Y. had been ultimately saved such misconduct would have worked a partial forfeiture of the reward only:—Held, further, that as the loss arising from the misconduct of the salvors was probably equal to that from which the Y. was first rescued, no salvage reward was due. *The Yan-Yean*, 8 P. D. 147; 52 L. J., P. 67; 49 L. T. 186; 31 W. R. 950; 5 Asp. M. C. 135—Hannen, P.

5. SALVAGE AGREEMENTS.

Implied Authority of Master.—[Observations as to the implied authority of shipmasters to enter into salvage agreements. *The Renpor*, 8 P. D. 115; 52 L. J., P. 49; 48 L. T. 887; 31 W. R. 640; 5 Asp. M. C. 98—Per Brett, M.R.

Validity—Action by Seamen.—[An agreement was made between the masters of the W. and the N., which was in need of assistance, that the W. should tow the N. to Queenstown for the sum of 200*l*. There was no evidence at the trial to shew that the master of the W. consulted the officers and crew as to the terms of the agreement. The service was duly performed, and subsequently thirteen of the officers and crew of the W. brought an action of salvage against the N. The defendants pleaded, *inter alia*, that they had tendered 200*l*. to the owners of the W., but this sum was not paid into court:—Held, that the agreement must be upheld, and the 200*l*. apportioned amongst the owner and crew of the W. Held, also, that when a fair salvage agreement has been made in a *bonâ fide* manner by the masters of the salving and the salvaged vessels the officers and seamen of the salving ship ought not to bring an action of salvage, and that the plaintiffs must therefore pay the costs of the action. *The Nasmyth*, 10 P. D. 41; 54 L. J., P. 63; 52 L. T. 392; 33 W. R. 736; 5 Asp. M. C. 364—Butt, J.

Liability of Shipowner for Value of Ship, Freight, and Cargo.—[An agreement made by the master of a vessel in distress to pay salvors a fixed sum is an agreement made on behalf of and pledging the credit of the shipowners, so as to make them liable to the salvors for the whole amount so agreed upon, and not merely for such proportion of such amount as the value of the ship and freight bears to the value of the cargo. *The Raisby* (10 P. D. 114) distinguished. *The Cimbrian*, 57 L. T. 205; 6 Asp. M. C. 151—Butt, J.

A vessel, the value of which was 3,500*l*., and the cargo of which was worth 14,000*l*., having been for three days on rocks in Castraes Bay, in the Gulf of Tartary, the master entered into an agreement with the salvors to pay them 200*l*. for each day of service, and a further sum of 2,000*l*. in the event of the vessel being got or coming off the rocks during the continuance of the attendance of the salvors:—Held, that the agreement was fair and reasonable and binding on the owners of the vessel, and that the owners of the vessel were liable for the whole amount agreed upon without any deduction in respect of the salvage of the cargo. *The Raisby* (10 P. D.

114) distinguished. *The Prinz Heinrich*, 13 P. D. 31; 57 L. J., P. 17; 58 L. T. 593; 36 W. R. 511; 6 Asp. M. C. 273—Butt, J.

— **Average Bond.**—[The G. fell in with the R. which was in distress. The following agreement was signed by the two captains: "At my request the captain of the G. will tow my ship the R. to St. Nazaire, that being the nearest port, for repairs. The matter of compensation to be left to arbitrators at home." The G. towed the R. safely to St. Nazaire. The R. discharged her cargo at Dunkirk, and an average bond in the usual form was taken from the consignees of the cargo. The owners of the G. brought an action for salvage of the ship and freight against the R., and were awarded salvage. They also brought an action in France for the salvage of the cargo against the cargo-owners, but failed in it. They then brought this action in personam against the owners of the R. to recover salvage in respect of the services to the cargo, or, in the alternative, damages from the defendants, for not taking a proper bond to secure salvage from the cargo-owners:—Held, that the defendants were not primarily liable to pay salvage in respect of the cargo, that they had not bound themselves by the above agreement to do so, and that it was not their duty to obtain a bond from the cargo-owners for the proportion of any salvage which might be due. *The Raisby* or *Cardiff Steamship Company v. Barwick*, 10 P. D. 114; 54 L. J., P. 65; 53 L. T. 56; 33 W. R. 938; 5 Asp. M. C. 473—Hannen, P.

6. RIGHT TO RECOVER SALVAGE EXPENSES.

Negligent Navigation—Right of Owner of Cargo against Shipowner.—[The plaintiffs under a charterparty shipped a large quantity of rye on board one of the defendants' ships, to be carried from the port of T. to the port of A. Owing to the negligent navigation of the defendants' servants the ship was cast ashore, and a large quantity of the rye was lost; but a considerable quantity was saved by the Salvage Association, who were employed by the underwriters of the cargo with the assent of the defendants. The average statement was prepared, and the sum assessed was agreed to by the plaintiffs, and the Salvage Association were paid by the underwriters the expenses claimed by them. The plaintiffs brought their action to recover the amount of the salvage expenses so paid by the underwriters. The plaintiffs recovered a verdict for an amount to be settled out of court. The question of law involved in the case was reserved for further consideration. The defendants contended that they were not liable because the plaintiffs themselves had not paid the expenses, and the payment under the circumstances was voluntary:—Held, on further consideration, that the plaintiffs were entitled to recover the amount of the salvage expenses, as, without their being incurred, the remainder of the cargo could not have been sent to its destination, which was for the benefit of the defendants, and that the payment under the circumstances was not voluntary. *Scaramanga v. Marquand*, 1 C. & E. 500—Huddleston, B. Affirmed 53 L. T. 810; 5 Asp. M. C. 506—C. A.

7. AMOUNT AWARDABLE.

a. Principles on which Award made.

Value of Property—Perils of Salvaging Ship—Possibility of Assistance—Character of Service.]

—In estimating the amount of a salvage remuneration the court takes into consideration, first, the value of the property saved, and next the actual perils from which it has been saved. In considering the perils, the possibility of assistance being rendered to the vessel in peril must be taken to lessen the amount to be awarded. The value of the salvaging ship will not substantially affect the amount of the reward, but the length of time to which she is exposed to additional risks is a material element for consideration. *The Werra*, 12 P. D. 52; 56 L. J., P. 53; 56 L. T. 580; 35 W. R. 552; 6 Asp. M. C. 115—Hannen, P.

Where salvage services have occasioned the salvors serious pecuniary loss, and where the value of the ship and cargo saved is ample not only to defray loss sustained by a salvor, in addition to a proper sum for the master and crew, but also to leave a substantial surplus for the owner of the property saved, the salvor should be remunerated where possible with a sum sufficient to reward him for the risk and labour, and to cover damages and expenses incurred through rendering the service, and evidence of the damages and expenses ought to be received by the judge, so that they may be ascertained with precision. *The City of Chester*, infra—Per Bagge and Lindley, L.JJ.

Where the property saved is ample, losses voluntarily incurred by the salvor should be transferred to the owner of the property saved, and in addition the salvor should receive a compensation for his exertions and for the risk he runs of not receiving any compensation in the event of his services proving ineffectual. *Bird v. Gibb*, *The De Bay*, 8 App. Cas. 559; 52 L. J., P. C. 57; 49 L. T. 414; 5 Asp. M. C. 156—P. C.

The losses should be ascertained with precision where practicable, but in that case the salvage remuneration added thereto should be fixed on a more moderate scale than where the losses cannot be fixed with precision. *Id.*

Evidence—Loss of Earnings by and Damage to Salvaging Ship.]—In an action for salvage, evidence of the loss of earnings by, and of the costs of repairing damage done to the salvaging vessel in consequence of rendering salvage services is admissible. These sums are only to be regarded as elements for consideration in estimating the amount of the salvage reward, and are not to be considered as fixed amounts to be awarded to the salvors in respect of these matters. *The Sunnyside*, 8 P. D. 137; 52 L. J., P. 76; 49 L. T. 401; 31 W. R. 859; 5 Asp. M. C. 140—Hannen, P.

In an action of salvage, in which the value of the salvaging steamer was 85,000*l.*, and of her cargo and freight 104,047*l.*, and of the salvaged steamer 90,000*l.*, and of her cargo and freight 89,535*l.*, the court awarded 4,500*l.* to the owners, 500*l.* to the master, and 1,500*l.* to the crew. During the hearing the owners tendered evidence of the particular injuries to their steamer caused by the performance of the services, of the costs of the repairs, and of the pecuniary

loss caused by the detention of their steamer whilst such repairs were being executed: the court refused to receive this evidence, or to refer it to the registrar and merchants to assess the amount of such costs and losses:—Held, on appeal, that the judge of the Admiralty Court is not bound *ex debito justitiæ* to admit such evidence or to decree in terms that a specific and ascertained amount shall be paid to salvors in respect of damages or costs caused by rendering salvage services, for he is not bound always to award a sum sufficient to indemnify a salvor. But the judge may, in his discretion, receive such evidence, and may, if it be proper under the circumstances, include an amount in respect of damages in his award. Having regard to the large value in the present case, the decree should be varied by awarding 1,000*l.* to the shipowners for the actual services rendered, and by referring the costs of repairs to, and of the detention of the salvor's steamer to be ascertained by the registrar and merchants, unless the appellants were willing that the decree of the court below should stand. *The City of Chester*, 9 P. D. 182; 53 L. J., P. 90; 51 L. T. 485; 33 W. R. 104; 5 Asp. M. C. 311—C. A.

b. Apportionment.

Derelict.]—The master of a Norwegian brig bound to Cardiff, with a crew of nine men, fell in, in the North Sea between Heligoland and the Dogger Bank, with a derelict vessel in a very crippled condition, and put his mate and two of his crew on board her. The mate and the two men on board the derelict, shortly after they had boarded her, fearing that she was about to founder, endeavoured to leave her, but their boat was swamped, and one of the men drifted astern, and was picked up by a fishing smack. The mate and the other hand succeeded in bringing the derelict safely into the English Channel, and within three miles of Dungeness; she was then taken in tow by a steamship and towed to the entrance of Dover Harbour, within which she was subsequently placed in safety. Actions of salvage were instituted by the owners, master, and crew of the brig, and by the owners, master, and crew of the steamship against the derelict vessel and her cargo, and the court awarded a moiety of the value of the property proceeded against, and apportioned three-fifths of the amount to the owners, master, and crew of the brig. *The Livietta*, 8 P. D. 24; 48 L. T. 799; 31 W. R. 643; 5 Asp. M. C. 132—Sir R. Phillimore.

In general.]—Two tugs rendered salvage services to a ship driven from her moorings in the Bristol Channel, by towing her, in a very heavy gale, into the River Usk. The services lasted for about three hours. The value of the salvaged ship was 4,000*l.*, of her cargo 900*l.*, and of her freight 288*l.*; 450*l.* was awarded. *The Monarch*, 12 P. D. 5; 56 L. J., P. 114; 56 L. T. 204; 35 W. R. 292; 6 Asp. M. C. 90—Hannen, P.

A vessel having got ashore on the Parkin Rock in the Red Sea, her master and part of the crew proceeded to Aden for assistance. During their absence the crew left on board were driven away by Arab wreckers, but the vessel was never permanently abandoned. Three steamers rendered

valuable services to the vessel, and finally succeeded in getting her off the rocks and saving part of her cargo. The value of the vessel for the purposes of the action was taken to be 3,750*l*. The court awarded 2,000*l*. as salvage. *The Erato*, 13 P. D. 163; 57 L. J., P. 107; 59 L. T. 840—Butt, J. See also *The City of Chester*, supra; *The Agamemnon*, and *The Anna Helena*, ante, cols. 1703, 1704.

c. Reviewing Award on Appeal.

Rule of Court of Appeal.—Where a salvage award is appealed against the Court of Appeal adheres to the rule laid down in the Privy Council, and will not alter the sum unless it has been given on wrong principles, or with a misapprehension of the facts, or it is exorbitant and out of reason.—6,000*l*. was awarded for services rendered to a steamer which had run aground on a reef in the Red Sea, nearly five miles from Suez, and which, owing to the heavy sea and the nature of her position, was in imminent peril. The services were rendered at much peril to the salvaging ship. The Court of Appeal refused to alter this award. *The Lancaster*, 9 P. D. 14; 49 L. T. 705; 36 W. R. 608; 5 Asp. M. C. 174—C. A.

The Court of Appeal will, in a salvage action, where it appears that the judge below has misapprehended the evidence, and consequently given a wrong award, increase or diminish the award as the justice of the case may require. *The Star of Persia*, 57 L. T. 839; 6 Asp. M. C. 220—C. A.

The barque "Star of Persia," having taken up a foul berth in bad weather in the Downs, collided with another barque. The tug C. towed her clear after an hour's towing, during which time her anchor and chain were slipped. After she had been got clear the tug continued to tow ahead until another anchor had been brought off from the shore by other salvors, and she was ultimately saved. Her value and that of her cargo and freight amounted in all to 23,000*l*. The court, in a salvage action against the "Star of Persia," having awarded 150*l*., the Court of Appeal held that the evidence as to the danger from which the "Star of Persia" had been saved, had been misapprehended, and increased the award to 300*l*. *Id*.

Salvage remuneration was reduced from \$12,000 to \$7,500, their Lordships being of opinion that the difference between the sum awarded and that which would be liberal was so large as to require correction. *The Glenduror* (3 L. R., P. C. 589) approved and followed. *The Thomas Allen*, 12 App. Cas. 118; 56 L. T. 285; 6 Asp. M. C. 99—P. C.

Where a judge had awarded 3,500*l*. for losses and 5,000*l*. for remuneration (the property saved being 67,000*l*.):—Held, that a total of 6,000*l*. was sufficient. *Bird v. Gibb*, *The De Bay*, ante, col. 1709. And see *The City of Chester*, ante, col. 1710.

8. PRACTICE IN SALVAGE ACTIONS.

Compromise—Mistake of Fact.—A compromise of a salvage action agreed to by the salvors under a mistake of fact is not binding upon them. *The Monarch*, supra.

Reception of Evidence in Salvage Actions where all Facts admitted.—See *The Hardwich*, post, col. 1725.

Costs—Tender.—Where in a salvage action defendants with their defence tender and pay into court a sum of money in satisfaction of the plaintiff's claim, and plead such payment into court, and the sum paid in is held to be sufficient, the court will order the defendants to pay the plaintiff's costs up to the date of the delivery of the defence, unless the circumstances of the case render it just and expedient to order otherwise. *The William Symington*, 10 P. D. 1; 54 L. J., P. 4; 51 L. T. 461; 33 W. R. 371; 5 Asp. M. C. 293—Butt, J.

In a salvage action it is not necessary that a tender should be accompanied with an offer to pay the plaintiff's costs up to the date of tender. *Id*.

Several Issues.—The plaintiffs having towed a vessel into greater comparative safety, the hawser then broke, and it was dangerous to take her again in tow. In an action for salvage:—Held, that the plaintiffs were entitled to the general costs of the action, but not to those of a special issue as to damage to machinery on which they had failed. *The Camellia*, 9 P. D. 27; 53 L. J., P. 12; 50 L. T. 126; 32 W. R. 495; 5 Asp. M. C. 197—Hannen, P.

Slight Character of Services.—See *The Agamemnon*, ante, col. 1703.

Officers and Seamen—Action on Agreement.—See *The Nasmyth*, ante, col. 1707.

9. AGREEMENTS AS TO TOWAGE.

Validity—Authority of Master.—The steamship W. having found the steamship A., on the 12th February, off Cape Finisterre, in a disabled condition, towed her off in heavy weather until the 14th February, when, in consequence of the condition of the A., the master of the W. proposed to abandon her. However, at the request of the master of the A., it was agreed in writing that the W. should "stand by the A. as long as possible, and that the W. and owners are to be paid for the time and towing already done and to be done from the 12th February, 1883." The W. therefore again took the A. in tow, but on the 16th February, owing to stress of weather, it was found necessary to abandon her, after which she was totally lost. In an action for towage against the owners of the A., the court held that the agreement entered into by the master of the A. was a reasonable one, and one which in his position of agent, ex necessitate for his owners, he had an authority to enter into; and awarded the plaintiffs the sum of 400*l*. in respect of the services rendered prior to and after the agreement. *Wellfield (Owners) v. Adamson, The Alfred*, 50 L. T. 511; 5 Asp. M. C. 214—Butt, J.

Condition Exempting from Liability—Negligence of Tug Owners or Servants.—The master of a steam tug, who had contracted to tow a fishing smack out of the harbour of Great Yarmouth to sea on the terms that his owners should not be liable for damage arising from any negli-

gence or default of themselves or their servants, after the towage had been in part performed, took in tow, in addition to the smack, six other vessels, and in consequence was unable to keep the fishing smack in her course, so that she went aground and was lost. By having more than six vessels in tow at once, the master of the tug disobeyed a regulation made by the harbour-master of Great Yarmouth under statutory authority. The owners of the fishing smack brought an action against the owners of the steam tug to recover damages:—Held, that the loss of the smack was occasioned by the negligence of the master of the tug: that the defendants were protected from liability by the terms of the towage contract, and that the action must be dismissed. *The United Service or Cole v. Great Yarmouth Steam Tug Company*, 9 P. D. 3; 53 L. J., P. 1; 49 L. T. 701; 32 W. R. 565; 5 Asp. M. C. 170—C. A.

Implied Agreement.]—A tug while towing the plaintiff's vessel came into collision with and sank her. The tug was chartered by the defendants, a company, to work with their own tugs, and one of the terms on which the company towed vessels was that they would not be answerable for loss or damage to any vessel in tow of their tugs (which were specified by name) whether occasioned by the negligence of their servants or otherwise. The tug in question was not one of those specified, but the plaintiff was a director of the defendant company, and was aware of the chartering of the tug:—Held, that the plaintiff must be taken to have impliedly agreed to employ the tug on the same terms as the other tugs of the company, and that his claim was therefore barred by the condition. *The Tasmania*, 13 P. D. 110; 57 L. J., P. 49; 59 L. T. 263; 6 Asp. M. C. 305—Hannen, P.

Efficiency of Tug for Service.]—There is an implied obligation in a contract of towage, that the tug shall be efficient and properly equipped for the service, and a proviso in the contract that the owners will not be responsible for the default of the master, does not release them from such implied obligation. *The Undaunted*, 11 P. D. 46; 55 L. J., P. 24; 54 L. T. 542; 34 W. R. 686; 5 Asp. M. C. 580—Butt, J.

10. LIABILITY FOR NEGLIGENCE IN TOWING.

Duty of Tug and Tow.]—It is the duty of those on board the vessel in tow to give general directions to the master of the tug as to the towage. But the master of the tug should exercise his discretion as to the proper manoeuvres to be employed, especially where he is more competent to form an opinion on this point than the master of the vessel in tow. *The Isca*, 12 P. D. 34; 56 L. J., P. 47; 55 L. T. 779; 35 W. R. 382; 6 Asp. M. C. 63—D.

Under an ordinary contract of towage, the vessel in tow has control over the tug, and is therefore liable for the wrongful acts of the latter, unless they are done so suddenly as to prevent the vessel in tow from controlling them. *The Niobe*, *infra*.

It is not the duty of those in charge of a tow which is being towed with a long scope of hawser

by night at sea to direct the movements of the tug—the circumstances being different to towing by day in a river. *The Stormcock*, 53 L. T. 53; 5 Asp. M. C. 470—Hannen, P.

Liability of Vessel in Tow for Collision.]—A tug with a vessel in tow came into collision with another vessel, which was seriously injured by the tug, but not injured by the vessel in tow. The collision might have been avoided had there been a good look-out on the vessel in tow, and had she warned the tug that the latter was in danger of collision by continuing on her course:—Held, that the owners of the vessel in tow were liable. *The Niobe*, 13 P. D. 55; 57 L. J., P. 33; 59 L. T. 257; 36 W. R. 812; 6 Asp. M. C. 300—Hannen, P.

Action in Rem against Tug—Maritime Lien.]—A steam tug under charter came into collision with the smack which she was towing, through the sole negligence of a servant of the charterers, who was in charge of the tug. The towage was on the terms that the charterers were not to be answerable for damage occasioned by the negligence of their servants:—Held, that an action in rem would not lie against the tug, for the maritime lien arising from collision is not absolute, and the owners not being personally liable for this collision, and the charterers being exempted by the terms of their contract with the plaintiff, the *prima facie* liability of the vessel was rebutted. *The Ticonderoga* (Swa. 215) explained. *The Tasmania*, *supra*.

Collision caused by Tug—Effect of Payment by Tow.]—The schooner *J. M. S.* having come into collision with a tug and her tow, a damage action in rem was instituted by the owners of the schooner against the tug to recover all the damages occasioned by the collision. Subsequently to the collision the plaintiffs received from the owners of the tow a sum of money described in an agreement entered into between these parties "as an advance on account of the damages to be recovered from the owners of the tug." By the agreement it was agreed that the owners of the tow should give the plaintiffs all information and assistance necessary to bring the action to a successful issue; that if the schooner and the tug should both be held to blame, the plaintiffs should repay any sum by which the money already paid exceeded the moiety of damages recoverable against the tug; and that, as a basis of the arrangement, it was understood that the schooner should be found blameless for the collision. The court, having found the tug alone to blame, held that the above payment was not such a payment by the tow in satisfaction of the damages occasioned by the collision as amounted to a settlement in discharge of the action, and was consequently no bar to the action; and that, notwithstanding the advance paid by the tow, the plaintiffs were entitled to recover from the defendants all the damages occasioned by the collision. *The Stormcock*, *supra*.

XIV. BOTTOMRY.

Bond—Jurisdiction of Registrar and Merchants—Reduction of Amount.]—The validity of a respondentia bond having been admitted, it

was referred to the registrar and merchants to decide what amount was payable thereunder. The registrar and merchants reduced the full amount of the bond by lessening the charges in respect of certain metal and felt supplied to the ship, commissions payable to the agents, and the premium on the bond, on the ground that the amounts charged were unreasonable. The plaintiffs objected to the reduction, and filed pleadings in objection to the report:—Held, that it was within the jurisdiction of the registrar and merchants to reduce the amount payable under the bond, since the defendants were not bound to pay more than such sum as was required to pay for things actually necessary for the ship, and at a reasonable rate. *The Pontida*, 9 P. D. 177; 53 L. J., P. 78; 51 L. T. 849; 33 W. R. 38; 5 Asp. M. C. 330—C. A.

Held, also, that as the premium on the bond was excessive it had been rightly reduced, and that the report must be confirmed. *Id.*

— **What is.]**—A foreign vessel was in an English port, and the owner, being temporarily in England and in want of funds for the purchase of necessities, made an agreement with the plaintiffs, by which, in consideration of their advancing him by cash or acceptance 600*l.* for necessities supplied to and for the use of the vessel, he thereby undertook to return them the amount so advanced, with interest and all charges on the return of the vessel from her voyage. And the plaintiffs were thereby authorised “to cover the amount advanced the owner by insurance on ship, &c., out and home at owner’s cost.” In an action in rem for necessities in respect of the amount so advanced:—Held (Brett, M.R., doubting), that the agreement was not equivalent to a bottomry bond. *The Heinrich Bjorn*, 10 P. D. 44; 54 L. J., P. 33; 52 L. T. 560; 33 W. R. 719; 5 Asp. M. C. 391—C. A.

XV. AVERAGE.

Discharge of Part of Cargo before Commencement of extraordinary Measures.]—A steamer, carrying among other cargo a large amount of specie, ran aground and lay in a dangerous position. The specie was landed by the master soon after the vessel struck. After the landing of the specie the master jettisoned part of the cargo, and had recourse to other extraordinary measures for getting off the vessel. These measures succeeded, and she completed her voyage with the cargo remaining on board. The specie was conveyed to a neighbouring port, whence it was sent on in another vessel, but for the purposes of the case was to be treated as having arrived in the steamer:—Held, that the losses and expenses incurred in getting the steamer off, and the expenses incurred in landing and conveying the specie, were not general average to which the owners of the specie were liable to contribute. *Royal Mail Steam Packet Company v. English Bank of Rio de Janeiro*, 19 Q. B. D. 362; 57 L. J., Q. B. 31; 36 W. R. 105—D.

Expenses of Reshipping Cargo and of Ship Leaving Port of Refuge.]—A ship on a voyage having sprung a dangerous leak, the captain,

acting justifiably for the safety of the whole adventure, put into a port of refuge to repair. In port the cargo was reasonably, and with a view to the common safety of the ship, cargo, and freight, landed in order to repair the ship. The ship was repaired, the cargo reloaded, and the voyage completed:—Held, that the cargo-owners were not chargeable with a general average contribution in respect of the expenses of reshipping the cargo. *Attwood v. Sellar* (5 Q. B. D. 286) discussed. *Svensden v. Wallace*, 10 App. Cas. 404; 54 L. J., Q. B. 497; 52 L. T. 901; 34 W. R. 369; 5 Asp. M. C. 453—H. L. (E.).

Average Bond—Proportion of Salvage—Duty of Shipowner.]—See *The Raisyb*, ante, col. 1708.

— **Security for Payment—Unreasonable Terms—Liverpool Bond.]**—Where a shipowner in the exercise of his lien for general average requires security from the owner of the cargo liable to contribution without insisting upon immediate payment of the amount due, the security so required must be reasonable. The defendants, who had a lien upon goods on board their ship for general average, did not demand payment of the amount due, but required as security that the consignees should make a deposit of 10 per cent. on the estimated value of the goods in the joint names of the defendants and their average adjuster, or in the names of the defendants, or in the name of the average adjuster, or should execute a bond providing that the deposit should be held as security for the general average and particular charges, and that the parties in whose name it stood might pay thereout such sums as they should from time to time consider ought to be paid to the owners or master on account of money actually disbursed by them or him, or to enable them or him to pay off and discharge claims which formed part of the general average and other expenses. It also provided that all questions of general average should be referred to the average adjuster of the shipowner, subject to an appeal from the adjustment to arbitrators, whose decision should be final:—Held, that the conditions of the deposit and the form of the bond were both unreasonable, and could not in the circumstances be imposed upon the consignees. *Huth v. Lamport*, or *Gibbs v. Lamport*, 16 Q. B. D. 735; 55 L. J., Q. B. 239; 54 L. T. 663; 34 W. R. 386; 5 Asp. M. C. 593—C. A.

Payment by Shipowner—Liability of Cargo-owner—Question for Jury.]—When ship and cargo are in peril, the fact that the shipowners have by the act of the master become bound to pay and have paid a sum of money for preservation of ship and cargo, and that the master in so binding them pursued a reasonable course under the circumstances, is not conclusive that the whole sum was chargeable to general average so as to bind the cargo-owners to pay their proportion. A new trial was ordered on the ground that the question of the amount chargeable to general average ought to have been submitted to the jury. *Anderson v. Ocean Steamship Company*, 10 App. Cas. 107; 54 L. J., Q. B. 192; 52 L. T. 441; 33 W. R. 433; 5 Asp. M. C. 401—H. L. (E.).

Deck Cargo jettisoned—“At Merchant’s

Risk.”—It was stipulated in a charterparty that the “ship should be provided with a deck cargo, if required, at full freight, but at merchant’s risk :”—Held, that the words “at merchant’s risk” did not exclude the right of the charterers to general average contribution from the shipowners in respect of deck cargo shipped by the charterers, and necessarily jettisoned to save the ship and the rest of the cargo. *Burton v. English*, 12 Q. B. D. 218; 53 L. J., Q. B. 133; 49 L. T. 768; 32 W. R. 655; 5 Asp. M. C. 187—C. A.

XVI. DOCKS, HARBOURS, LIGHTHOUSES AND WHARVES.

Docks—Mersey Dock—Tonnage Rates—“Trading Inwards” and “Trading Outwards.”—Vessels took in part of their cargo at Glasgow, sailed to Liverpool, entered the appellants’ docks and there completed their loading but discharged no cargo: they then proceeded to a port in India, there discharged and loaded a complete cargo, thence sailed to Liverpool, entered the appellants’ docks and there discharged the whole or part of their cargo and then returned with the remainder of their cargo or in ballast to Glasgow:—Held, that under s. 230 of the Mersey Docks Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), such vessels using the appellants’ docks as aforesaid on their way to India were liable to dock tonnage rates, not as vessels “trading inwards” from Glasgow, but as vessels “trading outwards” to India, and that such vessels using the docks as aforesaid on their return voyage from India were liable to rates as vessels “trading inwards” from India. *Mersey Docks v. Henderson*, 13 App. Cas. 595; 58 L. J., Q. B. 152; 59 L. T. 697; 37 W. R. 449—H. L. (E.).

—Barge Propelled by Oars only—“Vessel.”—A “dumb barge,” a river craft which is simply propelled by means of oars, and having no rigging or other equipment, is not a “vessel” within the meaning of ss. 100 and 101 of the London and St. Katharine Docks Act, 1864 (27 & 28 Vict. c. clxxviii.), notwithstanding the definition of the word “vessel” in the interpretation clause (s. 3) of the Harbours, Docks and Piers Clauses Act, 1847, 10 Vict. c. 27, and consequently the owner is not liable to a penalty for allowing her to remain in the docks regulated by the former act without any person on board. *Hedges v. London and St. Katharine Docks Company*, 16 Q. B. D. 597; 55 L. J., M. C. 46; 54 L. T. 427; 34 W. R. 503; 50 J. P. 580; 5 Asp. M. C. 539—D.

—Rating of.]—See POOR LAW.

Harbour Commissioners—Liability for Damage.]—The R., which was anchored in F. outer harbour, having to be beached in the inner harbour, S., the harbour-master, directed the master of the R. where to beach her. Before the R. left the outer harbour, S. came on board, although a Trinity House pilot was in the vessel, and when she had arrived near the place where she was to be beached gave directions as to the lowering of her anchor. The R. overran her anchor and grounded on it, sustaining damage. In an action against the harbour commissioners

and S., the court found as a fact that there was negligence on the part of S., and that the place where the R. grounded was outside the jurisdiction of the harbour commissioners:—Held, that the duties of the harbour-master comprised directions as to the mooring and beaching of vessels; that by giving directions when he went on board, S. had resumed his functions as harbour-master, and that he and the commissioners were therefore liable for the damage done to the R. *The Rhosina*, or *Edwards v. Falmouth Harbour Commissioners*, 10 P. D. 131; 54 L. J., P. 72; 53 L. T. 30; 33 W. R. 794; 5 Asp. M. C. 460—C. A.

By act of Parliament, 26 & 27 Vict. c. 89, the harbour of B. was vested in the defendants, the limits were defined, and the defendants had jurisdiction over the harbour of P. and the channel of P. beyond those limits, for the purpose of, inter alia, buoying “the said harbour and channel,” but they were not to levy dues or rates beyond the harbour of B. By 42 & 43 Vict. c. 146, a moiety of the residue of light duties to which ships entering or leaving the harbour of P. contributed, were to be paid to the defendants, and to be applied by them in, inter alia, buoying and lighting the harbour and channel of P. A vessel was wrecked in the channel of P., which under the Wrecks Removal Act, 1877 (40 & 41 Vict. c. 16), s. 4, the defendants had power to, and did partially remove. The wreck not removed was not buoyed, and the plaintiff’s vessel was in consequence wrecked:—Held, that the statutes imposed upon the defendants an obligation to remove the wreck from the channel, or to mark its position by buoys, and that, not having done so, they were liable in damages to the plaintiff. *Dormont v. Furness Railway*, 11 Q. B. D. 496; 52 L. J., Q. B. 331; 49 L. T. 134; 47 J. P. 711; 5 Asp. M. C. 127—Kay, J. See also *Reg. v. Williams*, ante, col. 337.

Lighthouses—Trinity House—Beacon—Liability for Negligence.]—The Trinity House was incorporated by charter in the reign of Henry VIII., for the purpose, inter alia, of ordering and erecting lighthouses, beacons, and buoys. Its powers were extended by several charters and statutes, until it became the general lighthouse authority for England and Wales. By the Merchant Shipping Act, 1854, s. 389, the superintendence and management of all lighthouses, buoys, and beacons in England and Wales, and certain other places, were, with certain exceptions, vested in the Trinity House:—Held, that the Trinity House was not a department of State, so as to be exempt from liability for negligence of its servants. *Gilbert v. Trinity House Corporation*, 17 Q. B. D. 795; 56 L. J., Q. B. 85; 35 W. R. 30—D.

A beacon erected by and vested in the Trinity House, having been nearly destroyed, a stranger applied to the Trinity House, and obtained leave to remove the remains of it. He removed part of the remains, but left an iron stump standing up above a rock under the water. A vessel struck against the iron stump and was lost:—Held, that the Trinity House was liable. *Id.*

—Rateability to Poor-rate.]—See POOR LAW.

Wharves and Quays—Exercise of Private Rights over—Obstruction of Public Traffic.]—

By a special act of 1840 trustees were appointed for the management of a certain harbour. S. 53 of the act authorised the lord of the manor, or the owner of land situate within or adjoining to the harbour, amongst other things, to lay down railways over the quays, roads, and works, but so as all such railways should be constructed of such height and in such form as should not in any manner impede or interrupt the general public traffic of the port, or the free passage to and from the same; and railways so to be erected or made were (subject to the aforesaid restriction) to be wholly excluded from the jurisdiction of the trustees, and be the private property and for the sole and exclusive use of the person or persons upon whose land the same should stand or be placed, and his or their assigns. The lord of the manor was the owner of lands adjoining the south side quay of the harbour. Tenants of the lord of the manor having proceeded to lay down two lines of railway from their works along the south side quay, an action was brought by the trustees of the harbour to restrain them from constructing such railway, on the ground that they would impede the general public traffic of the port:—Held, that the main object of the act was to benefit the persons frequenting the harbour, and that any railway laid on the south side of the quay must be constructed in such a way as not by its construction, or its natural and necessary user, in any manner to impede the fair public traffic of the port:—Held also, that, as the defendants' railway did so impede the traffic, the plaintiffs were entitled to an injunction, and to an order for removal of such railway. *Lowther v. Curwen*, 58 L. T. 168—Kay, J.

— **Jetty in Tidal River—Implied Representation by Wharfinger.**—The defendants, who were wharfingers, agreed with the plaintiff for a consideration to allow his vessel to discharge and load her cargo at their wharf, which abutted upon the river Thames. It was necessary in order that the vessel might be unloaded that she should be moored alongside a jetty of the defendants which ran into the river, and that she should take the ground with her cargo at the ebb of the tide. The vessel at the ebb of the tide sustained injury from the uneven nature of the ground. The bed of the river at the point where she took ground was vested in the Conservators, and the defendants had no control over it, but it was admitted that they had taken no steps to ascertain whether it was suitable for the vessel to ground upon:—Held, that there was an implied undertaking by the defendants that they had taken reasonable care to ascertain that the bottom of the river at the jetty was not in a condition to cause danger to the vessel, and that they were liable for the damage sustained by her. *The Moorcock*, 14 P. D. 64; 60 L. T. 654; 37 W. R. 439—C. A. Affirming 58 L. J., P. 15—Butt, J.

XVII. JURISDICTION.

1. ADMIRALTY DIVISION.

Collision—Damage to Cargo.—Under 24 Vict. c. 10, s. 7, the Admiralty Division has no jurisdiction to entertain an action in rem by the

owners of cargo against the vessel on which it was laden for damage done to such cargo. *The Victoria*, 12 P. D. 105; 56 L. J., P. 75; 56 L. T. 499; 35 W. R. 291; 6 Asp. M. C. 120—Butt, J.

Action in rem—Action under Lord Campbell's Act.—The Admiralty Court Act, 1861 (24 Vict. c. 10), which by s. 7 gave the Court of Admiralty "jurisdiction over any claim for damage done by any ship," did not give jurisdiction over claims for damages for loss of life under Lord Campbell's Act (9 & 10 Vict. c. 93); and the Admiralty Division cannot entertain an action in rem for damages for loss of life under Lord Campbell's Act. *The Franconia* (2 P. D. 163) overruled. *Seward v. The Vera Cruz*, 10 App. Cas. 59; 54 L. J., P. 9; 52 L. T. 474; 33 W. R. 477; 49 J. P. 324; 5 Asp. M. C. 386—H. L. (E.).

— **Co-ownership—Sale of Ship—Registered in Guernsey.**—The Admiralty Division has no jurisdiction over an action in rem, instituted under s. 8 of the Admiralty Court, 1861, claiming an account of the earnings and sale of a ship when the ship is registered at the port of Guernsey, and not at any port in England or Wales. *The Robinsons and The Satellite*, 51 L. T. 905; 5 Asp. M. C. 338—Butt, J.

2. COUNTY COURTS.

"Damage by Collision."—Damage occasioned to an object on the bank of a river by contact with the sailing gear of a vessel afloat in the river is not "damage by collision" within s. 3, sub-s. 3, of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), and a county court has not Admiralty jurisdiction in respect of such damage. *Robson v. Owner of the "Kate,"* 21 Q. B. D. 13; 57 L. J., Q. B. 546; 59 L. T. 557; 36 W. R. 910—D.

— **Actions under £50.**—The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), does not deprive county courts not having Admiralty jurisdiction of their original jurisdiction to try actions to recover damages for injuries caused by collision between vessels where the amount claimed does not exceed 50*l.* *Scovell v. Bevan*, 19 Q. B. D. 428; 56 L. J., Q. B. 604; 36 W. R. 301—D.

"Use or hire of any Ship"—Demurrage.—A loading agreement between a colliery company and the charterers of a ship, by which the colliery company undertake to load the ship in a certain time, and pay demurrage if that time is exceeded, is not an "agreement made in relation to the use or hire" of a ship within s. 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and hence the county court has no jurisdiction on the Admiralty side to entertain a claim for demurrage against the colliery company. *The Zeus*, 13 P. D. 188; 59 L. T. 344; 37 W. R. 127; 6 Asp. M. C. 312—D.

Freight—Actions under £50.—The statutes 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, do not deprive county courts not having Admiralty jurisdiction, of their jurisdiction to try actions to recover freight under charterparties, where the amount claimed is less than 50*l.* *Reg. v.*

Southend County Court Judge, 13 Q. B. D. 142; 53 L. J., Q. B. 423; 32 W. R. 754—D.

Breach of Contract of Towage.—A county court has under 32 & 33 Vict. c. 51, s. 2, sub-s. 1, jurisdiction to entertain a claim for damage for breach of a contract of towage. *The Isca*, 12 P. D. 34; 56 L. J., P. 47; 55 L. T. 779; 35 W. R. 382; 6 Asp. M. C. 63—D.

Carriage of Passengers' Luggage.—Passengers' luggage carried on board a ship is not "goods" within the meaning of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and consequently the act does not confer jurisdiction to try a claim arising out of the loss of such luggage, as a court having Admiralty jurisdiction. *Reg. v. City of London Court Judge*, 12 Q. B. D. 115; 53 L. J., Q. B. 28; 51 L. T. 197; 32 W. R. 291; 5 Asp. M. C. 283—D.

3. VICE-ADMIRALTY COURTS.

Extent of.]—Vice-Admiralty Courts have not (apart from statute) more than the ordinary Admiralty jurisdiction, i. e., as it existed before 3 & 4 Vict. c. 65 enlarged it. The Vice-Admiralty Act, 1863 (26 & 27 Vict. c. 24), s. 10, sub-s. 10, does not create a maritime lien with respect to necessities supplied within the possession. *Lewis v. Smith*, or *The Rio Tinto*, 9 App. Cas. 356; 50 L. T. 461; 5 Asp. M. C. 224—P. C.

Suit by Six Seamen for Wages and Compensation.]—By an Order in Council, s. 15, passed in pursuance of 2 Will. 4, c. 51, the Vice-Admiralty Court has jurisdiction to entertain a suit brought by any number of seamen, not exceeding six, to recover their wages. The Merchant Shipping Act, 1854, s. 189, does not take away such right of suit so long as the total aggregate amount claimed by such seamen exceeds 50*l.* Where, in a suit brought by six seamen in the Vice-Admiralty Court, the judge found that a total amount of 203*l.* 19*s.* 8*d.* was due to them, partly for wages, and partly for wrongful dismissal, but that the amount due to each was less than 50*l.* :—Held, that, under the above rule and section, the judge was wrong in dismissing the suit for want of jurisdiction, and that a decree for 203*l.* 19*s.* 8*d.* should be made. *Phillips v. Highland Railway, The Ferret*, 8 App. Cas. 329; 52 L. J., P. C. 51; 48 L. T. 915; 31 W. R. 869; 5 Asp. M. C. 94—P. C.

XVIII. PRACTICE.

1. WRIT AND PLEADINGS.

Writ—Address—Foreign Corporation.]—A writ in personam for service within the jurisdiction is invalidated by the omission of the address of the defendant. Where, therefore, such a writ was addressed to a foreign corporation without giving its address:—Held, that, having regard to Ord. II. r. 3, the omission was material, and that the writ was invalid, and must be set aside. *The W. A. Skolten*, 13 P. D. 8; 57 L. J., P. 4; 58 L. T. 91; 36 W. R. 559; 6 Asp. M. C. 244—Butt J.

Amendment of—Action in rem—Adding Parties.]—Plaintiffs commenced an action in rem under Lord Campbell's Act, on the 4th January, 1884, in respect of loss of life by collision at sea on the 10th January, 1883. After the 10th January, 1884, it having been decided in the interim that the Admiralty Court had no jurisdiction in such actions, the plaintiffs applied to add as defendants the owners of the wrong-doing ship personally:—Held, that the court had no power to add parties as defendants in personam in an action in rem, and that even if such power existed, the proceedings against the owners would be deemed to commence from the date of service on them of the writ of summons, and would be too late. *The Bowesfield*, 51 L. T. 128; 5 Asp. M. C. 265—Butt, J.

Pleading—Statement of Claim—Salvage.]—A statement of claim in a salvage action was drawn in the Form No. 6 of Appendix C. to the Rules of the Supreme Court, 1883; on motion by the defendants under Ord. XIX. r. 7 for a further and better statement of claim or particulars:—Held, that the plaintiffs must deliver a fuller statement of claim, and that in salvage actions a fuller form than that given in Appendix C., No. 6, should generally be followed. *The Isis*, 8 P. D. 227; 53 L. J., P. 14; 49 L. T. 444; 32 W. R. 171; 5 Asp. M. C. 155—Hannen, P.

Tender—Payment into Court.]—A plea of tender without payment into court is bad. *The Nasmyth*, 10 P. D. 41; 54 L. J., P. 63; 52 L. T. 392; 33 W. R. 736; 5 Asp. M. C. 364—Butt, J.

2. DEFAULT PROCEEDINGS.

Service of Writ in Rem.]—In an action in rem the writ of summons was served in the manner provided by Ord. IX. r. 12, no appearance was entered, and the action came on for judgment by default under Ord. XIII. rr. 12, 13. The affidavit of service of the writ was made by the solicitor's clerk who had served such writ:—Held, that service of a writ in rem by a solicitor or his clerk, and not by the marshal or his substitute, was a valid service, and that the affidavit was sufficient. *The Solis*, 10 P. D. 62; 54 L. J., P. 52; 52 L. T. 440; 33 W. R. 659; 5 Asp. M. C. 368—Butt, J.

The affidavit of service required to be filed in the registry before proceedings can be taken to obtain judgment by default in an action in rem must have the original writ in rem annexed to it. *The Eppos*, 49 L. T. 604; 32 W. R. 154; 5 Asp. M. C. 180—Hannen, P.

Motion for Judgment.]—Where the plaintiff in a default action in rem for necessities had complied with all the formalities entitling him to judgment save service of a statement of claim, but it appeared that the writ, though not specially indorsed, contained particulars of the claim, the court gave judgment for the plaintiff. *The Hulda*, 58 L. T. 29; 6 Asp. M. C. 244—Butt, J.

In order to obtain judgment by default of appearance in an action in rem under Ord. XIII. r. 12, the ten days stated in Ord. XXI. r. 6, must elapse, and a notice of trial under

Ord. XXXVI. r. 11, must be filed in the registry. *The Avenir*, 9 P. D. 84; 53 L. J., P. 63; 50 L. T. 512; 32 W. R. 755; 5 Asp. M. C. 218—Butt, J.

As under Ord. XIII. r. 12, default actions in rem are to proceed as if the defendant had appeared, Ord. XXVII. r. 11, as to setting down an action on motion for judgment where the defendant makes default in pleading, applies to such actions, and judgment therein is to be obtained under the provisions of that rule. *The Spero Expecto*, 49 L. T. 749; 32 W. R. 524; 5 Asp. M. C. 197—Butt, J.

Where in an action in rem for collision the defendant makes default, the plaintiff should, on moving for judgment, support his claim by affidavit. *Ib.*

3. STAY AND TRANSFER OF PROCEEDINGS.

Staying Proceedings—*Lis Alibi Pendens*.]—A collision occurred on the high seas between the C. and the J., two foreign vessels. The C. was arrested in Holland in an action brought by the owners of the J. and her cargo, but was released with the consent of the agent of the J. on the guarantee of a firm of underwriters interested in the C. to answer judgment in the action. Cross proceedings were instituted in the Dutch court by the owners of the C. and the J. An action was subsequently commenced in this country against the owners of the C. by the owners of the J. and her cargo, and the C. was arrested in respect of the same collision. The plaintiffs expressed their willingness to abandon the action in Holland:—Held (dissentiente Brett, M.R.), that the proceedings in this country must be stayed and the ship released. *The Christiansburg*, 10 P. D. 144; 54 L. J., P. 84; 53 L. T. 612; 5 Asp. M. C. 491—C. A.

In an action of damage in personam by the owners of the ship G., against the owners of the ship P., it appeared that a cause of damage in rem relating to the same collision had, prior to the proceedings in this court, been instituted by the owners of the P. against the G. in a vice-admiralty court abroad, and was then pending. The court, on the application of the owners of the ship P., stayed the proceedings in this court until after the hearing of the cause in the vice-admiralty court abroad. *The Peshawur*, 8 P. D. 32; 52 L. J., P. 30; 48 L. T. 796; 31 W. R. 660; 5 Asp. M. C. 89—Sir R. Phillimore.

Transfer of Actions.]—When an action is transferred from an inferior court and consolidated with a cross action begun in the High Court, the plaintiffs in the action in the inferior court will be placed in the position of plaintiffs in the consolidated actions, if they began the action in the inferior court before the cross action in the High Court. *The Never Despair*, 9 P. D. 34; 53 L. J., P. 30; 50 L. T. 369; 32 W. R. 599; 5 Asp. M. C. 211—Hannen, P. S. *The Bjorn*, 9 P. D. 36 n.; 5 Asp. M. C. 212 n.; and *The Cosmopolitan*, 9 P. D. 35 n.; 5 Asp. M. C. 212 n.—Sir R. Phillimore.

Although an action in which the sole question is a question of salvage may, under Ord. XLIX. r. 3, be properly transferred to the Admiralty Division, such a transfer should not be ordered

where there are other questions in the action capable of being tried by a jury. *Ocean Steamship Company v. Anderson*, 33 W. R. 536—C. A.

4. INSPECTION AND DISCOVERY.

Inspection by Trinity Masters before Trial.]—Before the hearing of an action an application was made under 24 Vict. c. 10, s. 18, by the plaintiffs, that two Trinity masters should inspect the lights of the defendants' ship:—Held, that the application was premature, and ought to be refused. *The Victor Covacevich*, 10 P. D. 40; 54 L. J., P. 48; 52 L. T. 632; 5 Asp. M. C. 417—Butt, J.

Discovery—Depositions made before Receiver of Wreck.]—Depositions of the master and crew of a British ship, the R., in regard to a collision, had been taken by the Receiver of Wreck, and the Board of Trade refused to give copies of such depositions to the owners of the P. in an action arising out of the collision between these vessels. Copies had however been obtained for the purpose of the action by the solicitors to the owners of the R., whose master and crew had made the depositions. On motion by the owners of the P. for leave to inspect and take copies of the depositions in the possession of the solicitors of the owners of the R.:—Held, that these copies were privileged. *The Palermo*, 9 P. D. 6; 53 L. J., P. 6; 49 L. T. 551; 32 W. R. 403; 5 Asp. M. C. 165—C. A.

5. TRIAL.

By Jury—Discretion.]—The plaintiff in an action in rem for disbursements in the Probate, Divorce, and Admiralty Division, applied for an order that the action should be tried by a judge with a jury:—Held, that Ord. XXXVI. r. 6, gives no absolute right to a jury in actions which before the passing of the Judicature Act, 1873, would have been tried without a jury; that the case fell within Ord. XXXVI. rr. 4 and 7a, and that the judge had a discretionary power only, to allow trial by a jury. *The Temple Bar*, 11 P. D. 6; 55 L. J., P. 1; 53 L. T. 904; 34 W. R. 68; 5 Asp. M. C. 509—C. A.

By Judge with Assessors.]—If the judge who tries the case differs from his assessors, he is bound to decide in accordance with his own opinion. *The Beryl*, 9 P. D. 137; 53 L. J., P. 75; 51 L. T. 554; 33 W. R. 191; 5 Asp. M. C. 321—C. A.

6. EVIDENCE.

Trial with Assessors.]—Where the court is assisted by Trinity masters sitting as assessors, evidence of expert witnesses on questions of nautical skill and seamanship will not be allowed. *The Kirby Hall*, 8 P. D. 75; 48 L. T. 797; 5 Asp. M. C. 90—Sir R. Phillimore.

Admissions in Pleadings.]—When the defendant admits all the facts pleaded in the statement of claim in a salvage action, the plaintiff will not be allowed to call evidence except by permission of the court, and on special grounds.

The Hardywick, 9 P. D. 32; 53 L. J., P. 23; 50 L. T. 128; 32 W. R. 598; 5 Asp. M. C. 199—Hannen, P.

Letter of Captain to Owners.]—A letter written by the captain of a ship to his owners is admissible in evidence against the owners; though all the statements contained in the letter may not be evidence. *The Solway*, 10 P. D. 137; 54 L. J., P. 83; 53 L. T. 680; 34 W. R. 232; 5 Asp. M. C. 482—Hannen, P.

Engineer's Log.]—In an action of damage the engineer's log is admissible as evidence against the shipowner by whom the engineer is employed. *The Earl of Dumfries*, 10 P. D. 31; 54 L. J., P. 7; 51 L. T. 906; 33 W. R. 568; 5 Asp. M. C. 342—Butt, J.

Reference—Cross-examination of Deponent.]—Under Ord. XXXVII. r. 2—which enables the evidence in references in Admiralty actions to be given by affidavit—it is in the discretion of the registrar to refuse, if he thinks fit, to give weight to such evidence unless and until the deponent has been cross-examined on his affidavit, and where the deponent is a party to the action, he may, though resident abroad, be required to attend in this country for such cross-examination. *The Parisian*, 13 P. D. 16; 57 L. J., P. 13; 58 L. T. 92; 36 W. R. 704; 6 Asp. M. C. 249—Butt, J.

7. DAMAGES.

Assessment of—Lord Campbell's Act.]—An action for damages under Lord Campbell's Act was commenced in the Admiralty Division, and no application was made to transfer the cause to any other division:—Held, that upon default in pleading by the defendants the plaintiffs were entitled, under Ord. XXVII. r. 4, to enter interlocutory judgment and to have the damages assessed and apportioned by a jury. *The Orwell*, 13 P. D. 80; 57 L. J., P. 61; 59 L. T. 312; 36 W. R. 703; 6 Asp. M. C. 309—Hannen, P.

Interest on.]—In an action in the Admiralty Division, which could not, prior to the Judicature Acts, have been tried in the Admiralty Court, the defendant made no objection to the jurisdiction, and interest was, according to the practice in the Admiralty registry, allowed on the assessed damages from the time when the plaintiffs' claim arose. In another action transferred by consent, after verdict for the plaintiff, to the Admiralty Division for the assessment of the damages by the registrar and merchants, the same practice was followed in regard to the interest:—Held, that interest on the damages was properly awarded by the registrar on the ground that the parties, in both cases, having proceeded on the understanding that the Admiralty practice should apply, had impliedly consented to abide by such practice. *The Gertrude, The Baron Aberdare*, 13 P. D. 105; 59 L. T. 251; 36 W. R. 616; 6 Asp. M. C. 315—C. A. Affirming 56 L. J., P. 106—Hannen P.

In Collision Actions.]—See ante, cols. 1698 et seq.

8. SALE OF SHIP.

When Ordered.]—An order will not be made for the sale of a vessel even upon the application of the owner, where such vessel is not proceeded against in the court. *The Weaford*, 13 P. D. 10; 57 L. J., P. 6; 58 L. T. 28; 36 W. R. 560; 6 Asp. M. C. 244—Butt, J.

— At Instance of Co-owners.]—See *The Marion*, ante, col. 1648.

Sale of Ship and Cargo—Freight.]—Where in an action in rem for collision against ship and freight, in which the defendants' ship was held solely to blame, the ship being still under arrest with the cargo on board, was ordered to be sold: the court on motion directed the marshal to discharge the cargo, to retain the same in his custody as security for the payment of the landing and other charges and freight, if any, due from the owners or consignees of the cargo in respect of the same, and that in default of any application for the delivery of the cargo within fourteen days, the marshal should be authorised to sell such part of the cargo as might be necessary to pay the said charges and freight, if any, due. *The Gettysburg*, 52 L. T. 60; 5 Asp. M. C. 347—Butt, J.

— Foreign Ship—Affidavit.]—The court ordered the sale of a foreign ship on the report of the marshal that it was desirable she should be sold, and subject to the filing of an affidavit, verifying the cause of action and stating that no appearance had been entered. *The Hercules*, 11 P. D. 10; 54 L. T. 273; 34 W. R. 400; 5 Asp. M. C. 545—Butt, J.

Appraisement—Private Contract.]—In an action for master's wages and disbursements, where the ship proceeded against was subject to other claims by mortgagees and material men, the court upon motion, no opposition being offered, ordered an official appraisement of the ship to be made, and the ship to be sold by the marshal by private contract for a sum of money not less than the appraisement, upon proof that the mortgagees assented to such sale, and that notice of the motion had been served upon all the claimants. *The Planet*, 49 L. T. 204; 5 Asp. M. C. 144—Hannen, P.

Expenses—Marshal's Fees—Mortgagees.]—The C. was arrested in an action for necessities supplied by the plaintiff. The owners appeared but did not give bail or deliver pleadings. The mortgagees of the C. intervened, and took possession under the mortgage, but the C. still remained in the custody of the marshal, and was subsequently sold by him under an order of the court obtained by the interveners. Judgment with costs, by consent, for the interveners, was afterwards entered. Under it the interveners claimed from the plaintiff the amount due to the marshal for the expenses of the sale:—Held, that as the interveners, though able to obtain the release of the C. by giving bail, had not done so, but had obtained an order for the sale of the C., and had received the proceeds of such sale, they must bear the expenses of it. *The Colonay*, 11 P. D. 17; 55 L. J., P. 81; 54 L. T. 338; 5 Asp. M. C. 545—Butt, J.

Fund in Court—Priorities.—When a fund, by a sale of a ship, is placed in court by one set of claimants, so as to be available for other claimants, the former are entitled to their costs up to and inclusive of the sale, though they do not rank first in respect of their actual claim. *The Immacolata Concezione*, 9 P. D. 37; 53 L. J., P. 19; 50 L. T. 839; 32 W. R. 705; 5 Asp. M. C. 208—Butt, J.

9. WARRANT OF ARREST.

Service.—A warrant of arrest in an action in rem was issued from the City of London Court directed to the high bailiff, and others the bailiffs thereof, but was, without authority from the court, served by a clerk in the high bailiff's office:—Held, that this was not a proper service of the warrant. Per Sir James Hannen: "Any officer" mentioned in 31 & 32 Vict. c. 71, s. 23, means any officer duly authorised by the court. Per Butt, J.: "That it means any officer whose ordinary duty it is to serve processes, or one duly authorised so to do." *The Palomares*, 10 P. D. 36; 54 L. J., P. 54; 52 L. T. 57; 33 W. R. 616; 5 Asp. M. C. 343—D.

Notice—Telegram.—When the marshal sends by telegram to his substitute at an outport notice of the issue of a warrant, and such substitute communicates it to the master of the ship against which it is issued, it is a contempt of court to move the ship from the place where it is lying. *The Seraglio*, 10 P. D. 120; 54 L. J., P. 76; 52 L. T. 865; 34 W. R. 32; 5 Asp. M. C. 421—Hannen, P.

10. REGISTRAR'S REPORT.

Objection to.—Where an action is instituted in an Admiralty District Registry by part owners of a ship against the managing owner for an account, and the writ claims an account under Ord. III. r. 8, and an order for the filing of the accounts is made under Ord. XV. r. 1, and the account is proceeded with pursuant to order, and the district registrar reports thereon, such report is to be treated as the usual report in an Admiralty Court action, and if the defendant seeks to take objection thereto, he must do so according to the provisions of Ord. LVI. r. 11, otherwise the plaintiff will be entitled to judgment thereon. *Gowan v. Sprott*, 51 L. T. 266; 5 Asp. M. C. 288—Butt, J.

Time for.—A report of the registrar and merchants does not necessarily stand confirmed by reason of the defendants failing to take objection thereto within the time provided for in r. 117 of the Admiralty Court Rules, 1859, so as to absolutely entitle the plaintiffs to payment to them by the defendants of a sum of money which the court is of opinion ought not to have been allowed them in the report. *The Thyatira*, 49 L. T. 713; 5 Asp. M. C. 178—Hannen, P.

Extension of Time.—The court will not extend the time for objecting to the registrar's report in a co-ownership action without special grounds being shown by the party seeking to object. *Gowan v. Sprott*, supra.

The court has power to extend the time within which objection to the report of the registrar and merchants may be taken. *The Thyatira*, supra.

11. COSTS.

Printing Evidence.—The parties to an action between the owners of the B. and the C. agreed that the evidence taken in an action between the owners of the A. and the C., and printed for the purpose of an appeal, should be used in the action between the B. and the C. The plaintiffs paid the solicitors of the A. for such prints, and charged the sums so paid in addition to the regular charge of 3*d.* per folio, as though the printing had been done in this action, under Ord. LXVI. r. 7:—Held, on objection to the taxation, that the charge of 3*d.* per folio was not improper. *The Mammoth*, 9 P. D. 126; 53 L. J., P. 70; 51 L. T. 549; 33 W. R. 172; 5 Asp. M. C. 289—Butt, J.

Third Counsel.—In an action arising out of a collision where damage had been done to the amount of 2,700*l.*:—Held, that the charges of a third counsel should not be disallowed. *Id.*

Counsel's Fees.—In an action for damage by collision, where the damage to one vessel amounted to 20,000*l.*, and to the other vessel to 2,000*l.*, three counsel were instructed on behalf of the plaintiffs, and the fees marked on their briefs were respectively, seventy-five guineas, fifty guineas, and thirty guineas, and the registrar, on taxation, reduced these fees to sixty guineas, forty guineas, and twenty-seven guineas; the court, on appeal from the taxation, allowed the original fees, holding that they were proper fees in a case of that magnitude. *The City of Lucknow*, 51 L. T. 907; 5 Asp. M. C. 340—Butt, J.

Inevitable Accident.—See *The Naples*, ante, col. 1697.

Discontinuance — Commissions for Bail.—The expenses of procuring bail for the release of a ship cannot be recovered as costs against a plaintiff who has discontinued his action, though in certain circumstances they may be recovered as damages. *The Numida*, *The Collingrove*, 10 P. D. 158; 54 L. J., P. 78; 53 L. T. 681; 34 W. R. 156; 5 Asp. M. C. 483—D.

On Higher Scale.—Costs on the higher scale will only be allowed under exceptional circumstances. *The Raishy* or *Cardiff Steamship Company v. Barwick*, 53 L. T. 56; 5 Asp. M. C. 473—Hannen, P.

Costs on the higher scale will only be granted when special grounds of urgency or importance are shown, as it was intended that the lower scale should be the ordinary scale. An award of 2,400*l.* having been made in a salvage action, an application under Ord. LXV. r. 9, for costs on the higher scale was made to the court:—Held, that this was not a special ground so as to take the case out of the ordinary rule. *The Horace*, 9 P. D. 86; 53 L. J., P. 64; 50 L. T. 595; 32 W. R. 755; 5 Asp. M. C. 218—Hannen, P.

Re'ference — Collision — Amount of Claim

allowed.]—Where a plaintiff in a reference in a collision action withdraws a large item of his claim at the reference, and not before, and he recovers less than two-thirds of the amount originally claimed, but more than two-thirds of the amount which remains after his withdrawal of the above item, the original amount of his claim before withdrawal is the claim upon which costs are to be given, and he is not entitled to his costs. *The Eilean Dubh*, 49 L. T. 444; 5 Asp. M. C. 154—Hannen, P.

— **Jurisdiction.]**—As by Ord. LXV. r. 1, of the Rules of the Supreme Court, 1883, the costs of all proceedings are in the discretion of the court, the general rule of practice in the Admiralty Court as to the costs of references, namely, that when more than a fourth is struck off a claim, each party pays his own costs, and when more than a third the claimant pays the other party's costs, is wrong, and the court must exercise its discretion according to the circumstances of each particular case. *The Empress Eugénie* (Lush. 140) overruled. *The Friedeburg*, 10 P. D. 112; 54 L. J., P. 75; 52 L. T. 837; 33 W. R. 687; 5 Asp. M. C. 426—C. A.

Arrest—Bail.]—A ship was arrested, and bail required for an exorbitant sum:—Held, that the plaintiffs must pay the costs and expenses incurred by the defendants in giving this bail. *The George Gordon*, 9 P. D. 46; 53 L. J., P. 28; 50 L. T. 371; 32 W. R. 596; 5 Asp. M. C. 216—Butt, J.

12. APPEALS.

From County Court—Time for.]—The power conferred by s. 27 of the County Court Admiralty Jurisdiction Act, 1868, to extend the time within which an instrument of appeal may be lodged, provided sufficient cause be shown, is not altered or curtailed by s. 6 of the County Courts Act, 1875, this latter section providing an alternative mode of appeal. *The Humber*, 9 P. D. 12; 53 L. J., P. 7; 49 L. T. 604; 32 W. R. 664; 5 Asp. M. C. 181—D.

— **To Court of Appeal.]**—Where, on appeal from a county court in an admiralty cause, the Probate Divorce and Admiralty Division alters the judgment, an appeal lies without leave to the Court of Appeal under s. 10 of the County Courts Acts, 1875, notwithstanding s. 45 of the Judicature Act, 1873. *The Lydia*, 14 P. D. 1; 58 L. J., P. 37; 59 L. T. 843; 37 W. R. 161—C. A.

Collision — Reasons of Nautical Assessors.]—Where in a collision action the nautical assessors sitting in the Admiralty Division reduce their reasons into writing, parties appealing from the decision are not entitled to see these reasons or have copies of them for the purposes of the appeal. *The Banshee*, 56 L. T. 725; 6 Asp. M. C. 130—C. A.

Staying proceedings pending Appeal to House of Lords.]—When an appeal is brought from the Court of Appeal to the House of Lords in an admiralty action in which bail has been given by the parties, an application by the appellant to stay execution pending the appeal will not be

granted, unless special circumstances are shown by affidavit. *The Annot Lyle*, 11 P. D. 114; 55 L. J., P. 62; 55 L. T. 576; 34 W. R. 647; 6 Asp. M. C. 50—C. A.

XIX. WRECKS.

Thames Conservancy—Expenses of Raising.]—In ascertaining the charges and expenses of weighing or raising a vessel under the Thames Conservancy Act, 1857, s. 86, the cost of a special apparatus provided by the Conservators for removing wrecks, and used on the particular occasion, may be taken into account; such cost comprising interest upon capital invested in the apparatus, repairs, a depreciation fund, and the insurance of the apparatus against risk. The charge for insurance of the apparatus cannot be estimated by reference to the tonnage of the wreck raised by it. Where it appears that the work in question could have been done more cheaply by a less expensive apparatus, the charges must be based on the lower rate. *The Harrington*, 13 P. D. 48; 57 L. J., P. 45; 59 L. T. 72; 6 Asp. M. C. 282—Hannen, P.

Notice to Receiver—Right to Salvage.]—The provisions of s. 450 of the Merchant Shipping Act, 1854, requiring a person who finds or takes possession of a wreck to give notice to the receiver, are not applicable to the case of a person who takes possession of a stranded vessel under the belief that he is the purchaser thereof, and in such a case these provisions do not operate to deprive him of his right to recover salvage. *The Liffey*, 58 L. T. 351; 6 Asp. M. C. 255—Hannen, P.

Liability of Harbour Authority for Non-removal.]—See *Dormont v. Furness Railway*, ante, col. 1718.

XX. INQUIRIES BY BOARD OF TRADE.

Refusal to order Re-hearing—Appeal.]—A refusal by the Board of Trade to grant a re-hearing of an investigation into the conduct of a certificated officer, is not a decision within 42 & 43 Vict. c. 72, s. 2, sub-s. 2, and therefore no appeal lies from it to the Admiralty Division of the High Court. *The Ida*, 11 P. D. 37; 55 L. J., P. 15; 54 L. T. 497; 34 W. R. 628; 6 Asp. M. C. 57—D.

Refusal to Institute Inquiry—Foreign Ship.]—A refusal by the Board of Trade to institute an inquiry under 17 & 18 Vict. c. 104, s. 512 is not a condition precedent to an action in rem against a foreign ship. *The Vera Cruz*, 9 P. D. 88; 51 L. T. 24; 5 Asp. M. C. 254—Per Butt, J. See S. C. in *H. L.*, ante, col. 1720.

XXI. RETENTION OF SHIPS BY BOARD OF TRADE.

Right to Trial at Bar—Change of Venue.]—By the Crown Suits Act, 1865, s. 46, where in any cause in which the attorney-general is entitled on behalf of the Crown to demand as of right a trial at bar he states to the court that he waives that right, "the court on the application

of the attorney-general shall change the venue to any court he may select": —Held, that an action under 39 & 40 Vict. c. 80, s. 10, against the secretary of the Board of Trade, to recover damages for the detention of a ship for survey without reasonable and probable cause, is within the above section, that the attorney-general is entitled to demand as of right a trial at bar in such an action, and that the court is bound on his waiving that right to change the venue to any county wherein he elects to have the action tried. *Dixon v. Farrer*, 18 Q. B. D. 43; 56 L. J., Q. B. 53; 55 L. T. 578; 35 W. R. 95; 6 Asp. M. C. 52—C. A.

SLANDER.

See DEFAMATION.

SLANDER OF TITLE.

See TRADE.

SOCIETY.

Building.—See BUILDING SOCIETY.

Friendly.—See FRIENDLY SOCIETY.

Benefit.—See FRIENDLY SOCIETY.

Industrial.—See INDUSTRIAL SOCIETY.

SOLICITOR.

I. ARTICLED CLERKS, 1733.

II. CERTIFICATE, 1733.

III. PRIVILEGE.

1. *Personal to Solicitor*, 1733.
2. *In Matters relating to Clients*, 1733.

IV. AUTHORITY AND DUTY.

1. *Authority in General*, 1735.
2. *Dealings with Clients*.
 - a. Mortgage by Clients, 1737.
 - b. Gifts to and Purchases by Solicitor, 1739.
3. *Notice to Solicitor, when Notice to Client.*—See NOTICE.
4. *Other Duties in relation to Clients*, 1740.

V. LIABILITY OF.

1. *Summary Jurisdiction*.
 - a. Striking off the Roll, 1741.
 - b. Attachment, 1742.
 - c. For Costs, 1743.
 - d. For Payment of Money, 1744.
 - e. Delivery up of Documents, 1746.
2. *For Negligence*, 1746.
3. *In other Cases*, 1748.
4. *What Acts of Partner binding on Firm*, 1749.

VI. COSTS.

1. *Bill of Costs*.
 - a. Delivery of, 1750.
 - b. Contents of, 1752.
 - c. Agreements as to Costs, 1753.
 - d. Interest on, 1753.
 - e. Taxation of, 1753.
 - i. Who entitled to Order, 1753.
 - ii. Practice Generally, 1754.
 - iii. After Payment, 1756.
 - iv. More than Twelve Months after Delivery, 1759.
 - v. Costs of Taxation, 1761.
 - vi. Reviewing Taxation, 1762.
 - vii. What Sums allowed,—See *infra*, VI. 2.
2. *What Sums allowed*, 1763.
 - a. Solicitors Remuneration Act.
 - i. Election as to Scale, 1763.
 - ii. In what cases applicable, 1765.
 - a. Generally, 1765.
 - b. Sale of Land, 1767.
 - c. Leases, 1773.
 - d. Mortgages, 1774.
 - e. Trustee and Cestui que Trust, 1775.
 - b. In other Cases, 1775.
 - c. When Solicitor a Party, 1778.
 - d. When Solicitor an Executor or Trustee, 1778.
3. *Payment*, 1781.
4. *Recovery of*, 1781.
5. *Lien for*, 1783.
 - a. What Debts, 1783.
 - b. On what Property, 1783.
 - c. In what Cases, 1784.
 - d. Priority, 1785.
 - e. When Lost, 1786.
 - f. Set-off, 1787.
 - g. Collusion, 1787.
6. *Charging Orders*, 1787.
 - a. Who entitled to, 1787.
 - b. In respect of what Costs, 1788.
 - c. Property Recovered or Preserved, 1788.
 - d. Priority, 1790.
 - e. Raising Costs, 1792.

VII. COUNTRY SOLICITOR AND LONDON AGENT, 1792.

VIII. CHANGE OF SOLICITORS, 1792.

IX. UNQUALIFIED PRACTITIONERS, 1793.

X. ATTESTATION OF BILL OF SALE BY.—
See BILLS OF SALE, I., 4 and 5.

I. ARTICLED CLERKS.

Examination—Ten Years' Employment.—A solicitor's clerk claiming the right under s. 4 of 23 & 24 Vict. c. 127, to go up for his intermediate examination after having served as general clerk in a solicitor's office for ten years, and as an articulated clerk for a year and a half, stated, in answer to questions put to him by the examiners of the Incorporated Law Society, that he had commenced such antecedent service at the age of thirteen. The examiners decided that service at such age was not *bonâ fide* an active employment in the business of a solicitor's office, and refused to admit him to the examination. On an application to the High Court to overrule this decision:—Held, that no appeal would lie. *James, In re*, 33 W. R. 654—D.

Death of Solicitor—Return of Premium.—A solicitor who had received a premium on taking an articulated clerk, died during the term of the articles: Held, that his estate was not liable for the return of any part of the premium. *Ferns v. Carr*, 28 Ch. D. 409; 54 L. J., Ch. 478; 52 L. T. 348; 33 W. R. 363; 49 J. P. 503—Pearson, J.

II. CERTIFICATE.

Renewal.—Where a solicitor has neglected for a whole year to renew his certificate, the Master of the Rolls only has power to order the registrar of certificates (the Incorporated Law Society) to grant him a certificate for the current year. The right of a solicitor who has neglected to renew his certificate to apply for a fresh one is not a "right acquired or accrued" within 40 & 41 Vict. c. 25, s. 23, Proviso (B). *Chaffers, In re, Incorporated Law Society, Ex parte*, 15 Q. B. D. 467—D.

—**Restraining by Court, instead of Striking off Rolls.**—*See Whitehead, In re*, post, col. 1741.

III. PRIVILEGE.

1. PERSONAL TO SOLICITOR.

Action commenced in High Court—Costs—County Courts Act, 1867, s. 5.—Section 5 of the County Courts Act, 1867, which deprives plaintiffs in actions commenced in the High Court of costs if less than 20*l.* in contract, or 10*l.* in tort, is recovered, applies to an action in which a solicitor is plaintiff. *Blair v. Eisler*, 21 Q. B. D. 185; 57 L. J., Q. B. 512; 59 L. T. 337; 36 W. R. 767—D.

May be sued in Mayor's Court.—A solicitor is equally liable to be sued in an action in the Mayor's Court as in the Superior Court. *Day v. Ward*, 17 Q. B. D. 703; 55 L. J., Q. B. 494; 55 L. T. 518; 35 W. R. 59—D.

2. IN MATTERS RELATING TO CLIENTS.

Production of Deed—Names of Clients.—In an action against a married woman judgment was given for the plaintiff, and an inquiry was directed before a master as to her separate

estate. On the defendant's marriage a settlement had been executed, to the trustees of which the appellant was solicitor, and as such was in possession of the deed. The appellant appeared before a master on a subpoena duces tecum, and was called upon to produce the deed, but refused to give the names of the trustees although he admitted that he knew them:—Held, first, that the appellant was bound to produce the deed inasmuch as his clients, the trustees, could not have withheld it; secondly, that he was bound to give the names of the trustees on the ground that, the privilege of the solicitor being the privilege of the client, the solicitor is bound to state the names of those for whom he claims the privilege, and on the further ground that the applicant's knowledge of the trustees might have been obtained otherwise than by means of confidential communications from his clients. *Bursill v. Tanner*, 16 Q. B. D. 1; 55 L. J., Q. B. 53; 55 L. T. 445; 34 W. R. 35—C. A.

Solicitor Defendant in Action—Confidential Communication.—In an action for libel contained in a circular, the defendants justified, giving full particulars of the justification. The plaintiff administered interrogatories as to certain communications referred to by the defendants, which they objected to answer upon the ground that by so doing they would disclose facts and information obtained by them in confidence and acting in their capacity as solicitors for a client:—Held, that the defendants were not bound to further answer the interrogatories, the privilege claimed not being their privilege, but that of their clients. *Proctor v. Smiles*, 55 L. J., Q. B. 527—C. A.

Advice sought to further Commission of Crime.—All communications between a solicitor and his client are not privileged from disclosure, but only those passing between them in professional confidence and in the legitimate course of professional employment of the solicitor. Communications made by a solicitor to his client before the commission of a crime for the purpose of being guided or helped in the commission of it, are not privileged from disclosure. *Reg. v. Cox*, 14 Q. B. D. 153; 54 L. J., M. C. 41; 52 L. T. 25; 33 W. R. 396; 49 J. P. 374; 15 Cox, C. C. 611—C. C. R.

C. and R. were partners under a deed of partnership. M. brought an action against R. & Co., and obtained judgment therein, and issued execution against the goods of R. The goods seized in execution were then claimed by C. as his absolute property under a bill of sale, executed in his favour by R. at a date subsequent to the above-mentioned judgment. An interpleader issue was ordered to determine the validity of the bill of sale, and upon the trial of this issue, the partnership deed was produced on C.'s behalf, bearing an indorsement purporting to be a memorandum of dissolution of the said partnership, prior to the commencement of the action by M. Subsequently C. and R. were tried and convicted upon a charge of conspiring to defraud M., and upon that trial the case for the prosecution was, that the bill of sale was fraudulent, that the partnership between R. and C. was in truth subsisting when it was given, and that the memorandum of dissolution endorsed on the deed was put there after M. had obtained judgment, and fraudulently

undated, the whole transaction being, it was alleged, a fraud intended to cheat M. of the fruits of his execution. Upon the trial a solicitor was called on behalf of the prosecution to prove that after M. had obtained the judgment C. and R. together consulted him as to how they could defeat M.'s judgment, and as to whether a bill of sale could legally be executed by R. in favour of C. so as to defeat such judgment, and that no suggestion was then made of any dissolution of partnership having taken place. The reception of this evidence being objected to, on the ground that the communication was one between solicitor and client, and privileged: the evidence was received, but the question of whether it was properly received was reserved for this court:—Held, that the evidence was properly received. *Cromack v. Heathcote* (2 B. & B. 4); *Rex v. Smith* (1 Phil. & Arn. on Evidence, 188); and *Doe v. Harris* (5 C. & P. 592), overruled. *Follett v. Jefferyes* (1 Sim., N.S. 1); *Russell v. Jackson* (9 Hare, 387); and *Gartside v. Outram* (26 L.J., (Ch. 113), approved. *Ib.*

Communications with Client when Privileged from Discovery.]—See DISCOVERY, I., 4 and II., 5.

IV. AUTHORITY AND DUTY.

I. AUTHORITY IN GENERAL.

Retainer.—To issue Writ—London Agent.]—A retainer to a country solicitor does not justify an action in which his London agents are the solicitors on the record. A., an illiterate woman, being desirous of knowing whether there was any balance coming to her, as administratrix of C., her deceased husband, out of the proceeds of a sale by the mortgagee of property mortgaged by C., gave to B., a country solicitor (who had recovered judgment in an action against her, as administratrix, for a debt due to him from her deceased husband) this written retainer: "I hereby authorise you to act as my solicitor in the administration of my late husband's estate, and authorise you to investigate the accounts of the mortgagee, and take such steps as you may think proper in the matter on my behalf." A writ was subsequently issued by a London firm of solicitors in the names of A. and B., as plaintiffs, claiming an account of the proceeds of sale of the mortgaged property and payment of the balance, the claim by A. being "as legal personal representative of C.," by B. "as a creditor of C. who had obtained judgment against A., and had obtained execution by the appointment of a receiver of the balance due from C." Upon motion by A. that her name might be struck out of the writ as having been issued without her knowledge and without any authority on her part:—Held, that the retainer was not sufficient to justify the issue of the writ; but whether sufficient or not, it was a retainer to B., and did not authorise the London firm to issue the writ in the name of A. as her solicitors. *Wray v. Kemp*, 26 Ch. D. 169; 53 L. J., Ch. 1020; 50 L. T. 552; 32 W. R. 334—Chitty, J.

Service of Notices on former Solicitor.]—Where a judgment has not been worked out, nor the fruits of the judgment obtained, in-

asmuch as it is the duty of the solicitor of the defendant to defend his client's interest in the event of execution being levied against him, his authority still continues so as to make service of a notice of appeal on him good service on his client, until such time as the client has taken the proper steps for informing his opponent that he has withdrawn his solicitor's authority. *De la Pole (Lady) v. Dick*, 29 Ch. D. 351; 54 L. J., Ch. 940; 52 L. T. 457; 33 W. R. 585—C. A.

Employment to collect a Debt—Proceedings in Interpleader.]—A solicitor who has recovered judgment for a client under an ordinary retainer, has no authority, without special instructions, to engage in proceedings in interpleader. *James v. Ricknell*, 20 Q. B. D. 164; 57 L. J., Q. B. 113; 58 L. T. 278; 36 W. R. 280—D.

To Receive Mortgage Money.]—G. and H. were mortgagees for 1,000*l.* on property of S. Their solicitors, D. & P., who had the deeds in their custody, applied to the defendant, who was also a client of theirs, saying that they believed he had 1,000*l.* to invest on mortgage, and that G. and H. wanted 1,000*l.* on a transfer of S.'s mortgage. The defendant inspected the property, and being satisfied, he, on the 12th of June, 1878, sent the 1,000*l.* to D. & P., who gave him a receipt for it. In July, D. & P. fraudulently induced G. and H. to execute a deed of transfer to the defendant with a receipt indorsed, which deed they stated to G. and H. to be a deed of reconveyance to S. on his paying off the mortgage. D. & P. shortly afterwards handed this deed with the title deeds to the defendant, and went on paying him interest as if they had received it from S., who was in fact paying his interest to the agents of G. and H.; G. and H. made no inquiry as to the mortgage, and this went on till 1883, when D. & P. became bankrupts, and the 1,000*l.* received from the defendant, which had never been handed over to G. and H., was lost. G. and H. then brought their action against the defendant, asserting a right against the property in the nature of an unpaid vendor's lien.—Held, that as the plaintiffs by the deed of transfer and receipt which they handed to D. & P. enabled them to represent to the defendant that the 1,000*l.* which he had previously handed to D. & P. had come to the hands of the plaintiffs, they had raised a counter-equity which prevented their claiming a vendor's lien, though this would not have been the case if (D. & P. having no authority to receive money for the plaintiffs) the defendant had paid the 1,000*l.* to D. & P. at the time when the deeds were delivered to him, since he would then have known that the plaintiffs had not received the money. *Swinbanks, Ex parte* (11 Ch. D. 525), distinguished. *Gordon v. James*, 30 Ch. D. 249—C. A.

To receive Payments from Receiver.]—The solicitor having carriage of the proceedings has not, as such, and in the absence of special authority in that behalf, power to give a valid receipt for moneys ordered to be paid by a receiver to his client. *Browne's Estate, In re*, 19 L. R., Ir. 183—C. A.

2. DEALINGS WITH CLIENTS.

a. Mortgage by Clients.

Absence of Independent Advice—Rate of Interest—Power of Sale.—The plaintiff, who had only just attained his majority, and his sister and brother, being entitled in remainder under a will of which R., who was their father, and P. were trustees, and under which R. was tenant for life, joined with R. in mortgaging the property to secure advances, with interest thereon at 10 per cent., which was made for R.'s benefit. The power of sale was exercisable without notice, and the mortgage contained a clause providing that if the power of sale should arise in the lifetime of R., it should be lawful for P. to postpone the sale, or to await R.'s death, and then obtain payment of the shares of the children. P. was a certificated conveyancer, and prepared the deeds for all parties. In an action by the plaintiff against R. and P. and the other mortgagors, claiming to have the deeds set aside on the ground of undue influence and want of proper advice, or that R. might indemnify the plaintiff, the judge being satisfied that the plaintiff had, on his own evidence, acted voluntarily and with full understanding, the plaintiff was refused relief against P., but R. having used the trust funds for his own benefit, was ordered to indemnify the plaintiff against his liability to P.:—Held (on appeal against the judgment in favour of P.), that the court being dissatisfied with the mortgage (1) on account of the interest being 10 per cent.; (2) on the ground that the exercise of the power of sale could be postponed; and (3) on the ground that the power of sale was unrestricted, the judgment would only be affirmed on the terms of (1) P. asking for no costs in the court below or on appeal; (2) P. undertaking to press for no interest against the plaintiff which had accrued due in R.'s lifetime; (3) P. allowing the plaintiff to redeem his share on payment of a sum proportionate to his share of the property mortgaged. *Readdy v. Pendergast*, 56 L. T. 790—C. A.

Unusual Provisions—Power of Sale—Duty to Explain Provisions.—In April, 1879, P. owed 450*l.* to his solicitor K., who was pressing for payment. On the 11th of April, 1879, he gave K. his promissory note for 466*l.* 17*s.* 10*d.*, payable three months after date, and on the 31st of May signed an agreement to mortgage to K. his interest in a railway for the 466*l.* 17*s.* 10*d.* The agreement contained a provision that, if that sum was not paid on the 11th of July, K. should be at liberty to sell the property without notice. The agreement was drawn by K., and P. had no independent advice. Default having been made, K. sold without giving such notice as is required in the common form of power of sale:—Held, that as this was not an ordinary mortgage transaction, but an arrangement for giving the client time for payment of a debt presently payable, the doctrine of *Cockburn v. Edwards* (18 Ch. D. 449) did not apply; that it was not incumbent on K. to explain to P. the unusual form of the power of sale; and that the sale could not be impeached on the ground that it was not authorised by the common form of power. *Pooley's Trustee v. Whetham*, 33 Ch. D. 111; 55 L. J., Ch. 899; 55 L. T. 333; 34 W. R. 689—C. A.

In a mortgage to a solicitor by his client there was a power of sale without qualification. It was not explained to the mortgagor that it was usual to insert a proviso that the power should not be exercised unless interest was in arrear for three months or notice to pay off had been given:—Held, that the power could not be properly exercised as against the mortgagor, though three months' interest was in arrear. *Craddock v. Rogers*, 53 L. J., Ch. 968; 51 L. T. 191—North, J.

Injunction to Restrain Sale by Mortgagee.—The ordinary rule that the court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale except on the terms of the mortgagor paying into court the sum sworn by the mortgagee to be due for principal, interest, and costs, does not apply to a case where the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor. In such a case the court will look to all the circumstances of the case, and will make such order as will save the mortgagor from oppression without injuring the security of the mortgagee. *Macleod v. Jones*, 24 Ch. D. 289; 53 L. J., Ch. 145; 49 L. T. 321; 32 W. R. 43—C. A.

The plaintiff was a lady who was entitled to a life interest in leasehold property which she had mortgaged to various persons. The defendant acted as her solicitor, and with her sanction, in order to release her from embarrassment, bought up several of the incumbrances with his own money and took a transfer of them to himself, having previously taken a mortgage of the life interest to secure his past costs and the costs which he might incur in paying off the incumbrances. Afterwards the plaintiff discharged the defendant, and employed another solicitor, who applied to the defendant for information respecting the securities transferred. The defendant refused to give this information unless the payment of what was due to him was guaranteed, and threatened to proceed to a sale of the property. The plaintiff then brought an action to impeach the securities and to restrain the sale of the property, and moved for an injunction till the hearing:—Held, that, considering all the circumstances, an injunction ought to be granted, on the plaintiff paying into court such a sum as the court considered would cover the amount actually advanced by the defendant, and amending the writ so as to make it a simple action for redemption and injunction. *Id.*

Rate of Interest allowable.—Where the mortgagee at the time of making the mortgage was the solicitor of the mortgagor, and a dispute arose as to the rate of interest to which he was entitled:—Held, that interest must, under the circumstances, be allowed at 5 per cent. *Macleod v. Jones*, 53 L. J., Ch. 534; 50 L. T. 358; 32 W. R. 660—Pearson, J.

Opening Settled Account—Lapse of Time.—Accounts between a mortgagee solicitor and his client, the mortgagor, stated and signed more than thirty years ago, were opened on the grounds that the client had no independent advice, and signed without examination or explanation, that the accounts contained improper items, and that a third person was put forward

as the mortgagee. *Ward v. Sharp*, 53 L. J., Ch. 313; 50 L. T. 557; 32 W. R. 584—North, J.

b. Gifts to and Purchases by Solicitor.

Voluntary Gift—Election to Abide by—Delay—Action by Personal Representative.—If a person, who has made a gift to a solicitor while the relation of solicitor and client subsisted between them, is entitled at the time of his death to have the gift set aside, the personal representative of the deceased upon his death, succeeds to the right, although the deceased had no intention of exercising it, and had even expressed a determination not to do so, for he might have changed that determination the next day, and would have had a perfect right to do so. A solicitor cannot take a gift from his client while the relation of solicitor and client subsists, and, in order to sustain such a gift, if made, something must be done, after the confidential relation has ceased, amounting to a release of the client's right to set aside the gift; but the subsequent settlement by the client of a bill of costs does not amount to such a release. *Tyars v. Alsop*, 59 L. T. 367; 36 W. R. 919—Kekewich, J. Affirmed 37 W. R. 339; 53 J. P. 212—C. A.

A., acting as a solicitor for G. in an action, in June, 1880, recovered by a compromise, 5,000*l.* for her, which he received, and, out of it, by her desire, retained 1,000*l.* as a gift to himself. The relation of solicitor and client terminated shortly afterwards. In his evidence A. swore that in April, 1883, G. had told him that she had determined to adhere to what she had done. Since the severance of the relation G. had also settled a bill of costs, and had never done any act indicating an intention to recede from her gift. She died in June, 1883. Her administratrix commenced this action within six months, but died in October, 1884. In June, 1886, T. took out administration to G.'s effects, and in the following August he got an order of revivor in this action. Poverty was the excuse given for the delay:—Held, that the gift was bad at the time it was made; that G. had never effectually released her right to set it aside, and at the time of her death was entitled to exercise that right; that on her death her personal representative succeeded to the right; that it had been kept alive by the action notwithstanding the delay; and that the gift must consequently be now set aside. *Morgan v. Morgan* (6 Ch. D. 638) approved and followed. *Mitchell v. Homfray* (8 Q. B. D. 587) explained and distinguished. *Id.*

Purchase from Client's Trustee in Bankruptcy—Obligation to make complete Disclosure.—An action was brought by the trustee in bankruptcy of L. to set aside a sale, made by a former trustee in the bankruptcy, of the bankrupt's interest in certain freehold property under a will. The defendants were J. P., the solicitor of the bankrupt, and his brother, W. P., and the sale was made to J. P. in the name of W. P. as his nominee. Upon the construction of the will, under which the bankrupt was entitled, it was doubtful whether he took absolutely or for life only. In the former case his interest would be worth about 2,000*l.*; in the latter case about 200*l.* J. P. purchased it for 77*l.*, and it was subsequently declared by the court to be an absolute interest. J. P. had acted as solicitor to

the bankrupt before and after his bankruptcy, and had advised him, according to counsel's opinion, that he took only a life interest. The question was, whether the rule of law, which prevents a solicitor from purchasing the property of his client without giving full and complete disclosure, applied to a purchase by a solicitor from the trustee in bankruptcy of his client. In the view which the court took of the evidence, the confidential relation of solicitor and client existed between J. P. and the bankrupt at the time of the purchase, and J. P. had acquired a knowledge or belief as to the value of the property, which he would have been bound before buying to communicate to L., in case he had not been bankrupt, and which he did not disclose either to L., or his trustee, or to the solicitor of the trustee:—Held, that the trustee in bankruptcy so stood in the place of the bankrupt that the bankrupt's solicitor could not be allowed, as against the trustee, an advantage obtained by him on a purchase from the trustee by means of the knowledge he had gained while acting as solicitor for the bankrupt; and, therefore, that the transaction could not be supported in equity, and that the defendants must be declared to be trustees of all the advantage of the purchase for L.'s trustee in bankruptcy. *Luddy's Trustee v. Peard*, 33 Ch. D. 500; 55 L. J., Ch. 884; 55 L. T. 137; 35 W. R. 44—Kay, J.

Sale by Court—Leave to Bid.—Leave to bid at a sale by the court, granted to a solicitor on the record, relieves him from his fiduciary character, and places him in the same position as an ordinary purchaser. *Coahs v. Boswell*, 11 App. Cas. 232; 55 L. J., Ch. 761; 55 L. T. 32—H. L. (E.). Reversing 33 W. R. 376—C. A.

3. NOTICE TO SOLICITOR, WHEN NOTICE TO CLIENT.—See NOTICE.

4. OTHER DUTIES IN RELATION TO CLIENTS.

Solicitor appointing Son as Co-Trustee.—On the retirement of one of two trustees of a will, the continuing trustee, who was the solicitor to the trustees, appointed his son, who was his partner in his business, to be a new trustee. The trusts of the will were being administered by the court:—Held, that, without any reference to the personal fitness of the son, by reason of his position, the appointment was one which the court ought not to approve, though it would not have been invalid if the court had not been administering the trusts. *Norris, In re, Allen v. Norris*, 27 Ch. D. 333; 53 L. J., Ch. 912; 51 L. T. 593; 32 W. R. 955—Pearson, J.

Preparation of Wills.—It is a failure of duty on the part of a solicitor to prepare a will under any circumstances without seeing the testator, and it is utterly inexcusable to do so for an aged testator on the instructions of a person who is named an executor, and is to receive such a benefit as a legacy of 3,000*l.*, with a percentage on the income of the property to be administered by him. The solicitor in such a case might prepare a draft, or even an engrossment, but he

ought never to part with it until he had seen the testator. *Clery v. Barry*, 21 L. R., Ir. 152—C. A.

Voluntary Deed—No Power of Revocation.]—It is the duty of a solicitor who prepares a voluntary deed on behalf of a client to distinctly call the attention of the settlor to the advisableness of inserting a clause of revocation, and to point out the results that might ensue from the omission. *Horan v. Macmahon*, 17 L. R., Ir. 641—C. A.

V. LIABILITY OF.

1. SUMMARY JURISDICTION.

a. Striking off the Roll.

Appeal to Court of Appeal.]—When the High Court makes an order ordering a solicitor to be struck off the rolls for misconduct, it does so in exercise of a disciplinary jurisdiction over its own officers, and not of a jurisdiction in any criminal cause or matter within the meaning of s. 47 of the Judicature Act, 1873, and therefore an appeal lies from such order to the Court of Appeal. *Hardwick, In re*, 12 Q. B. D. 148; 53 L. J., Q. B. 64; 49 L. T. 584; 32 W. R. 191—C. A.

Security for Costs.]—A solicitor who appealed from an order striking him off the roll, and directing an account and payment of moneys due from him to clients of his who obtained the order, was directed to give security for costs, it being shown that he was in insolvent circumstances. Whether security for costs would have been required if the solicitor had appealed only against an order striking him off the roll, *quære*. *Strong, In re*, 31 Ch. D. 273; 55 L. J., Ch. 506; 54 L. T. 219; 34 W. R. 420—C. A.

Jurisdiction of Court of Appeal.]—From the evidence given by a solicitor in an action in the court of the County Palatine of Lancaster, he appeared to have been guilty of gross misconduct in his character of solicitor as to one of the mortgages to which the action related. The plaintiffs in the action having appealed, the conduct of the solicitor came under the consideration of the Court of Appeal, who directed the official solicitor to take proceedings. The official solicitor accordingly moved in the Court of Appeal for an order calling on the solicitor to explain his conduct, or that he might be struck off the roll:—Held, that the Court of Appeal had jurisdiction to entertain the application, although not brought before them by way of appeal. *Whitehead, In re*, 28 Ch. D. 614; 54 L. J., Ch. 736; 52 L. T. 703; 33 W. R. 601—C. A.

Restraining Solicitor from applying for Renewal of Certificate.]—The solicitor had not taken out his certificate for several years and did not take any notice of the application. The court, under the special circumstances of the case, did not think fit to strike him off the roll or suspend him, but made an order restraining him from applying to renew his certificate without the leave of the court. *Id.*

b. Attachment.

Default in Payment subsequent to Order Striking off Roll.]—Where a solicitor makes default in payment of a sum of money which he has been ordered to pay in the character of an officer of the court, he is not the less liable to an attachment because in the interval between the date of the order and the time fixed for payment he has been struck off the roll, and has ceased to be a solicitor. *Strong, In re*, 32 Ch. D. 342; 55 L. J., Ch. 553; 55 L. T. 3; 34 W. R. 614; 51 J. P. 6—C. A.

Of the three possible periods for ascertaining whether the person ordered to pay and making default held the character of a solicitor, and was as such within the exception of s. 4, sub-s. 4, of the Debtors Act, 1869, viz.—(1) of the act done; (2) of the order made; or (3) of the default committed, that to be looked to is, if not the first, at the latest the second period. In cases of a trustee and person acting in a fiduciary capacity (sub-s. 3) (and per Fry, L. J., in that of a solicitor also) the period to be looked to is that of the act done. *Id.*

Non-compliance with Order for Payment.]—A solicitor received on behalf of a client a sum of 339*l.*, which he paid into his account with his own bankers and dealt with as his own money. He afterwards forwarded to his client a sum of 100*l.*, and refused to pay the balance, on the ground that he had a claim against an agent whom his client had employed to communicate with him. Application having been made to the Queen's Bench Division to compel the solicitor to pay the money, the matter was referred to a master, who reported that the balance was due from the solicitor to his client. An order was made by the Queen's Bench Division, and also a subsequent order was made at chambers, that the solicitor should pay the balance claimed to his client. These orders not having been complied with, an order for the attachment of the solicitor was made by a judge at chambers: Held, that the orders for the payment of the balance claimed were not merely in the nature of civil process, but were orders made against the solicitor as an officer of the court, and that the attachment was properly granted. *Ball, In re* (8 L. R., C. P. 104) explained. *Freston, In re* (11 Q. B. D. 545) followed. *Dudley, In re, Monet, Ex parte*, 12 Q. B. D. 44; 53 L. J., Q. B. 16; 49 L. T. 737; 32 W. R. 264—C. A.

Town Agent of Country Solicitor.]—A solicitor, the London agent of a country solicitor, made default in payment of a sum ordered to be paid by him in an action for an account of his agency:—Held, that the defendant was liable to imprisonment under s. 4, sub-s. 3, of the Debtors Act, 1869, as a person acting in a fiduciary capacity, but not liable under s. 4, sub-s. 4, as a solicitor ordered to pay in his capacity of officer of the court. *Litchfield v. Jones*, 36 Ch. D. 530; 57 L. J., Ch. 100; 58 L. T. 20; 36 W. R. 397—North, J.

Effect of Receiving Order in Bankruptcy—Jurisdiction.]—An attachment against a solicitor for his default in the payment of a sum of money, which he has been ordered to pay in his character of an officer of the court, is not a merely civil process, but is in its nature

punitive or disciplinary, and therefore the fact that a receiving order in bankruptcy has been made against the solicitor is not of itself a sufficient reason for refusing to issue an attachment against him in such a case; but that when such an order for the payment of money has been made against a solicitor before the making of a receiving order against him, and he has not obeyed it, the court has, under s. 10 of the Bankruptcy Act, 1883, a discretion whether it will order an attachment to issue by way of punishment to the solicitor, and it will decline to do so if it is satisfied that the person who asks for the order can derive no benefit from it, and that the making of it will embarrass the bankruptcy proceedings. Sect. 9, sub-s. 1, of the Bankruptcy Act, 1883, does not apply to proceedings pending against a debtor at the time when a receiving order is made against him. On appeal:—Held, that the Court of Appeal would not interfere with the discretion of the court below. *Wray, In re*, 36 Ch. D. 138; 56 L. J., Ch. 1106; 57 L. T. 605; 36 W. R. 67—C. A.

c. For Costs.

Of Infant Defendant.—Where a writ of summons is served on an infant, and an appearance entered for him by a solicitor, without knowledge of his infancy and *bonâ fide*, and costs are subsequently incurred by the plaintiff in proceedings in the action, which became abortive by reason of the defendant's infancy:—Held, that although the appearance and defence will be set aside as irregular, the solicitor entering the appearance is not personally liable for the costs thereby occasioned to the plaintiff. *Wade v. Keefe*, 22 L. R., Ir. 154—Q. B. D.

Notice of Appeal—Client suing in formâ pauperis.—A former solicitor of the plaintiff in an action, who was suing in formâ pauperis, served notice of appeal on all the defendants who had been successful in the court below. These respondents appeared by counsel on the hearing of the appeal, but no relief was then asked as against one of them. He had not been previously informed that the appeal would not be pressed against him, and had incurred expense in preparing to resist the appeal:—Held, that it was a proper case for giving leave to the respondent to serve the solicitor with a notice of motion for an order to show cause why he should not pay the costs incurred by serving notice of appeal without good cause. *Martinson v. Clowes*, 52 L. T. 706; 33 W. R. 555—C. A.

Order to repay Costs on Reversal of Judgment.—An action being dismissed at the hearing with costs, a sum of money which had been paid into court as security for the defendants' costs was ordered to be paid out to the solicitors for the defendants in part payment of the defendants' costs. The judgment was reversed by the Court of Appeal, and the costs ordered to be paid by the defendants. The plaintiffs asked for an order against the defendants' solicitors for repayment by them:—Held, that the court had no jurisdiction on the appeal to order the defendants' solicitors to refund the money, the solicitors not being present. Nor, semble, could such an order have been made if they had been served with notice of the application. *Lydney*

and Wigpool Iron Ore Company v. Bird, 33 Ch. D. 85; 55 L. T. 558; 34 W. R. 749—C. A.

Of Proceedings rendered Necessary by Solicitor's Conduct.—See *Slater v. Slater and Batten v. Wedgwood Coal and Iron Company*, infra.

Order to Pay—Appeal without Leave.—An order that the costs of an application at chambers on behalf of a client shall be paid by the solicitor personally cannot be costs left to the discretion of the court within s. 49 of the Judicature Act, 1873, unless the solicitor has been guilty of misconduct or negligence, and, therefore, an appeal lies from such order without leave as to whether there has been such misconduct or negligence. *Bradford, In re*, 15 Q. B. D. 635; 53 L. J., Q. B. 65; 50 L. T. 170; 32 W. R. 238—C. A.

d. For Payment of Money.

Relation of Solicitor and Client—When constituted.—A client agreed in writing to lend his solicitor a sum of money to enable him to make a purchase of land, but if the purchase was not completed, the money was to be at once repaid. The purchase was not made, and the money was not returned. The client applied for an order for repayment, under the summary jurisdiction of the court:—Held, that, there being no relation of solicitor and client between the parties in respect of the agreement, no order could be made under the summary jurisdiction of the court. *Bryant, In re*, 50 L. T. 450—V.-C. B.

Guarantee of Client's Debt.—A solicitor who guarantees payment of a debt due from his client may, on default of payment by the client, be ordered by the court in a summary way to pay the amount himself, without any necessity on the part of the creditor to bring an action against the solicitor. *Pass, In re*, 35 W. R. 410—D.

Order for payment into Court on Trustee's Default.—An order was made on a trustee to pay into court interest found due from him, and the balance, beyond his costs to be taxed, of capital money certified to have come to his hands. The capital money had been received by the trustee's solicitors as part of the trust estate. The order was made on statements implying that the trustee, who was totally unable to pay, was solvent. The trustee having made default in payment of the interest, the court made an order, notwithstanding the former order, that the solicitors should pay into court the capital come to their hands with interest. *Stanhar v. Evans*, 34 Ch. D. 470; 56 L. J., Ch. 581; 56 L. T. 87; 35 W. R. 286—North, J.

Defence setting up Tender—Payment out of Court—Liability to refund.—In an action for wrongful dismissal, claiming a year's salary in lieu of notice, the defendant pleaded that the plaintiff was only entitled to one month's notice; or, in the alternative, three months; that before action the defendant made tender of three months' salary, which the plaintiff refused; that the defendant had paid the amount into court, and that it was enough to satisfy the plaintiff's claim. The request for lodgment in court contained a statement that the money was paid in

with a defence setting up tender. The plaintiff's solicitor, without obtaining an order, but on the written authority of the plaintiff, took the money out of court, and the plaintiff proceeded with the action. At the trial judgment was given for the defendant on the ground that the plaintiff was only entitled to one month's salary. The defendant applied for an order against the solicitor to refund so much of the money taken out of court as represented the difference between one month's and three months' salary. The solicitor had acted bona fide in taking the money out of court, and had paid it over to the plaintiff before the application to make him refund it was made:—Held, that although the plaintiff ought not to have had the money out of court, because a defence of tender of the sum paid in could not be pleaded to a claim for unliquidated damages, yet under the circumstances the solicitor ought not to be ordered to refund it. *Davys v. Richardson*, 21 Q. B. D. 202; 57 L. J., Q. B. 409; 59 L. T. 765; 36 W. R. 728—C. A.

Money wrongly paid out of Court—Forged Affidavit.—In an administration action a fund belonging to the children of M. who should attain twenty-one or marry was carried over to "the account of the issue or children of M. deceased." B., managing clerk of the firm of solicitors conducting the action, knew that M. died leaving one daughter, who would attain twenty-one in December, 1886. He retained L. as solicitor on behalf of the daughter to get the fund out, saying he had authority. A summons was taken out in chambers, and B. having produced an affidavit that the daughter was of age, an order was made by the chief clerk on the 28th January, 1884, for transfer and payment to the daughter. B. got the usual form of power of attorney from the Paymaster-General, and it was apparently executed by the daughter of M. in favour of L., but in reality it was forged. L. obtained payment, and after deducting one-half of one-sixth of the fund and other expenses, pursuant to an agreement between him and B., paid the remainder to B. on an authority apparently signed by the daughter of M., but really forged. L. never saw the daughter of M., and had no communication with her. The daughter of M. never saw B., and never gave any authority to B. B. absconded. In December, 1886, when the daughter of M. attained twenty-one, she presented a petition for a certificate that the fund might be replaced out of the Consolidated Fund. The petition was served upon L.:—Held, that the order of the 28th January, 1884, must be discharged, and an order now be made that the sums, and such further sums as would have been standing to the credit of the account, if the order of the 28th January, 1884, had not been made, should be respectively transferred and paid to the petitioner, and that L. should within two months from the date of the present order pay into court to the account of the Paymaster-General the said sums:—Held, that such costs of the petitioner as would necessarily have been incurred if the petitioner had been applying for payment to her of the funds which would have been standing to the credit of the account if the order of the 28th January, 1884, had not been made, must come out of the fund, or be paid by the petitioner, and L. would be ordered to pay all the other costs of the proceedings. *Slater v. Slater*, 58 L. T. 149—Kay, J.

Negligence—Omission to procure Investment of Purchase-money—Liability to Person not a Client.—An order was obtained by the solicitor for the plaintiff that the purchaser of property, sold under an order of the court in an action, should pay his purchase-money into court, and that the money when paid in should be invested in Consols. The plaintiff had the conduct of the sale. The money was paid into court by the purchaser, but the plaintiff's solicitor omitted to leave with the paymaster the necessary request for its investment, and consequently the investment was not made. On the further consideration of the action it was ordered that the balance of the purchase-money, after the payment of certain costs, should be paid to the receiver in the action, in part satisfaction of a balance due to him. The carriage of the order was given to the receiver, and he then discovered that the purchase-money had not been invested. He took out a summons, asking that the plaintiff's solicitor might be ordered to pay to him the amount of interest lost by the non-investment of the purchase-money:—Held, that the solicitor, as the officer of the court having the conduct of the sale, was responsible not only to his client but to the court for the due discharge of his duty, and that he must make good to the person entitled the loss of interest, but that he was entitled to a set-off in respect of a gain which had resulted from a fall in the price of Consols between the time when the investment ought to have been made and the date of the order on further consideration, and that this liability could be enforced by summons in the action. The solicitor was ordered to pay the costs of the summons, though on allowing the set-off, it appeared that the amount to be paid by the solicitor would be only 5*l.* 8*s.* 6*d.* *Batten v. Wedgwood Coal and Iron Company*, 31 Ch. D. 346; 55 L. J., Ch. 396; 54 L. T. 245; 34 W. R. 228—Pearson, J.

e. Delivery up of Documents.

In what Cases.—The court will not summarily order a solicitor to deliver up a deed to his client unless it be clearly shown not only that his solicitor has no lien upon it, but that he is holding it for the applicant alone, and as his solicitor. *Cobeldick, Ex parte*, 12 Q. B. D. 149; 49 L. T. 741; 32 W. R. 239—C. A.

Payment into Court of Security.—The court has jurisdiction, upon payment into court, or giving security for a sum sufficient to answer the solicitor's demand, to order before taxation delivery up by a solicitor of the client's papers, where retention by the solicitor of the papers on which he claims a lien would embarrass the client in the prosecution or defence of pending actions. *Quære* (per Lindley, L. J.), whether the jurisdiction is not extended by Ord. L. r. 8. *Galland, In re*, 31 Ch. D. 296; 55 L. J., Ch. 478; 53 L. T. 921; 34 W. R. 158—C. A.

2. FOR NEGLIGENCE.

Restrictive Covenant.—A solicitor was consulted by a lessee of premises with reference to the building of a wall, to the erection of which

on the demised premises his lessor objected. The lease was shown to the solicitor. The solicitor made no inquiries as to whether there was any objection to building the wall, other than what might be contained in the lease. The land was subject to a restrictive covenant against any such erection in favour of the original vendors of the freehold, and the wall after erection had to be pulled down:—Held, that the solicitor had been guilty of no negligence. *Pitman v. Francis*, 1 C. & E. 355—Mathew, J.

Mortgage—Insufficient Security—Statute of Limitations.—A mortgage was made through a solicitor and proved to be an insufficient security. More than six years afterwards an action was brought by the client against the executor of the solicitor claiming damages as for the wilful default of the solicitor:—Held, on the facts, that the client had approved of the mortgage, and that the solicitor merely did the legal part of the business and was not in the position of trustee, and therefore that the Statute of Limitations applied. *Dooby v. Watson*, 39 Ch. D. 178; 57 L. J., Ch. 865; 58 L. T. 943; 36 W. R. 764—Kekewich, J.

A solicitor in advancing money on mortgage may be employed, (1) to invest in a particular mortgage; (2) to find securities to be approved by the client and then invest the money; (3) to find securities and invest the money, the client taking little or no part in the business. In an action for negligence against the solicitors, the Statute of Limitations is a good defence in the first case and also in the second case if the client has approved of the mortgage, no relation of trustee and cestui que trust then existing between them. *Id.*

— Misrepresentation of Adequacy of Security—Accounts.—P., who was a solicitor, had acted as agent for the late husband of M. in several matters of business, including investments of money. M. took out administration to her husband, and placed the administration of his assets in the hands of P. as her agent. P. collected the personal estate, and received large sums on foot of it. He acted not only as solicitor, but as general agent for M., and furnished her with accounts of his receipts and disbursements. While acting as agent for M. in 1871, P. invested 1,500*l.* on mortgage to H., upon security which proved to be valueless. There was no evidence that P. was authorised to lend upon this or on any special security. P. acted as solicitor both for M. and for H. in the matter of the loan. The interest was paid for some years on the 1,500*l.*, but afterwards H. ceased to pay any interest. Proceedings were taken and expenses were incurred by M. in endeavouring to realise the security, which proved to be fruitless. P. having died, proceedings were taken by his administratrix to administer his real and personal estate in the Chancery Division. M. in this action claimed as creditor the 1,500*l.* and arrears of interest thereon, and the costs of the proceedings to realise the security; first, as for damages sustained by negligence on the part of P. as her solicitor in the investment of the money; secondly, for damages for false representations by P. that the security was adequate; thirdly, as for money due by P. on foot of sums received by him for her use, and for which he

undertook to find securities as her agent and trustee, and which were unaccounted for by him; and of which and all other dealings between her and P., as her agent and trustee, she sought an account:—Held, that M. was entitled to have an account taken of the dealings between herself and P., as between principal and agent; that there was a fiduciary relation between P. and M. which precluded the personal representative of P. from relying on the Statute of Limitations as an answer to M.'s claim, but that the claim put forward by M. for damages for negligence and for misrepresentation of the adequacy of the security was not now open to M. *Power v. Power*, 13 L. R., Ir. 281—V. C.

Where there is not merely an agency between the parties, but also a superadded fiduciary relation, the remedy of the principal, who is then also the cestui que trust, is not one arising merely from contract, or duty springing from such contract, where a common law liability would alone exist, but is one to be dealt with on the equitable relation of trustee and cestui que trust. *Id.*

— Liability to Co-Trustee.—In an action against trustees, the court held that the investments were improper; that the trustees had been guilty of negligence in not making inquiries as to the particulars, and in not giving proper instructions to the valuers, and in acting upon valuations which under the circumstances they ought not to have acted upon, and they were jointly and severally liable for the money lost. One of the trustees, A., was a solicitor, authorised to make professional charges for work done for the trust. The other was the widow of the testator, and the tenant for life under his will of the trust funds. A. took the more active part in making the investments, and was paid costs for his professional work, charging scale fees both for negotiating the loans, deducting the title, and preparing and completing the mortgages; and he did not, in the opinion of the court, communicate what he did to his co-trustee in such a way as to enable her to exercise her judgment upon the investments, and make them her acts as well as his own:—Held, that A. had undertaken to find proper investments, and that the widow had joined in advancing the fund on the faith that the investments were proper ones which had been looked into by A., as solicitor; that she had been misled by him, and he had been guilty of negligence in his duty as a solicitor; and that, as between A. and the widow, A. was primarily liable for the breach of trust. *Partington, In re, Partington v. Allen*, 57 L. T. 654—Stirling, J.

Deed settled by Court.—A solicitor may be guilty of such negligence in respect to a deed settled in chambers as to make him liable to his client, notwithstanding that the deed professes to be a deed settled by the court. *Stanford v. Roberts*, 26 Ch. D. 155; 53 L. J., Ch. 338; 50 L. T. 147; 32 W. R. 404; 48 J. P. 692—Kay, J.

Power of Master to disallow Costs caused by.—See *Massey and Carey, In re*, post, col. 1776.

3. IN OTHER CASES.

Undertaking as to Costs.—Where the solicitors of the promoters of an act of parliament,

whereby a company is created and empowered to raise capital and carry out works, and, if they so resolve, to raise separate capital for and carry out separately certain portions of such works as a separate undertaking, agree to pay certain claims out of the first capital raised by the company and the company duly raise capital for the separate undertaking and none other, the solicitors are not liable under the agreement. *Allan v. Regent's Canal, City and Docks Railway*, 54 L. J., Q. B. 201—Mathew, J. Reversed in C. A.

Liability to account—Treasury Prosecution by Local Solicitors.]—When local solicitors are retained by the Treasury, to conduct prosecutions on their behalf, such local solicitors are agents for the Treasury, and are therefore bound to account to the Treasury for any sums of money received in respect of costs, and to pay over to the Treasury the difference between the sums so received as costs and the sum allowed them on taxation. *Parkinson, In re*, 56 L. T. 715—D.

Constructive Trustee.]—A solicitor cannot be made liable as a constructive trustee to account for money paid to him in respect of his costs, unless he can be brought within the doctrine with reference to other strangers who are not themselves trustees, but who are liable in a proper case to be made to account as constructive trustees, and a stranger receiving money from the trustee which he knows to be part of the trust estate is not liable as a constructive trustee unless facts are brought home to him which show that to his knowledge the money is being applied in a manner inconsistent with the trust, so that it must be made out that the solicitor was either party to a fraud or party to a breach of trust on the part of the trustee. *Blundell, In re, Blundell v. Blundell*, 40 Ch. D. 370; 57 L. J., Ch. 730; 58 L. T. 933; 36 W. R. 779—Stirling, J.

Liability to Company as Promoter.]—See *Great Wheel Polgooth, In re*, ante, col. 355.

Statute of Limitations—Trustees.]—See LIMITATIONS, STATUTE OF, I., 1.

Joinder of for Purposes of Discovery or Costs.]—The court will not allow the joinder of solicitors or others as defendants against whom no further relief is sought beyond discovery or payment of costs. *Burstall v. Beyfus*, 26 Ch. D. 35; 53 L. J., Ch. 565; 50 L. T. 542; 32 W. R. 418—C. A.

4. WHAT ACTS OF PARTNER BINDING ON FIRM.

Negligence and Fraud.]—In May, 1869, P., a member of a firm of solicitors, suggested to the plaintiff, as an investment for a sum of 3,557*l.* to which he was entitled in court, a mortgage of a leasehold property at E., and made certain misrepresentations with respect to the property. In July the money was paid out of court to the firm on behalf of the plaintiff, and the balance, after certain deductions for the costs of payment out, was shortly afterwards paid away by two cheques signed by the firm for 33*l.* and 3,400*l.* respectively. P. sent the 33*l.* to the plaintiff, and informed him that the 3,400*l.* was invested upon the security at E. as arranged, and in August,

1869, he sent to the plaintiff a memorandum of deposit to the effect that he held the title-deeds as solicitor for and on behalf of the plaintiff to secure 3,400*l.* In 1875 P. executed a legal mortgage of the same property to H. without disclosing the plaintiff's equitable charge. The property was insufficient to satisfy both charges. P. continued to pay interest to the plaintiff on his investment until 1881, when his fraud was discovered and he absconded. The firm did not make any charge to the plaintiff for investment, but their bill of costs was limited to the costs incidental to the payment of the money out of court. In 1884 the plaintiff brought an action against the firm to recover from them the 3,400*l.* lost by P.'s fraud:—Held, first, that the firm was guilty of negligence, in the transactions of 1869, in not seeing that the plaintiff's money was invested upon a proper mortgage, but that that claim was barred by the statute; secondly, that they were not liable for P.'s misrepresentations, there being no sufficient proof that the plaintiff relied upon them; thirdly, that they were not liable for P.'s fraud in 1875, as it was not committed in the course of the firm's business. The fact that a representation is by its nature calculated to induce a person to enter into a contract does not raise a presumption of law that he relied upon such representation. *Hughes v. Twisden*, 55 L. J., Ch. 481; 54 L. T. 570; 34 W. R. 498—North, J.

Deposit of Bonds—Scope of Business.]—Trustees under a will deposited certain bonds payable to bearer with P., a member of the firm of solicitors who were acting for the estate. His partners had no knowledge of this, but letters referring to the bonds were copied in the letter-book of the firm and were charged for in the bill of costs of the firm, and the bonds were included in a statement of account which the firm made out for the trustees. P. paid some of the interest of the bonds by cheques of the firm, but on each occasion recouped the firm by a cheque for the same amount on his private account. P. misappropriated the bonds:—Held, that the cheques, letters and entries were too ambiguous to affect the other partners with acquiescence in P. having the custody of the bonds as part of the partnership business, and that they could not be held liable for their misappropriation. *Harman v. Johnson* (2 E. & B. 61) and *Dundonald (Earl of) v. Masterman* (7 L. R. Eq. 504) considered. *Cleather v. Twisden*, 28 Ch. D. 340; 54 L. J., Ch. 408; 52 L. T. 330; 33 W. R. 435—C. A.

VI. COSTS.

1. BILL OF COSTS.

a. Delivery of.

Unsigned Bill—Alteration after Delivery.]—A solicitor cannot, after delivery of a bill of costs, and objection taken to the amounts of the charges therein contained, even though the bill be unsigned, withdraw the bill from taxation, and substitute another in which the charges are reduced. *Jones, In re, King, Ex parte*, 54 L. T. 648—D.

Lump Sum in Bill Delivered—Subsequent.

Alteration.]—Solicitors having brought in, under an order for taxation, a bill of costs containing an item in a lump of 1,000*l.* for the costs, charges, and expenses of an action, it was held that the agreement to pay this sum was invalid, because it was not in writing:—Held, that they were entitled to bring in for taxation a bill containing the particulars of these charges, so long as the charges did not exceed 1,000*l.* *Russell, In re*, 55 L. T. 71—C. A.

Condition for Withdrawal—Delivery of Second Bill.]—A solicitor may, when sending in his bill of costs to his client, reserve to himself the right to withdraw or alter it on condition, provided the condition is fully and clearly stated to the client; but if the solicitor has sent in his bill without any condition, or with a condition which he could not fairly impose, he cannot afterwards withdraw it or send in an amended bill. *Thompson, In re*, 30 Ch. D. 441; 55 L. J., Ch. 138; 53 L. T. 479; 34 W. R. 112—C. A.

A firm of solicitors, on being pressed by their clients to send in their bill of costs, delivered a bill accompanied by a letter saying that there were certain charges which, owing to haste, had not been included in the bill, but that they were willing to accept a stated sum in full discharge, though, if such sum was not paid within eight days, they reserved to themselves the right to withdraw the bill and deliver another. The clients, however, insisted on being furnished with the particulars of further charges, and the solicitors wrote withdrawing the bill. The clients then obtained a common order for taxation of that bill, and for delivery and taxation of a further bill. On motion by the solicitors, Bacon, V.-C., discharged the common order on the ground that no bill had been "delivered" within the meaning of s. 37 of the Solicitors Act, 6 & 7 Vict. c. 73; but ordered the solicitors to deliver a bill within fourteen days, such bill to be taxed. The solicitors, in pursuance of that order, delivered a second bill, but of a considerably less amount than the first, whereupon the clients appealed to reverse that order and to have it declared that the bill to be taxed was that first delivered:—Held, discharging the last-mentioned order, that the first bill was conditional, but that the condition was one which a solicitor could not impose on his client, and that therefore the original common order for taxation must stand. *Ib.*

To Third Parties—Withdrawal.]—On a sale of mortgaged property by the mortgagors, the mortgagees' solicitors rendered services for which they were entitled to be paid by the mortgagors, and the mortgagors' solicitors, acting on behalf of their clients, undertook to pay those charges. In the course of a correspondence between the solicitors, the mortgagees' solicitors mentioned a lump sum as the amount of their costs, and stated that their bill was not yet drafted, and they wished to know whether details were required. The mortgagors' solicitors requested to have details, and the mortgagees' solicitors then sent their bill to them, and added that if further details were required they must furnish them. The parties could not agree as to the amount to be paid, and the mortgagors presented a petition for taxation:—Held, that the mortgagors' solicitors were acting within the scope of their employment in obtaining the bill, and it could not now

be withdrawn on the ground that it had been improperly delivered in being sent to the solicitors, and not to the clients; that it was not necessary that the bill should be delivered to the mortgagees to enable the mortgagors to tax it; that the document delivered was in fact a bill, and the details which were offered were not necessary to complete it, but might have been given on the taxation. *Kelloch, In re*, 56 L. T. 887; 35 W. R. 695—Stirling, J.

Power of Court to order.]—Under s. 396 of the Victorian Common Law Procedure Act, the court has power to order delivery of his bill by an attorney, whether or not it has been paid, and whether or not it is one which it would have jurisdiction to refer to taxation. [See 6 & 7 Vict. c. 73, ss. 37 & 41.] *Duffett v. McEoy*, 10 App. Cas. 300; 54 L. J., P. C. 25; 52 L. T. 633—P. C.

— Business not Transacted in Court—Jurisdiction.]—The jurisdiction given by s. 37 of the Solicitors Act, 1843, to order delivery of a solicitor's bill of costs where no part of the business charged for has been transacted in any court of law or equity, was given to the Lord Chancellor and Master of the Rolls as Judges of the Court of Chancery, and was transferred to the High Court of Justice by s. 16 of the Judicature Act, 1873. The Judges of the Queen's Bench Division, therefore have jurisdiction to order delivery of a bill of costs in such a case; though the application for delivery ought to be made in the Chancery Division (Lord Esher, M.R., dissenting). S. 37 of the Solicitors Act, 1843, gave the jurisdiction to the Lord Chancellor and the Master of the Rolls, not as judges of the Court of Chancery, but in respect of their independent offices as Lord Chancellor and Master of the Rolls, and that jurisdiction has not been transferred by any subsequent legislation. By Lord Esher, M.R. *Pollard, In re*, 20 Q. B. D. 656; 57 L. J., Q. B. 273; 59 L. T. 96; 36 W. R. 515—C. A. Reversing 52 J. P. 85—D.

b. Contents of.

Scandalous Matter.]—The general jurisdiction of the court to prevent proceedings before it being made the vehicle of scandal or impertinence extends to a bill of costs delivered, and, accordingly, entries in a bill of costs which contain scandalous matter will be ordered to be struck out. *Miller, In re, French, In re, Love v. Hills*, 54 L. J., Ch. 205; 51 L. T. 853; 33 W. R. 210—Kay, J.

Substantial Part improperly described.]—Where a substantial part of a bill of costs is improperly set out and described, the whole bill is not bad, but the solicitor can recover only those items that are properly described. Where, therefore, in a bill of costs for 5*l.* 16*s.* 6*d.*, a lump charge of 38*l.* 10*s.* was made for a number of items lumped together, and the remaining items, amounting to 13*l.* 6*s.* 6*d.*, were properly described, it was held that the solicitor could recover upon those items that were properly described. Dicta in *Haigh v. Ousey* (7 E. & B. 578) followed. *Blake v. Hummell*, 51 L. T. 430; 1 C. & E. 345—Denman, J.

c. Agreements as to Costs.

Verbal.—Since the Attorney and Solicitors Act, 1870, a verbal agreement by a client to pay his solicitor a lump sum in discharge of past costs is not binding on the client. *Russell, In re*, 30 Ch. D. 114; 54 L. J., Ch. 948; 52 L. T. 794; 33 W. R. 815—Kay, J.

Fair and Reasonable.—A solicitor agreed to conduct certain bankruptcy proceedings on the terms that his costs should not exceed 10*l*. In the course of the proceedings his clients left him and employed other solicitors, and he sent in a bill of costs for a larger amount than 10*l*. The county court judge sitting in bankruptcy declared the agreement to be void, because it did not contain a provision that the solicitor originally employed might conduct the bankruptcy proceedings to an end:—Held, that the order was wrong on the ground that the agreement was fair and reasonable, and that the solicitor could have gained no advantage if he had been allowed to prosecute the proceedings in bankruptcy to a conclusion, since under no circumstances could he have obtained costs beyond the amount of 10*l*. out of the estate. *Payton, Ex parte, Owen, In re*, 52 L. T. 628; 2 M. B. R. 87—D.

d. Interest on.

Disbursements and Costs—Demand from Client.—By General Ord. VII. under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 5, the interest which a solicitor is entitled to recover under the order on the amount due on business transacted by him is not to commence till the amount due is ascertained, either by agreement or taxation—and it is provided that a solicitor may charge interest at 4 per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client. A solicitor delivered his bill to a client without claiming interest. The bill was taxed, and the client paid the amount allowed on taxation. On such amount being paid the solicitor claimed interest thereon at 4 per cent. from one month from the date of the delivery of the bill:—Held, that the solicitor was entitled to such interest. *Blair v. Cordner*, 19 Q. B. D. 516; 56 L. J., Q. B. 642; 36 W. R. 109—D.

— **Appropriation of Payment.**—See *Harrison, In re*, post, col. 1781.

e. Taxation of.

i. Who Entitled to Order.

Ex parte—Special Agreement—Non-professional Work.—Where an agreement has been made for the remuneration of a solicitor, and the solicitor alleges that the remuneration was for non-professional work, the person chargeable cannot obtain the *ex parte* order for the delivery and taxation of the bill of costs. The Solicitors' Remuneration Act, 1881, s. 8, has made no difference in the practice in this respect. *Inderswick, In re*, 25 Ch. D. 279; 54 L. J., Ch. 72; 50 L. T. 221; 32 W. R. 541—C. A.

Solicitor to Guardians—Taxation by Clerk of the Peace.—When a solicitor is employed by the guardians of the poor, the taxation of his bill of costs by the clerk of the peace under the Poor Law Amendment Act, 1844, is not final and conclusive against him, and he is entitled to an order for taxation as between solicitor and client, under the Solicitors Act, 1843. *Southampton Guardians v. Bell*, 21 Q. B. D. 297; 59 L. T. 181; 36 W. R. 924; 52 J. P. 567—D.

Trustee in Bankruptcy.—The trustee in bankruptcy of a mortgagor is entitled to an order to tax, under 6 and 7 Vict. c. 73, the bill of costs of the solicitor of the mortgagee incurred in selling the property under a power of sale. *Marsh, In re* (15 Q. B. D. 340) distinguished. *Allingham, In re*, 32 Ch. D. 36; 55 L. J., Ch. 800; 54 L. T. 905; 34 W. R. 619—C. A.

"Assignee" of Costs.—Whether an assignee of costs due to a solicitor is such an "assignee" of the solicitor as is, under s. 37 of the act 6 & 7 Vict. c. 73, entitled to obtain a taxation of the costs, *quære*. *Ward, In re*, 28 Ch. D. 719; 54 L. J., Ch. 508; 33 W. R. 783—Pearson, J.

ii. Practice Generally.

Petitioner out of Jurisdiction.—A petitioner, in a matter under the Solicitors Act (12 & 13 Vict. c. 53), resident out of the jurisdiction, was ordered to give security for the costs in the matter, and a balance claimed to be due to the respondent. *Cornwall, In re*, 15 L. R., Ir. 144—M. R.

Summons—Service out of the Jurisdiction.—A summons to tax a bill of costs, not being a writ of summons within the meaning of Ord. XI. r. 1, leave to serve it out of the jurisdiction will not be granted. *Brandon, Ex parte, Bouron, In re*, 54 L. T. 128; 34 W. R. 352—D.

Petition—Signature.—London solicitors acting for country solicitors, duly authorised, obtained an order for taxation of costs. The names of the London solicitors were indorsed on the petition for taxation as principals. The order for taxation was discharged on the motion of the client, without costs. *Scholes, In re*, 32 Ch. D. 245; 55 L. J., Ch. 626; 54 L. T. 466; 34 W. R. 515—Pearson, J.

Petition or Summons.—The application by mortgagors to tax the bill of the mortgagees' solicitors ought to be made by summons, and not by petition, but it can be dealt with under Order LXX. r. 1, on the terms that the petitioners should pay the difference between the costs of a petition and those of an adjourned summons. *Kellock, In re*, 56 L. T. 887; 35 W. R. 695—Stirling, J.

Common Order or Special Order.—Where solicitors delivered a first bill which was afterwards withdrawn, the clients should, instead of obtaining the common order to tax, obtain a special order on petition raising the question as

to the right of the solicitors to withdraw their bill. *Thompson, In re*, 30 Ch. D. 441; 55 L. J., Ch. 138; 53 L. T. 479; 34 W. R. 112—C. A.

Common Order—Retainer.—The question of retainer can be raised on a common order to tax as to particular items or heads; but not as to the whole of a bill of costs. A bill of costs was divided into general costs and costs relating to a particular matter. On a common order to tax:—Held, that the whole of the latter, except two small items, having been incurred without authority, were properly taxed off. *Herbert, In re*, 34 Ch. D. 504; 56 L. J., Ch. 719; 56 L. T. 322; 35 W. R. 606—North, J.

—**Obtained by Solicitor — Retainer.**—Where a client obtains the common ex parte order for the taxation of a solicitor's bill of costs, he cannot dispute his retainer to the extent of the whole of the bill, though he may do so in respect of particular items in the bill, the practice being to require the client on his application for the order to make an admission of the retainer; but where a solicitor obtains the common ex parte order the client is not bound by the allegation of retainer contained in the petition, and consequently may object to every item in the bill on the ground of there having been no retainer. Consequently it is no objection to the common order when obtained by a solicitor that he knew that the clients disputed his retainer as to the whole bill. *Jones, In re*, 36 Ch. D. 105; 56 L. J., Ch. 720; 57 L. T. 26; 35 W. R. 649—Stirling, J.

Third-party Order—Special Expenses authorised by Client primarily liable.—By an agreement, dated the 15th July, 1885, the Willenhall Local Board agreed with the Earl of Lichfield and Lord Anson, his eldest son, for the purchase of land, part of their entailed estates, at a price to be fixed by arbitration. The agreement contained a clause that the local board should pay all the costs of the reference to arbitration. The arbitration took place, and the purchase was completed. The vendors' solicitors sent in their bill of costs to the board, and the board obtained the usual order for taxation on the petition of a third party liable to pay under s. 38 of the Attorneys and Solicitors Act, 1843, which provides that the third party shall stand in the same position as the original client. The order for taxation, which was in the common form, contained a recital that the petitioners submitted to pay what should be found due upon taxation. The bill of costs contained a number of heavy fees paid to eminent surveyors who had been called as witnesses for the vendors at the arbitration. The local board objected to these payments as excessive. The taxing-master at first marked them for reduction, but, on the vendors' solicitors producing a letter from Lord Anson, stating that he had acted for his father in the matter, and had authorised the calling of the surveyors in question, and approved the payments made to them, the taxing-master held that he was precluded from reducing the items. The local board took out a summons to review the taxation:—Held, that, by taking the usual third-party order for taxation under s. 38 of the act, the local board had precluded themselves from taking any objection to the bill of costs, which could not have been taken by the vendors;

and that, though by the agreement the board were only bound to pay reasonable costs, they could not, on taxation, object to anything authorised by the vendors as unreasonable. Their proper course, if the payments were unreasonable, was not to apply for taxation, but to refuse to pay, and leave the vendors to bring an action or refer the matter to arbitration. *Holliday and Godlee, In re*, 58 L. T. 301—North, J.

One Bill out of Several.—An assignee of costs cannot obtain an order of course to tax one bill of costs out of several, even if that bill only has been assigned to him. An order to tax one bill out of several alone can only be obtained by means of a special application. *Ward, In re*, 28 Ch. D. 719; 54 L. J., Ch. 508; 33 W. R. 783—Pearson, J.

Part of Bill—Country Solicitor and London Agent.—London agents delivered to a country solicitor their bill of agency charges for a year. The bill included their charges relating to a number of distinct actions and matters in which they acted as agents for the solicitor. The charges relating to each distinct action or matter, were made out separately under the head of that action or matter, though the whole of the charges were comprised in one bill:—Held, that the bill thus delivered was one bill, and that the country solicitor was not entitled to have the charges relating to one of the actions taxed without having the whole bill taxed; but held, on appeal, that, notwithstanding s. 37 of the Solicitors Act, the court under its general jurisdiction can order taxation of part of a bill, and that in this case it was right that such jurisdiction should be exercised, but only upon terms which would prevent any injustice being done. Taxation of the charges relating to the one action was therefore ordered, upon the appellants giving an undertaking to pay within a short limited time (subject to an undertaking to refund) the balance claimed by the agents to be due to them for charges and disbursements, and the appellants, who had not previously offered any undertaking, were ordered to pay the costs of the appeal. *Johnson and Weatherall, In re*, 37 Ch. D. 433; 57 L. J., Ch. 306; 58 L. T. 692; 36 W. R. 374—C. A.

Power to cross-examine Witnesses.—On a taxation between solicitor and client, the master, after perusing an affidavit of the solicitor and an affidavit of the client denying the facts, refused to allow the solicitor to submit an affidavit in reply, or to cross-examine the client:—Held, that under such circumstances, the master should allow further evidence, and should take *viva voce* evidence under the powers given him by Ord. LXV. r. 27, sub-r. 26. *Brown, Ex parte, Evans, In re*, 35 W. R. 546—D.

iii. After Payment.

Retention of Costs by Solicitor.—From February, 1874, to August, 1879, S. had acted as the solicitor and man of business of B., a married woman, and during this period had wound up her former husband's estate, collected her rents, and managed her estates; lent her money, and negotiated mortgages for her. In the course of these transactions the various items of receipts and payments on her behalf, including costs

and professional charges, were entered in a book of accounts kept by S. Copies of these accounts were sent to B. from time to time, and one of the mortgages by B. to S. contained a recital that they had been gone through and settled. In August, 1879, when a mortgage was negotiated from a third person of sufficient amount to pay off B.'s debt to S., the accounts were gone through and explained to B., when S. retained the amount due to him for advances, and for his costs and professional charges, out of the mortgage money, and carried the balance to her credit in the book of accounts. B. thereupon signed the account. S. continued to act for B. as before down to the end of 1885. B. had no independent advice when she signed the account in August, 1879. On an application by B. and her husband for the delivery and consequent taxation of bills of costs from February, 1874, to August, 1879:—Held, following *Street, In re* (10 L. R., Eq. 165), that there had been no payment within the meaning of 6 & 7 Vict. c. 73, s. 41, and that B. was entitled to an order for delivery of proper bills of costs for the period required, and a consequent taxation, notwithstanding the lapse of time and the signature by B. of the accounts. *Soydon, In re, Baker, Ex parte*, 56 L. J., Ch. 420; 56 L. T. 355; 51 J. P. 565—Chitty, J.

Special Circumstances—Application by Cestui que Trust.—Quære, whether the provision in s. 41 of the Solicitors Act, 1843, as to the necessity of showing "special circumstances" on an application for taxation of a bill of costs after payment, applies in the case of an application by a cestui que trust under s. 39 for taxation of a bill paid by trustees. *Chowne, In re*, 52 L. T. 75—C. A.

— **Discretion of Court.**—Whether the provision applies or not, the court, on an application under s. 39, has a discretion as to ordering taxation, even where special circumstances are shown. Where overcharges of only 2*l.* or 3*l.* were shown, and no pressure or fraud was proved, the court declined to exercise its discretion by ordering taxation. *Id.*

— **Overcharge amounting to Fraud—Pressure.**—After a solicitor's bill had been paid, an order for the taxation of it will not be made, unless special circumstances—as overcharges such as amount to fraud, or which are accompanied by pressure—can be shown, which, in the opinion of the judge, appear to make it proper that the bill should be taxed. *Munns and Longden, In re*, 50 L. T. 356—Kay, J. See also *Eley, In re*, post, col. 1768.

A tenant having an option of purchase of the fee at a given price on the terms of his paying all the vendor's costs, gave notice in December, 1882, of his exercise of the option, and stated that he should not require an abstract of title. The time for completion was the 25th of March, 1883, but it was arranged for the tenant's convenience that the completion should be six weeks earlier, and that the property should be conveyed in two lots. He sent his draft conveyances for perusal before the end of December. On the 2nd of February, 1883, the vendor's solicitors sent in their bill of costs, in which they charged 30*s.* per cent. on the pur-

chase-money of each lot. The purchaser's solicitors objected to these charges, but the vendor's solicitors refused to allow completion unless they were paid, and on the 14th of February the purchaser paid them under protest, and completed the purchase. After this he applied for taxation of the bill:—Held, that, having regard to the dates, there was no pressure, and that there was no overcharge amounting to fraud, and that there were therefore no special circumstances to authorise taxation after payment. *Lacey and Son, In re*, 25 Ch. D. 301; 53 L. J., Ch. 287; 49 L. T. 755; 32 W. R. 233—C. A.

A foreclosure action having been commenced, and judgment for foreclosure having been obtained but not made absolute, the mortgagee, on the 19th June, 1882, paid the mortgagee's solicitor 263*l.*, which was alleged to be due for principal, interest, and costs. There was no taxation or delivery of the bill of costs. In February, 1883, the mortgagee took out a summons for delivery and taxation of the bill of costs:—Held, that, even if there had been payment to the solicitor within the meaning of the Solicitors Act, 1843, the mere pendency of the foreclosure action did not amount to pressure so as to entitle the mortgagee to taxation. *Griffith Jones & Co., In re*, 53 L. J., Ch. 303; 50 L. T. 434; 32 W. R. 350—C. A.

Mortgagees for 2,000*l.* were proceeding to sell the mortgaged estates. On the 1st of September, S., the mortgagor's solicitor, wrote to B., the mortgagee's solicitor, informing him that he had found a transferee, and proposing to complete the transfer on the 3rd. B. wrote back proposing the 10th for completion, and afterwards postponed the appointment to the 13th. His bill of costs, which amounted with surveyor's charges to more than 450*l.*, was received by S. on the 9th. On that day S. wrote to B., saying that the bill of costs appeared excessive, and would require to be carefully gone into, but did not propose to postpone the completion. On the 12th S. took with him a written protest against the bill, and had two interviews with B., at which arrangements were made for completion. S. did not mention the subject of costs at either interview, but deposed that he had intended to do so at a third appointment on the same day, which B. did not keep. On the 13th the parties met, the transfer was completed, and the bill of costs paid, B. refusing to part with the deeds unless it was paid. S. delivered his written protest, and it appeared that B. expressed willingness to reconsider his bill if any item were shown to be erroneous, but said nothing to the effect that it was to be treated as open to taxation. The mortgagor applied for taxation, alleging pressure and overcharge, but not referring to any particular items of overcharge. Bacon, V.-C., made an order for taxation, and B. appealed:—Held, by Cotton and Fry, L.J.J. (dissentiente, Bowen, L.J.), that the order for taxation must be discharged, for that as the shortness of the interval between the delivery of the bill and the time fixed for completion did not arise from any act of the mortgagee's solicitor, but was owing only to the desire of the mortgagor for speedy completion, there was no pressure such as to justify taxation, though the case would have been otherwise if the mortgagee had been pressing for an early settlement. *Boycott, In re*, 29 Ch. D. 571; 55 L. J., Ch. 835; 52 L. T. 482; 34 W. R. 26—C. A.

Held, by Bowen, L.J., that the Solicitors Act, 1843, s. 41, authorises taxation after payment where there are special circumstances which, in the opinion of the judge, require the same; that there is no inflexible rule that the special circumstances must be pressure with overcharge, or overcharge so gross as to amount to fraud; and that in the present case, as the parties did not at completion treat the bill as finally settled, and B. had taken advantage of the inconvenience which a postponement of the settlement would have occasioned to the mortgagor, there were special circumstances justifying taxation. *Id.*

Held, by Bowen, L.J., that where a bill is so large as to be redolent of overcharge it is not necessary that specific items of overcharge should be pointed out. *Id.*

Held, by Fry, L.J., that though the bill appeared excessive, the court could not treat overcharges as shown, unless specific items were pointed out on which it could exercise its judgment. *Id.*

— **Common Mistake.**—Where a fee was paid under a common mistake of the solicitor and client that the scale under the Solicitors' Remuneration Act applied, the court refused to accede to an application for an order for taxation. *Glasvoldine and Curlyle, In re*, 52 L. T. 781—C. A.

— **Costs incurred previously to Retainer—Adoption of Services by Client.**—A solicitor undertook, without retainer, certain investigations as to who were the next of kin of an intestate. These investigations were adopted and paid for by the administrator for whom the solicitor subsequently acted. A summons was taken out by another of the next of kin for taxation of the solicitor's bill of costs, to which the solicitor consented. The taxing-master was to be at liberty to state special circumstances. The taxing-master disallowed the costs of these preliminary investigations. On an application by the solicitor to be allowed such costs, the court directed that, subject to the amount overpaid being paid into court, there should be an inquiry as to what costs, if any, ought to be allowed the solicitor for the investigations (the majority of the next of kin being willing that they should be allowed), such order to be served on the next of kin. The court was, however, of opinion that, under s. 41 of the Attorneys and Solicitors Act, 1843, it had jurisdiction, even in the absence of such willingness on the part of the next of kin to make the above order, inasmuch as on the finding of the taxing-master there were "special circumstances" within the meaning of that enactment:—But held, on appeal, that the judgment must be varied by striking out the direction for immediate payment into court, the solicitors undertaking to repay any sum which might be disallowed as the result of the inquiry. *Hill, In re*, 55 L. J., Ch. 871; 55 L. T. 456—C. A.

iv. More than Twelve Months after Delivery.

— **"Special Circumstances."**—The "special circumstances" which, under 6 & 7 Vict. c. 73, s. 37, allow a solicitor's bill of costs to be referred for taxation, although twelve months have elapsed since it was delivered to the client,

are not merely pressure and overcharge, or overcharge amounting to fraud. A judge has a discretion in ordering the bill of costs to be taxed, if it contains items unreasonably large, or charges requiring explanation, or gross blunders. Semble, that the same principle ought to be applied to the taxation of a bill of costs which has been paid. *Boycott, In re* (supra) commented on. *Norman, In re, Bradwell, Ex parte*, 16 Q. B. D. 673; 55 L. J., Q. B. 202; 54 L. T. 143; 34 W. R. 313—C. A.

Bills of costs delivered by a solicitor contained the following charges:—73*5*l. for the costs of a reference, lasting six days; 83*l.* for witnesses' expenses, none of which had been paid by the solicitor, but nearly the whole of which had been paid by the client; and 71*l.* for shorthand notes of the proceedings at a reference where no professional shorthand writer had been employed, but the clerk to the solicitor had taken the notes, and it did not appear that the solicitor had given his clerk any part of the 71*l.* charged. More than twelve months had elapsed since the bills were delivered:—Held, that these charges constituted "special circumstances" within the meaning of 6 & 7 Vict. c. 73, s. 37, which justified a judge in referring the bill for taxation. *Id.*

— **Overcharge amounting to Fraud.**—The charge by a mortgagor's solicitor to his client of a scale fee for "negotiating loan" in addition to the procuration fee according to the scale paid to mortgagee's solicitor, is an overcharge amounting to fraud so as to entitle the client to an order to tax on application more than a year after delivery of the bill; especially when coupled with the fact that the solicitor by whom the overcharge was made had not complied with his client's instructions to get the bill taxed. *Pybus, In re*, 35 Ch. D. 568; 56 L. J., Ch. 921; 57 L. T. 362; 35 W. R. 770—Chitty, J.

— **Country Solicitor and London Agent.**—London solicitors acted as agents in London for a country solicitor during the years 1877 to 1884 inclusive. The agency was terminated in 1884. During the period of the agency the London agents delivered to the country solicitor, generally once a year but sometimes oftener, detailed bills of the charges which they claimed against him in each of the actions or other matters in which they had acted for him. They also delivered to him a cash account for each year, in which he was credited with all payments made by him to them, and all moneys received by them on his behalf, and was debited with all payments made by them to him or on his behalf, and with the gross amounts of the several bills of charges which had been delivered. The balance appearing to be due from him on each account but the last was carried on to the next account. Some of the actions continued during several years, and one of them (*Rhodes v. Jenkins*) continued during the whole period of the agency, and was not then concluded. After the close of the agency the country solicitor claimed a taxation of the whole of the bills:—Held, by Pearson, J., that only those bills which had been delivered within twelve months could be taxed, and that the earlier bills must be treated as having been settled in account and thus paid. Held, by the

Court of Appeal, that the bills of costs in *Rhodes v. Jenkins* (to which the appeal was limited), notwithstanding the fact that all the costs in it had not yet been taxed, being in fact separate bills could not be treated as one continuous bill, at the option of the country solicitor. *Nelson, In re*, 30 Ch. D. 1; 54 L. J., Ch. 998; 53 L. T. 415; 33 W. R. 645—C. A.

Charge for Counsel's Fees not yet paid.]—The London agents had charged the county solicitor with fees to counsel which had not yet been paid, but the country solicitor had not supplied them with sufficient funds to pay the fees:—Held, by Pearson, J., that this charge was not a circumstance sufficient to justify a taxation. *Ib.*

At instance of Third Party.]—The words of the proviso at the end of s. 41 of the Solicitors Act, 1843, being express, apply to applications under s. 38. *Dawson, In re* (8 W. R. 554) not followed. *Smith, In re*, 32 W. R. 408—Chitty, J.

v. Costs of Taxation.

Offer by Solicitor to reduce the Amount—Certifying special circumstances.]—C., a solicitor, sent in to executors a bill of costs for 83*l.*, writing at the foot, "say 78*l.*," and the 78*l.* was paid. The residuary legatee obtained an order to tax the bill, which was taxed at 66*l.*, being more than five-sixths of 78*l.*, but less than five-sixths of 83*l.* The residuary legatee objected to certain items as excessive, and the taxing-master considered that they were excessive; but held that as the executors had authorised them, and admitted their liability to pay them, the residuary legatee could not have them reduced:—Held, that the taxing-master was right in allowing these items; that the bill must be treated as a bill for 78*l.*, from which less than one-sixth had been taxed off, and that the solicitor was entitled to the costs of the reference. But held, on appeal, that the bill delivered, within the meaning of 6 & 7 Vict. c. 73, s. 37, was a bill for 83*l.*, and that, as more than one-sixth had been taxed off, the solicitor must, according to that section, pay the costs of the reference; the case not coming within the proviso giving the court a discretion where special circumstances are certified. *Carthou, In re*, 27 Ch. D. 485; 54 L. J., Ch. 134; 51 L. T. 435; 32 W. R. 940—C. A.

P., a solicitor, delivered a bill for 362*l.*, but stated that he would only claim 320*l.*, and the 320*l.* only was entered in the cash account which he delivered to his clients. The clients obtained an order for taxation. The taxing-master taxed the bill at 280*l.*, being more than five-sixths of 320*l.*, but less than five-sixths of 362*l.*, and certified that he had allowed the solicitor the costs of the reference, as he considered that since he had never claimed more than 320*l.*, the difference of 42*l.* between this sum and the amount of the whole bill, ought to be deducted from the sums taxed off, thus reducing them to 40*l.*, which was less than a sixth of the sum he had claimed:—Held, that the solicitor must pay the costs of the reference. Held, on appeal, that special circumstances were certified, so as to give the court a discretion as to the costs of the reference, but that the special circumstances were not such as

to induce the court to depart from the general rule that the costs of the reference should follow the event of the taxation, and that in this case also, more than one-sixth having been taxed off the 362*l.*, the solicitor must pay the costs of the reference. *Paull, In re*, 27 Ch. D. 485; 54 L. J., Ch. 134; 51 L. T. 435; 32 W. R. 940—C. A.

Bill delivered—Payment of Less Sum in Discharge.]—This was a summons on behalf of a client for review of taxation, and that the costs of taxation might be allowed to the client and disallowed to the solicitors. The solicitors had paid themselves 20*l.* out of money of their client in their hands in full discharge of their bill of costs. After this the client changed his solicitors and required a bill of costs, and obtained a common order to tax the costs of his former solicitors. The bill was delivered to him, and soon after the solicitors moved the court to cancel the order, but the motion was refused. The bill delivered amounted to 26*l.* 8*s.* 3*d.*, and was reduced, on taxation, to 20*l.* 16*s.* 7*d.*, more than one-sixth being taxed off. The taxing-master certified that the solicitors were entitled to all the costs of the taxation, on the ground that the sum allowed on taxation was greater than the sum accepted by the solicitors in full discharge:—Held, that one-sixth having been taxed off the bill, the solicitors are not entitled to the costs of the taxation. *Elwes and Turner, In re*, 58 L. T. 580—Kay, J.

Rule not applying to Bankruptcy.]—There is no practice in bankruptcy by which a creditor reducing the bill of the trustee's solicitor by more than one-sixth is entitled to the costs of the taxation, and the Solicitors Act (6 & 7 Vict. c. 73), ss. 37 and 39, does not apply. *Marsh, Ex parte, Marsh, In re*, 15 Q. B. D. 340; 54 L. J., Q. B. 557; 53 L. T. 418; 34 W. R. 620; 2 M. B. R. 232—C. A.

vi. Reviewing Taxation.

Objections taken before Taxing-master.]—To enable the court to entertain a summons to review a taxing-master's certificate, where the ground of objection is to the whole of the finding generally, it is not necessary that the objections raised by the summons to his finding should have been carried in before the signing of the certificate: Ord. LXV. r. 27, sub-r. 39 and 41, being applicable only where particular items are objected to. *Sparrow v. Hill* (7 Q. B. D. 362; 8 Q. B. D. 479) followed. *Castle, In re*, 36 Ch. D. 194; 56 L. J., Ch. 733; 57 L. T. 76; 35 W. R. 621—Kay, J.

Where under an order for taxation of a solicitor's bill of costs and cash account, the taxing-master found that, in consequence of all accounts between the parties having been settled, there was nothing to tax, and certified accordingly, but no objections to the finding were carried in before the certificate was signed:—Held, that the court had jurisdiction to entertain a summons to review the certificate. *Ib.*

Ord. LXV. r. 27, sub-r. 42, of the Rules of Court, 1883, precludes appellants to the Court of Appeal from taking at that stage of the proceedings any objection to the taxation or adduc-

ing any evidence other than that which had been carried in and brought before the taxing officer. *Hester v. Hester*, 34 Ch. D. 607; 56 L. J., Ch. 247; 55 L. T. 862; 35 W. R. 233; 51 J. P. 438—C. A.

In Bankruptcy.]—*See* BANKRUPTCY, XVIII. 5.

Party to take out Summons.]—Where solicitors to trustees claimed to be entitled to certain charges that were disallowed by the taxing-master, the trustees took out a summons to review the taxation:—Held, that the matter had been wrongly brought before the court, as the summons ought to have been taken out by the solicitors, and not the trustees, whose duty it was to protect the estate against increased charges, and the costs of the application must be paid by the trustees personally. *Wood v. Calvert*, 55 L. T. 53; 34 W. R. 732—Kay, J.

Notice to consider Objections—Length of.]—Upon a party objecting to the allowance of certain costs, his solicitors received at 4.30 p.m. from the taxing-master a notice that at 1 p.m. the following day, he would proceed to consider the objections. On a summons to review taxation on the ground that by analogy to r. 16 of Ord. LXV. of the Rules of Court, 1883, the taxing-master ought to have given a clear day's notice of his intention to proceed, notice of the 4th of December, 1885, was sufficient. *Hill, In re*, 33 Ch. D. 266; 55 L. T. 104—C. A.

2. WHAT SUMS ALLOWED.

a. Solicitors' Remuneration Act.

i. Election as to Scale.

Time for — “Before undertaking any Business.”]—The solicitors of the assigns of a lease of copyhold land wrote to P., the copyholder, asking for renewed leases to their clients under a covenant in the original lease. On the 25th of July P.'s solicitors wrote to the solicitors of the applicants stating that P. had called on them with the letter, and that the matter therein referred to should have their attention, and asking for evidence of the title of the applicants. The evidence required was furnished. Some delay took place in consequence of the necessity of P. being admitted, and obtaining a licence to demise. On the 16th of October, P.'s solicitors were informed by the steward of the manor that P. could be admitted, and that licence to demise would be given. On the 19th of October, P.'s solicitors gave him written notice of their election to be remunerated according to the old system as modified by Schedule II. to the rules under the Solicitors' Remuneration Act. In the books of the solicitors was an entry under that date “instructions for drawing new leases,” but there was no evidence as to the circumstances under which it was made. On the 21st of October P.'s solicitors sent to the applicant draft leases. The leases were granted, and the lessees, who were bound to pay the costs of the lessor's solicitors, insisted that the remuneration must be according to the scale in Schedule I. :—Held, that the election on the 19th of October was too late, for that the business had been undertaken on the 25th of July, and that the

taxation must be according to the scale. *Allen, In re*, 34 Ch. D. 433; 56 L. J., Ch. 487; 56 L. T. 6; 35 W. R. 218—C. A.

The notice of election under rule 6 of the General Order to the Solicitors' Remuneration Act, 1881, must be given by the solicitor before he undertakes any business at all in the particular matter for his client. After having done any work in the matter for which he could charge his client if the scale under the order did not apply, it is too late for him to elect. *Allen, In re* (supra) followed. *Hester v. Hester*, 34 Ch. D. 607; 56 L. J., Ch. 247; 55 L. T. 862; 35 W. R. 233; 51 J. P. 438—C. A. Affirming 55 L. T. 669—Kay, J.

A solicitor who acted for a mortgagee in relation to the mortgaged property received from the solicitors of the persons entitled to the equity of redemption a request that the mortgagee would sell under his power of sale, and in pursuance of this he, without any express authority from his client, did work in relation to the contract for sale for which if authorised he would, apart from the rules, under the Solicitors' Remuneration Act, have been entitled to be paid, and which would be covered by the scale fee. The sale was completed :—Held, that a notice of election to be remunerated according to the old system, which was given by the solicitor after work of the above description had been done, was too late, although given before the contract was signed, for that as the client had ratified his proceedings he stood in the same position as if he had received previous authority, and must be treated as having undertaken the business as soon as he did any work of the above description. *Id.*

Where money is paid into court under statutes incorporating s. 80 of the Lands Clauses Consolidation Act, 1845, the solicitor for the vendor may entitle himself to detailed charges, provided that he signifies his election “before undertaking the business.” *Brideveell Hospital and Metropolitan Board of Works, In re*, 57 L. T. 155—Chitty, J.

The notice of election under rule 6 of the general order under the Solicitors' Remuneration Act, 1881, as to remuneration for conveyancing business arising in an action, must be given by the solicitor before he undertakes such conveyancing business. After having done any work in the matter which would properly be covered by the scale charge, e.g., discussed with the client the mode of sale and questions relating to the title, it is too late for him to elect. *Allen, In re* (34 Ch. D. 433), and *Hester v. Hester* (34 Ch. D. 607) followed. *Metcalf v. Metcalf*, *In re, Metcalf v. Blencowe*, 57 L. J., Ch. 82; 57 L. T. 925; 36 W. R. 137—Stirling, J.

Sending in a bill of costs in the old form cannot be treated as an election by the solicitors to charge according to Schedule II. of the Order. *Fleming v. Hardcastle*, 52 L. T. 851; 33 W. R. 776—Pearson, J.

Notice of Election—To whom given.]—Semble, where a solicitor is acting for several trustees, notice of election must be given to them all. *Hester v. Hester*, supra.

Where notice of election under the rule has been properly given by a solicitor to his client, a first mortgagee, it is binding on a subsequent incumbrancer and also on the mortgagor. *Hester v. Hester*—Per Kay, J., supra.

— “Clients.”]—Where, under a lease containing a power of renewal, the assigns are liable to pay the costs of a new lease, the only person to whom any notice of election under r. 6 need be given by the lessor’s solicitor is the lessor himself; the assigns not being “clients” of the solicitor within s. 1, sub-s. 3, of the Solicitors’ Remuneration Act, 1881, so as to make any notice to them necessary. *Allen, In re*, 34 Ch. D. 423; 56 L. J., Ch. 6; 55 L. T. 630; 35 W. R. 100; 51 J. P. 325—Per Kay, J. See *S. C. in C. A.*, supra.

Work done before Rules.]—Whether a solicitor might on the rules coming into operation have effectually declared such election, *quære*. *Field, In re*, infra.

ii. In what Cases Applicable.

a. Generally.

Conveyancing Business in Action—“Other Business.”]—Solicitors who transact conveyancing business in an action will, under the Solicitors’ Remuneration Act, 1881 (44 & 45 Vict. c. 44), and the General Order of August, 1882, be allowed taxed costs and charges for such business according to the scales set forth in the schedules to the General Order. The proper construction of the language of s. 2 of the Solicitors’ Remuneration Act, 1881, is that it refers to conveyancing matters which take place in an action as well as to those out of court, and that the exception is only from “other business” not being conveyancing business, and accordingly where the taxing-master had disallowed certain charges made for conveyancing business in an action, and under the scales of charges contained in the schedules to the General Order of August, 1882, he was directed to review his taxation. *Stanford v. Roberts*, 26 Ch. D. 155; 53 L. J., Ch. 338; 50 L. T. 147; 32 W. R. 404; 48 J. P. 692—Kay, J.

The words of s. 2, “not being business in any action or transaction in any court or in the chambers of any judge or master,” apply only to the “other business” mentioned immediately before, i.e., to business not being conveyancing business, and do not exclude from the scale conveyancing business done under the direction of the court. *Merchant Taylors’ Company, In re*, 30 Ch. D. 28; 54 L. J., Ch. 867; 52 L. T. 775; 33 W. R. 693—C. A.

Whole of Business must be Done.]—A tenant having an option of purchase of the fee at a given price on the terms of his paying all the vendor’s costs, gave notice of the exercise of the option, and stated that he should not require an abstract of title, and sent in his draft conveyances for perusal. The vendor’s solicitors sent in their bill of costs, in which they charged 30s. per cent. on the purchase-money of each lot, considering that this was the proper charge under the Solicitors’ Remuneration Act, 1881, which provides that amount of remuneration to a vendor’s solicitor “for deducing title to freehold, copyhold or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale if any)”:—Held, that the case was governed by the new rules, but that the bill was framed on an erroneous footing, for that the ad valorem remuneration authorised by Schedule I. was chargeable only where the whole of the business in respect of which it was imposed, viz., the deducing title and perusing and completing conveyance was done; that here, as there was no deducing of title, but only perusal and completion of the conveyance, Schedule I. did not apply, but that under the General Order, r. 2 (c), the solicitor’s remuneration was to be regulated by the old system as modified by Schedule II. *Lacey & Sons, In re*, 25 Ch. D. 301; 53 L. J., Ch. 287; 49 L. T. 755; 32 W. R. 233—C. A.

Under a provision contained in a will the testator’s sons took the real estate at a valuation, and took over the assets and liabilities of his business, the sons giving a mortgage to the trustees to secure the purchase-money. The same solicitors acted for all parties in preparing the necessary deeds, and charged full vendors’ and purchasers’ costs, and also mortgagors’ and mortgagees’ costs under the scale:—Held, that they were only entitled to remuneration under schedule 2, for, as they had not “investigated and deduced title,” the scale charge did not apply. *Keeping and Gloag, In re*, 58 L. T. 679—Stirling, J.

In July, 1881, W. instructed his solicitors to prepare a building agreement with form of lease to be granted on completion set out in the schedule. In June, 1883, the premises having been completed, W. gave further instructions for a lease, which, as prepared, was, except as to parties, a verbatim copy of that contained in the schedule. In November, 1883, the solicitors delivered their bill of costs, in which under date July, 1881, were various items amounting to 17l. in relation to preparing the agreement; and under date June, 1883, “to costs of preparing, engrossing, executing, and completing lease and counter-part, as per Schedule I. of Solicitors’ Remuneration Act, 59l. 10s.” On taxation this item was objected to, on the ground that the act did not apply, as the substantial part of the work done was previous to the 1st of January, 1883, and had been already charged for in the costs of preparing the agreement. The taxing-master disallowed the objection, but deducted 20l. from the 59l. 10s., and directed a detailed bill of costs in relation to the preparation of the lease to be brought in. This bill was delivered, but was not taxed. On summons to review taxation:—Held, that the taxing-master ought to have taxed the detailed bill for the actual preparation of the lease, and not have allowed the ad valorem scale even to the extent he did; that the ad valorem scale applied only where the solicitor had substantially done the work specified in Schedule I.; that as the scale charges did not apply, the taxing-master ought to have taxed their charges in accordance with r. 2, sub-s. (c), and Schedule II. *Hickley, In re*, 54 L. J., Ch. 608; 52 L. T. 89; 33 W. R. 320—Chitty, J. See also *Wilson, In re*, and *Wood v. Calvert*, post, col. 1771.

Part of Work done before Act.]—Negotiations for a lease were carried on through the lessor’s solicitor for two years before the rules under the Solicitors’ Remuneration Act, 1881, came into operation. After they came into operation terms were come to, and a lease executed. The solicitor in his bill charged for the negotiations, and also charged the amount fixed by Schedule I. Part II. to the rules, as remuneration “for preparing, settling, and completing lease and counter-

part." The taxing-master disallowed all the items for negotiations. The solicitor appealed:—Held, that though the business had been commenced before the rules came into operation, the taxation must be conducted according to the rules, the solicitor not having declared his election to the contrary. *Field, In re*, 29 Ch. D. 608; 54 L. J., Ch. 661; 52 L. T. 480; 33 W. R. 553; 49 J. P. 613—C. A. And see preceding case.

In June, 1882, D. contracted to sell a piece of land for 375*l.* upon the terms of the purchaser paying to the vendor "all reasonable and proper costs" of making and verifying his title and executing the conveyance. In January, 1883, the general order under the Solicitors' Remuneration Act, 1881, came into operation. That Order provides that the costs of the vendor's solicitor, with respect to such a sale, shall be according to an ad valorem scale of 30*s.* per cent. (see Schedule I., part 1). In April, 1883, D. (who had previously employed a country solicitor) transferred the business to a London solicitor. In March, 1884, the London solicitor sent in his bill of costs to the purchaser's solicitor made out on the old system. The purchaser's solicitor objected that the bill ought to be made out according to the scale prescribed by the General Order. On a summons by the purchaser for a declaration to this effect:—Held, that the costs payable by the purchaser were regulated by that Order. *Denne and Secretary of State for War, In re*, or *Secretary of State for War and Denne, In re*, 54 L. J., Ch. 45; 51 L. T. 657; 33 W. R. 120—Pearson, J. See also *Fleming v. Hardcastle*, *infra*.

B. Sale of Land.

Out of the Jurisdiction.]—The general order made in pursuance of the Solicitors' Remuneration Act, 1881, does not apply to a sale of land situate outside the jurisdiction. Therefore, on such a sale, the costs of the vendor's solicitor are not chargeable according to the scale in Schedule I., part 1, but are regulated by the old system as altered by Schedule II. *Greville's Settlement, In re*, 40 Ch. D. 441; 58 L. J., Ch. 256; 60 L. T. 43; 37 W. R. 150—Kay, J.

"Investigating Title."]—The Corporation of London resolved to purchase the old bankruptcy court, which under s. 68 of the Bankruptcy Act, 1861, was vested in the Public Works Commissioners, the purchase-money, 93,500*l.*, being payable out of funds in court under various acts, including the Lands Clauses Act, and representing lands of the corporation taken by certain public bodies. On applying to the commissioners the corporation were informed that the property was vested in the commissioners under the above section, and that they "did not agree to furnish any evidence of title," but would apply to the Lord Chancellor, under the section, for his authority to sell; and they subsequently wrote that the Lord Chancellor had authorised the sale by his secretary. The city solicitor, however, having regard to the terms of the section, required a written authority signed by the Lord Chancellor himself, which was duly obtained. The solicitor, having thus satisfied himself as to the commissioners' title, obtained, on summons in chambers, an order sanctioning the purchase, the chief clerk, upon the produc-

tion of the Lord Chancellor's authority and at the request of the solicitor, dispensing with the usual reference as to title. The purchase having been completed, the corporation carried in their solicitor's bill for taxation, containing a charge for 278*l.* 15*s.*, according to the scale in Schedule I., part 1, of the general order under the Solicitors' Remuneration Act, 1881, for "investigating title and preparing and completing conveyance." The taxing-master disallowed the charge on the ground that there had been no investigation of title, and that therefore the scale charge did not apply. On a summons by the corporation to review the taxation:—Held, that there had been an "investigation of title" within the terms of the general order, and that therefore the scale charge applied. *London (Mayor), Ex parte*, 34 Ch. D. 452; 56 L. J., Ch. 308; 56 L. T. 13; 35 W. R. 210—Kay, J.

A lessee, with an option of purchasing the freehold of the land leased, gave notice of his desire to exercise the option. E. said he thought one of the lessors had money to lend, and communicated the lessee's desire to him. The lessee and lessor met and arranged between them that 800*l.* should be advanced upon mortgage of the property about to be purchased. E. acted as solicitor in reference to the mortgage and purchase. He did not ask for or inspect any abstract of title on behalf of the mortgagee, as the only title was that of the lessors, a copy of which had been given to the lessee. The purchase and mortgage were completed, and E. delivered a bill of costs, by which he charged the fees allowed by Sched. I., part 1, of the general order under the Solicitors' Remuneration Act, 1881, for investigating title and preparing mortgage. The bill was paid, and a summons was taken out after payment for taxation:—Held, that E. was not entitled to the scale fee for investigating title, as there had been no investigation, and that the overcharge in these respects was such as to constitute "special circumstances" justifying taxation after payment under 6 & 7 Vict. c. 73, s. 41; but it appearing that there had been a bargain between the client and E. previous to payment not to dispute the bill of costs, the summons was dismissed. *Eley, In re*, 37 Ch. D. 40; 56 L. J., Ch. 905; 57 L. T. 253; 36 W. R. 96—North, J.

—Preparation of Contract—Negotiation—Completion.]—Under the usual order for taxation of costs, charges, and expenses in an administration action, the solicitors sent in a bill of costs for conveyancing work done for the estate made out in the old way. It related to purchases by the trustees, the negotiations and most of the work for which was done before, but which was completed after, the act came into operation. The taxing-master allowed only costs according to the first schedule of the general order. One of the purchases was a purchase back by the trustees of surplus lands taken from them by a railway company, and the title was therefore taken without investigation, except as to a very small piece which had belonged to another owner; the solicitors, though acting for the purchasers, had prepared the contract for sale:—Held, that the scale applied, although part of the work was done before the act; that the title had substantially been investigated as far as was necessary, and therefore *Lacey, In re* (25 Ch. D. 301) did not apply, but that they were entitled

to charge for preparation of the contract in addition to the scale charge, because the scale assumes the contract to be prepared by the vendor's solicitor, and they were entitled to 1 per cent. for negotiating the purchase as well as to the $1\frac{1}{2}$ per cent. for completion. *Fleming v. Hardecastle*, 52 L. T. 851; 33 W. R. 776—Pearson, J.

— **Part of Money on Mortgage.**—When part of the purchase-money is allowed to remain on mortgage of the property sold, the solicitor of the vendor mortgagee cannot charge the scale fee under Schedule I., part 1, of the general order under the Solicitors' Remuneration Act, 1881, for investigating the mortgagor's title. *Glascoine and Carlyle, In re*, 52 L. T. 781—C. A.

Deducing Title—Perusing and Completing Conveyance.—See *Harris, In re*, post, col. 1772.

— **Searches.**—To entitle a solicitor to the percentage charges under Schedule I., parts 1 and 2, of the general orders under the Solicitors' Remuneration Act, 1881, he must have deduced title to the premises, and of such deduction of title, furnishing searches is an essential part. *Buckley, In re, Ferguson, Ex parte*, 21 L. R., Ir. 392—M. R.

Perusing Abstracts.—Upon the construction of Schedule II. of the General Order (containing scales of charges) made in pursuance of the Solicitors' Remuneration Act, 1881, abstracts of title are not included in the words "deeds, wills, and other documents," the charge for perusing which is therein fixed at 1s. per folio; but the old scale of 6s. 8d. for perusal of every three brief sheets of eight folios each remains unaltered. *Parker, In re*, 29 Ch. D. 199; 54 L. J., Ch. 959; 52 L. T. 686; 33 W. R. 541—Chitty, J.

Perusing Conveyance—Partition Action.—In a partition action an order was made for the sale of the estate and payment of the costs of all parties out of the proceeds. The plaintiff, who was the owner of one-fourth of the estate, had the conduct of the sale, and his solicitor was paid his costs in accordance with r. 2, sub-s. (a), of the general order under the Solicitors' Remuneration Act, 1881:—Held, that the solicitors of the defendants, who were the owners of the other three-fourths of the estate, were entitled to be paid the costs of perusing the conveyance, and obtaining its execution by their clients, under r. 2, sub-s. (c). *Humphreys v. Jones*, 31 Ch. D. 30; 55 L. J., Ch. 1; 53 L. T. 482; 34 W. R. 1—C. A.

Attempted Ineffectual Sale—Change of Solicitors.—Schedule I., part 1, r. 2, of the general order to the Solicitors' Remuneration Act, 1881, applies only to cases where the attempted ineffectual sale and the subsequent effectual sale therein mentioned are conducted by the same solicitors. If there is a change of solicitors after an attempted ineffectual sale, the taxation of the costs of such sale must be made under general order, r. 2 (c). *Dean, In re, Ward v. Holmes*, 32 Ch. D. 209; 55 L. J., Ch. 420; 54 L. T. 266—Kay, J.

Subject to Incumbrances—Scale Charge, how ascertained.—The property of a company in

liquidation was sold by the solicitors of the official liquidator for 24,000*l.* (subject to a mortgage for 900*l.*), and after the satisfaction of the claims of former successive owners a sum of 1,750*l.* remained for the official liquidator. The sale was confirmed by an order made in the liquidation, and the parties to the conveyance were the company, the official liquidator, the original owners, and certain intermediate purchasers who had claims for unpaid purchase-money. The solicitors on taxation included in their bill of costs scale charges as upon a sale for 24,900*l.* as follows:—Negotiating, 102*l.* 5*s.*; deducting title, and completing, including contract, 107*l.* 5*s.* The taxing-master disallowed the negotiating fee, and only allowed the scale charge upon the 1,750*l.* On summons to review taxation:—Held, that the court could look not only at the contract, but at the substance of the transaction, and that, having regard to the whole of the matters with reference to the provisional contract coupled with the order, the liquidator's name was only used for the purpose of convenience, and that the taxing-master's decision was right. *Grey's Brewery Company, In re*, 56 L. T. 298—Chitty, J.

Upon the sale by a trustee in bankruptcy of property belonging to the bankrupt subject to incumbrances, the solicitor of the trustee is entitled to be paid a percentage on the total amount of the purchase-money, and not simply on the value of the equity of redemption. *Harris, Ex parte, Gallard, In re*, 21 Q. B. D. 38; 57 L. J., Q. B. 528; 59 L. T. 147; 36 W. R. 592; 5 M. B. R. 123—Cave, J.

Under Lands Clauses Act.—Money arising from the sale of land belonging to a corporation, and taken by a railway company under their statutory powers, was reinvested in land under the direction of the court. The solicitor of the corporation charged the ad valorem scale fee prescribed by the rules under the Solicitors' Remuneration Act, 1881, Schedule I., part 1, "for investigating title and preparing and completing conveyance":—Held, that the exception in Schedule I., part 1, r. 11, which provides that the scale shall not apply in cases of sales under the Lands Clauses Act, or any other private or public act under which the vendor's charges are paid by the purchaser, was not applicable to the case. *Merchant Tailors' Company, In re*, 30 Ch. D. 28; 54 L. J., Ch. 867; 52 L. T. 775; 33 W. R. 693—C. A.

Held, also, that as the purchaser's solicitor had had to do all the things which he would have had to do in a purchase not under the direction of the court, the case was not taken out of the scale by the fact that, in a purchase under the direction of the court, he did not incur as much responsibility as in a private purchase, and therefore, that the scale fee was properly chargeable. *Id.*

— **Perusal of Deeds.**—Under an order to tax the costs awarded to the owner of lands compulsorily taken by a company, his solicitor is not entitled to 1s. per folio for perusing deeds referred to in the abstract of title furnished. The general order made in pursuance of the Solicitors' Remuneration Act, 1881, Schedule II., does not apply to such taxation. *Bann Navigation Act, In re, Olpherts, Ex parte*, 17 L. R., Ir. 168—M. R.

— **Election as to Scale.**—*See Bridewell Hospital and Metropolitan Board of Works, In re*, ante, col. 1764.

Sale by Auction—Some Work done by Surveyor.—A trust estate in Yorkshire was ordered to be sold by the court, and the costs to be taxed. The appointment of an auctioneer was sanctioned in chambers, and also the appointment of a certain firm of surveyors. The property was sold. The taxing-master allowed a fee to the auctioneer for putting the property up for sale and knocking it down, which, according to the custom of the country, was the manner in which an auctioneer was paid there. He also allowed charges to the surveyors for dividing the property into lots, valuing it, preparing plans, and settling the reserves. The solicitors to the trustees claimed to be entitled to the scale charges allowed by the schedule to the Solicitors' Remuneration Act, 1881, for conducting the sale, and also to be allowed the fees which they had paid to the surveyors; the auctioneer's fee they proposed to pay themselves. The taxing-master disallowed the scale charges. The trustees took out a summons to review the taxation:—Held, that the solicitors were not entitled to the scale charges, inasmuch as some of the work which they ought to have done had been done by the surveyors, and their fees paid by the clients. *Wood v. Calvert*, 55 L. T. 53; 34 W. R. 732—Kay, J.

Property of a lunatic in Lancashire was put up for sale by auction under an order in lunacy, but was not sold. The solicitor charged 16*l.* 12*s.* 6*d.* remuneration according to the scale in the order under the Solicitors' Remuneration Act, 1881, on 8,300*l.*, the amount of the reserved prices. He also paid the auctioneer 5*l.* 5*s.*, which was allowed against the estate, and the surveyor's bill of 40*l.* 3*s.* was allowed at 31*l.* 10*s.* against the estate, but the taxing-master disallowed the 16*l.* 12*s.* 6*d.*, and only allowed 2*l.* 2*s.* for instructing the auctioneer and surveyor, and 3*l.* 3*s.* for particulars, &c. His reasons were, first, that the solicitor had not in fact conducted the sale, the auctioneer and surveyor having done most of the work and been paid by the client; and secondly, that the scale did not apply, for that a commission had been paid to the auctioneer by the client within the meaning of r. 11 to part 1 of Schedule I. to the general order:—Held, that as the bill of the surveyor contained charges for various things which it was the duty of the person conducting the sale to do, the solicitor had not done the whole of the work for which the *ad valorem* remuneration was provided, and the scale did not apply. *Wilson, In re*, 29 Ch. D. 790; 55 L. J., Ch. 627; 53 L. T. 406—C. A.

— **Conducting Sale—No Commission paid by Client to Auctioneer.**—Semble, also, that the case was taken out of r. 4 by the specific provision of r. 11 to part 1 of Schedule I. to the order, which provides that the scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer. *Ib.*

An agreement for sale of certain leasehold property was entered into whereby the purchasers, who were a public body, agreed to pay the vendor's solicitors' preliminary costs, and also the costs of title and conveyance, and the

fees of the vendor's surveyor. A surveyor was employed, who, according to the vendor's solicitors' statement, merely valued the property, though it was alleged by the purchasers that he also negotiated the price. The purchasers, who had become owners of the reversion, did not require any abstract or copy of the vendor's lease to be furnished to them on being informed by the vendor's solicitors that the title consisted of the lease only. The purchase was completed, and the purchasers paid the fee of the vendor's surveyor. The vendor's solicitors sent in a bill of costs to the purchasers consisting of two items only, the first being the charge allowed by the scale in Sched. I., part 1, of the General Order to the Solicitors' Remuneration Act, 1881, for negotiating a sale by private contract, and the second being the charge allowed by the same schedule for deducing title to leasehold property and perusing and completing conveyance. Upon taxation the taxing-master held that the vendor's solicitors were not entitled to costs calculated upon the scale in Sched. I., part 1, but to costs calculated under Sched. II. only:—Held, upon summons to review taxation, that the solicitors were not entitled to the scale charge for negotiating a sale by private contract, as the surveyor's fee was a commission to "an auctioneer or estate or other agent" within Sched. I., part 1, r. 11, of the General Order, and that they were not entitled to the scale charge for deducing title and perusing and completing conveyance, as no title was deduced. *Harris, In re*, 56 L. T. 477—North, J.

Property was put up for sale by public auction, and sold in two lots. The auctioneer's commission was paid by the vendor. The solicitor employed by the vendor in connexion with the sale, charged the scale fee provided by part 1 of Sched. I. to the General Order of August, 1882, under the Solicitors' Remuneration Act, 1881, for "deducing title," &c.; and he also made various charges for work done by him previous to the sale, for which he claimed to be entitled under clause 2 (c) of the order. The taxing-master allowed the scale fee, but disallowed the other items, considering himself bound by *Emanuel, In re* (33 Ch. D. 40):—Held, that the solicitor was entitled under clause 2 (c) (in addition to the scale fee for deducing title), to charge in respect of work properly done by him in connexion with the sale for which the auctioneer had not been paid. *Faulkner, In re*, 36 Ch. D. 566; 56 L. J., Ch. 1011; 57 L. T. 342; 36 W. R. 59—North, J.

On a sale by auction of property in Yorkshire, under an order made in an administration action, the chief clerk, previously to sale, settled a sum for auctioneer's fees. In accordance with the mode of business in Yorkshire the auctioneer merely offered the property for sale, and the solicitor having the conduct of the sale paid all other expenses of the auction, including those of preparing and distributing the particulars and conditions of sale, advertisements, printer's bills, and the costs of lithographed plans:—Held, that under the Solicitors' Remuneration Act, 1881, General Order, Sched. I., part 1, r. 11, the solicitor was not entitled to scale fees for conducting the sale by auction. *Sykes, In re, Sykes v. Sykes*, 56 L. J., Ch. 238; 56 L. T. 425; 36 W. R. 234—Chitty, J.

A solicitor employed in a sale of property by auction, where the auctioneer's commission was

paid by the client, delivered a bill, in which he charged the scale fee for conducting the sale, and deducting the title, and mentioned items of solicitor's work not included in the scale fee for deducting the title. The taxing-master disallowed the fee for conducting the sale because of the auctioneer's charges being paid by the client, and did not allow any fee for items mentioned in the bill of solicitor's work not included in the scale fee for deducting the title, on the ground that the bill was made up on a wrong footing, and could not be altered by adding charges:—Held, that the taxing-master was right in disallowing the scale fee for conducting the sale, but that he ought to have allowed the solicitor a quantum meruit for solicitor's work done by him, and mentioned in his bill, and which was not covered by the scale fee for deducting title. *Peace and Ellis, In re*, 57 L. T. 753; 36 W. R. 61—North, J.

Solicitors were employed in a sale of property by auction, the client paid the auctioneer a lump sum for his services. The solicitors claimed remuneration for work done by them in relation to the conducting of the sale. Rule 11 of Sched. I., part 1, provides that "the scale for conducting a sale by auction shall apply only to cases where no commission is paid by the client to the auctioneer":—Held, that rule 11 does not deprive the solicitor of all remuneration for work done in respect of the conduct of the sale, but that under the General Order, s. 2, sub-s. (c), he is entitled to a quantum meruit for such work, the remuneration to be regulated according to the old system as altered by Schedule II. *Parker v. Blenkhorn, Neubould v. Bailward*, 14 App. Cas. 1; 58 L. J., Q. B. 209; 59 L. T. 906; 37 W. R. 401—H. L. (E.). Reversing *Parker, In re*, 59 L. T. 491—C. A., and *Neubould, In re*, 20 Q. B. D. 204; 57 L. J., Q. B. 41; 58 L. T. 334; 36 W. R. 161—C. A.

γ. Leases.

Prior Agreement for—Scale Fee.—The scale fee prescribed by part 2 of Sched. I. to the General Order of August, 1882, under the Solicitors' Remuneration Act, 1881, to be paid to a lessor's solicitor "for preparing, settling, and completing lease and counterpart," includes the solicitor's remuneration for the preparation of a prior agreement for the lease, and the solicitor cannot charge for the preparation of the agreement in addition to the scale fee. *Emanuel, In re*, 33-Ch. D. 40; 55 L. J., Ch. 710; 55 L. T. 79; 34 W. R. 613; 51 J. P. 22—C. A.

An agreement for a lease provided that the lessor should at his own expense do certain repairs to the property and deliver possession to the lessee as soon as they were done, which was to be not later than a certain day, time to be of the essence of the contract, and that, on the lessor complying with these conditions, the lessor should grant, and the lessee accept, a lease in the form thereto annexed:—Held, that these stipulations did not relate to collateral matters, so as to make the agreement something more than a step towards the granting of the lease, but related only to the terms on which the lease was to be granted, and that the preparation of the agreement was "business connected with" the lease within the meaning of r. 2 of the general order, and could not be separately charged for. *Id.*

"Agreements for leases" in Sched. I., part 2, means agreements for leases intended to be relied on as regulating the tenancy without any formal lease, and the scale fee is payable in respect of them. *Id.*

Charge for Negotiations.—Having regard to r. 2, the amount fixed by Sched. I., part 2, includes the charges for negotiations prior to granting a lease. *Field, In re*, 29 Ch. D. 608; 54 L. J., Ch. 661; 52 L. T. 480; 33 W. R. 553; 49 J. P. 613—C. A.

Scale—Rent—Shares—Money Payment or Premium.—A firm of solicitors were employed by a lessor to prepare for him a lease of certain property for twenty-one years to a company, the consideration for the lease being a rent of 80l., and the issue of 400 shares of the nominal value of 10l. None of the company's shares had been sold, so that no market value had been placed upon them; and 200 of the 400 shares had not been issued. The solicitors charged the scale fee on the rent of 80l., and also the scale fee for deducting title, perusing and completing the deed as upon a premium of 4,000l., the amount of the nominal value of the 400 shares:—Held, that they were not entitled to make the latter charge, as the value of the shares could not be estimated, and r. 5, part 2, Sched. I., of the Remuneration Order, 1882, did not apply to such a case. *Hasties and Crawford, In re*, 36 W. R. 572—North, J.

δ. Mortgages.

Negotiating Fee.—A solicitor mentioned to a borrower the name of a client of his as likely to lend. A mortgage was arranged without further action on the part of the solicitor, who then acted for both parties in the matter of the mortgage:—Held, that the solicitor was not entitled to a negotiating fee. *Eley, In re*, 37 Ch. D. 40; 56 L. J., Ch. 905; 57 L. T. 253; 36 W. R. 96—North, J.

"Perusing" Title-deeds.—A solicitor making advances to a client upon the security of real property and perusing for that purpose the title-deeds of such property, is not entitled to charge at the rate of 1s. per folio "for perusing" under the 2nd schedule of the General Order of August, 1882, made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44). *Robertson, In re*, 19 Q. B. D. 1; 56 L. T. 859; 35 W. R. 833—D.

Sale of Leaseholds—Discretion of Taxing-Master.—In an administration action, to which mortgagees of leaseholds were not parties, the plaintiffs obtained an order to sell the leaseholds, and that the money should be paid into court. The order was made without the knowledge of the mortgagees. The plaintiffs wrote to the mortgagees sending draft particulars and conditions of sale as settled by the conveyancing counsel to the court "for your perusal." The mortgagees undertook to concur in the sale on condition that their mortgage debt and costs and expenses were provided for out of the proceeds of sale in court, and they returned the conditions approved. The taxing-master disallowed the fees charged at the rate of 1s. a

folio for perusing the conditions of sale, but allowed a fee of one guinea for reading them. One of the grounds of disallowance was that conditions of sale were not such documents as were intended by the word "documents" in Schedule II, of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881. On summons to vary the taxing-master's certificate:—Held, that (while not deciding that conditions of sale did not come within the word "documents") this was an extraordinary case where the taxing-master had a discretion. *Rees, In re, Rees v. Rees*, 58 L. T. 68—Kay, J.

€. *Trustee and Cestui que Trust.*

Act not Applying.]—In taxation between solicitor and client, cases for counsel to advise trustees whether they should require a release from their cestui que trusts on their discharge, statements for the information of the client as to the investment of the trust funds, and the prudence of changing it, or directions to the trustees, signed by the client, consenting to the change of investment, and directing a new investment, are not included in Sched. II. of the General Order to the Solicitors' Remuneration Act, 1881, but are taxable under the scale of fees prior to that act. *O'Hagan, Ex parte*, 19 L. R., 1r. 99—M. R.

b. In Other Cases.

Charge on Recovered or Preserved Property.]

—H. and H., solicitors acting for an administrator, were authorised by him to retain, in respect of their costs, certain moneys forming part of the estate of the deceased. An order to tax the bill of costs of H. and H. was obtained by J., one of the next of kin of the deceased, acting by R., her solicitor. The taxation showed that H. and H. had been overpaid to the extent of 354l. H. and H. then acted for J., and, on her behalf, disputed the validity of R.'s retainer by J. It was, however, decided by Kay, J., that the retainer was valid. An order was then obtained by R. giving him a charge on the 354l., in respect of his costs properly incurred in the recovery of that sum; and such costs were thereby directed to be taxed. The Court of Appeal affirmed the order, upholding R.'s retainer. In taxing the costs of R. under the charging order, the taxing-master allowed him the costs of the opposition to the proceedings to set aside the retainer, and also the costs connected with the appeal. H. and H. having objected to such allowance, they received, at 4.30 p.m. on the 4th December, 1885, from the taxing-master, a notice that, at 1 p.m. on the following day, he would proceed to consider their objections. H. and H. requested the taxing-master to adjourn to a later day, but he refused to do so, and proceeded in their absence. On a summons being taken out by the administrator, that the taxation should be reviewed on the grounds: (1) That the costs in reference to the dispute as to retainer ought not to have been included in the taxation, inasmuch as they were merely the costs of a private dispute between J. and R.; (2) that the costs of the appeal ought not to have been included, inasmuch as they were incurred after the date of the charging order:—Held, (1) that the costs of the opposition to the proceedings to set aside the retainer were

costs of "recovering" the 354l., and that such costs were properly included in the taxation; (2) that the appeal having been brought in consequence of the proceedings in the court below, the costs thereof were properly included. *Hill, In re*, 33 Ch. D. 266; 55 L. T. 104—C. A.

In County Court—Scale in Actions under £10.]

—The Appendix to the County Court Rules, 1886, contains a scale of costs as between solicitor and client where the amount recovered exceeds 2l., and does not exceed 10l., and provides that no other costs are to be allowed where the amount claimed does not exceed 10l., unless the judge certifies under s. 5 of the County Courts (Costs and Salaries) Act, 1882. The plaintiff having commenced an action in a county court for 10l., consulted solicitors with reference to it, who, after taking various steps to investigate the claim, recommended a settlement, which the plaintiff refused to accept. The solicitors then returned the papers to the plaintiff, who proceeded with the action in person:—Held, that upon the taxation of the solicitors' bill for the services rendered by them, it was a question for the master whether the solicitors had, in fact, acted in the conduct of the action, and that if they appeared to have so acted, they could recover no other costs than those specified in the appendix. *Emanuel and Company, In re* (9 Q. B. D. 408) considered. *Dod, Longstaffe and Company, In re, Lamond, Ex parte*, 21 Q. B. D. 242; 57 L. J., Q. B. 503; 59 L. T. 467—D.

Power to disallow Items caused by Negligence.]

—The taxing-master in taxing a bill of costs between a solicitor and his client has power to disallow the costs of proceedings in an action conducted by the solicitor which were occasioned by the negligence or ignorance of the solicitor. But if the negligence goes to the loss of the whole action, he ought not to disallow them, but to leave the client to bring an action for negligence against the solicitor. *Massey and Carey, In re*, 26 Ch. D. 459; 53 L. J., Ch. 705; 51 L. T. 390; 32 W. R. 1008—C. A.

Inaccurate Particulars—Conditions of Sale.]

A solicitor inserted an inaccurate statement in the particulars of a sale, which he attempted to cover by a condition. An intending purchaser refused to complete on discovering the inaccuracy, but counsel advised the vendor's solicitor that the condition in question bound the purchaser, and advised a summons under the Vendor and Purchaser Act, which was accordingly taken out; the chief clerk and court of first instance agreed with counsel, but the Court of Appeal reversed their decision, and held that the said condition could not get rid of the positive statements in the particulars, so that the purchaser could not be compelled to complete. In the taxation of the vendor's costs as between him and the solicitor, the taxing-master disallowed the solicitor his costs in connexion with the abortive attempt at a sale and with the summons, and the court affirmed his disallowance. *X, In re*, 54 L. T. 634—V.-C. B.

Country Solicitor—Journeys to London.]

Upon a summons by a solicitor for an order directing the taxing-master to review his taxation of a bill of costs:—Held, that the journeys

of a country solicitor to town to attend counsel and otherwise to conduct the proceedings in an action ought to be allowed, where the solicitor had authority from his client to make these charges, but that such journeys to town ought not to be allowed simply on the principle that the country solicitor would probably be better acquainted with the subject-matter than his London agent. *Foster, In re* (8 Ch. D. 598) dissented from. *Storer, In re*, 26 Ch. D. 189; 53 L. J., Ch. 872; 50 L. T. 583; 32 W. R. 767—Pearson, J.

Solicitor attending Trial where he does not Practise.—A solicitor attending on a record for trial at assizes in a county where he does not usually practise is entitled upon taxation between solicitor and client, to 2l. 2s. for each day necessarily occupied, irrespectively of the number of days the cases may be actually at hearing, or of its being settled without a trial. The allowances Nos. 100 and 101 in the schedule to the General Rules of 1854 as between solicitor and client, are not altered by the orders as to costs under the Judicature Act. *M'Namara v. Malone*, 18 L. R., Ir. 269—Ex. D.

Case for Counsel's Opinion.—A fee to counsel for advising as to whether an ejectment will lie, and who are the necessary parties to be made plaintiffs, may in a proper case be allowed, as between solicitor and client. *Id.*

Counsel's Fees—Quantum—Authority to employ particular Counsel.—The special allowances and scale of fees mentioned in rules of Supreme Court, 1883, Ord. LXV. r. 27, sub-s. 48, are applicable to all taxations, whether in an action in the Supreme Court, or under the common order, or under a special order obtained by a client against his solicitor under the jurisdiction given by the Solicitors Act, 1843 (6 & 7 Vict. c. 73). But Ord. LXV. r. 27, sub-s. 48, does not prevent the client from giving the solicitor authority, which may be expressed or implied, to employ a particular leader, and to give him such special fees by way of refresher or otherwise, though of far larger amount than the maximum fixed by sub-s. 48, as may be necessary to secure his services. And such authority having been shown by the evidence to have been clearly and distinctly given by the clients (a board of directors) to their solicitor:—Held, that the taxing-master was not precluded from allowing more than the maximum scale fee fixed by sub-s. 48, and that he must exercise his discretion as to the quantum, having regard to the authority given by the clients to their solicitor. *Harrison, In re*, 33 Ch. D. 52; 55 L. J., Ch 768; 55 L. T. 72; 34 W. R. 645; 50 J. P. 372—C. A.

— Refresher and Consultation Fees.—There is no recognised rule that where special fees have been paid to the leader, the fees paid to his juniors must be according to the same rate; and, accordingly, in the absence of proof that the clients had authorised payment of special refresher fees to the junior counsel proportionate to those paid to the leader, the disallowance by the taxing-master of special refresher fees to the junior counsel was upheld. Although the case was one of very great magnitude and complication, and occupied twenty-nine days, the court declined to interfere with

the discretion of the taxing-master in disallowing extra fees paid by the solicitor to his counsel for consultations. *Id.*

— Third Counsel—Solicitor not informing Client of unusual Expense.—The rule laid down in *Blyth and Fanshawe, In re* (10 Q. B. D. 207), applies to the costs of employing a third counsel on the hearing of an appeal, the expense being an unusual one. Therefore, even if a solicitor has obtained his client's sanction to the employment of a third counsel on an appeal, the costs will not be allowed on taxation between solicitor and client, unless the solicitor has also explained to the client that the costs will probably not be allowed as between party and party, and that, even if he succeeds on his appeal, he may have to pay the costs of the third counsel himself. *Broad, In re*, 15 Q. B. D. 420; 54 L. J., Q. B. 573; 52 L. T. 888—C. A. Affirming 33 W. R. 749—D.

c. When Solicitor a Party.

Solicitor Suing or Defending in Person.—Where a solicitor sues or defends an action in person, and obtains judgment with costs, he is entitled to recover from his adversary the same costs as would have been allowed if he were not a party to the action, but were acting as solicitor for another person, subject to this, that the costs to be allowed must not include any items which the union of the two characters renders impossible or unnecessary; and where any items are attributable to the fact that the solicitor is acting in the two characters, such items should be treated on taxation as attributable to his character as party to the action, and not to his character as solicitor. *London Scottish Permanent Benefit Society v. Chorley*, 13 Q. B. D. 872; 53 L. J., Q. B. 551; 51 L. T. 100; 32 W. R. 781—C. A.

Where one of a body of mortgagees is a solicitor, and acts as such in enforcing the mortgage security, he is entitled to charge profit costs against the mortgagor, whether the mortgagees are trustees or not. If in such a case the mortgagor, in applying to tax the bill of the solicitor-mortgagee, desires to raise the objection to profit costs, he should state his objection in his petition for taxation. *Donaldson, In re*, 27 Ch. D. 544; 54 L. J., Ch. 151; 51 L. T. 622—V.-C. B.

d. When Solicitor an [Executor or Trustee.

Profit Costs.—A testatrix, after appointing V. and H., who was a solicitor and also one of the attesting witnesses to the will, executors and trustees of her will, declared that H. should be entitled to charge and to receive payment for all professional business to be transacted by him under the will in the same manner as he might have done if he had not been an executor. V. proved the will, and a creditor's action was instituted against her. V. employed the firm of solicitors, in which H. was a partner, as her solicitors in the action. H. afterwards proved the will, and was made a defendant to the action. When the action came on for further consideration, a question arose whether H. was entitled to his profit costs, and an order was made declaring

that he was not entitled to claim payment of profit costs by virtue of the declaration in the will, he being one of the attesting witnesses thereto, such declaration to be without prejudice to any of his rights apart from the clause in the will. The taxing-master disallowed H.'s profit costs of action, on the ground that he was a solicitor-trustee, and as such not entitled to make a profit out of his trust:—Held, on a summons to review the taxation, that H. was entitled to profit costs of action, but that he was not entitled to profit costs for business not done in the action, and that the rule applied as well to costs incurred before as after he proved the will. *Craddock v. Piper* (1 Mac. & G. 664) discussed, and held not to have been overruled. *Broughton v. Broughton* (5 D. M. & G. 160) discussed. *Barber, In re, Burgess v. Vinicombe*, 34 Ch. D. 77; 56 L. J., Ch. 216; 55 L. T. 882; 35 W. R. 326—Chitty, J.

E., a partner in a firm of country solicitors, was one of two trustees of a will which contained no power to charge for professional services. E. and his co-trustee were respondents to an application for maintenance by a next friend on behalf of an infant under the summary procedure of the court, and E.'s firm, through their London agents, acted as solicitors for E. and his co-trustee and made profit costs:—Held, that E.'s firm were entitled to receive those profit costs as coming within the exception laid down in *Craddock v. Piper* (1 Mac. & G. 664). Although that case has been often disapproved, it has been so long acted on as a binding authority that it ought not now to be overruled. The exception applies not only to proceedings in a hostile suit, but to friendly proceedings in chambers, such as an application for maintenance of an infant. *Corsellis, In re, Lawton v. Elwes*, 34 Ch. D. 675; 56 L. J., Ch. 294; 56 L. T. 411; 35 W. R. 309; 51 J. P. 597—C. A.

After the death of E.'s co-trustee, E. was made defendant to an administration action in which a receiver was appointed, and E.'s firm, through their London agents, acted for the receiver and made profit costs:—Held, that these profit costs could not be retained by the firm; on the principle that a trustee must not place himself in a position in which his interest conflicts with his duty. *Id.*

— **Preparing Leases.**—E. and his firm made profit costs by preparing leases and agreements for leases of portions of the trust estate, which costs were paid by the lessees:—Held, that although the costs were paid by the lessees, the solicitors were employed on behalf of the trust estate, and that E. and his firm must account to the estate for the costs. *Id.*

— **Fees of Steward of Manor.**—E. and his co-trustee appointed E.'s partner steward of a manor which formed part of the trust estate, and fees for manorial business were paid to the steward by the tenants and brought into the partnership accounts:—Held, that the fees, not being received by the steward in his character of solicitor, were not liable to be accounted for to the trust estate. *Id.*

Declaration in Will—Solicitor—Attesting Witness.—A declaration in a will that a solicitor, who is an executor trustee of the will,

may charge profit costs for work done for the testator's estate, confers a beneficial gift or interest on him, within s. 15 of the Wills Act, 1837, and is therefore void where the solicitor trustee has been one of the attesting witnesses of the will. *Poolley, In re*, 40 Ch. D. 1; 58 L. J., Ch. 1; 60 L. T. 73; 37 W. R. 17—C. A.

Charges not strictly Professional.—A testatrix by her will appointed her solicitor (who prepared her will) one of her two executors and trustees, and, stating that it was her desire that he should continue to act as solicitor in relation to her property and affairs, and should "make the usual professional charges," expressly directed that notwithstanding his acceptance of the office of trustee and executor he should be entitled to make the same professional charges and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time, and trouble given and bestowed by him in or about the execution of the trusts and powers of the will, and the management and administration of the trust estate, real or personal, as if he, not being himself a trustee or executor, were employed by the trustee or executor. Under this direction the solicitor-executor delivered bills of costs which included charges for all business done by him, whether such business was strictly professional or could have been transacted by a lay executor without the assistance of a solicitor:—Held, that all items which were not of a strictly professional character ought to be disallowed. *Chapple, In re, Newton v. Chapman*, 27 Ch. D. 584; 51 L. T. 748; 33 W. R. 336—Kay, J.

A testator by his will authorised any trustee thereof, who might be a solicitor, to make the usual professional or other proper and reasonable charges, for all business done and time expended in relation to the trusts of the will, whether such business was usually within the business of a solicitor or not. On the further consideration of an action for the administration of the testator's estate, an order was made for the taxation of the costs, charges, and expenses of the trustees, and it was directed that the taxing-master should have regard to the terms of the will as to the costs of the trustees:—Held, that the taxing-master had power to allow to a trustee, who was a solicitor, the proper charges for business, not strictly of a professional nature, transacted by him in relation to the trust estate. *Ames, In re, Ames v. Taylor*, 25 Ch. D. 72; 32 W. R. 287—North, J.

— **Remuneration.**—Where estates were devised to a near relative and a family solicitor until B. attained the age of twenty-eight years, upon trust to receive the rents and manage the estate, and the will empowered any trustee being a solicitor to charge and be paid for all business done by him as a solicitor in respect of such estate, and a legacy of 100*l.* was given to each trustee, and the trustees managed the estates consisting of 2,000 acres partly unlet for fifteen years, paying themselves a salary of 100*l.* a year each for the trouble of such management, amounting in all to 3,000*l.*; on an originating summons on behalf of the tenant for life and the infant remainderman:—Held, that such payments of 200*l.* a year were unauthorised by the will; the trustees might at any time have applied to the court, but they neglected to do

so; that it was not a case to follow the course adopted in *Marshall v. Holloway* (2 Sw. 432), where an inquiry was directed as to whether any and what sum should be allowed to the trustees for their trouble. The salary was disallowed, and an order made for payment into court, without interest, within six months. *Bedingfield, In re, Bedingfield v. D'Eye*, 57 L. T. 332—Kay, J.

3. PAYMENT.

Appropriation.—A solicitor who has made disbursements for his client, and who has received from the client sums paid generally on account, but sufficient to cover those disbursements, is not entitled to appropriate the sums so received to costs for which he has not delivered a bill, in order that he may, under s. 17 of the Solicitors Act, 1870, claim interest on the disbursements. *Harrison, In re*, 33 Ch. D. 52; 55 L. J., Ch. 768; 55 L. T. 72; 34 W. R. 645; 50 J. P. 372—Per Pearson, J.

To Solicitor of Trustees.—A solicitor dealing with a trustee and having no notice of any breach of trust on his part, is entitled to deal with him on the footing that he is executing the trust and doing nothing which is wrong, and is not bound, before he accepts payment out of the trust estate, to call upon the trustee to produce his accounts, and satisfy himself that he has acted properly. To preclude a solicitor from accepting payment out of the trust estate, there must be brought home to him knowledge that at the time when he accepted it the trustee had been guilty of such a breach of trust as to prevent him altogether from resorting to the trust estate for payment of those costs, and that, in fact, such a payment was a breach of trust. *Blundell, In re, Blundell v. Blundell*, 40 Ch. D. 370; 57 L. J., Ch. 730; 58 L. T. 933; 36 W. R. 779—Stirling, J.

4. RECOVERY OF.

Solicitor to Trustees—Rights of.—A solicitor employed in trust business is the solicitor of the trustees personally, and has no direct claim on the trust estate for costs. *Stanier v. Evans*, 34 Ch. D. 470; 56 L. J., Ch. 581; 56 L. T. 87; 35 W. R. 286—North, J.

An executor or trustee who properly employs a solicitor or other agent to assist him in the execution of the trust enters into a contract in which he is personally liable, but he is entitled to be indemnified out of the trust estate, not merely against payments actually made, but against his liability, so that he has a right to resort to the trust estate in the first instance for making the necessary payments to the persons whom he employs, though he may commit acts which will deprive him of such right. *Blundell, In re, Blundell v. Blundell*, supra.

Actions—Promotion of Bill Illegal.—A rural sanitary authority, being unable to acquire by purchase land and water rights necessary for the purpose of procuring a water supply for their district, which it was the duty of the authority to do under the Public Health Acts, instructed their solicitor to promote a bill in Parliament

for the purpose of obtaining powers to purchase the land and water rights compulsorily.—Held, that the rural sanitary authority had no power to promote such a bill, and that therefore their solicitor could not recover his costs from them. *Cleeve v. St. Germain's Union*, 56 L. J., Q. B. 83—Stephen, J.

— Order XIV.—Taxation—Form of Order.]

—Where an action is brought on a solicitor's bill of costs, and the defendant admits his liability but desires that the bills should be taxed, the proper order to be made on an application for liberty to sign judgment under Ord. XIV. r. 1, is as follows:—"It is ordered that the bill of costs on which the action is brought be referred to the taxing-master, pursuant to the statute 6 & 7 Vict. c. 73, and that the plaintiff give credit at the time of taxation for all sums of money received by him from or on account of the defendant, and let the plaintiff be at liberty to sign judgment for the amount of the master's allocatur in the said taxation, and costs to be taxed. *Smith v. Edwards*, 22 Q. B. D. 10; 58 L. J., Q. B. 227; 60 L. T. 10; 37 W. R. 112—C. A.

In an action by solicitors on an untaxed bill of costs, the court, on motion by the plaintiffs under Ord. XIII. r. 2, referred the costs for taxation, subject to credits, and ordered judgment to be entered for the amount to be certified. *Larkin v. M'Inerney*, 16 L. R., Ir. 246—Ex. D.

— Taxation, whether Condition precedent.]

—It is not a condition precedent of a solicitor's right to sue a guarantor of costs to be incurred, that the costs should have been taxed. *Moore v. Walton*, 1 C. & E. 279—Mathew, J.

— Right of Assignee to sign and sue.]—A

solicitor assigned his bill of costs and the right to recover on it, and the assignee gave notice of the assignment, and delivered the bill to the party to be charged, inclosed in a letter signed by himself. After the expiration of a month he brought an action in his own name on the bill of costs.—Held, that the plaintiff was an assignee within s. 37 of the Solicitors Act, 1843, and was entitled to maintain the action. *Ingle v. M'Cutchan*, 12 Q. B. D. 618; 53 L. J., Q. B. 311—D.

— Signature, Sufficiency of.]—Where a

solicitor, whose right hand was paralysed, had his hand guided over his name, appended to a bill of costs, by a clerk who had written the name:—Held, to be a sufficient compliance with the provisions of s. 37 of the Attorneys and Solicitors Act, 1843. *Angell v. Pratt*, 1 C. & E. 118—Lopes, J.

Execution—Service of Order and Certificate.]

—A. obtained a common order for taxation of the costs of his former solicitor B., the order directing payment by A. to B. of the amount of the taxed costs within twenty-one days after the service of the order and of the certificate of taxation. The order and certificate were served, not on A. personally, but on the solicitor then acting for him in the taxation. A. failed to pay the amount within twenty-one days after service of the order and certificate on the solicitor, and B. applied for the issue of a writ of fi. fa. against A. for

the amount, but the officer of the court refused to issue the writ, on the ground that A. had not been personally served with the order and certificate:—Held, that B. might have the writ at his own risk, without service of the order and certificate on A. personally. *Solicitor, In re, 33 W. R. 131*—Pearson, J.

5. LIEN FOR.

a. What Debts.

Not General Debts—Statutory Debt.—Lien is confined to what is due to the solicitor in that character, and does not extend to general debts. Accordingly the lien of the solicitor of a railway company for his costs does not include costs incurred in relation to the promotion of the company before incorporation, such costs by the usual clause in the act having been made a statutory debt to be paid by the company. *Galland, In re, 31 Ch. D. 296; 55 L. J., Ch. 478; 53 L. T. 921; 34 W. R. 158*—C. A.

Debt Barred by Statute.—A lien is not barred by the fact that the debt in respect of which the lien is claimed is barred, and may be enforced for the purpose of obstructing an administration action, if the debtor declines to waive his rights under the statute. *Carter, In re, Carter v. Carter, 55 L. J., Ch. 230; 53 L. T. 630; 34 W. R. 57*—Kay, J.

b. On what Property.

Letters of Administration—Costs of Independent Proceedings.—M. and her sister S., had employed F. as their solicitor and as their land agent over a joint property; and M. was indebted to him in the amount of certain costs in 1881, when S. instituted a suit against him in the Chancery Division for an account as her land agent. In September, 1881, F. filed an account in that suit, showing that there was a considerable balance due to him in respect of the rents. He died insolvent in August, 1882, and no step was taken to revive the suit against his personal representatives. The costs due to F. had been incurred by his obtaining for M., in 1869, a grant of administration de bonis non of her late father, limited to receive the dividends on a sum of stock standing in the name of the latter as executor of a will under which the dividends were payable to a tenant for life, upon whose death M., having become beneficially interested in the principal, obtained in November, 1882, an order from the judge of the Probate Division authorising her to apply for a general grant, so as to obtain a transfer of the stock into her own name. M. thereupon required T., the solicitor for F.'s personal representative, to bring in the limited grant for cancellation, which he declined to do, claiming a lien upon it for the costs due by M.:—Held, that T. was entitled to the lien claimed. *Martin, In goods of, 13 L. R., Ir. 312*—C. A.

On Documents of Company—Winding up.—An order having been made for winding up a company, applications were made by the official liquidator against B., a solicitor employed by the company before the winding-up, that B. might be ordered to deliver up the following documents: 1. The share register and minute book,

which were in B.'s hands before the commencement of the winding-up; 2. Other documents which came to B.'s hands after the presentation of the winding-up petition, but before the winding-up order; 3. Documents relating to allotments of shares which had come to B.'s hands before the presentation of the petition. B. resisted the applications on the ground that he claimed a lien. The court ordered that all the documents should be delivered to the liquidator, subject to the lien, if any, of B.:—Held, on appeal, that the order was right as regarded the share register and minute book, for that the directors had no power to create any lien on them which could interfere with their being used for the purposes of the company:—Held, also, that the order was right as to class 2; for that a solicitor could not assert against documents which came to his hands pending the winding-up any such lien as would interfere with the prosecution of the winding-up:—But held, that the order for delivery of class 3 must be discharged, for that the winding-up order could not defeat any valid lien existing at the time when the winding-up petition was presented. *Belaney v. French (8 L. R., Ch. 918)* and *Boughton v. Boughton (23 Ch. D. 169)* distinguished. *Capital Fire Insurance Association, In re, 24 Ch. D. 408; 53 L. J., Ch. 71; 49 L. T. 697; 32 W. R. 260*—C. A.

Extent of.—The solicitor of a company cannot acquire a lien for costs upon such books of the company as under the articles of the company or the provisions of the Companies Acts ought to be kept at the registered office of the company. *Anglo-Maltese Hydraulic Dock Co., In re, 54 L. J., Ch. 730; 52 L. T. 841; 33 W. R. 652*—Kay, J.

Costs of Interlocutory Application.—Costs awarded upon an interlocutory application are subject to the lien of the solicitor for the party to whom they are given, and cannot be attached by a judgment creditor of the party to the prejudice of the lien. *Cormick v. Ronayne, 22 L. R., Ir. 140*—Ex. D.

c. In what Cases.

Title-deeds held for Mortgagor and Mortgagee—Costs owing by Mortgagor.—A solicitor acting for mortgagee as well as mortgagor in the preparation of a mortgage thereby loses his lien on the title-deeds in his possession for costs due to him from the mortgagor, even though the costs were incurred prior to the mortgage and the title-deeds never left the solicitor's office. *Quinn, Ex parte, Nicholson, In re, 53 L. J., Ch. 302; 49 L. T. 811; 32 W. R. 296*—C. J. B.

Documents belonging to Estate—Costs due from Testator, Administrator and Administrator de bonis non.—There is a privity of estate between an administrator or executor who has partly administered and a subsequent administrator de bonis non, and the latter receives the estate with all the liabilities to which it was subject in the hands of the previous administrator or executor. The solicitor of a testator who has afterwards acted for his legal personal representatives during a partial administration of the estate, and has unpaid bills of costs against both

the testator and his representatives, is entitled as against a subsequent administrator de bonis non, to a lien upon documents in his hands belonging to the estate for all the costs so owing to him. *Watson, In re*, 53 L. J., Ch. 305; 50 L. T. 205; 32 W. R. 477—Pearson, J.

Where Solicitor is also a Mortgagee.—Lands were ordered to be sold on the petition of C., an incumbrancer. C., who had previously been solicitor for the owner, lodged in court, under an order and subject to his lien for costs due to him by the owner, several deeds and documents relating to the lands, including proposals and counterparts of leases under which the tenants held. These deeds and documents (as the court held) had come into the hands of C., as solicitor for the owner. C. was also transferee of a mortgage of the lands, which had been executed to one H., and C. had acted as solicitor for H. and the owner on the occasion of the mortgage. The owner made a private offer for purchase of the lands which was accepted, and took a conveyance. The owner having objected to the claim of lien, on the grounds that the documents were not such as a purchaser would require, and further, that C. had held them not as solicitor but as mortgagee:—Held, that these grounds of objection were unsustainable, and that C. was entitled to his lien on the deeds and documents lodged under the order. *Semble*, C. would not have lost the lien by taking a mortgage from the owner for money due other than the costs secured by the lien. *Harvey's Estate, In re*, 17 L. R., Ir. 65—Monroe, J.

Change of Solicitor.—An action was brought for the administration of the estate of H. by his infant grandchildren. The action was brought with the approval of the infants' father, and the next friend was nominated and approved by him. The father having died pending the action, the mother of the infants, who was also their testamentary guardian, applied to be appointed next friend, in the place of the existing next friend, and an order was made appointing her. She changed the plaintiff's solicitors, and the new solicitors applied to the old solicitors for delivery of the papers in the action. The original solicitors refused to deliver them till their costs were paid:—Held, upon a summons, that the old solicitors must deliver them over to the new solicitors without prejudice to their lien for costs. The action being a very heavy one, and the taxation of costs not likely to come on for some years, the costs of the original solicitors were under the special circumstances ordered to be taxed at once. *Hutchinson, In re, Hutchinson v. Norwood*, 54 L. T. 842; 34 W. R. 637—North, J.

d. Priority.

Change of Solicitor.—In 1875 A. commenced an action against a colliery company on behalf of himself and all other debenture-holders. Shortly afterwards the company was ordered to be wound up, and the official liquidator was appointed receiver and manager in the action. In 1881 the plaintiff A. became bankrupt, and in 1882 B., another debenture-holder, was substituted as plaintiff in the action. An order was made directing A.'s solicitor to hand over

the papers in the action to B.'s solicitor, without prejudice to his lien, if any. The colliery was carried on by the receiver and manager until 1883, when it was sold under an order obtained in the action by an auctioneer thereby appointed. The purchase-money, which was paid into court, was insufficient to pay the balance found due to the receiver, and the costs of all parties. The solicitors of A., the first plaintiff, claimed that, having given up the papers without prejudice to their lien, they were entitled to be paid their costs in priority to all parties to the action:—Held, that the solicitors of a plaintiff in a representative action for whom another plaintiff was substituted, are not entitled to be paid their costs out of a fund recovered in the action in priority to the new plaintiff, or other parties, by reason of any lien they might have upon the papers handed over by them in the action. *Batten v. Wedgwood Coal and Iron Co.*, 28 Ch. D. 317; 54 L. J., Ch. 686; 52 L. T. 212; 33 W. R. 303—Pearson, J. *See also Wadsworth, In re*, post, col. 1788.

e. When Lost.

Discharge of Retainer by Solicitor.—Where a solicitor has discharged himself of his retainer from acting further for his client, he will be compelled, if the client has resolved to further conduct his own case in person, to deposit the papers and documents in the cause which he has in his possession in the custody of the officer of court for a certain period in order that the client may have access to them, although the solicitor has still a lien upon such papers and documents for his unpaid bill of costs. *Wontner, In re, Scheyer, Ex parte*, 52 J. P. 183—D. Affirmed in C. A., W. N., 1888, p. 136.

Where a solicitor applied to his client for funds to carry on an action under a special stipulation in the retainer that such funds should be supplied, and, on the client refusing to pay, declined to continue the suit or deliver up the papers until his taxed costs were paid:—Held, that this was a discharge by the solicitor, and that he might be called upon to deliver to new solicitors the papers relating to the matters in question in the action. *Robins v. Goldingham* (13 L. R., Eq. 440) followed. *Bluck v. Lovering*, 35 W. R. 232—D.

Loss of Possession—Dissolution of Firm.—A firm of solicitors had a lien for costs upon certain documents in their possession. The partnership was dissolved, and the firm was reconstituted. Shortly after dissolution, the documents in question were removed from the office of the firm by a former partner without their consent or permission:—Held, that the lien was not destroyed. *Carter, In re, Carter v. Carter*, 55 L. J., Ch. 230; 53 L. T. 630; 34 W. R. 57—Kay, J.

Payment into Court of Security.—The court has jurisdiction, upon payment into court, or giving security for a sum sufficient to answer the solicitor's demand, to order before taxation delivery up by a solicitor of the client's papers, where retention by the solicitor of the papers on which he claims a lien would embarrass the client in the prosecution or defence of pending actions:—*Quære* (per Lindley, L.J.), whether

the jurisdiction is not extended by Ord. L. r. 8. *Galland, In re*, 31 Ch. D. 296; 55 L. J., Ch. 478; 53 L. T. 921; 34 W. R. 158—C. A.

f. Set Off.

Client indebted to Trust Estate.—Where a person, at the time of an order being made for the payment of his costs by trustees on a petition in the matter of a trust, is indebted to the trust estate, although the amount is not then ascertained, he cannot get any of such costs until he has paid the amount due from him to the trust, and the trustees, therefore, can set off the costs payable by them against the amount due from him. His solicitor cannot be in a better position than he is himself, and has no lien on such costs. *Harraid, In re, Wilde v. Walford*, 53 L. J., Ch. 505; 51 L. T. 441—C. A. Reversing 31 W. R. 318—Fry, J.

Secus, as to the costs of the trustees incurred in recovering such amount. *Id.*

Cross-Judgments in Separate Actions.—The court, upon an application to set off cross-judgments in distinct actions, are entitled, notwithstanding Ord. LXV. r. 14, to order that the set-off shall be subject to the lien for costs of the solicitor of the opposite party—for assuming that r. 14 applies to a set-off in distinct actions, it leaves the court a discretion to allow the set-off, either subject to or notwithstanding the solicitor's lien, and if it has no application the court have the same discretion by the practice previously to Reg. Hil. Term, 1853, r. 63, which, since the repeal of that rule by the new rules, is revived. *Edwards v. Hope*, 14 Q. B. D. 922; 54 L. J., Q. B. 379; 53 L. T. 69; 33 W. R. 672—C. A.

g. Collusion.

Compromise of Parties.—In an admiralty action for wages the plaintiffs and defendants compromised the action by payment to each of the plaintiffs of a certain sum in discharge of the claim and costs. The plaintiffs left the country without paying their solicitors' costs:—Held, that as there was no evidence that the parties had made the settlement, with the intention of depriving the plaintiffs' solicitors of their lien for their costs, the defendants ought not to be ordered to pay the plaintiffs' taxed costs. *Brunsdon v. Allard* (2 E. & E. 19), *Sullivan v. Pearson, Morrison, Ex parte* (4 L. R., Q. B. 153) approved. *The Hope*, 8 P. D. 144; 52 L. J., P. 63; 49 L. T. 148; 32 W. R. 269; 5 Asp. M. C. 126—C. A.

6. CHARGING ORDERS.

a. Who entitled to.

Solicitor Discharged before Trial.—A solicitor, through whose instrumentality property has been recovered or preserved in an action, is entitled under the 28th section of the Attorneys and Solicitors Act, 1860, to a declaration of charge upon such property, although his client may have discharged him before the trial of the action. In such a case his charge will be subject to the lien for costs of the client's solicitor for

the time being. *Wadsworth, In re, Rhodes v. Sugden*, 29 Ch. D. 517; 54 L. J., Ch. 638; 52 L. T. 613; 33 W. R. 558—Kay, J.

London Agents.—London agents of a country solicitor have no right to a charge for costs as they are not the solicitors employed by the client. *Macfarlane v. Lister*, 37 Ch. D. 88; 57 L. J., Ch. 92; 58 L. T. 201—C. A.

Parties to Action cannot obtain Order.—The Attorneys and Solicitors Act, 1860, is intended for the benefit and protection of solicitors only, and the court will not sanction the use of it for the purpose of enabling parties to an action to charge the property recovered or preserved in the action with the payment of costs for which they themselves are liable, and which they are able to pay. *Harrison v. Cornwall Minerals Railway*, 53 L. J., Ch. 596; 50 L. T. 452; 32 W. R. 748; 48 J. P. 724—Kay, J.

b. In respect of what Costs.

In an Action.—A company had given notice to take property compulsorily, the price to be paid was ascertained by arbitration:—Held, that the solicitors who acted for the vendor in the matter were not entitled to a charging order, as the proceedings were not in a court of justice. *Macfarlane v. Lister*, supra.

What allowed on Taxation.—See *Hill, In re*, ante, col. 1776.

Proceedings in Court where Order made.—A solicitor is entitled, under 39 & 40 Vict. c. 44, s. 3 (equivalent to 23 & 24 Vict. c. 127, s. 28), to a charge for costs incurred in recovering or preserving property, not only against his own client but against all persons entitled to the property. But the charging order must be confined to costs of proceedings in the court where it is made. It does not extend to miscellaneous costs or costs of proceedings in another court or of a proceeding (e. g., to remit an action to an inferior court) which has been abandoned. *Sheolin v. McGrane*, 17 L. R., Ir. 271—Prob.

Sale of Estate by order of Executrix—Executrix indebted to Estate.—A solicitor was allowed a lien on the proceeds of the estate of a deceased person, realised by him under an order of the court, notwithstanding that a balance was due to the estate by his client as executrix, which she was unable to bring into court. *White, In re*, 17 L. R., Ir. 223—V. C.

c. Property Recovered or Preserved.

Money Paid into Court.—An action having been brought to recover a sum of 727*l.*, C., one of the defendants, counter-claimed against the plaintiff for the sum of 700*l.* C. presented also a petition in bankruptcy against the plaintiff, who was ordered to bring into court a sum of 300*l.* The action and the proceedings in bankruptcy ultimately were referred to an arbitrator, who, by his award, found that the plaintiff was entitled to judgment in the action for 157*l.*, that no debt was due from the plaintiff to C., and that the sum of 300*l.* must be paid to the plaintiff out of the Court of Bankruptcy. The plaintiff's soli-

citors having applied to the Queen's Bench Division for a charging order on the sum of 300*l.* for their costs in the action:—Held, that they were not entitled to an order. *Pierson v. Knutsford Estates Co.*, 13 Q. B. D. 666; 53 L. J., Q. B. 181; 32 W. R. 451—C. A.

Money paid into court as a security for the costs of a party to an action is not, in case by the success of the party it becomes payable to him, property "preserved" in the action within the meaning of the Act. *Wadsworth, In re, Rhodes v. Sugden*, 29 Ch. D. 517; 54 L. J., Ch. 638; 52 L. T. 613; 33 W. R. 558—Kay, J.

Wife's permanent Maintenance.]—A sum secured to the wife on a dissolution of marriage under s. 32 of the Divorce Act, 1867, is not alimony, and is property in respect of which the court has jurisdiction to grant the wife's solicitor a charging order for costs under s. 28 of the Solicitors Act, 1860; but the court will not grant such an order unless the solicitor make out a *prima facie* case of inability to obtain payment in any other way. *Harrison v. Harrison*, 13 P. D. 180; 58 L. J., P. 28; 60 L. T. 39; 36 W. R. 748—C. A.

Partnership Action—Compromise.]—An action was brought for the dissolution of a partnership and the winding-up of the partnership business. The defendant delivered a defence, and a counterclaim claiming certain remedies against his co-partners. At the trial the parties agreed to compromise the action, including the counterclaim, and an order was made directing the taxation of the costs of all parties, and staying all proceedings except for the purpose of enforcing the agreement and that order. The agreement, which was set out in the schedule to the order, provided for the dissolution of the partnership, the sale of the partnership property, and that all costs of the parties should be paid out of the estate. Subsequently the parties made an agreement that a sale of a certain part of the partnership property should be rescinded; that all litigation should be put an end to, and the business carried on as before the action. The defendant's solicitor applied for an order charging his costs on the shares, both of the plaintiffs and defendant, in the partnership property, or, in the alternative, on the defendant's share. The defendant was willing that the order should be made as regards his share of the property:—Held, that the solicitor could not have a charging order on the plaintiffs' shares, as they had been in no way recovered or preserved through his instrumentality. Also, that the persons to apply to enforce the order carrying out the agreement were the parties to it, and the solicitor could not apply under it to obtain payment of his costs. *Rowlands v. Williams*, 53 L. T. 135—Kay, J. Reversed in C. A.

Costs ordered to be refunded.]—Costs paid under order of the court below and ordered by the Court of Appeal to be refunded are property recovered within the meaning of the 23 & 24 Vict. c. 127, s. 28. *Guy v. Churchill*, 35 Ch. D. 489; 56 L. J., Ch. 670; 57 L. T. 510; 35 W. R. 706—C. A.

An action was dismissed with costs, which were taxed at 29*l.* and paid. On appeal this judgment was reversed, leave was given to amend the pleadings, and the action was ordered to

proceed on the amended pleadings, and the defendants were ordered to repay to the plaintiffs the costs they had received, and to pay to the plaintiffs their costs of the appeal, which were taxed at 165*l.* After this the plaintiffs became bankrupt:—Held, on the application of the solicitors who had acted for the plaintiffs in the appeal, that they were entitled to receive from the defendants the 165*l.*, and also to receive from the defendants out of the 29*l.* the difference between the 165*l.* and the plaintiffs' costs of the appeal taxed as between solicitor and client, and that the balance only of the 29*l.*, after paying the above difference and the costs of the solicitors and the defendants of the application, was to be paid to the trustee in the bankruptcy. *Id.*

d. Priority.

Solicitor discharged before Trial.]—The solicitor who had acted for the plaintiff in the institution and conduct of an action to establish his right to a sum of money was discharged by the client shortly before the trial. The action was continued by new solicitors on behalf of the plaintiff, and judgment was delivered in favour of the plaintiff ordering the defendant to pay him the money. After the trial the former solicitor obtained, under the Attorneys and Solicitors Act, 1860, s. 28, a declaration of charge upon the sum recovered "subject to the lien of the present solicitors of the plaintiff upon the said sum":—Held, that the solicitor who was solicitor at the time the fund was recovered was entitled to a first charge thereon for all his taxed costs of the action, and subject thereto that the discharged solicitor was entitled to such lien as he obtained under his charging order. *Cormack v. Beisley* (3 De G. & J. 157) followed. *Wadsworth, In re, Rhodes v. Sugden*, 34 Ch. D. 155; 56 L. J., Ch. 127; 55 L. T. 596; 35 W. R. 75—Kay, J.

Landlord's Claim for Rent.]—A solicitor who has obtained an order, under s. 28 of the Solicitors Act, charging property preserved with payment of his taxed costs, takes priority over a landlord who, before the charging order, might have, but had not, distrained for rent upon the same property. *Suffield and Watts, In re, Brown, Ex parte*, 20 Q. B. D. 693; 58 L. T. 911; 36 W. R. 584; 5 M. B. R. 83—C. A.

Solicitor acting for Mortgagor and Mortgagee—Direction of Client as to Money.]—While a suit for redemption of a mortgaged estate was pending the plaintiff mortgaged his interest in the estate to D. The plaintiff's solicitor in the suit acted for both parties in this mortgage. A company had given notice to take the property compulsorily, but the price had not been ascertained. On the day of the execution of the mortgage to D. the plaintiff wrote to his solicitors and their London agents a letter directing them to pay D.'s mortgage debt out of the first money that should come to their hands from the company, and the solicitors handed this letter to D. with the mortgage deed. After this the price of the land was ascertained by arbitration, in which arbitration the London agents acted as the plaintiff's solicitors, and the price was carried over to the credit of the redemption suit, and left a balance after paying off the original mortgage debt. After this the solicitors

and their London agents applied for an order charging the fund with their costs in the action and in the arbitration. The court made an order giving them a charge, and decided that they were entitled to priority over D.'s mortgage:—Held, on appeal, that the mere fact that the solicitors acted for D., as well as for the plaintiff, in the matter of the mortgage, did not disentitle them to priority. *Snell, In re* (6 Ch. D. 105) distinguished. But held, that the plaintiff's letter was a direction to the solicitors that moneys to come to their hands from the property were to be applied in the first place in paying D., and that they having forwarded this letter to D. were bound by the direction, and could not set up a claim of their own in opposition to it, and were in no better position as to moneys in court than as to moneys which actually came to their hands, and that their charge must be postponed to D.'s mortgage. *Macfarlane v. Lister*, 37 Ch. D. 88; 57 L. J., Ch. 92; 58 L. T. 201—C. A.

Garnishee Summons.—The proceeds of a *fi. fa.*, issued on behalf of the successful plaintiff in an action, were attached in the hands of the sheriff by a garnishee summons from a county court to answer a judgment obtained against the plaintiff in that court. The plaintiff's solicitor in the action, who had received notice of the service of the garnishee summons, subsequently obtained an order under 23 & 24 Vict. c. 127, s. 28, charging the fund recovered with costs of the action remaining due to him:—Held, that such order was rightly made, and the solicitor's claim was entitled to priority over the claim of the judgment creditor of the plaintiff under the garnishee summons. *Dallow v. Garrold*, 14 Q. B. D. 543; 54 L. J., Q. B. 76; 52 L. T. 240; 33 W. R. 219—C. A.

Claim by Foreign Consul for Payment of Expense of sending Crew of Ship home.—Salvage actions were brought against an Italian vessel, and she was sold by order of the court. After the salvors had been remunerated, the balance of the fund in court was insufficient to satisfy the costs of the solicitors who had appeared in the above actions for the parties interested in the ship, and who sought to enforce their claim for such costs by virtue of 23 & 24 Vict. c. 127, s. 28, as well as the claim of the Italian consul in respect of the expenses of sending the crew back to Italy. It was proved that by the law of Italy such expenses and the keep of the master and crew ranked next to the salvage payments:—Held, that the claim of the Italian consul had priority to that of the solicitors. *The Livietta*, 8 P. D. 209; 52 L. J., P. 81; 49 L. T. 411; 5 Asp. M. C. 151—Hannen, P.

Partnership Property—Rights of Creditors.—Where in a partnership action a receiver who was appointed at the instance of the plaintiff, realised the assets and paid into court a fund representing the proceeds of such realisation:—Held, that the solicitors of the plaintiff were entitled to a lien on the fund for their costs in priority to the creditors of the partnership. *Hamer v. Giles* (11 Ch. D. 942) explained. *Jackson v. Smith, Digby, Ex parte*, 53 L. J., Ch. 972; 51 L. T. 72—Kay, J.

Semble, the court in such a case would not

make an order declaring the lien in the absence of the creditors. But where one of the creditors was present, and the case was argued on his behalf, the court appointed him to represent all the creditors. *Ib.*

e. Raising Costs.

Direction in Order.—In the absence of evidence that the plaintiff was himself unable to pay the costs, the order ought not to direct the costs to be raised out of the fund, but should merely give liberty to the solicitors to apply as to raising them. *Ib.*

Time for—Action not finished.—A decree for administration of a testator's estate was made at the suit of an infant who was entitled to a contingent reversionary share in the estate. R. was solicitor for the plaintiff and for J. and A., two of the persons entitled to the other shares. After decree he ceased to be solicitor for these parties, and obtained an order directing taxation of his costs as their solicitor in the action, including the costs of the application, and charging their shares in the estate with the payment of such costs, with liberty to apply to have them raised. Before the cause had been heard, on further consideration, he applied to have the costs raised by a sale of the shares charged:—Held, that the application was premature, and that no order ought to be made for raising the costs until the cause was heard on further consideration. *Green, In re, Green v. Green*, 26 Ch. D. 16; 54 L. J., Ch. 54; 50 L. T. 513; 32 W. R. 373—C. A.

VII. COUNTRY SOLICITOR AND LONDON AGENT.

Taxation of Costs.—See *Nelson, In re*, ante, col. 1761.

— **Petition—Signature by Agent of Solicitor.**—See *Scholes, In re*, ante, col. 1754.

— **Bill of London Agent by Solicitor.**—See *Johnson and Weatherall, In re*, ante, col. 1756.

Retainer to Country Solicitor—Issue of Writ by London Firm.—See *Wray v. Kemp*, ante, col. 1735.

Service of Notice of Motion and Affidavits for Attachment of the Person.—See ATTACHMENT.

Money due to Solicitor by Agent—Debtors Act.—See *Litchfield v. Jones*, ante, col. 1742.

Power of London Agent to obtain Charging Order.—See *Macfarlane v. Lister*, ante, col. 1738.

VIII. CHANGE OF SOLICITORS.

Taxation of Costs of Ineffectual Sale.—See *Dean, In re, Ward v. Holmes*, ante, col. 1769.

Charging Order.]—*See Wadsworth, In re*, ante, col. 1788.

Lien for Costs.]—*See Hutchinson, In re*, ante, col. 1785.

IX. UNQUALIFIED PRACTITIONERS.

Acting as a Solicitor—Attachment for Contempt.]—Every person who acts as a solicitor contrary to s. 2 of 6 & 7 Vict. c. 73, is liable to attachment for contempt of court under 23 & 24 Vict. c. 127, s. 26, whether he so acts in the name of any other person or in his own name, unless such person be duly qualified. Although the court will generally adopt the findings of the master as to such conduct, his report is not conclusive. *Simmons, In re*, 15 Q. B. D. 348; 53 L. T. 147; 33 W. R. 706; 49 J. P. 740—D.

— **Conviction.**]—S., a partner in a firm of coal merchants, wrote to A., who was indebted to the firm for coals, a notice signed by himself, headed, "Final notice before proceeding in county court. Unless you pay the sum of 22s. 6d. to the firm of, &c., I shall proceed against you under the above act."—Held, the justices were wrong in convicting S. of pretending to be a solicitor contrary to 37 & 38 Vict. c. 68, s. 12. *Symonds v. Incorporated Law Society*, 49 J. P. 212—D.

B., an agent who used to issue county court summonses for people, was authorised by V. to write to a debtor of V. for payment. B. sent a notice signed by himself in the words, "County Courts. Unless the sum of 1l. 15s. 6d. due to V. is paid I shall proceed against you under the above acts." The real debt due to V. was only 1l. 6s. B. being summoned under 37 & 38 Vict. c. 68, s. 12:—Held, the magistrate was right in dismissing the summons, as there was no evidence that B. pretended, &c., to act as a solicitor. *Incorporated Law Society v. Bedford*, 49 J. P. 215—D.

— **Treatment in Prison—"Criminal Prisoner."**]—A person committed to prison under 6 & 7 Vict. c. 73, s. 32, and 23 & 24 Vict. c. 127, s. 26, for acting as a solicitor, though not duly qualified, is a "criminal prisoner" within 28 & 29 Vict. c. 126, s. 4, which enacts that "criminal prisoner shall mean any prisoner charged with or convicted of a crime." Such a person is not entitled to be treated as a misdemeanant of the first class by 40 & 41 Vict. c. 21, s. 41. *Osborne v. Milman*, 18 Q. B. D. 471; 56 L. J., Q. B. 263; 56 L. T. 808; 35 W. R. 397; 51 J. P. 437—C. A. Reversing 16 Cox, C. C. 138—Denman, J.

SPECIAL CASE.

See reff. sub tit. PRACTICE, ante, col. 1495.

SPECIFIC PERFORMANCE.

1. *The Contract.*
2. *In what Cases.*
3. *Jurisdiction and Practice.*

1. THE CONTRACT.

Formation of Contract, &c.]—*See* ante, CONTRACT.

Variation of written Agreement by oral Proviso.]—By the terms of a written agreement, J. agreed to lease to W. a shop and premises which are to be built at a cost not to exceed 400l., at the annual rental of 75l. J. expended 750l. in building the premises, and refused to grant a lease to W. at the annual rent of 75l. In an action by W. against J. for specific performance of the written agreement, the defendant set up as a defence a contemporaneous parol proviso to the agreement, to the effect that, if the outlay exceeded 400l., the rent was to be raised in proportion:—Held, that, as such parol proviso did not contradict, but merely explained the terms of the written instrument, evidence of it was admissible; and, as the evidence proved that the plaintiff had agreed to such parol proviso, that the action must be dismissed. *Williams v. Jones*, 36 W. R. 573—Kekewich, J.

Part Performance—Parol Agreement as to Easement of Light.]—The plaintiff and defendant, the owners of adjoining houses, being about to rebuild, entered into a verbal agreement that the plaintiff should pull down a party-wall and rebuild it lower and thinner, and that each party should be at liberty to make a lean-to skylight with the lower end resting on the party-wall. The plaintiff rebuilt the party-wall and erected a lean-to skylight on his side of it as agreed; the defendant also erected a skylight on his side, but, instead of a lean-to, so shaped it as to obstruct the access of light to the plaintiff's premises more than the agreed lean-to skylight would have done:—Held, that the effect of the agreement was to give to each party an easement of light over the other's land; and that the plaintiff, having performed the agreement on his part, was entitled to have it enforced on the part of the defendant. A mandatory injunction was accordingly granted, the plaintiff being put under a corresponding undertaking. *McManus v. Cooke*, 35 Ch. D. 681; 56 L. J., Ch. 662; 56 L. T. 900; 35 W. R. 754; 51 J. P. 708—Kay, J.

— **Damages.**]—The equitable jurisdiction of part performance cannot be made use of for the purpose of obtaining damages on a contract the specific performance of which is no longer possible; neither has the Judicature Act, 1873 extended the equitable jurisdiction so as to enable the court to give damages in cases where before the act specific performance would not have been decreed. *Lavery v. Pursell*, 39 Ch. D. 508; 57 L. J., Ch. 570; 58 L. T. 846; 37 W. R. 163—Chitty, J.

2. IN WHAT CASES.

Agreement by Purchaser to build Wall on Land of Vendor.]—Though the court will not, as
3 M

a rule, specifically enforce contracts to build or repair, it will do so in cases where the contract for building is in its nature defined. *Hepburn v. Leather*, 50 L. T. 660—V.-C. B.

Preliminary Building Agreement.]—The court will not decree the specific performance of a preliminary building agreement, nor give damages for the breach of such an agreement. *Wood v. Silcock*, 50 L. T. 251; 32 W. R. 845—V.-C. B.

Agreement for Lease—Breach of Covenant in Draft Lease.]—Where a tenant has entered into possession of premises under an agreement for a lease for a term of twenty-one years, such agreement not being under seal and consequently void as a lease, the tenant is, until payment of rent, merely tenant at will, and the landlord may determine the tenancy by notice without assigning any reason for so doing, and may enter under a power of re-entry. Where any rent has been paid by the tenant, the landlord is estopped from denying the existence of a tenancy from year to year upon such of the terms of the agreement as are applicable to such a tenancy. The court will not decree specific performance of such an agreement where the tenant has committed a breach of one of the covenants contained in the draft lease which has been signed as approved by both the parties; and the matter is in no wise affected by s. 14 of the Conveyancing Act, 1881. *Coatsworth v. Johnson*, 55 L. J., Q. B. 220; 54 L. T. 520—C. A.

Misdescription — Underlease described as Lease.]—By an agreement, dated the 15th August, 1885, and made between eleven persons described as the committee of Verulam Church and A. L. Waring, the committee agreed to purchase from the said A. L. Waring "his interest in the lease held by him of Verulam Church, in Kennington-lane, for the sum of 550*l*." The committee having failed to complete the purchase, A. L. Waring brought an action for specific performance. On the 2nd November, 1887, judgment was given in the said action directing the usual inquiry whether a good title could be made. The chief clerk's certificate, dated 22nd March, 1888, found that a good title could be made to a derivative term of ninety-three and a quarter years from the 25th December, 1824, less three days:—Held, that the words of the agreement took the case out of the authority of *Madeley v. Booth* (2 De G. & Sm. 718), and that the plaintiff was entitled to specific performance. *Waring v. Scotland*, 57 L. J., Ch. 1016; 59 L. T. 132; 36 W. R. 756—North, J.

Agreement to Make a Road—Approval of Local Board—Requirements of Local Board inconsistent with Specification.]—The defendants agreed to construct a road over land of the plaintiff, who was to grant the defendants a right of way over the road when completed, and to permit it to be declared a public highway by the local board. Defendants were to make the road according to a plan and specification already approved by the local board, and to do all things necessary to carry out a resolution passed by the board, that the road should, six months after completion to their satisfaction, be declared by the board a public highway. The

specification provided that the pathways should be gravelled, and did not provide for means of lighting. After completion of the road, the board were advised that the road did not comply with the requirements of the Public Health Act, 1875, s. 152, inasmuch as it was not flagged nor provided with means of lighting, and they withheld their sanction to its being declared a public highway. The plaintiff brought an action claiming specific performance by the defendants of the agreement, on the ground that they had not done all things necessary to enable the board to declare the road a public highway, and claiming damages:—Held that, inasmuch as to compel the defendants to construct the road so as to conform with the provisions of the act would be to enforce performance of terms at variance with the agreement and entirely outside the contemplation of the parties, specific performance could not be ordered. Whether the plaintiff would have been entitled to damages if any had been shown, *quære*. *Saunders v. Brading Harbour Improvement Company*, 52 L. T. 426—North, J.

Trustees for Sale—Depreciatory Conditions—Breach of Trust.]—Trustees for sale, in November, 1882, put up land for sale by auction as building land in thirty-three lots, under conditions (4) providing that the title should commence with a conveyance dated in October, 1872, and that recitals in any abstracted document should be conclusive evidence; (6) stating that the land was sold subject to the existing tenancies, restrictive covenants, and to all easements, quit-rents, and other incidents of tenure (if any) affecting the same, and providing that the purchasers should enter into covenants to perform the covenants and indemnify the vendors. There were no existing tenancies or quit-rents, and the covenants were not stated so as to show only the actual liabilities thereunder:—Held, that, having regard to the nature of the property and the large number of small lots, the limitation of title in the manner provided by condition (4) was not an unreasonable exercise of the discretion vested in them as trustees for sale; but that the 6th condition, suggesting various difficulties which had in fact no existence, was eminently calculated to deter intending purchasers, and that the trustees could not obtain the assistance of the court in enforcing the contract. The court refuses to enforce specific performance of a contract which is a breach of trust, equally at the suit of the vendors as of the purchasers. *Dunn v. Flood*, 28 Ch. D. 586; 54 L. J., Ch. 370; 52 L. T. 699; 33 W. R. 315—C. A.

3. JURISDICTION AND PRACTICE.

Jurisdiction of County Court.]—*See Reg. v. Westmoreland County Court Judge*, ante, col. 547.

Rectification and Specific Performance.]—Since the Judicature Act, 1873, the court has jurisdiction (in any case in which the Statute of Frauds is not a bar), in one and the same action, to rectify a written agreement, upon parol evidence of mistake, and to order the agreement to be specifically performed. *Olley v. Fisher*, 34 Ch. D. 367; 56 L. J., Ch. 208; 55 L. T. 807; 35 W. R. 301—North, J.

Disentailing Assurance—Fines and Recoveries Act.—[The jurisdiction which the courts of equity had prior to the Fines and Recoveries Act of decreeing specific performance of a contract by a tenant in tail to bar the entail by ordering him to levy a fine or suffer a common recovery for the purpose, and enforcing the order as against the tenant in tail personally by the process of contempt, has not been excluded by s. 47 of the Fines and Recoveries Act, and the court can still as against the tenant in tail himself decree specific performance of a contract to execute a disentailing assurance, although the contract is not enforceable as against the succeeding issue in tail. *Banks v. Small*, 36 Ch. D. 716 ; 56 L. J., Ch. 832 ; 57 L. T. 292 ; 35 W. R. 765—C. A.]

Waiver of Construction of Agreement.—[Where a written agreement has been signed, though it is in some cases a defence to an action for specific performance according to its terms that the defendant did not understand it according to what the court holds to be its true construction, the fact that the plaintiff has put an erroneous construction upon it, and insisted that it included what it did not include, does not preclude the plaintiff from waiving the question of construction and obtaining specific performance according to what the defendant admits to be its true construction. *Preston v. Luck*, 27 Ch. D. 497 ; 33 W. R. 317—C. A.]

What Plaintiff must Establish.—[A plaintiff in an action for specific performance of a contract for a sale of land must prove readiness and willingness on his own part, and repudiation of the contract on the defendant's part does not relieve the plaintiff from this obligation. *Ellis v. Rogers*, 50 L. T. 660—Kay, J.]

Effect of Delay.—[On a sale of real estate the purchaser paid 500*l.*, which was stated in the contract to be paid "as a deposit, and in part payment of the purchase-money." The contract provided that the purchase should be completed on a day named, and that if the purchaser should fail to comply with the agreement, the vendor should be at liberty to re-sell and to recover any deficiency in price as liquidated damages. The purchaser was not ready with his purchase-money, and after repeated delays, the vendor re-sold the property for the same price. The original purchaser having brought an action for specific performance :—Held, that the purchaser had lost by his delay his right to enforce specific performance. *Howe v. Smith*, 27 Ch. D. 89 ; 53 L. J., Ch. 1055 ; 50 L. T. 573 ; 32 W. R. 802 ; 48 J. P. 773—C. A.]

Damages—Judicature Act—Lord Cairns' Act.—[Under the Judicature Act, 1873, the court has complete jurisdiction both in law and in equity ; so that, whether the court could in a particular case grant specific performance or not, it could give damages for breach of the agreement. *Elmore v. Pirrie*, 57 L. T. 333—Kay, J.]

Under Lord Cairns' Act, the plaintiff had first to make out that he was entitled to specific performance before he could get damages at all ; now he may come to the court and say, "If you think I am not entitled to specific performance of the whole or any part of the agreement, then give me damages." *Id.*

The Judicature Act, 1873, s. 25, sub-s. 11, does

not extend the equity jurisdiction so as to enable the court to grant damages in a case wherein before the act damages were not recoverable, e.g., in the case of an oral agreement not capable of specific performance in equity, and in respect of which, in an action at law for damages, the defendant could have successfully pleaded the Statute of Frauds. *Northumberland Avenue Hotel Company, In re, Sully's Case*, 54 L. T. 76—Chitty, J. See also *Lavery v. Purcell*, ante, col. 1794.

Plaintiff by his own Act unable to Perform Contract.—[The plaintiff by his statement of claim claimed specific performance of a contract by which he agreed to sell, and the defendant agreed to purchase, the lease, goodwill, fixtures, and stock-in-trade of a business ; the plaintiff alleging that he was and always had been able and willing to perform the contract, but that the defendant refused to perform the same. The statement of claim in the alternative claimed 100*l.* as liquidated damages fixed by the contract for the refusal to perform the contract. The defence set up certain alleged false representations by the plaintiff as to the character of the business, and denied that the plaintiff was able and willing to perform the contract. The plaintiff, after the close of the pleadings, gave notice to the defendant that, unless the defendant completed the purchase within a week, he should re-sell the business, which he accordingly did. No amendment of the pleadings was then asked for by the plaintiff, and the action went on to trial. At the trial the plaintiff's counsel, admitting that the claim for specific performance must be abandoned, sought to recover the 100*l.* as liquidated damages. He did not apply for any amendment of the pleadings :—Held, that the action must be treated as one for specific performance with a claim for damages in the alternative as a substitute for specific performance, according to the practice existing before the Judicature Act in the Court of Chancery, and that the plaintiff, having by his own act rendered specific performance impossible, was not in such action entitled to damages. *Hipgrave v. Case*, 28 Ch. D. 356 ; 54 L. J., Ch. 399 ; 52 L. T. 242—C. A.]

Delay in Giving Possession—Loss of Tenant and Deterioration.—[Two houses, stated in the particulars to have been "recently in the possession of F.," were put up by the plaintiffs (mortgagees from F.) for sale by auction, and were bought by the defendant. A day was fixed for completion of the purchase, when the rents or possession were to belong to the purchaser. At that day F. was still in possession, and remained so until he was turned out by the sheriff, more than a month after. The purchaser had agreed to let the houses to a tenant as from a day five days later than the day fixed for completion, but the tenant, finding that he could not have immediate possession, had refused to take the houses, which had remained unoccupied, and had also been damaged by the removal of some fixtures and otherwise. The vendors brought an action for specific performance simply. The defendant counterclaimed for specific performance, with compensation :—Held, that the purchaser was entitled to damages in the nature of compensation for loss of a tenant, and that the damages would be the amount of rent lost, and

that the purchaser was entitled to damages for the deterioration of the property. *Bain v. Fothergill* (7 L. R., H. L. 158) distinguished. *Phillips v. Silvester* (8 L. R., Ch. 173) followed and discussed. *Royal Bristol Permanent Building Society v. Bomash*, 35 Ch. D. 390; 56 L. J., Ch. 840; 57 L. T. 179—Kekewich, J.

— **Delay—Right of Way.**—The purchaser of a piece of land agreed, as part of the consideration, to grant within a given time to the vendor a right of way, and to make a road with sewers leading to other land belonging to the vendor. The purchaser was unable to grant the right of way or to make the road and sewers until long after the time fixed, and the vendor brought an action for specific performance and for damages as the other land had remained unproductive until the road was made:—Held, that judgment for specific performance with costs must be given but no damages, as the contract was for a sale of real estate; there being no distinction between a contract to grant a right of way and make a road and sewers, and a contract to sell real estate. The principle on which in such a case damages would be assessed, discussed. *Rowe v. London School Board*, 36 Ch. D. 619; 57 L. J., Ch. 179; 57 L. T. 182—Kekewich, J.

Defences—Sale by Auction—Fictitious Bidding by Stranger.—[It is no defence to an action for specific performance brought by the vendors against the purchaser at a sale by auction, that unknown to the vendors a fictitious bidding was made, and that the purchaser was thereby induced to give more than he had previously bid, which was more than the reserved price. On a sale by mortgagees under the direction of the court in a foreclosure action, the mortgagees are ordinary vendors, and are not liable for the acts of other parties to the action. *Union Bank v. Munster*, 37 Ch. D. 51; 57 L. J., Ch. 124; 57 L. T. 877; 36 W. R. 72; 52 J. P. 453—Kekewich, J.]

— **Non-mutuality.**—The doctrine of non-mutuality being a bar to specific performance, does not apply to a contract which to the knowledge of both parties cannot be enforced by either until the occurrence of a contingent event. *Wylson v. Dunn*, 34 Ch. D. 569; 56 L. J., Ch. 855; 56 L. T. 192; 35 W. R. 405; 51 J. P. 452—Kekewich, J.

Defendant not appearing at Trial—Judgment.—[In an action by a vendor for the specific performance of an agreement to purchase real estate, the purchaser having accepted the title, but having failed to complete at the time fixed, there being a condition empowering the vendor, in case of the failure of the purchaser to comply with any of the conditions of sale, to forfeit the deposit and resell the property:—Held, that, in lieu of judgment for specific performance, a declaration may be made, even though the defendant had not appeared to the writ, that the vendor was entitled to forfeit the deposit and resell the property, if the writ has claimed such a declaration in the alternative. But held, that the order should direct plaintiff to pay the costs of the action. *Stone v. Smith* (35 Ch. D. 188) distinguished. *Kingdon v. Kirk*, 37 Ch. D. 141; 57 L. J., Ch. 328; 58 L. T. 383; 36 W. R. 430—North, J.]

In a vendor's action to enforce a contract to purchase leaseholds, the defendant delivered a defence admitting that he was unwilling to complete the contract, and did not appear at the trial:—Held, that the plaintiff was not entitled to immediate judgment rescinding the contract and forfeiting the deposit, but only to the usual judgment for specific performance. *Stone v. Smith*, 35 Ch. D. 188; 56 L. J., Ch. 871; 56 L. T. 333; 35 W. R. 545—Kekewich, J.

Ordering Possession to be given up—Payment into Court.—The Metropolitan Board of Works gave notice to the plaintiff of their intention to acquire houses occupied by him under their statutory powers. They afterwards agreed to purchase the houses, on a representation by the plaintiff that he held them as a lessee for twenty-one years. The board, on investigating the title, discovered that the lease could be put an end to by the landlord or the tenant at the end of seven or fourteen years, and on that ground claimed an abatement in the purchase-money. The plaintiff refused to make the abatement, and brought an action against the board for specific performance of the agreement. The board then moved in the action for an order giving them possession of the houses on their paying into court the amount of the agreed price with interest, and Pearson, J., made the order:—Held, on appeal, that Pearson, J., had, under a mistake, acted on analogy to the Land Clauses Act, 1845, but that he had no power to do so where, as in this case, the statutory requirements had not been strictly complied with. *Bygrave v. Metropolitan Board of Works*, 32 Ch. D. 147; 55 L. J., Ch. 602; 54 L. T. 889; 50 J. P. 788—C. A.

Refusal to obey Order of Court—Execution of Lease.—A decree was made for specific performance of an agreement to grant a new lease of certain premises, and the defendant was ordered to execute such new lease to the plaintiff. The defendant having refused to obey the order, the plaintiff moved for leave to issue a writ of attachment against her:—Held, that there having been a decree for specific performance, the court had jurisdiction under s. 30 of the Trustee Act, 1850, to appoint a person to execute the lease in place of the defendant, and the motion was directed to be amended accordingly. The motion having been amended, an order was made declaring the defendant a trustee of the premises within the meaning of the Trustee Act, and a person was appointed in place of the defendant to execute the lease to the plaintiff. *Hall v. Hale*, 51 L. T. 226—Kay, J. See now 47 & 48 Vict. c. 61, s. 14.

— **Rescission after Decree—Costs.**—After a decree for specific performance of a contract, if the party in whose favour the decree has been made is unable, or neglects to carry the decree into effect, the person against whom the decree was made is entitled to an order for rescission of the contract, retaining the benefit of any direction as to costs of the action, but not to damages or to occupation rent. He is also entitled to the costs of obtaining the order for rescission. *Henty v. Schröder* (12 Ch. D. 666), *Foligno v. Martin* (16 Beav. 586), and *Watson v. Cox* (15 L. R., Eq. 219), explained and followed. *Sweet*

v. Meredith (4 Giff. 207) not followed. *Hutchings v. Humphreys*, 54 L. J., Ch. 650; 52 L. T. 690; 33 W. R. 563—North, J.

— **Conditional Order for Payment—Delivery of Deeds.**—The decree in a vendor's action for specific performance directed that, on the plaintiff executing an assignment and delivering to the defendant the deeds and writings relating to the property, the defendant should pay to the plaintiff the amount certified to be due for purchase-money, interest, and costs. The plaintiff executed the assignment, and tendered the deeds to the defendant. The defendant refused to receive the deeds, or to pay the money. The plaintiff moved for leave to issue execution for the amount certified to be due, on the ground that he had performed the condition:—Held, that the plaintiff must deposit the executed assignment and the deeds in court, and on such deposit an order should be drawn up that the defendant should pay the amount certified and the costs of the motion within four days. *Bell v. Denver*, 54 L. T. 729; 34 W. R. 638—North, J.

— **Form of Order.**—Form of order on further consideration in an action for specific performance by vendor where the defendant has persistently endeavoured to evade the judgment. *Morgan v. Brisco*, 31 Ch. D. 216; 55 L. J., Ch. 194; 53 L. T. 852; 34 W. R. 193—V.-C. B.

Form of four-day order in an action by vendor for specific performance, where the defendant has persistently endeavoured to evade both the judgment and the order on further consideration. *Morgan v. Brisco*, 32 Ch. D. 192; 54 L. T. 230; 34 W. R. 360—V.-C. B.

Costs.—A vendor is entitled to costs of action, if he showed and offered a good possessory title before action, though it is not proved till afterwards in chambers. *Games v. Bonnor*, 54 L. J., Ch. 517; 33 W. R. 64—C. A.

SPECIFICATION.

Of Patents.—See PATENT, II.

Of Work.—See BUILDING CONTRACTS.

STAGE CARRIAGE.

See METROPOLIS, IV.

STAKEHOLDER.

See INTERPLEADER.

STAMPS.

See REVENUE.

STANNARIES.

See COURT.

STATUTES.

I. CONSTRUCTION.

1. *Generally*, 1802.
2. *Avoidance of Transactions*, 1806.
3. *Nuisance authorised*, 1806.
4. *Retrospective Effect*, 1807.
5. *Repeal when Implied and otherwise*, 1808.
6. *Particular Words*, 1810.

II. WAIVER OF STATUTORY RIGHTS, 1810.

III. REMEDIES FOR BREACH, 1811.

I. CONSTRUCTION.

1. GENERALLY.

Effect of, on Crown.—Assuming that the Lands Clauses Act would have been read into the special act of 1855, in any ordinary case, can this be done in the case of these commissioners, who it is said represent the Crown, and are in fact the Crown, the Crown not being mentioned in the Lands Clauses Act? The Lands Clauses Act is brought into the Act of 1855 by reference, and the legal effect of its incorporation is this, that the moment the later act is passed, it must be considered that the legislature has written into it the provisions of the Lands Clauses Act, and, if that be so, the Act of 1855, in dealing with these commissioners, if they are to be taken to be the Crown, is dealing with the Crown itself. Therefore, the objection that the Crown is not mentioned in the Lands Clauses Act, falls to the ground. *Wood's Estate, In re, Commissioners of Works and Buildings, Ex parte*, 31 Ch. D. 607; 55 L. J., Ch. 488; 54 L. T. 145; 34 W. R. 375—Per Lord Esher, M.R.

Application of English Acts to foreign Property.—There is a general rule of construction that English acts of parliament, when dealing with property in general, are not to be treated as applying to foreign or colonial property.

Colquhoun v. Brooks, 19 Q. B. D. 406; 57 L. J., Q. B. 70; 57 L. T. 448; 36 W. R. 332—Per Wills, J.

Penal Statute.—If you treat the Debtors Act as an act which authorises the court to commit people to prison, it is a highly penal act affecting the liberty of the subject, and you must construe it strictly. *Scott v. Morley*, 20 Q. B. D. 126; 57 L. J., Q. B. 43; 57 L. T. 219; 36 W. R. 67; 52 J. P. 230; 4 M. B. R. 286—Per Lord Esher, M.R.

Private Act.—A private act of parliament will be construed more strictly than a public one as regards provisions made by it for the benefit of the persons who obtained it, but, when once the true construction is ascertained, the effect of a private act is the same as that of a public act. *Altrincham Union v. Cheshire Lines Committee*, 15 Q. B. D. 597; 50 J. P. 85—C. A.

Ordinary Meaning—Application to Subject-matter.—Whenever you have to construe a statute or a document you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used, unless there is something which obliges you to read them in a sense which is not their ordinary sense in the English language as so applied. *Lion Insurance Association v. Tucker*, 12 Q. B. D. 186; 53 L. J., Q. B. 185; 49 L. T. 764; 32 W. R. 546—Per Brett, M.R.

Intention of Legislature.—Where the main object and intention of a statute are clear it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law, except in the case of necessity or the absolute intractability of the language used. *Salmon v. Duncombe*, 11 App. Cas. 627; 55 L. J., P. C. 69; 55 L. T. 446—P. C.

The ordinary meaning of the words used in a statute must be adhered to unless that meaning is at variance with the intention of the legislature to be collected from the statute itself or leads to some absurdity or repugnance. *Pietermaritzburg (Mayor) v. Natal Land Company*, 13 App. Cas. 478; 58 L. J., P. C. 82; 58 L. T. 895—P. C.

Injustice modifying plain Language.—A very strong case of injustice arising from giving the language of an Act of Parliament its natural meaning must be made out before the court will construe a section in a way contrary to the natural meaning of the language used. *Hall, In re*, 21 Q. B. D. 141; 57 L. J., Q. B. 494; 59 L. T. 37; 36 W. R. 892—Per Cave, J.

Two Meanings—One causing Injustice.—If the words of an Act of Parliament, though capable of an interpretation which would work manifest injustice, can possibly within the bounds of grammatical construction and reasonable interpretation be otherwise construed, the court ought not to attribute to the legislature what is a clear, manifest, and gross injustice. *Plumstead Board of Works v. Spackman*, 13 Q. B. D. 878; 53 L. J., M. C. 142; 51 L. T. 760;

49 J. P. 132—Per Brett, M.R. S. P. Reg. v. *Tonbridge Overseers*, per Brett, M.R., *infra*.

Powers given to Local Authority.—If there are two possible constructions, we ought, I think, to adopt that construction which is based on the theory that the legislature only gave such powers as were necessary to enable the local authority to carry out the objects of the statute, and that we ought not to presume that the legislature intended to confer upon the local authority any larger powers than were necessary. *Wandsworth Board of Works v. United Telephone Company*, 13 Q. B. D. 904; 53 L. J., Q. B. 457; 51 L. T. 148; 32 W. R. 776; 48 J. P. 676—Per Bowen, L.J.

Contradicting other Statutes.—If it is found that reading enactments in their ordinary sense, they would contradict some other enactments, but that reading them in a sense in which, though not their ordinary sense, they were reasonably capable of being read, they would not contradict such other enactments, then I agree that they should be read so that all the enactments must be read together without contradicting each other. *Reg. v. Tonbridge Overseers*, 13 Q. B. D. 342; 53 L. J., Q. B. 489; 51 L. T. 199; 33 W. R. 24; 48 J. P. 740—Per Brett, M.R.

Argument of Inconvenience.—With regard to inconvenience, I think that it is a most dangerous doctrine. I agree if the inconvenience is not only great, but what I may call an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if you read it in a manner in which it is capable of being read, though not its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning. *Id.*

Wresting Words when superfluous.—Nothing can be more mischievous than the attempt to wrest words from their proper and legal meaning, only because they are superfluous. *Hough v. Windus*, 12 Q. B. D. 229; 53 L. J., Q. B. 165; 50 L. T. 312; 32 W. R. 452; 1 M. B. R. 1—Per Selborne, L.C.

Policy of a Statute.—It is never very safe ground in the construction of a statute, to give weight to views of its policy, which are themselves open to doubt and controversy. *Municipal Building Society v. Kent*, 9 App. Cas. 273; 53 L. J., Q. B. 290; 51 L. T. 6; 32 W. R. 681—Per Selborne, L.C.

Interference with Common Law Rights.—The fact that statutes interfere with a plaintiff's common law rights is no reason why they should be construed differently from any other Acts of Parliament. *The Warwick*, 9 P. D. 21; 53 L. J., P. 4; 49 L. T. 715; 32 W. R. 479; 5 Asp. M. C. 194—Per Butt, J.

Injuring Persons without Compensation.—It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it. *Attorney-General v. Horner*, 14 Q. B. D. 257; 54 L. J.,

Q. B. 232; 33 W. R. 93; 49 J. P. 326—Per Brett, M.R.

Applicable to particular Trade.]—An Act of Parliament which is made applicable to a large trade or business should be construed, if possible, not according to the strictest and nicest interpretation of language, but according to a reasonable and business interpretation of it with regard to the trade or business with which it is dealing. It seems to me impossible reasonably to hold that those who have to regulate a large trade or business should be supposed to have made an enactment which would prevent that trade or business from being carried on, unless you are forced to come to such a conclusion by the language. *The Dunelm*, 9 P. D. 171; 53 L. J., P. 81; 51 L. T. 214; 32 W. R. 970; 5 Asp. M. C. 304—Per Brett, M.R.

Act divided into Parts with Headings.]—Remarks as to the effect upon interpretation of dividing an Act of Parliament into parts with appropriate headings. *Union Steamship Company of New Zealand v. Melbourne Harbour Trust*, 9 App. Cas. 365; 53 L. J., P. C. 59; 50 L. T. 337—P. C.

Several Words followed by general Expression.]—I think that, as a matter of ordinary construction, where several words are followed by a general expression which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all. *Great Western Railway v. Swindon and Cheltenham Railway*, 9 App. Cas. 787; 53 L. J., Ch. 1075; 51 L. T. 798; 32 W. R. 957—Per Bramwell, Lord.

Creating a Casus omissus.]—We ought not to create a casus omissus by interpretation save in some case of strong necessity. *Mersey Docks v. Henderson*, 13 App. Cas. 607; 58 L. J., Q. B. 152; 59 L. T. 697; 37 W. R. 449—Per Lord Fitzgerald.

Words in Later Act following those in Former Act.]—Where cases have been decided in courts of justice on particular forms of words, and acts of Parliament use those forms of words which have received judicial construction, in the absence of anything in the acts showing that the legislature did not mean to use the words in the sense attributed to them by the courts, the presumption is that parliament did so use them. *Barlow v. Teal*, 15 Q. B. D. 403; 54 L. J., Q. B. 400; 53 L. T. 52—Per Coleridge, C.J.

Impairing Obligation of Person's Contract.]—It is a principle of law, to avoid, if possible, a construction of a statute which would enable a person to defeat or impair the obligation of his own contract by his own act. *Gowan v. Wright*, 18 Q. B. D. 201; 56 L. J., Q. B. 131; 35 W. R. 297—C. A.

Effect of Usage and Practice.]—Neither usage nor long-continued practice can have any effect upon acts of parliament relating to tolls. *Northam Bridge Company v. Reg.*, 55 L. T. 759—Chitty, J.

Parol Evidence to Explain.]—Upon the trial of an information at the suit of the attorney-

general against a member of the House of Commons for voting without having taken the oath of allegiance within the meaning of the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Acts, 1868, evidence of the practice observed in the House of Commons as to taking the oath of allegiance is admissible for the purpose of explaining the construction of those statutes. *Attorney-General v. Bradlaugh*, 14 Q. B. D. 667; 54 L. J., Q. B. 205; 52 L. T. 589; 33 W. R. 673—C. A.

2. AVOIDANCE OF TRANSACTIONS.

Purpose of Act must be considered.]—Clauses in statutes avoiding transactions or instruments are to be interpreted with reference to the purpose for which they are inserted, and, when open to question, are to receive a wide or a limited construction according as the one or the other will best effectuate the purpose of the statute. *Byrne, Ex parte, Burdett, In re*, 20 Q. B. D. 314; 57 L. J., Q. B. 263; 58 L. T. 708; 36 W. R. 345; 5 M. B. R. 32—C. A.

Act passed subsequently.]—A building agreement provided that A. should build houses on land within a specified time, and that on their completion B. would grant to A. leases of them. A. agreed to pay a specified rent to B. from the date of the agreement to the expiration of the leases. The houses were not built by the specified time, and before they were built, an act of parliament rendered their erection illegal:—Held, that A. was not relieved from his liability to pay the rent under the agreement. *Gibbons v. Chambers*, 1 C. & E. 577—Day, J.

Contracts rendered illegal.]—See CONTRACT, III. 3.

3. NUISANCE AUTHORISED.

In what Cases.]—A railway company were by their act authorised, among other things to carry cattle, and also to purchase by agreement (in addition to the lands which they were empowered to purchase compulsorily) any lands not exceeding in the whole fifty acres, in such places as should be deemed eligible for the purpose of providing additional stations, yards, and other conveniences for receiving, loading, or keeping any cattle, goods, or things conveyed or intended to be conveyed by the railway, or for making convenient roads or ways thereto, or for any other purposes connected with the undertaking which the company should judge requisite. The company were also empowered to sell such additional lands and to purchase in lieu thereof other lands which they should deem more eligible for the aforesaid purposes, and so on from time to time. The act contained no provision for compensation in respect of lands so purchased by agreement. Under this power the company, some years after the expiration of the compulsory powers, bought land adjoining one of their stations and used it as a yard or dock for their cattle traffic. To the occupiers of houses near the station the noise of the cattle and drovers was a nuisance which, but for the act, would have been actionable. There was no negligence in the mode in which the company conducted the business:—Held, that the pur-

pose for which the land was acquired being expressly authorised by the act, and being incidental and necessary to the authorised use of the railway for the cattle traffic, the company were authorised to do what they did, and were not bound to choose a site more convenient to other persons; and that the adjoining occupiers were not entitled to an injunction to restrain the company, *Metropolitan Asylum District v. Hill* (6 App. Cas. 193) distinguished. *London, Brighton, and South Coast Railway v. Truman*, 11 App. Cas. 45; 55 L. J., Ch. 354; 54 L. T. 250; 34 W. R. 657; 50 J. P. 388—H. L. (E.)

— Statutory Power to create Nuisance.]—

The town of H. having been drained for a long time into a river, the company obtained a local act to make a sewer and intercept the sewage and purify it and then discharge the effluent water into the river; all inhabitants of H. being at the same time prohibited from draining direct into the river. The act provided that the N. company should not discharge sewage water into the river until after being purified by the best known process:—Held, that the statutory provisions superseded all common law rights, that the N. company were entitled to discharge the effluent water after being purified by the best process, and that no action lay against the N. company for polluting the river, though the process was still forbidden. *Lea Conservancy Board v. Hertford (Mayor)*, 48 J. P. 628; 1 C. & E. 299—Williams, J.

4. RETROSPECTIVE EFFECT.

General Rule.]—Prima facie the general rule of construing Acts of Parliament is that they are prospective, and you are not to interfere with rights unless you find express words to that effect. *Allhusen v. Brooking*, 26 Ch. D. 564; 53 L. J., Ch. 520; 51 L. T. 57; 32 W. R. 657—Chitty, J.

When Words not Plain.]—The rule of construction, which is only available when the words of an act of parliament are not plain, is embodied in the well-known maxim “nova constitutio futuris temporibus formam imponere debet non præteritis,” that you ought, except in special cases, to construe the new law so as to interfere as little as possible with vested rights or vested dispositions of property. It seems to me that even if an act is to a certain extent retrospective, and even if construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. *Reid v. Reid*, 31 Ch. D. 102; 55 L. J., Ch. 294; 54 L. T. 100; 34 W. R. 333—Per Bowen, L.J.

When a statute renders necessary to the validity of a transaction a condition with which it is impossible that the parties to the transaction could comply at the time when the statute comes into operation, the statute cannot apply to antecedent transactions, unless the legislature have plainly expressed their intention that it is to apply to them. *Todd, Ex parte, Ashcroft, In re*, infra—Per Fry, L.J.

Statute Repealing former Statute and in part Re-enacting it.]—In determining whether any

provision of an act was intended to be retrospective or not, I think the consequences of holding that it is not retrospective must be looked at, and to my mind it is inconceivable that the legislature, when, in a new act which repeals a former act, they repeat in so many words certain provisions of the repealed act, should have intended that persons who, before the passing of the new act had broken the provisions of the old act, should entirely escape the consequences of their wrongdoing by reason of the repeal of the old act. I think it is a wholesome doctrine to hold that the section is retrospective so far as it is a repetition of the former enactment, but that it is not retrospective so far as it is new. *Todd, Ex parte, Ashcroft, In re*, 19 Q. B. D. 195; 56 L. J., Q. B. 431; 57 L. T. 835; 35 W. R. 676; 4 M. B. R. 209—Per Esler (Lord), M.R.

Dealing with Procedure.]—Where an enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the act. *Singer v. Hasson*, 50 L. T. 326—D.

5. REPEAL WHEN IMPLIED AND OTHERWISE.

Implied Repeal—Special by General Act.]—

Where an act of Parliament dealing in a special way with a particular subject-matter is followed by a general act dealing in a general way with the subject of the previous legislation, general words in the general act are not to be held as repealing the prior special legislation, unless the general act contains some reference to the special legislation, or unless the general act cannot be given effect to without such a repeal. *Smith, In re, Clements v. Ward*, 35 Ch. D. 589; 56 L. J., Ch. 726; 56 L. T. 850; 35 W. R. 514; 51 J. P. 692—Stirling, J.

It does not necessarily follow that a previous special act is to remain standing, notwithstanding the general provisions of a subsequent general act, if it is found on the consideration of the act or acts that such is not the intention of the legislature. *Williams, In re, Jones v. Williams*, 36 Ch. D. 573; 57 L. J., Ch. 264; 57 L. T. 756; 36 W. R. 34—Per North, J.

Where there are general words in a later act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation to be indirectly repealed, altered, or derogated from, merely by force of such general words, without any indication of a particular intention to do so. *Seward v. The Vera Cruz*, 10 App. Cas. 68; 54 L. J., P. 9; 52 L. T. 474; 33 W. R. 477; 5 Asp. M. C. 386—Per Selborne, L. C.

Burden of Proof.]—When a statute is not expressly repealed, the burden is on those who assert that there is an implied repeal to show that the two statutes cannot stand consistently the one with the other. *Lybbe v. Hart*, 29 Ch. D. 15; 52 L. T. 636—Chitty, J.

General Provisions—Land Drainage Charge—Priority.]—The General Land Drainage and Improvement Company's Act, 1849, and the Lands Improvement Company's Act, 1853, each contained a section which provided that,

upon the final order or certificate of the Inclosure Commissioners and the execution of the improvements, the company should have a first charge upon the inheritance of the improved lands in priority over every other then existing or future charge. The company of 1853 having executed improvements of land already subject to a charge in favour of the company of 1849, contended that the latter charge was displaced by theirs :—Held, that the two sections were not irreconcilable, and that the charge which was first in order of time was entitled to priority. *Pollock v. Lands Improvement Company*, 37 Ch. D. 661; 57 L. J., Ch. 853; 58 L. T. 374; 36 W. R. 617—Chitty, J.

Qualified Repealing Section considered.—It has been urged that the power to order service out of the jurisdiction which was conferred by the Acts 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 84, is still subsisting, notwithstanding the repeal of those acts, and no doubt the act 46 & 47 Vict. c. 49, and each of the repealing acts, contains a saving clause, which provides that the repeal is not to affect any jurisdiction established by any enactment repealed by the act. But where, as here, we have a code of rules providing for service out of the jurisdiction, I think it would be wrong to hold that by virtue of this saving clause a further jurisdiction exists under a statute which has been repealed. *Busfield, In re, Whaley v. Busfield*, 32 Ch. D. 123; 55 L. J., Ch. 407; 54 L. T. 220; 34 W. R. 372—Per Cotton, L.J.

I should like to refer to the great difficulty of interpreting what, if any, limitation can be put upon sub-s. (b) of s. 5 of the Statute Law Revision Act, 1883. I have never been able to attach any definite meaning to that section. It is almost wide enough to preserve everything intended to be swept away by the act. Its professed object is to pave the way to a revised edition of the statutes in force, and to eliminate obsolete statutes; yet, by this sub-section, jurisdiction, rights and liabilities are preserved for which reference must be made to numerous old statutes, while by ss. 7 and 8 powers are given and provisions enacted which are expressly stated to be interpreted according to the provisions in the sections of the three Common Law Procedure Acts, 1852, 1854, and 1860; yet these are professed to be specifically repealed in the schedule of the act. *Winfield v. Boothroyd*, 54 L. T. 574; 34 W. R. 501—Per Wills, J.

Amendment Act—Implied Re-enactment.—In 1877 the Metropolitan Street Improvements Act was passed authorising the Metropolitan Board of Works to execute certain street improvements and to take land for that purpose. It incorporated the Lands Clauses Consolidation Acts. Section 33 provided that accommodation should be furnished for such of the labouring classes as would be displaced by the proposed improvements, and authorised the Board of Works to acquire or appropriate certain lands, and sell or let the same for the purpose of providing such accommodation, and imposed certain restrictions on the board. An amending act was passed in 1882, which by s. 2 enacted that the board should, in exercise of the powers by the act of 1877 conferred upon them, appropriate lands, shown on a certain plan, to the erection

of artizans' dwellings in three pieces successively. Section 3 enacted that, in reference to the land shown in the said plan, the act of 1877 should be read as though s. 33 were not contained therein :—Held, that s. 33 of the act of 1877 had not been repealed for all purposes, and that the board had by implication the powers of selling and letting conferred by that section for the purpose of carrying out the buildings referred to in s. 2 of the act of 1882. *Wigram v. Fryer*, 36 Ch. D. 87; 56 L. J., Ch. 1098; 57 L. T. 255; 36 W. R. 100—North, J.

Practice under Repealed Statutes.—On a motion to strike out a plea to a return to a writ of mandamus it was contended that, because the statutes which allowed a plea in any case had been repealed, and because the rules of 1883 did not provide for the case of a plea to a return of the kind, therefore the practice which existed under those statutes was no longer in operation. By Ord. LXVIII. r. 1, and by Ord. LXXII. r. 2, nothing in these rules is to affect the procedure or practice in proceedings on the Crown side of the Queen's Bench Division :—Held, that the practice prevailing at the time the rules came into operation still existed, and therefore the plea which was in accordance with the repealed statutes must stand. *Reg. v. Staffordshire JJ. or Pirehill North JJ.*, 14 Q. B. D. 13; 54 L. J., M. C. 17; 51 L. T. 534; 33 W. R. 205—C. A.

6. PARTICULAR WORDS.

"Or" read as "And."—I know no authority for reading "or" as "and" unless the context makes the necessary meaning of "or" "and" as in some instances it does; but I believe it is wholly unexampled so to read it when doing so will upon one construction entirely alter the meaning of the sentence, unless some other part of the same statute or the clear intention of it requires that to be done. It may indeed be doubted whether some of the cases of turning "or" into "and" and vice versa have not gone to the extreme limit of interpretation. *Mersey Docks v. Henderson*, 13 App. Cas. 603; 58 L. J., Q. B. 152; 59 L. T. 697; 37 W. R. 449—Halsbury, L. C.

When "Person" includes Corporation.—An action against the Melbourne Harbour Trust Commissioners is an action brought against a "person" within the meaning of s. 46 of the Melbourne Harbour Trust Act. *Union Steamship Company of New Zealand v. Melbourne Harbour Trust*, 9 App. Cas. 365; 53 L. J., P. C. 59; 50 L. T. 337—P. C.

A corporation, such as a board of guardians, is included in the word "person," so as to be within the protection of the Sale of Food and Drugs Act, 1875. *Enniskillen Guardians v. Hilliard*, 14 L. R., Ir. 214—Ex. D.

II. WAIVER OF STATUTORY RIGHTS.

By Person benefited.—A statute, or charter having the force of a statute, may be waived by the party for whose benefit it was enacted, so as to render the acts of persons disregarding it legal.

Goldsmid v. Great Eastern Railway, 25 Ch. D. 511; 53 L. J., Ch. 371; 49 L. T. 717; 32 W. R. 341—C. A.

An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it. As to the result of past breaches of the obligation people may come to what agreement they like; but as to future breaches of it, there ought to be no encouragement given to the making of an agreement between A. and B. that B. shall be at liberty to break the law which has been passed for the protection of A. *Baddeley v. Granville (Earl)*, 19 Q. B. D. 426; 56 L. J., Q. B. 501; 57 L. T. 268; 36 W. R. 63; 51 J. P. 822—Per Wills, J.

III. REMEDIES FOR BREACH.

General Rules.—There are three classes of cases in which a liability may be established by statute:—(1) Where a liability existed at common law and was only re-enacted by the statute with a special form of remedy, in such cases the plaintiff had his election unless the statute contained words necessarily excluding the common law remedy; (2) where a statute has created a liability but given no remedy, then the party may adopt an action of debt or other remedy at common law to enforce it; (3) where the statute creates a liability not existing at common law and gives a particular remedy, here the party must adopt the form of remedy given by the statute. *Vallance v. Falle*, 13 Q. B. D. 109; 53 L. J., Q. B. 459; 51 L. T. 158; 32 W. R. 770; 48 J. P. 519; 5 Asp. M. C. 280—Per Mathew, J.

Provision for special Benefit of Individual.—Where an act of parliament contains a provision for the special protection or benefit of an individual he may enforce his rights thereunder by an action without either joining the attorney-general as a party or showing that he has sustained any particular damage. *Devenport (Mayor) v. Plymouth Tramways Company*, 52 L. T. 161; 49 J. P. 405—C. A.

Special Remedy excluding Ordinary Remedy.—A private act enacted that in all cases of encroachments of buildings on the streets of P. by projections on the true lines thereof, it should be competent for the corporate council to have the same dealt with and adjudicated upon, on due notice of any such intention given to the owner thereof. The act created a board of assessors with power to award compensation to owners of property:—Held, that the private act ousted the jurisdiction of the courts, and that it was incumbent upon the corporation to proceed under it for the removal of an encroachment on the street. *Pietermaritzburg (Mayor) v. Natal Land Company*, 13 App. Cas. 478; 57 L. J., P. C. 82; 58 L. T. 895—P. C.

Where a special remedy is given for the failure to comply with the directions of a statute, that remedy must be followed, and no other can be supposed to exist. *Bailey v. Bailey*, 13 Q. B. D. 859; 53 L. J., Q. B. 583—Per Brett, M. R.

Abolition of superior of two Remedies.—Where there are two remedies for the non-

observance of a right, and the superior remedy is abolished by act of parliament, the necessary result is that the inferior remedy is brought into exercise. *Christie v. Barker*, 53 L. J., Q. B. 541—Per Brett, M. R.

STAYING PROCEEDINGS.

See PRACTICE.

STEALING.

See CRIMINAL LAW.

STOCK.

See COMPANY.

STOCK EXCHANGE.

Deposit of Bonds—Loan to Depositor.—A stockbroker, member of the London Stock Exchange, deposited bonds as a security for a loan with a stock and share dealer, a member of the London Stock Exchange. On the day on which such a loan is repayable, the practice is for the lender to send back the securities to the borrower in the morning, and for the borrower later in the day to send a good cheque to the lender for the amount of the loan, or else to return the securities or other securities of equal value. The lender sent back the securities to the borrower on the morning on which the loan was payable:—Held, that this did not affect the lender's right to the securities if the borrower did not give him a good cheque for the loan, or send him other securities of a value equal to that of the securities sent back. *Burra v. Ricardo*, 1 C. & E. 478—Mathew, J.

Sale of Shares—Custom—Common Broker—Payment.—The defendants C. and B., and the plaintiffs, D. M., H. M., K. and T., had for some time been in the habit, respectively, of employing W. as their stockbroker. C. and B. instructed W. to sell for them some shares in the A. Co. and D. M., and H. M., K. and T., respectively instructed him to buy some shares in the same company. On the 6th December, 1881, W. sent to D. M. and H. M. a bought note for thirty shares, at a certain price, and to K. and T. bought notes for five shares each, and he sent to C. and B. a sold note for forty shares. On the same day W. debited the accounts of D. M. and H. M., K. and T. with thirty shares, five shares, and five shares, respectively, and

credited the account of C. and B. with 2,283*l.* 10*s.* 6*d.*, the price at which they were sold. Immediately prior to this transaction W., upon his account with C. and B., was indebted to them in a sum of 200*l.* None of these parties were aware of the fact that W. was acting as common broker for the buyers and the sellers. On the 15th December, D. M. and H. M. sent W. a cheque for the amount of the price of the thirty shares. T. had sufficient money in W.'s hands to pay the entire price of the shares sold to him, and K. sufficient to pay part, and W. appropriated this money to that purpose, and K. sent W. a cheque for the balance due by him. The cheques were paid by W. into his own bank. On the 22nd December, W. sent to D. M. and H. M. a transfer for fifteen shares, which were executed and returned. Transfers of the remaining shares never were executed, nor the money paid by W. to C. and B., and on the 27th January, 1882, W. was adjudicated a bankrupt, D. M. and H. M., K. and T., having brought an action against C. and B. for specific performance of the contracts contained in the bought and sold notes:—Held, that the payment of the purchase-money by D. M., H. M., K. and T. to W. did not amount to payment to C. and B., and that the contract contained in the bought and sold notes could not be specifically performed, unless upon the terms of the payment to C. and B. of the purchase-money. *McDevitt v. Connolly*, 15 L. R., Ir. 500—C. A.

Sale of Bonds—Carrying over—Continuation.]

—Where bonds are sold and not paid for, but the purchaser's broker is instructed by him to carry them over, and the holders of the bonds at his request "continue" them, the transaction is not a loan, but a sale and repurchase. "To continue" is a technical term, which means to sell and to rebuy the same amount of stock at a future day at the same price, a further sum being paid for the accommodation. *Bongiovanni v. Société Générale*, 54 L. T. 320—C. A.

Broker's Right of Indemnity by Principal.]—

See cases, ante, cols. 1522 et seq.

Custom as to Liability of Broker where Principal not disclosed.]—*See Wildy v. Stephenson*, ante, col. 1521.

Liability of Trustee for Fraud of Broker.]—

See Speight v. Gaunt, post, TRUST AND TRUSTEE.

STOPPAGE IN TRANSITU.

See SALE, I. 5.

STRAITS SETTLEMENTS.

See COLONY.

STREET.

See HEALTH—METROPOLIS—WAY.

SUCCESSION DUTY.

See REVENUE.

SUMMARY JURISDICTION.

See JUSTICE OF THE PEACE.

SUMMONS.

Debtor's Summons.]—*See BANKRUPTCY.*

Writ of.]—*See PRACTICE.*

SUNDAY.

See TIME.

SUPERFLUOUS LAND.

See LANDS CLAUSES ACT.

SUPPORT.

See EASEMENT.

SURETY.

See PRINCIPAL AND SURETY.

SURGEON.

See MEDICINE.

SURRENDER.

See LANDLORD AND TENANT, V.

SURVEYOR.

See ARCHITECT.

TAXATION OF COSTS.

Between Party and Party.—*See* COSTS.

Between Solicitor and Client.—*See* SOLICITOR.

Of Election Petitions.—*See* ELECTION LAW.

TAXES.

See REVENUE.

TELEGRAPHS AND TELEPHONES.

Telegraph — Compensation for Monopoly — Award of Lump Sum—Further Claim—Arbitration Clauses.—By the Telegraph Act, 1868, s. 9, sub-s. 6, the Postmaster-General shall pay railway companies by way of compensation (clause D.) such sums as shall be settled by arbitration in respect of the loss by such railway company of the privilege of granting other way-leaves and making future arrangements with telegraph or other companies, and in respect of granting a monopoly to the Postmaster-General for the conveyance of telegraphs over their railways. By clause H. of the same sub-section, on acquisition of the telegraphs, the Postmaster-General shall have a perpetual right of way for his poles and wires over the whole of the railway company's system, and in consideration thereof he shall pay to the railway company such sum per mile per wire over the whole of the said system by way of yearly rent as shall be fixed by arbitration. The arbitrator in determining the amounts to be paid to the railway company under this act, shall have regard to the agreements which subsist between the railway company and any telegraph company, and also to a compulsory sale being required from the railway company; and in estimating the amount to be paid under any one part of this section shall have regard to the advantages to be obtained and the disadvantages to be sustained by the railway company under any other part of this section. By sub-s. 8 of the same section, power is reserved to the railway company to erect and work private telegraphs for annual rent or payment for way-leave from traders. An arbitrator had awarded a

certain lump sum to the defendants as and by way of compensation in pursuance of the provisions of sub-s. 6 of s. 9 of this act, but had made no allusion in his award to any yearly rent under clause H. of that sub-section:—Held, that the defendants were precluded from any further compensation for extra poles or wires which the Postmaster-General might in future require to be erected upon their railway system. *Reg. v. Metropolitan Railway*, 50 L. T. 6—C. A.

Telegraph Wires — Overhead and Under-ground.—A local board, on being applied to by the Postmaster-General under s. 3 of the Telegraph Act, 1878, for their consent to the placing of telegraphs and posts upon, along and over streets and roads in their district, refused their consent, except on condition that the wires across or along streets or roads should be underground. This difference, after having been referred to a metropolitan police magistrate, was, in accordance with s. 4 of the Telegraph Act, 1878, brought before the Railway Commissioners. The Commissioners decided that overhead wires should be allowed, subject to the following conditions:—1. That all wires shall be of copper. 2. That all poles shall be of iron. 3. That no wire shall be placed over, along, or across any road or footway at a less height than thirty feet above such road or footway. 4. That where a wire crosses over any public road or street the distance between the points of support at either side of such road or street shall not in any case exceed 100 yards. *Wandsworth District Local Board v. Postmaster-General*, 4 Nev. & Mac. 301—Comms.

Overhead Wires—Metropolis—Injunction.—By the Metropolis Management Act, 1855, s. 96, "all streets, being highways, shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate." Defendants, a telephone company, fixed a telephone wire to a chimney, and stretched it across a street, which was vested in plaintiffs as the district board, at a height of about thirty feet from the ground. Plaintiffs brought an action for an injunction to restrain defendants from keeping up the wire:—Held, that what was vested in plaintiffs was the property in the surface of the ground, together with as much space, both above and below the surface, as amounted to the area of ordinary user; and that as the wire in question was above this area, and was not shown to be dangerous, so as to amount to a nuisance, plaintiffs were not entitled to an injunction:—Held, also, that defendants did not require plaintiffs' consent under 26 & 27 Vict. c. 112, s. 12, to entitle them to place the wire across the street. *Wandsworth Board of Works v. United Telephone Company*, 13 Q. B. D. 904; 53 L. J., Q. B. 449; 51 L. T. 148; 32 W. R. 776; 48 J. P. 676—C. A.

Telegrams—Increased Charge—Authority of Clerk.—Where a certain sum is charged for a telegram and the sender is afterwards called upon to pay an increased sum:—Held, that he is bound to pay the amount so claimed, as the Postmaster-General is in no way estopped from suing, and is not bound by inaccurate representations made by a clerk in his employ. *Postmaster-General v. Green*, 51 J. P. 582—D.

— **Contract by—Where made.**—The plaintiff telegraphed from Regent Street to the defendant at Ludgate Hill directing him to make bets, on his behalf, on certain horses. The defendant replied by telegram, "You are on." Upon the plaintiff suing the defendant, as his agent, in the Mayor's Court for 35*l.* received to his use, the defendant applied for a writ of prohibition:—Held, that the application must be refused, since the whole cause of action arose within the city—the telegraph office being merely the medium through which the parties were brought into communication—and they were accordingly in the same position as if they had met together in the city and made a contract. *Cowan v. O'Connor*, 20 Q. B. D. 640; 57 L. J., Q. B. 401; 58 L. T. 857; 36 W. R. 895—D.

Rating Wires, etc.—*See* POOR LAW.

TENANT.

1. *Tenant for Life and Remainderman*, 1817.
2. *Tenants for Life*, 1819.
3. *Joint Tenancy*, 1820.
4. *Tenants in Common*, 1821.
5. *Tenants in Tail*, 1821.
6. *Landlord and Tenant*—*See* LANDLORD AND TENANT.

1. TENANT FOR LIFE AND REMAINDERMAN.

Unauthorised Security—Enjoyment by Tenant for Life in Specie—Power to Trustees to retain existing Securities.—A testator empowered his trustees at their discretion to continue all or any part of his personal estate in the state or investment in or upon which the same should be at his death, or otherwise to convert the same and to invest the proceeds in the names of the trustees in certain specified securities. At the death of the testator part of his personal estate consisted of securities not of a wasting nature and not specifically authorised. In an action for the administration of the estate the chief clerk found that some of these securities were proper to be continued, and that others were proper to be called in:—Held, that the tenants for life under the will were entitled to receive in specie the income of those unauthorised securities which were retained, and which were not of a wasting nature. *Sheldon, In re, Nixon v. Sheldon*, 39 Ch. D. 50; 58 L. J., Ch. 25; 59 L. T. 133; 37 W. R. 26—North, J.

Putting Leaseholds into Repair.—A testator bequeathed certain leaseholds to trustees upon trust for his widow for life, and after her death upon trust to sell and to divide the proceeds as therein mentioned. And the testator authorised his trustees, "providing they should deem it advisable," to sell any portion of his short leasehold messuages. At the time of the death of the testator these leaseholds were in a very bad state of repair, and the tenant for life only did sufficient repairs to keep them in a like state:—Held, that the tenant for life was under no legal obligation to put the leaseholds in such a state

of repair as to satisfy the covenants in the leases. *Courtier, In re, Coles v. Courtier*, 34 Ch. D. 136; 56 L. J., Ch. 350; 55 L. T. 574; 35 W. R. 85; 51 J. P. 117—C. A.

Permissive Waste—Gift subject to keeping Property in "good and tenantable Repair."—A testator devised to his wife for life two freehold houses with the buildings, land, and appurtenances thereto belonging, "she keeping the same in good and tenantable repair." The testator directed the property to be sold by his trustees after the death of his wife, the proceeds to be held upon the trusts mentioned in his will. After the death of the testator his widow entered into possession of the property and continued therein until the date of her own death. It was then discovered that the property was in a dilapidated condition, and particularly the out-buildings adjoining one of the houses, consisting of greenhouses and conservatories formerly used in the business of a fruit-grower, in whose possession such house was before the testator purchased it. An originating summons was accordingly taken out by the trustees of the will, asking that what sum the representative of the testator's widow was liable to pay by reason of the property not having been kept by her in good and tenantable repair might be determined. Evidence was adduced to show that the greenhouses were wholly neglected and in complete disrepair at the time the testator purchased; that he never intended to put the same into repair, but had thought of having them pulled down. It was therefore contended that the estate of the testator's widow was not liable in respect of the repairs required to such greenhouses:—Held, that the fact that the testator did not himself keep the greenhouses in good and tenantable repair could not be regarded as an excuse for his widow not doing so, having regard to the express direction contained in the will; and that, therefore, her estate was liable for the amount of the repairs required. *Bradbrook, In re, Lock v. Willis*, 56 L. T. 106—Kay, J.

"Ordinary Outgoings"—Drainage Expenses.—A testator gave freehold and leasehold houses, bonds and consols on trust to pay the income after deducting ordinary outgoings to his widow for life:—Held, that the tenant for life must bear the cost of drainage work required to be done to one of the leasehold houses by the vestry under the Metropolitan Local Management Act, 1855, s. 73. *Crawley, In re, Acton v. Crawley*, 28 Ch. D. 431; 54 L. J., Ch. 652; 52 L. T. 460; 33 W. R. 611; 49 J. P. 598—Pearson, J.

Profits of Business—Power to postpone Sale.—*See Chancellor, In re, ante, col. 776.*

Mortgage—Arrears—Deficient Security.—*See Moore, In re, ante, col. 795.*

Capitalization of Annuity.—*See Muffett, In re, ante, col. 795.*

Issue of New Stock—Profit arising from.—*See Bromley, In re, Sanders v. Bromley, ante, col. 398.*

Compensation for Damage to Mines.—*See Barrington, In re, ante, col. 1228.*

Bonus Dividend—Capital or Income.]—See *Bouch v. Sproule*, ante, col. 399.

Mining Fixtures.]—See *Ward v. Dudley (Countess)*, ante, col. 1228.

Contingent Reversionary Interest—Apportionment—Capital and Income.]—A testator by his will bequeathed his residuary personal estate upon trust, after payment of debts and legacies, to lay out and invest the residue as therein mentioned, and to pay the income to the plaintiff for life, with remainders over. Part of the residuary estate consisted of a contingent reversionary interest in some settled funds. The testator died in 1832, and the reversion first became saleable in 1846, but it had never been sold. Since 1846 the reversion had enormously increased in value. Upon an application in effect to have the value of the reversion apportioned as between tenant for life and remainderman:—Held, that the principle of *Chesterfield's Trusts, In re* (24 Ch. D. 643), applied, and that assuming the reversion to have been sold at an agreed price, it must be ascertained what principal sum would, with compound interest from the date of the testator's death, make up the agreed price, and such principal sum alone must be attributed to corpus, and the whole of the rest to income. *Hobson, In re, Walker v. Appach*, 55 L. J., Ch. 422; 53 L. T. 627; 34 W. R. 70—Kay, J.

Trust for Conversion—Power to postpone—Apportionment.]—Where a testator has bequeathed his residuary personal estate to trustees upon trust for conversion, with power to postpone such conversion at their discretion, and to hold the proceeds upon trust for a person for life with remainders over, and such residue includes outstanding personal estate, the conversion of which the trustees, in the exercise of their discretion, postpone for the benefit of the estate, and which eventually falls in some years after the testator's death—as, for instance, a mortgage debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a life policy—such outstanding personal estate should, on falling in, be apportioned as between capital and income, by ascertaining the sum which, put out at interest at 4 per cent. per annum, on the day of the testator's death, and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received; and the sum so ascertained should be treated as capital, and the residue as income. *Chesterfield's (Earl) Trusts, In re*, 24 Ch. D. 643; 52 L. J., Ch. 958; 49 L. T. 261; 32 W. R. 361—Chitty, J. S. P., *Beavan v. Beavan*, 24 Ch. D. 649, n.; 52 L. J., Ch. 961, n.; 49 L. T. 263, n.; 32 W. R. 363, n.—Romilly, M. R.

2. TENANTS FOR LIFE.

Creation of Estate by Will.]—See WILL (INTEREST PASSING).

Powers under Settled Land Act.]—See SETTLEMENT.

Heirlooms—Security—Inventory.]—A tenant for life of heirlooms will not be required to give

security for the heirlooms but only to sign an inventory, unless there is reason to suppose that the heirlooms will be in danger in his possession. *Temple v. Thring*, 56 L. J., Ch. 767—North, J.

Reversion—Purchase of.]—Renewable leaseholds were devised to A. for so much of the term as he should live, and after his decease during the continuance of the term to the children of A., share and share alike, as tenants in common. The lease was renewed twice by A., who then purchased the reversion:—Held, that the doctrine that a tenant for life can only renew a leasehold for the benefit of the remainderman applied where he had purchased the reversion, and that the children of A. became possessed of the fee-simple in the property subject to the trusts of the will. *Phillips v. Phillips*, 29 Ch. D. 673; 54 L. J., Ch. 943; 53 L. T. 403; 33 W. R. 863—C. A.

Tenant in Tail restraining Tenant for Life from cutting Timber.]—See TIMBER.

Whether entitled to Proceeds of Windfalls.]—See TIMBER.

Production of Cestui que vie.]—Under the statute 6 Anne, c. 18, the court has power to make an order for the production of a cestui que vie as well upon a person having an interest determinable on a life, as on a person having an estate pur autre vie strictly so called. *Stevens, In re*, 31 Ch. D. 320; 55 L. J., Ch. 433; 54 L. T. 80; 34 W. R. 268—Chitty, J.

3. JOINT TENANCY.

Severance by Infant's Settlement.]—A marriage settlement contained a proviso for the settlement of the present and after-acquired property of the intended wife, who was an infant. She was then entitled in remainder jointly with two others to a share in Bank annuities standing in the names of trustees:—Held, that the joint tenancy was severed. *Burnaby v. Equitable Reversionary Interest Society*, 28 Ch. D. 416; 54 L. J., Ch. 466; 52 L. T. 350; 33 W. R. 639—Pearson, J.

Chose in Action—Severance by Marriage.]—Marriage will only operate as a severance of a wife's joint tenancy when it would by itself, without the necessity of any act of the husband, have the effect of divesting the wife's property out of her and vesting it in her husband. Consequently, it is no severance of her joint tenancy in a chose in action, whether it be in possession or reversion. *Baillie v. Treharne* (17 Ch. D. 388) disapproved. *Butler, In re, Hughes v. Anderson*, 38 Ch. D. 286; 57 L. J., Ch. 643; 59 L. T. 386; 36 W. R. 817—C. A.

Joint Tenancy or Tenancy in Common.]—By a settlement, dated in 1856, real estate was settled to the use of trustees during the life of A. upon certain trusts, and after his death to the use of B. for life, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons successively in tail male, and on default of such issue to the use of the "right heirs" of C. for ever. C. had no estate of his own in the property. He died in 1854. His "right heirs" at the time of his death were three

sisters and five daughters of a deceased sister. The preceding limitations all failed. The present survivors of the "right heirs" were four of the five daughters of the deceased sister. The question was whether the heirs took as personæ designatæ or as coparceners. On the one hand it was contended that the persons who were the "right heirs" took as joint tenants so that the estate was now vested in the survivors; on the other hand, that the "right heirs" took as tenants in common, and that consequently their shares passed by descent or devise to the several parties claiming under them:—Held, that the persons who were the "right heirs" of C. at his death took as personæ designatæ, and as joint tenants, and not as coparceners with descent from them as such; so that on the death of one of them the share did not pass by her will or descend to her heirs, but survived to the others; and, therefore, that the estate was now vested in the four surviving daughters of the deceased sister. *Berens v. Fellowes*, 56 L. T. 391; 35 W. R. 356—Kay, J.

—**Mortgage in joint Names of several Persons.**—Mortgages in fee were taken in the name of three sisters as joint tenants, each of the deeds containing a clause by which it was declared that the mortgage money belonged to the mortgagees on a joint account in equity as well as at law. The money advanced on the security of the mortgages formed part of the proceeds of the estate of a brother, to which the three sisters were, under his will, entitled as tenants in common. Having regard to this fact and the other facts in evidence:—Held, that notwithstanding the insertion of the joint account clause the mortgagees were entitled to the mortgage money as tenants in common. *Jackson, In re, Smith v. Sibthorpe*, 34 Ch. D. 732; 56 L. J., Ch. 593; 56 L. T. 562; 35 W. R. 646—North, J.

4. TENANCY IN COMMON.

House—Repairs—Contribution.—One tenant in common of a house who expends money on ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution. *Leigh v. Dickeson*, 15 Q. B. D. 60; 54 L. J., Q. B. 18; 52 L. T. 790; 33 W. R. 538—C. A.

Action for Use and Occupation.—Where one tenant in common has by lease demised his interest to his co-tenant in common, if the tenant in common who was lessee continues in occupation as tenant at sufferance after the expiration of the lease, he will be liable in an action for use and occupation at the suit of his co-tenant in common who was lessor. *Ib.*

Bailiff in Possession—Accounts.—*See Hobbs, In re*, ante, col. 971.

Joint Tenancy or Tenancy in Common.—*See supra.*

5. TENANTS IN TAIL.

Sale by—Further Assurance—Base Fee—Future Estate.—On a sale by a tenant in tail in remainder who had disentailed without the

concurrence of the tenant for life, the tenant in tail covenanted that he would execute every disentailing and other assurance for further or more perfectly assuring the premises as the purchaser should reasonably require:—Held, on the construction of the whole deed, that under this covenant the tenant in tail was bound to execute a disentailing deed after the death of the tenant for life. *Davis v. Tollemache* (2 Jur., N. S. 1181) observed upon. *Banhes v. Small*, 36 Ch. D. 716; 56 L. J., Ch. 832; 57 L. T. 292; 35 W. R. 765—C. A.

Disentailing Assurance—Copyholds—Post-Nuptial Settlement.—A feme covert entitled to an equitable estate tail in copyholds at B. executed in February, 1870, a deed declaring that such copyholds should be held in trust for such persons as she and her husband should jointly appoint, and default for herself in fee. The deed was duly acknowledged, but was not entered upon the court rolls of the manor within six months after execution. By a deed of settlement dated in March, 1870, she and her husband purporting to exercise this joint power, appointed the copyholds at B., and also covenanted to surrender those and other copyholds to which she was entitled in fee, to trustees upon trust to sell, invest the proceeds, and hold the fund (in the events which happened) for her for her separate use for life, then for her husband for life, and then for her children other than her eldest son. No sale or surrender of any of the copyholds was ever made. The feme covert had several children, and after the deaths of her and her husband the trustee of the settlement petitioned that all the copyholds might vest in him for all the estate therein of the eldest son and customary heir, who was an infant; and the court made a vesting order according to the prayer of the petition:—Held, first, that the deed of February, 1870, being a mere declaration of trust by the tenant in tail, and not a "disposition" within the Fines and Recoveries Act, was inoperative as an assurance to bar the estate tail in the copyholds at B. Secondly, that in concurrence with *Honywood v. Foster* (30 Beav. 1) and *Gibbons v. Snape* (1 De G. J. & S. 621), and upon the construction of the statute, that, taking s. 41, together with ss. 50 and 53 of the Fines and Recoveries Act, a disentailing assurance by an equitable tenant in tail of copyholds, which is not entered upon the court rolls of the manor within six months after execution, is void; and consequently that the power of appointment which the deed of February, 1870, purported to create could not be exercised. Thirdly, that the settlement of March, 1870, was not a disposition by the feme covert within the Act, and could not be treated either as an assignment of her equitable interest in the copyholds or as a valid declaration of trust, or as anything more than a mere covenant to surrender. Fourthly, that the petition for a vesting order must be treated as an action by the persons interested under the settlement to enforce the covenant therein contained for the surrender and settlement of the copyholds, and that although the interchange of estates between the husband and wife imported a valuable consideration as between them, the settlement being post-nuptial, was voluntary as regarded the children of the marriage, who were strangers to the contract, and consequently that the court would not interfere in their favour,

and the order appealed from must be discharged. *Green v. Paterson*, 32 Ch. D. 95; 56 L. J., Ch. 181; 54 L. T. 738; 34 W. R. 724—C. A.

— **Specific Performance of Contract to Execute.**—*See Bankes v. Small*, ante, col. 1797.

— **By Infant Female—Omitting Property—Mistake.**—*See Mills v. Fox*, ante, col. 969.

TENDER.

Defence—Action for unliquidated Damages.—A defence of tender of the sum paid into court cannot be pleaded to a claim for unliquidated damages. *Davys v. Richardson*, 21 Q. B. D. 202; 57 L. J., Q. B. 409; 59 L. T. 765; 36 W. R. 728—C. A.

Payment into Court with Plea.—*See Davys v. Richardson*, ante, col. 1427.

THAMES.

Watermen.—*See SHIPPING*, II.

Collisions in.—*See SHIPPING*, XII, 2, f.

THEATRE.

Having or keeping a House for the Public Performance of Stage Plays.—The appellant was the owner and occupier of a building which he gratuitously allowed to be used on a few occasions for the performance of stage plays, to which the public were admitted on payment, for the benefit of a charity. The appellant had no licence for the performance of stage plays in such building:—Held, that he was rightly convicted, of having or keeping a house for the public performance of stage plays without a licence, under 6 & 7 Vict. c. 68, s. 2. *Shelley v. Bethell*, 12 Q. B. D. 11; 53 L. J., M. C. 16; 49 L. T. 779; 32 W. R. 276; 48 J. P. 244—D.

THIRD PARTY.

See PRACTICE.

TIMBER.

Windfalls—Real and Personal Estate—Tenant for Life.—A testator devised estates upon which there were plantations of larch trees. At the

time of his death a great number of the larch trees had been more or less blown down by extraordinary gales. It was held by Pearson, J., that as between the devisees and the executors of the testator the trees which had been blown down to such an extent that they could not grow as trees usually grow, were severed and belonged to the executors, and that the trees which were merely lifted but would have to be cut for the proper cultivation of the plantations belonged to the devisees:—Held, that having regard to the maxim “quicquid plantatur solo, solo cedit,” the principle applicable was that if a tree was attached to the soil it was real estate, and if severed, personalty; that the life and manner of growth of any particular tree was no test of its attachment to the soil, and that the degree of attachment or severance was a question of fact in the case of each particular tree. *Ainslie, In re, Swinburn v. Ainslie*, 30 Ch. D. 485; 55 L. J., Ch. 615; 53 L. T. 645; 33 W. R. 910; 50 J. P. 180—C. A.

— **Capital or Income.**—A large part of the income of a settled estate was derived from the thinnings and cuttings of larch plantations, and, during a tenancy for life, high winds blew down a very large proportion of the larches, and it became necessary for the good cultivation of the estate to remove almost the whole of those which remained. It was estimated that it would take forty years for the plantations to yield the same income as before:—Held, that the tenant for life was not entitled to receive the proceeds of sale either of the trees not blown down but which had to be removed, or of the trees which were actually blown down, but that the whole of the proceeds of sale must be invested as capital. But held, that the tenant for life was entitled to receive out of the income arising from the invested fund and the plantations a fixed annual sum, equal to the average income which would have been derived from the plantations if no gales had occurred—such sum, if necessary, to be made up out of capital; the trustees to be at liberty to have recourse to the investments or the income of the plantations for the purpose of fresh planting. *Harrison, In re, Harrison v. Harrison*, 28 Ch. D. 220; 54 L. J., Ch. 617; 52 L. T. 204; 33 W. R. 240—C. A.

Tenant in Tail restraining Tenant for Life from cutting—Ornamental or sheltering Timber.

—The plaintiff was tenant in tail in remainder, and the defendant tenant pur autre vie of an estate settled in 1855. At the date of the settlement there was no mansion-house on the estate, but one was acquired in 1859 by exchange under a power in the settlement. The defendant felled certain trees in the vicinity of the mansion-house, marked others for cutting, and advertised a sale of timber; the plaintiff applied for an injunction:—Held, that there must be an inquiry in the form adopted in *Marker v. Marker* (9 Hare 1), as to what trees could be cut without impairing the beauty of the place, or the shelter given to the mansion-house, as at the acquisition thereof in 1859; an undertaking by the plaintiff in damages, and an injunction as prayed, but conditional on the plaintiff giving such undertaking. *Ashby v. Hincks*, 58 L. T. 557—Stirling, J.

TIME.

Generally.]—See PRACTICE, ante, col. 1496.

For Appeal.]—See APPEAL.

"Forthwith."]—Where an order for the discharge of a patient has been given under 8 & 9 Vict. c. 100, s. 72, by the person who signed the order for the reception of such patient, the proprietor of the asylum is bound to discharge the patient forthwith, that is, as soon as practically possible under the circumstances. *Low v. Fox*, 15 Q. B. D. 667; 54 L. J., Q. B. 561; 53 L. T. 886; 34 W. R. 144; 50 J. P. 244—C. A. See *Hill, Ex parte*, ante, col. 204.

"Not less than" Fourteen Days.]—An interval of not less than fourteen days which is to elapse between two acts done is an interval of fourteen clear days exclusive of the days on which such acts were to be done. *Railway Sleepers Supply Company, In re*, 29 Ch. D. 204; 54 L. J., Ch. 720; 52 L. T. 731; 33 W. R. 595—Chitty, J.

Calculation of Time for Registration of Bill of Sale—Sundays.]—A bill of sale through inadvertence not being registered within the time limited by the Bills of Sale Act, 1879, leave was given on the ex parte application of the grantee to register within three days, and the bill of sale was registered on the fourth day from the order, reckoning an intervening Sunday:—Held, that Sunday was not to be counted in the three days limited by the order for registration, and that therefore the registration had been effected within the time prescribed by that order. *Parke, In re*, 13 L. R., Ir. 85—Miller, J.

"Within Three Months."]—See *Foster, Ex parte, Hanson, In re*, ante, col. 101.

TITHES.

See ECCLESIASTICAL LAW.

Subject to Annuity—Settled Land Act.]—See *Esdaile, In re*, ante, col. 1635.

TITLE.

Title of Dignity or Honour—Incorporeal Hereditament.]—When a dignity is limited to the heirs of the body, then, although no place be named in the creation of the title, the dignity is within the statute De Donis, and descendible as an estate tail, and the patent does not create a fee simple conditional. There is no difference in these respects between a baronetcy and other descendible dignities. *Rivett-Carnac's Will, In re*, 30 Ch. D. 136; 54 L. J., Ch. 1074; 53 L. T. 81; 33 W. R. 837—Chitty, J.

Right of Entry—"Pretenced" Title to Land—Buying of—Forfeiture—Knowledge of Buyer.]—In an action for a forfeiture under 32 Hen. 8, c. 9, s. 2, against the buyer of a right of entry, since 8 & 9 Vict. c. 106, s. 6, the onus is upon the plaintiff to prove not only that the title purchased was bad, but also that the buyer knew that it was "pretenced," i.e., fictitious, or bad in fact. The mere fact that the right purchased was barred by the Statute of Limitations at the time of the purchase does not necessarily render the title "pretenced" within the meaning of the 32 Hen. 8, c. 9. *Kennedy v. Lyell*, 15 Q. B. D. 491; 53 L. T. 466; 1 C. & E. 584—Denman, J.

TITLE-DEEDS.

See DEED AND BOND, IV. 1.

TOLLS.

Charge of, for Carriage.]—See CARRIER.

Market Tolls.]—See MARKET.

Liability of Postmaster-General to pay.]—See POST OFFICE.

Import Dues—Grain imported for Sale.]—The importation of an article for the purpose of its manufacture or conversion into a form other than that in which it is imported, is not an importation of such article for sale, notwithstanding that it may at the time of importation be intended for sale when manufactured or converted. Where, therefore, a local act rendered grain brought into a port for sale liable to duty, such duty was held not to be leviable upon grain imported by a miller for the purposes of his business. *Scott v. Taylor*, 48 J. P. 424—D.

TORTS.

See NEGLIGENCE—TRESPASS—TROVER, ETC.

TOWAGE.

See SHIPPING, XIII.

TOWN.

See HEALTH—METROPOLIS.

Council.]—See CORPORATION.

TOWING PATH.

See WATER (CANAL COMPANY).

TRADE AND TRADE MARK.

I. TRADE.

1. *Trade Name*, 1827.
2. *Imitation of Goods*, 1830.
3. *Trade Labels—Slander of Title*, 1831.
4. *Conspiracy to Injure*, 1834.
5. *Contracts in Restraint of*—See CONTRACT, III. 3, g.

II. TRADE MARKS.

1. *Registration*.
 - a. Who may Register, 1834.
 - b. What may be Registered.
 - i. Generally, 1836.
 - ii. Fancy Words—Words not in Common Use, 1838.
 - iii. Distinctive Device, Word, Mark, &c., 1840.
 - iv. Similarity—Calculated to Deceive, 1843.
 - v. Three Mark Rule, 1846.
 - vi. Words Publici Juris, 1847.
 - c. Practice.
 - i. Generally, 1847.
 - ii. Rectification of Register, 1850.
 - iii. Common Elements—Disclaimer, 1854.
2. *Infringement*, 1855.

III. MERCHANDIZE MARKS, 1858.

IV. DESIGNS, 1858.

V. TRADE UNIONS, 1860.

I. TRADE.

1. TRADE NAME.

Insurance Companies—Similarity—Injunction.—The plaintiff company having for many years carried on an insurance business under its name as stated below, the defendant company obtained registration, and began to issue prospectuses and advertisements under the name stated below. The offices of both companies were situated in the city of London. On motion of the plaintiff company, an injunction was granted to restrain the defendant company, until the hearing or further order, from using its name as stated below, or any other name calculated to cause the defendant company to be mistaken for the plaintiff company. *Accident Insurance Company v. Accident, Disease, and General Insurance Corporation*, 54 L. J., Ch. 104; 51 L. T. 597—Pearson, J.

Newspaper—Grounds on which Publication restrained.—The right of the proprietor of a newspaper to prevent another person from

adopting the same or similar name for a similar publication is not founded on the right of property in the proprietor, but rests upon the equitable doctrine that the user of such name is reasonably calculated to induce the public to believe that the new paper is that of the original proprietor, and to pass off his paper for that of the original proprietor. *Walter v. Emmott*, *infra*.

Where the owner of a publication claims an injunction to restrain the issue of another publication with a similar name he must show not only that the assumption of the name by the defendant is calculated to deceive the public, but also that there is a probability of the plaintiff being injured by such deception. *Borthwick v. Evening Post*, 37 Ch. D. 449; 57 L. J., Q. B. 406; 58 L. T. 252; 36 W. R. 434—C. A.

The plaintiff had long been the proprietor of a daily morning newspaper, called the "Morning Post." The defendants commenced a daily evening newspaper called the "Evening Post." There was no evidence of any actual injury having been done to the plaintiff by the conduct of the defendants:—Held, that although the conduct of the defendants in taking the name "Evening Post" might be calculated to deceive the public into supposing that there was a connexion between the two papers, there was no probability that the plaintiff would be injured by such supposition; and an injunction was therefore refused. *Ib*.

—Misrepresentation—Interlocutory Injunction.—The proprietor of an old-established paper called "The Mail," published three days a week at 11 a.m. at the price of 2d. in London, but whose principal circulation was in the provinces and abroad, was held not entitled, upon interlocutory application, to an injunction restraining the defendant from using on a daily morning paper which he had just started, and which was published in London at 3 a.m. at the price of 3d., the title of "The Morning Mail." *Walter v. Emmott*, 54 L. J., Ch. 1059; 53 L. T. 437—C. A.

Registration of Copyright—User and Reputation.—The plaintiffs, on the 3rd February, 1888, published the first number of a newspaper, and registered it at Stationers' Hall on the next day. No advertisement had been issued that a newspaper under that name was about to be published. On the 6th February the defendants published the first number of a newspaper with the same name. Very few copies of the plaintiffs' paper had then been sold:—Held, that the plaintiffs could not restrain the defendants from publishing their newspaper under that name, for that the registration at Stationers' Hall gave the plaintiffs no exclusive right to the name, and that a title to it by user and reputation could not be acquired by a publication for three days with a very small sale. *Licensed Victuallers' Newspaper Company v. Bingham*, 38 Ch. D. 139; 58 L. J., Ch. 36; 59 L. T. 187; 36 W. R. 433—C. A.

The plaintiff was the proprietor of a newspaper called "The Grocer," published in London, to which there had been originally attached a monthly supplement entitled "The Oil Trade Review," both of which were registered at Stationers' Hall. In 1886 the two were amalgamated under the name of "The Grocer and Oil Trade Review."

In 1888 the defendants commenced, in Dublin, the publication of a bi-monthly paper called "The Grocer and Wine Merchant and Irish Brewer and Distiller," intended by the defendants to represent and to advocate the interests of a different branch of the trade from the plaintiff's paper:—Held, that the plaintiff was entitled to an injunction to restrain the defendants from using the term "Grocer" as the first or principal part of the title of their paper. *Reed v. O'Meara*, 21 L. R., Ir. 216—V. C.

Assuming Name — Telegraphic Address.—The short address "Street, London," was used for many years in sending telegrams from abroad to Street & Co., of Cornhill. A bank adopted by arrangement with the Post Office the phrase "Street, London," as a cypher address for telegrams from abroad to themselves:—Held, that the court had no jurisdiction to restrain the bank from using such cypher address. *Street v. Union Bank of Spain and England*, 30 Ch. D. 156; 55 L. J., Ch. 31; 53 L. T. 262; 33 W. R. 901—Pearson, J.

"Castle Album" of Photographs.—An album for holding photographs containing a printed list of various castles, painted illustrations of which, with short descriptions, appeared on the pages of the album, is not a book within the Copyright Act, 1842. Even if the album were a book, there was no infringement of copyright in taking as a title the words "Castle Album," which had not on the evidence been proved to have acquired a secondary sense in the market designating the plaintiff's album exclusively so as to fall within the principle of *Wotherspoon v. Currie* (5 L. R., H. L. 508). *Schove v. Schmincké*, 33 Ch. D. 546; 55 L. J., Ch. 892; 55 L. T. 212; 34 W. R. 700—Chitty, J.

Exclusive Use of another Person's Name.—F. sought to restrain C. and V. from using the name "Richter Concerts," or from representing themselves as owners of the undertaking known by that name, or from representing that they were carrying on the "Richter Concerts" in succession to F.'s series; and also to restrain V. from acting in the matter as agent for C. F. alleged that he engaged Dr. Richter to conduct concerts, and in 1879 had originated the "Richter Concerts"; and that no concerts had ever been given under that name excepting by him. It appeared that C. had announced a series of "Richter Concerts," and that V., notwithstanding a written agreement to act as F.'s agent, had held himself out as the agent of C. It was contended by F. that he had acquired the right to the exclusive use of the term "Richter Concerts," as a "trade name," by having originally introduced the name and obtained a list of subscribers, and by the introduction of original features as to price and music. Dr. Richter had declined to act any longer as the conductor of F.'s concerts, and had made arrangements with C.:—Held, that it required a strong case to be made out to sustain a claim to the exclusive use of another person's name as a trade name, that no such case had been established in the present instance, and that there was no ground for saying that the term "Richter Concerts" had become dissociated from Dr. Richter himself, who was at liberty to carry his services to any market he

chose. *Franko v. Chappell*, 57 L. T. 141—Chitty, J.

Label on Champagne Bottles—Misrepresentation—Long User.—In July, 1885, M., of Dizy, in France, commenced the consignment to the plaintiff in London of champagne under the label "Le Court et Cie., Reims," which had then recently been registered in France as his trade-mark, and to which in December, 1886, his right was established in proceedings against X. before the French tribunal. Further consignments were made to the plaintiff down to July, 1886, and advertised and sold by him as Le Court et Cie.'s champagne. In March, 1886, the defendant, trading under the name of Short & Co., began to sell (chiefly at a wine bar across the counter) champagne which was sent to him from France by X. as Le Court et Cie.'s champagne; and it appeared that in 1882 he had proposed to register in France a label with the name Le Court et Cie. as corresponding to his own trade-name of Short & Co., but from difficulties in obtaining registration abandoned the idea. Upon motion by the plaintiff to restrain the use of the name and brand by the defendant:—Held, that the plaintiff was not entitled to an injunction against the defendant: because the evidence failed to show that either by long user or reputation had the wine sold under the name and brand "Le Court et Cie." become so associated with the wine of the plaintiff as to enable him to assert his common law right of restraining another person from passing off his goods as those of the plaintiff. *Goodfellow v. Prince*, 35 Ch. D. 9; 56 L. J., Ch. 545; 56 L. T. 617; 35 W. R. 488—C. A.

Right of User on Sale of Goodwill.—*See GOODWILL.*

2 IMITATION OF GOODS.

Public not Retail Dealers deceived—Right to Injunction — Form of Account.—The defendants, who were soap manufacturers, brought out their soap in packets so closely resembling those in which the plaintiffs, who were also soap manufacturers, had been in the habit of bringing out their soap, as to be calculated to deceive purchasers:—Held, that, although the retail dealers who bought soap from the defendants would not be deceived, the defendants, by their imitation of the plaintiffs' packets put into the hands of the retail dealers an instrument of fraud, and ought to be restrained by injunction. An injunction was accordingly granted, and an account was directed of the profits made by the defendants in selling soap in the form in which it was held that they were not entitled to sell it; and on an appeal the court held that the injunction had been rightly granted, and that the account was in the proper form, and ought not to be limited by excluding from it soap which the retail dealers sold to persons who bought it as the defendants' soap. *Lever v. Goodwin*, 36 Ch. D. 1; 57 L. T. 583; 36 W. R. 177—C. A.

"Guaranteed Corset"—Exclusive User.—A firm of corset manufacturers had for upwards of four years been the exclusive makers and sellers of a corset which they called the "Guaran

teed Corset," the wear of which they guaranteed for twelve months by undertaking to supply any purchaser with a new corset in case of complaint within that period. The corset was sold in a box bearing a printed label with the words "Guaranteed Corset" in large and conspicuous type, and in smaller type the words, "This corset is guaranteed to wear twelve months." The defendants, a rival firm of corset manufacturers, subsequently introduced a cheaper and inferior corset, the wear of which they also professed to guarantee for twelve months, and which they sold in a box bearing a printed label with the words "Guaranteed Corset" in large type, and words in smaller type similar to the plaintiffs':—Held, in an action by the plaintiffs for an injunction, that the word "guaranteed" was not so distinctively and exclusively applicable to the plaintiffs' corset as that the court would restrain the defendants from using the same word in connexion with their corset. *Symington v. Footman*, 56 L. T. 696—Kay, J. See *Goodfellow v. Prince*, supra.

Colourable Imitation.—W. registered the word "Reversi" as a trade-mark for "a game somewhat analogous to draughts." The word was the name of a game of cards popular in France in the 16th century. In the rules of W.'s game the word "reverse" frequently occurred, and the game depended on each player reversing or turning over his adversary's counters. A. brought out a similar game under the name "Annex," and on the labels of the boxes in which he sold it, he added to the name "a game of reverses." W. brought an action to restrain A. from using the word "reverses":—Held, that the use of the words "a game of reverses," which were a fair description of the nature of the game, did not show any design on the part of A. to pass off his game as that of W., and that an injunction ought not to be granted. *Waterman v. Ayres*, *Waterman's Trade-mark*, *In re*, 39 Ch. D. 29; 57 L. J., Ch. 893; 59 L. T. 17; 37 W. R. 110—C. A.

Exclusive Right to Use apart from Legislation.—In the absence of any legislation for the registration of trade-marks, as soon as a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the exclusive property of that firm, and no one else has a right to copy it, or even to appropriate any part of it, if by such appropriation purchasers may be induced to believe that they are getting goods which were made by the firm to which the trade-mark belongs. But the acquisition of such exclusive right to a mark or name in connexion with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark or name in connexion with goods of a totally different character. *Somerville v. Schembri*, 12 App. Cas. 453; 56 L. J., P. C. 61; 56 L. T. 454—P. C.

3. TRADE LABELS—SLANDER OF TITLE.

Wrapper—Descriptive Title—Injunction.—It had been established by litigation between the L. Company and A. that (1) the words "Liebig's Extract of Meat" is a merely descriptive title

open to all the public; (2) that it is equally open to the public to sell the article as "Baron Liebig's Extract of Meat;" or (3) to use a photograph of Baron Justus Von Liebig, the inventor of the receipt. A. then proceeded to use in connexion with the extract of meat sold by him, a wrapper with a photograph of Baron Liebig, and a statement "this is the only genuine brand," with a reference to the "favourable decision" of the House of Lords and the judgments of the various judges who had given judgment in the litigation which had been carried to the House of Lords. The L. Company moved to restrain A. from using the wrapper in question:—Held, that the company, who were not carrying on a fraudulent trade, were entitled to an injunction, notwithstanding that they might in their own advertisements have to some extent gone beyond what they were entitled to say. *Liebig's Extract of Meat Company v. Anderson*, 55 L. T. 206—Chitty, J.

Circular Warning against Infringement of Patent—Balance of Convenience.—The defendants, who were the owners of patents in Belgium and England for an invention for making glass lamp globes, by a deed executed in Belgium, granted a licence to the plaintiffs to manufacture articles under their invention in Belgium, but not elsewhere. The deed contained a clause for submitting disputes to arbitration. The plaintiffs under this licence manufactured articles in Belgium and sold them in England. The defendants issued a circular warning persons engaged in the trade that the importation and sale of articles made in foreign countries under their invention, except by themselves, would be a violation of their patent. The plaintiffs brought an action to restrain the issue of this circular until the matters in dispute had been determined by arbitration:—Held, that where a trade circular is issued bona fide, an interim injunction will not be granted to restrain it unless it is in violation of some contract between the plaintiff and defendant, however much the balance of convenience may be in favour of granting it. *Société Anonyme des Manufactures de Glaces v. Tilghman's Patent Sand Blast Company*, 25 Ch. D. 1; 53 L. J., Ch. 1; 49 L. T. 451; 32 W. R. 71; 48 P. 68—C. A.

The plaintiffs were the makers of "rainbow water raisers or elevators," and they commenced an action for an injunction to restrain the defendants from issuing a circular cautioning the public against the use of such elevators as being direct infringements of certain patents of the defendants. The plaintiffs subsequently gave notice of a motion to restrain the issue of this circular until the trial of the action. The defendants then commenced a cross action, claiming an injunction to restrain the plaintiffs from infringing their patents:—Held, that as there was no evidence of mala fides on the part of the defendants, they ought not to be restrained from issuing the circular until their action had been disposed of; but that they must undertake to prosecute their action without delay. *Household v. Fairburn*, 51 L. T. 498—Kay, J.

The defendants issued a circular to their customers stating that they were unable to supply a particular electric bell (for which the plaintiff had obtained protection) as it had "been proved to be an infringement" of another patented bell. Up to date of issue of the circular no action or proceeding had been commenced

by any one against the plaintiff in respect of his bell. An action was afterwards commenced, and then abandoned:—Held, that as the alleged infringement had not been proved by any proper proceeding before the court, there was no reasonable and probable cause for the statement in the circular, and the plaintiff was entitled to damages. *Crompton v. Swete*, 58 L. T. 516—Kekewich, J.

Circular — Privilege — Malice — Erroneous Statement of Judgment in former Action—Damages.—The plaintiff, who traded as R. H. & Co.; and the defendants, who traded as R. H. & Sons, were rival manufacturers of sail-cloth. The plaintiff had formerly been a partner in the defendant's firm. In 1885 the defendants brought an action against the plaintiff, claiming (inter alia) an injunction to restrain him from representing his firm to be the original firm of R. H. & Sons. At the trial of the action, North, J., dismissed it, without costs as to that issue, and with costs as to the other issues. North, J., was satisfied by the evidence that the then defendant had never made any such representation, but that on two or three occasions one of his agents without his knowledge or concurrence had represented that the then defendant's firm was the original firm. The then defendant repudiated this as soon as he knew it, and at the trial he offered by his counsel to give an undertaking that he would never make such a representation. North, J., desired that this undertaking should be inserted in the judgment; the defendant assented, and it was accordingly inserted in the judgment drawn up by the registrar. In 1886 the present defendants distributed a printed circular, which stated that they were the original firm, and after giving the title of the former action, headed by the word "Caution," proceeded: "By the judgment the defendant was ordered to undertake not to represent that his firm is, or that the plaintiffs' firm is not the original firm of R. H. & Sons. Messrs R. H. & Sons, finding that serious misrepresentations were in circulation to their prejudice, felt themselves compelled to bring the above action":—Held, that the circular contained an untrue statement of the effect of the judgment in the former action; that it was a libel injurious to the plaintiff's trade; that it was not privileged; that the defendants had published it maliciously; and that the plaintiff was entitled to an injunction, with the costs of the action. But there being no evidence of damage to the plaintiff, except his own affidavit that the publication of the circular was calculated to injure him, and had injured him, in his business, which he said had greatly fallen off since the issue of it; and the plaintiff not having brought the action until three months after he knew of the publication of the circular, only 5*l.* damages were awarded to him. *Hayward & Co. v. Hayward & Sons*, 34 Ch. D. 198; 56 L. J., Ch. 287; 55 L. T. 729; 35 W. R. 392—North, J.

Actions not abating by Death of Party.—An action for defamation, either of private character or of a person in relation to his trade, comes to end on the death of the plaintiff, but an action for the publication of a false and malicious statement, causing damage to the plaintiff's personal estate, survives:—Held, therefore, that a claim for falsely and maliciously publishing a statement calculated

to injure the plaintiff's right of property in a trade-mark was put an end to by the death of the plaintiff after the commencement of the action only so far as it was a claim for libel, but that so far as the claim was in the nature of slander of title the action survived, and could be continued by his personal representative, who would be entitled to recover on proof of special damage. *Hatchard v. Mege*, 18 Q. B. D. 771; 56 L. J., Q. B. 397; 56 L. T. 662; 35 W. R. 576; 51 J. P. 277—D.

Injunction to restrain.—See DEFAMATION, I. 4.

4. CONSPIRACY TO INJURE.

Combination to keep down Freights—Rival Ship-owners—Whether Actionable.—The plaintiffs complained that the defendants unlawfully contrived and conspired to prevent the plaintiffs carrying on their trade by forming themselves into a conference offering a rebate of 5 per cent. upon all freights paid by those shippers who shipped their cargoes on board conference vessels alone, to the exclusion of the plaintiffs' vessels:—Held, that the combination was not unlawful, and that the defendants were not guilty of a misdemeanour; that the acts done in pursuance of the combination were not unlawful, wrongful, malicious, nor in restraint of trade. The bargain was one the defendants had a right to make, and they were entitled to judgment. *Mogul Steamship Company v. McGregor*, 21 Q. B. D. 544; 57 L. J., Q. B. 541; 59 L. T. 514; 37 W. R. 286; 53 J. P. 391; 6 Asp. M. C. 320—Coleridge, C. J. Affirmed 37 W. R. 756—C. A.

— **Interlocutory Injunction.**—A confederation or conspiracy by an associated body of shipowners which is calculated to have, and has, the effect of driving the ships of other merchants or owners, and those of the plaintiffs in particular, out of a certain line of trade, even though the immediate and avowed object be not to injure the plaintiffs, but to secure to the conspirators themselves a monopoly of the carrying trade between certain foreign ports and this country, is, or may be, an indictable offence, and therefore actionable, if private and particular damage can be shown. To warrant the court, however, in granting an interim or interlocutory injunction to restrain the parties from continuing to pursue the objectionable course, those who complain must at least show that they have sustained or will sustain "irreparable damage,"—that is, damage for which they cannot obtain adequate compensation without the special interference of the court. *Mogul Steamship Company v. McGregor*, 15 Q. B. D. 476; 54 L. J., Q. B. 540; 53 L. T. 268; 49 J. P. 646; 5 Asp. M. C. 467; 15 Cox, C. C. 740—D.

5. CONTRACTS IN RESTRAINT OF.—See CONTRACT, III. 3, g.

II. TRADE MARKS.

1. REGISTRATION.

a. Who may Register.

Applicant carrying on Business Abroad.—Whether in order to entitle a person to have a

trade-mark registered, he must be carrying on or intending to carry on business in England, quære. *Rivière's Trade-mark, In re*, 26 Ch. D. 48; 53 L. J., Ch. 578; 50 L. T. 763; 32 W. R. 390—C. A.

Joint Mark—Termination of Joint Adventure—Application by One Party.—R. J., a merchant in Manchester, for some time prior to the passing of the Trade-marks Act, 1875, shipped cotton drills to A. & Co., a firm at Manilla, for sale on commission, the goods, in common with other goods sold by A. & Co. for other people, bearing a trade-mark representing the figure of Britannia, which mark was the property of A. & Co. After the passing of the act, doubts having arisen as to the propriety of using the Britannia mark, R. J. wrote to A. & Co., suggesting the use of a new design; and they sent back a proposed trade-mark which represented the house of business at Manilla of A. & Co., with their name on the signboard. Beneath were three columns in Chinese characters. The first represented "R. J., Manchester," the second contained the crest of K. (the Manilla partner of A. & Co.), with words indicating that it was his "chop" or mark, and the third represented "A. & Co., Manilla." On the construction of the letters between the parties, the court held that there was no contract that the mark should be the property of R. J.:—Held, that R. J., after the termination of the joint adventure, was not entitled to register the trade-mark in his name, and, semble, that if there had been such a contract, it could not have been enforced, as the trade-mark, if registered as the property of R. J., would have been calculated to deceive the public. *Jones's Trade-mark, In re*, 53 L. T. 1—C. A.

Assignees—Goodwill—Rectification.—M. and R., carrying on business as co-partners in New York, instructed their agents in this country, B. and W., to register two trade-marks for goods of theirs, of which B. and W. had the exclusive sale. Such trade-marks were registered by B. and W. as to one in the name of their firm, and as to the other in the name of W. only. B. and W., having no beneficial ownership in the trade-marks, in August, 1884, assigned them to M. and R. In December, 1884, one of the partners in the firm of M. and R. retired, and by deed assigned all his interest in the business of the firm and in the trade-marks to the continuing partners. In December, 1885, another partner retired, and three new partners joined the firm, but no assignment was executed by the retiring partner. On a motion by the present partners in the firm of M. and R., and the last retiring partner, under s. 78 of the Patents, Designs, and Trade-marks Act, 1883, that proper notices of the assignments of August, 1884, and December, 1884, might be entered on the register, and that the persons entitled under the last-mentioned assignment might be entered as the present proprietors of the trade-marks:—Held, that the application might be granted, as the trade-marks had been transmitted in connexion with the goodwill of the business of M. and R. within the meaning of s. 70 of the act. *Wellcome's Trade-mark, In re*, 32 Ch. D. 213; 55 L. J., Ch. 542; 54 L. T. 493; 34 W. R. 453—Chitty, J.

b. What may be registered.

i. Generally.

Entire Class—User for part of Class—Exclusive Title for Entire Class.—An assignee of the goodwill of a business with the right to a trade-mark which has been registered by the assignor under the Trade-marks Registration Act, 1875, in respect of an entire class, but of which the articles dealt with in such business form part only, is not entitled to the exclusive user of the trade-mark for the entire class, but only for the particular articles in connexion with which it is actually used, even though the trade-mark may have been on the register for five years. *Edwards v. Dennis, Edwards's Trade-mark, In re*, 30 Ch. D. 454; 55 L. J., Ch. 125; 54 L. T. 112—C. A. Reversing 1 C. & E. 428—A. L. Smith, J.

Semble, it is not the intention of the act that a man registering a trade-mark for an entire class, and yet only using it for one description of goods in that class, shall be able to claim for himself the exclusive right to use it for every description of goods in that class. If he desires to extend his business and apply his trade-mark to a new description of goods in the class, he should have his trade-mark registered in respect of those goods. Quære, whether a man can claim the exclusive use of a registered trade-mark not in actual use in connexion with particular goods at the time of registration. *Id.*

In 1883 E. purchased and took an assignment of the goodwill of the business of an iron merchant and manufacturer, and also of the right to a trade-mark, consisting of a device of "Neptune" holding a trident, with the word "Neptune" added, which had been registered by the assignor in 1878, under the Trade-marks Registration Acts, 1875 and 1876, for the whole of Class 5, described in the "Trade-marks Journal" as "unwrought and partly wrought metals used in manufacture," E. duly getting himself registered as proprietor of the trade-mark. The only business actually carried on by E. and his assignor was and had been that of a manufacturer of iron sheets. In 1880 D. registered a trade-mark bearing the word "Neptune" for "steel wire and iron wire" in Class 5, his business consisting solely of the manufacture and sale of wire. In 1884 E. brought an action against D. for infringement, on the ground of the alleged similarity of D.'s trade-mark. D. then applied by summons under s. 5 of the act of 1875, to have the register rectified by limiting E.'s trade-mark to the articles in Class 5 other than steel and iron wire:—Held, that inasmuch as the goods sold by E. and D. were entirely distinct, E. was not entitled to an injunction:—Held, also, that, notwithstanding the five years' registration of E.'s trade-mark for the whole of Class 5, his trade-mark must be limited to those articles in the class in connexion with which it was being actually used, namely, iron sheets. *Id.*

Sufficiency of User.—C. & Co. in 1876 registered as a trade-mark the words "Excelsior Spring Mattress." In 1883 they commenced an action in the Palatine Court of the Duchy of Lancaster against B. to restrain him from using their trade-mark "Excelsior." B. moved to remove the trade-mark from the register on the ground that the word "Excelsior" had not been used as a trade-mark before the passing of the

act of 1875. It appeared that the word had been used on bills and notices, but always applying to a mattress made under a patent of B.'s predecessors in business which expired in 1883; that it had been used in combination with a device of a man and a banner on metal plates which were affixed to the mattresses; that an indiarubber stamp containing the words alone had been made, and was usually impressed upon the side of the mattress, and that a photograph was constantly used in selling the goods which showed the mattress with a label attached, having on it only the words "Excelsior Spring Mattress":—Held, that there had been sufficient user as a trade-mark and the mark was rightly put on the register. *Chorlton's Trade-mark, In re*, 53 L. T. 337; 34 W. R. 60—Pearson, J.

Where it appeared that the customers of a firm of H. & Co. had for many years been accustomed to ask for a certain article by the name of "Coker Canvas," but it did not appear that the words "H.'s Coker Canvas" had been stamped upon any of the goods of the firm or advertised as a trade-mark:—Held, that there had been no use by the firm of the words "H.'s Coker Canvas" as a trade-mark. *Hayward's Trade-mark, In re*, 54 L. J., Ch. 1003; 53 L. T. 487—Kay, J.

Words descriptive of Patented Article.—User before 1875.—P. in 1876 registered "braided fixed stars" as a trade-mark for matches, alleging that he had used it as a trade-mark before the passing of the act of 1875. He also at the same time registered a label enveloping the boxes in which his matches were sold, which contained the words "braided fixed stars" in two places so as to be conspicuous on each side of the boxes, but also contained a number of other words. It was shown that at the time when P. introduced the term "braided fixed stars" the term "fixed stars" was known in the trade as denoting a particular class of fuses, and that he had just bought a patent for enveloping the stems of fuses with wire by means of a braiding machine. This patent expired in August, 1881. It appeared from the evidence that P. had not before the act used "braided fixed stars" separately as a trade-mark, or otherwise than as a part of the above-mentioned label. In October, 1881, an application was made by a rival trader to expunge the registration:—Held, that the registration must be expunged, for that to entitle P. to register these words as a trade-mark he must before the act have used them as such alone, and not merely in conjunction with other words. *Palmer's Trade-mark, In re*, 24 Ch. D. 504; 50 L. T. 30; 32 W. R. 306—C. A.

User of Word in Foreign Country.—Whether a word used alone as a trade-mark in a foreign country before the passing of the Trade Marks Act, 1875, can be registered under the act if it has not been so used in this country, *quære*. *Leonard v. Wells, Leonard's Trade-mark, In re*, 26 Ch. D. 288; 53 L. J., Ch. 603; 51 L. T. 35—C. A. Affirming 32 W. R. 530—Pearson, J.

Fraudulent User of Foreign Trade-mark.—In 1718 G.'s firm, who were manufacturers of iron at Leufsta, in Sweden, registered in Sweden, as their trade-mark, the letter L. inclosed in a ring or hoop, commonly known as the "hoop L." In 1878 they registered in England, under the

Trade Marks Registration Act, 1875, the hoop L. mark alone, and also in combination with the word "Leufsta." Since 1835 they had exported iron of the highest quality to England for the manufacture of a particular kind of steel known as "blister steel." The hoop L. mark was stamped upon the iron in combination either with the name of their English consignee, or with the word "Leufsta," or with both. They registered these in Sweden as bye-stamps in addition to their original hoop L. mark. H.'s firm, who were English iron and steel and edge tool manufacturers, had for fifty years past used the hoop L. mark, in combination with the name of their firm, as their trade mark upon blister steel manufactured by them from inferior brands of Swedish iron. For this purpose it was necessary to cut off the Swedish mark, as the bars of iron when converted into steel retained upon their surface, unless intentionally obliterated, any marks which might be stamped upon them. A similar practice was adopted by thirty other English firms of iron and steel manufacturers, but this practice did not come to G.'s knowledge until 1881. H. applied, under the Trade Marks Registration Act, 1875, to register the hoop L. mark in combination with the words "Brades Co., Warranted":—Held, that the application must be refused, with costs, upon the ground that, whatever might have been the practice as to the user, it was one which had its inception in fraud, and was calculated to deceive, and therefore, though apparently established by time and usage, could not receive the sanction of the court. *Heaton's Trade-mark, In re*, 27 Ch. D. 570; 53 L. J., Ch. 959; 51 L. T. 220; 32 W. R. 951—Kay, J.

ii. *Fancy Words—Words not in Common Use.*

Name for New Article.—A name which has been given to a new article, and which is the only name by which it is known, cannot be a "fancy word" as regards that article. *Waterman v. Ayres, Waterman's Trade-mark, In re*, infra—Per Fry, L. J.

Descriptive of Pattern — "Gem."—Where a name or word was originally, or has come to be, descriptive of the article to which it is applied, so that while indicating what the article is, it does not connect it with any particular manufacturer, such name or word cannot be registered as a trade-mark. Accordingly, where at the time of an application made in 1884 for the registration of the word "gem" as a trade-mark for air-guns which in 1881 had been newly introduced into England and called "Gem" air-guns by the applicant, the word "gem" had become descriptive of a particular pattern of gun, and not merely of the applicant's gun, it was held that the word could not be registered as the applicant's trade-mark for air-guns. The word "gem" having now come to indicate the excellence of the article to which it is applied is not now a "fancy word" within the meaning of the Patents, Designs, and Trade Marks Act, 1883, s. 64, sub-s. 1 (c). *Arbenz, In re*, "Gem" *Trade-mark, In re*, 35 Ch. D. 248; 56 L. J., Ch. 524; 56 L. T. 252; 35 W. R. 527—C. A.

"Sanitas."—"Sanitas" is not a "fancy word not in common use" within the meaning of sub-s. 1 (c) of s. 64 of the Patents, Designs, and

Trade Marks Act, 1883, and cannot therefore be registered. *"Sanitas" Trade-mark, In re, 58 L. T. 166—Kay, J.*

"Red, White and Blue."—An application to proceed with the registration of the words "Red, White, and Blue," as "fancy words not in common use" within the meaning of s. 64 of the Patents, Designs, and Trade Marks Act, 1883, was refused. *Hanson's Trade-mark, In re, 37 Ch. D. 112; 57 L. J., Ch. 173; 57 L. T. 859; 36 W. R. 134—Kay, J.*

"Reversi."—W. registered the word "Reversi" as a trade-mark for "a game somewhat analogous to draughts." The word was the name of a game of cards popular in France in the 16th century. In the rules of W.'s game the word "reverse" frequently occurred, and the game depended on each player reversing or turning over his adversary's counters. A. brought out a similar game under the name "Annex," and on the labels of the boxes in which he sold it, he added to the name "a game of reverses." W. brought an action to restrain A. from infringing the trade-mark, and A. applied to remove the trade-mark from the register:—Held, that as the word "Reversi" would suggest to an ordinary Englishman the idea that the game had something to do with reversing, it was not a word which obviously could not have any reference to the character of the article. *Van Duzer's Trade-mark, In re (34 Ch. D. 623, 639);* that it therefore was not a "fancy word," and ought to be removed from the register. *Waterman v. Ayres, Waterman's Trade-mark, In re, 39 Ch. D. 29; 57 L. J., Ch. 893; 59 L. T. 17; 37 W. R. 110—C. A.*

"Hand Grenade Fire Extinguisher."—The words "Hand Grenade Fire Extinguisher" are not capable of registration as fancy words under the Patents, &c., Act, 1883, s. 64, as a trade-mark for an instrument consisting of a glass vessel containing a fire-extinguishing fluid intended to be liberated by means of the vessel being broken when thrown by the hand. *Harnden Star Hand Grenade Company, In re, 55 L. J., Ch. 596; 54 L. T. 834—Chitty, J.*

"Melrose"—"Electric."—The fanciful or abnormal use of a word not in itself obviously non-descriptive, does not make it a "fancy word" within the Patents, Designs, and Trade Marks Act, 1883, s. 64, sub-s. 1 (c), so as to be capable of registration as a trade-mark. Accordingly applications for a direction to the Comptroller-General to proceed with the registration as trade-marks of the words "Melrose Favourite Hair Restorer" and "Electric Velveteen," were, in both cases, refused. *Trade-mark Alpine, In re (29 Ch. D. 877) questioned, Van Duzer's Trade-mark, In re; Leaf's Trade-mark, In re, 34 Ch. D. 623; 56 L. J., Ch. 370; 56 L. T. 286; 35 W. R. 294—C. A.*

"Jubilee."—The word "Jubilee" is not obviously meaningless as regards paper or note-paper, because it may signify that the paper is produced in the Jubilee year (1887) of Her Majesty's reign, and it is, moreover, a common English word used by well-known English authors. Consequently the word "jubilee" is not capable of registration as a trade-mark for

paper, as a fancy word within s. 64 of the Patents, Designs, and Trade Marks Act, 1883. *Towgood v. Pirie, 56 L. T. 394; 35 W. R. 729—Chitty, J.*

"National Sperm."—An application was made for an order upon the Comptroller of Trade-marks to register a mark having the words "Price's Patent Candle Company" in common letters round the upper border and "National Sperm" in the centre, with the address of the company round the lower border:—Held, that the words "National Sperm" not being fancy words "not in common use," the label did not fulfil the requirements of the Patents, Designs, and Trade-marks Act, 1883, s. 64. *Price's Patent Candle Company, In re, 27 Ch. D. 681; 54 L. J., Ch. 210; 51 L. T. 653—Pearson, J.*

"Alpine."—The word "Alpine" and words of such class, although words in common use and not strictly fancy words, may, when applied to articles such as woollen and cotton goods, be registered as a trade-mark, as they are, if not "fancy words," at least fanciful words when applied to such goods, and so fall within s. 64, sub-s. 1 (c), of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57). *Trade-mark "Alpine," In re, 29 Ch. D. 877; 54 L. J., Ch. 727; 53 L. T. 79; 33 W. R. 725—Chitty, J.*

"Strathmore."—The plaintiff, who was a wine and spirit merchant, registered a trade-mark together with the words "Strathmore Blend," which was the name of a certain blend of various whiskeys made and sold by him, and he advertised the same very widely. Many of the plaintiff's customers were in the habit of ordering his whiskey by calling it "Strathmore whiskey," omitting the word "blend," and the whiskey became known in the market as "Strathmore whiskey." The defendant subsequently registered a trade-mark and the name of "Strathmore" for a whiskey blended and sold by him. The question was whether the use of the word "Strathmore" by the defendant was calculated to deceive:—Held, that the word "blend" described simply the operation of manufacturing, and was not an essential part of the name of the plaintiff's whiskey; that the word "Strathmore" was a fancy name; that the use of that word by any person, other than the plaintiff, as a name for whiskey would be calculated to deceive; and that the defendant must be restrained by injunction from using the word either as part of his trade-mark or otherwise. Held, also, that it was not lawful for the defendant to register the word "Strathmore" in combination with his trade-mark, and that the register must be rectified by striking out the word. *Blair v. Stock, 52 L. T. 123—Kay, J.*

iii. Distinctive Device, Word, Mark, etc.

Independently of Colour.—Under s. 67 of the Patents, Designs, and Trade Marks Act, 1883, a trade-mark may be registered in any colour or colours; but, having regard to s. 64, it must be a trade-mark that is distinctive independently of colour. A trade-mark of which the only distinction is colour cannot be registered. *Han-*

son's Trade-mark, In re, 37 Ch. D. 112; 57 L. J., Ch. 173; 57 L. T. 859; 36 W. R. 134—*Kay, J.*

In 1872 H., a wholesale grocer, commenced using, for French coffee, a red, white and blue label, and in 1881 he registered it under the Trade Marks Registration Act, 1875, in class 42, for "coffee" only. The label as registered was shaded so as to represent three colours, across it being printed the words "Red, White and Blue." After the passing of the Patents, Designs, and Trade Marks Act, 1883, H. applied for the registration of a red, white and blue label (in colours) for the whole of the goods in class 42, but the comptroller refused to register the label as not being sufficiently distinctive. On a motion by H. for an order on the comptroller to proceed with the registration:—Held, that, having regard to ss. 64 and 67 of the act, the label was not capable of registration as it possessed no distinctive character independently of the colours. *Id.*

"Special and Distinctive Words."]—A "special and distinctive word" used in the definition of a trade-mark in s. 10 of the Trade Marks Registration Act, 1875, means a word which distinguishes the goods to which it is attached as goods made or sold by the owner of the mark; and by using some additional words so as to induce the general public, as distinguished from persons in the secrets of the particular trade who would not be deceived, to believe that goods so marked are of foreign brand and manufacture, the inventor of the original word is precluded from saying that such word is distinctive of his own manufacture, so as to be capable of registration as his trade-mark. *Wood's Trade-mark, In re, Wood v. Lambert*, 32 Ch. D. 247; 55 L. J., Ch. 377; 54 L. T. 314—C. A. And see *Harbord, In re*, *infra*.

An application was made for an order upon the Comptroller of Trade-marks to register a mark having the words "Price's Patent Candle Company" in common letters round the upper border and "National Spermin" in the centre, with the address of the company round the lower border:—Held, that the name of the firm printed in common letters not being distinctive, the label did not fulfil the requirements of the Patents, Designs, and Trade Marks Act, 1883, s. 64. *Price's Patent Candle Company, In re*, 27 Ch. D. 681; 54 L. J., Ch. 210; 51 L. T. 653—*Pearson, J.*

"Distinctive Mark."]—In 1861 the plaintiffs registered a design for the shape of blocks of black lead, being a cylinder terminated by a dome at one end. From that time they sold black lead in boxes, upon which a black dome was impressed, and they imprinted a dome upon each block of black lead. This they did without regard to the shape of the blocks they sold, and there was evidence that the term "dome black lead" had become known in the trade as denoting black lead of the plaintiff's manufacture. In 1877 they registered a black dome as their trade-mark for "black lead." The plaintiffs having brought an action to restrain infringement of their trade-mark, the defendants applied to have it expunged from the register:—Held, that there was no reason why a dome should not be a distinctive mark for black lead, that the evidence showed it to be in fact distinctive, that

it was therefore capable of registration as a trade-mark. *James's Trade-mark, In re*, or *James v. Parry*, 33 Ch. D. 392; 55 L. J., Ch. 915; 55 L. T. 415; 35 W. R. 67—C. A.

Separate User of Distinctive Words before 1875.]—In 1877 Perry Davis & Son were registered as proprietors of a trade-mark consisting of the words "Pain Killer," in respect of which they claimed user for forty years prior to registration, in connexion with a medicine sold by them. On an application by L. for the removal of the name from the register, the evidence showed that, although the medicine had been spoken of and ordered as "Pain Killer," it had not been sold under that name alone. The wrapper round the bottles, and a label attached to the bottles, described the article as "Perry Davis' Vegetable Pain Killer;" on the bottles were stamped the words, "Davis' Vegetable Pain Killer," and the government stamp attached bore the description "Pain Killer" alone:—Held, that as the words "Pain Killer" had not been used alone as a trade-mark before the passing of the Trade Marks Registration Act, 1875, they were not a proper mark for registration under s. 10 of that act:—Held, also (by Fry and Lopes, L.JJ.) that the words were not "special and distinctive words" within the meaning of that section. Quære, whether words must be special and distinctive from their own proper nature or internal force, or whether they may acquire a distinctive character by user as applied to goods. *Harbord, In re*, 58 L. T. 695—C. A.

In order to obtain registration of a word as having become "distinctive" within s. 64, sub-s. 3, of the Trade Marks Act, 1883, by user or recognition in the trade, such user or recognition must have been prior to August, 1875. Accordingly applications for a direction to the Comptroller-General to proceed with the registration as trade-marks of the words "Melrose Favourite Hair Restorer" and "Electric Velveteen," the use of which by the applicants would, independently of the act, by user and recognition in the trade since August, 1875, have been entitled to protection, were, in both cases, refused. *Van Duzer's Trade-mark, In re; Leaf's Trade-mark, In re*, 34 Ch. D. 623; 56 L. J., Ch. 370; 56 L. T. 286; 34 W. R. 294—C. A.

In order to entitle a person to register a trade-mark under s. 10 of the Trade Marks Registration Act, 1875, consisting of special and distinctive words, or combination of figures or letters, used as a trade-mark before the passing of that act, the words must have been used as a trade-mark by themselves, and not in conjunction with any other device. In 1876 S. registered the words "Diamond Cast Steel," as a trade-mark for steel and for files. The words were never used on goods by themselves, but always in combination with a device and a name. The words were, however, sometimes stamped on one side of the goods, whilst the device and name were stamped on the reverse side. Upon an application to rectify the register of trade-marks by expunging this trade-mark:—Held, that the case was within the principles upon which *Palmer's Trade-mark, In re* (24 Ch. D. 504) was decided; and that as there had been no separate user of the words as a trade-mark, the same ought not to have been registered, and must, therefore, be expunged from

the register. *Spencer's Trade-mark, In re*, 54 L. T. 659—C. A.

—“**Heading**”—“**Valvoline**.”—L. and E. invented in 1873 a process for making a certain description of lubricating oil which they called “Valvoline,” and in that year registered in America as their trade-mark the word accompanied by a device. In August, 1877, they registered the same trade-mark in England, and in February, 1878, registered the word “Valvoline” alone as their trade-mark. After this mark had been five years on the register they commenced an action against W. to restrain him from selling under the name of Valvoline any oil not made by the plaintiffs. W. moved to rectify the register by striking out the trade-mark “Valvoline.” The court came to the conclusion on the evidence that L. and E. had not used “Valvoline” alone as a trade-mark, either in America or England, before the passing of the Trade Marks Registration Act, 1875, but only in conjunction with a device, and that “Valvoline” was a word invented to describe the particular class of oil at the same time as the process was invented, and was used as a descriptive term for that particular kind of oil. The process was not the subject of a patent:—Held, that a single word cannot be registered under the act, on the ground that it was used as a “heading,” unless it was so used before the passing of the act; and that, therefore, the trade-mark “Valvoline” must be removed from the register. *Leonard v. Wells, Leonard's Trade-mark, In re*, 26 Ch. D. 288; 53 L. J., Ch. 603; 51 L. T. 35—C. A. Affirming 32 W. R. 530—Pearson, J.

“**Distinctive Device**”—**Portrait**—**Words Publici Juris**.]—A device consisting of a portrait of the original inventor of the article sold, with words above and below it, the essential portion of which have become the common property of the trade and publici juris, is not a distinctive device within s. 10 of the Registration of Trade Marks Act, 1875 (repealed by 46 & 47 Vict. c. 57), and cannot be registered as a trade-mark under that act. *Anderson's Trade-mark, In re*, 54 L. J., Ch. 1084—C. A. Affirming 26 Ch. D. 409; 32 W. R. 677—Chitty, J.

—**Descriptive Words**.]—Where one person registers under the Trade Marks Registration Act, 1875, a trade-mark consisting of a distinctive device, together with a word descriptive of the article to which the mark is to be applied, another person is entitled, notwithstanding such registration, to register for the same goods a trade-mark consisting of a different distinctive device, together with a descriptive word identical with or similar to the word comprised in the earlier trade-mark. *Horsburgh's Application, In re*, 53 L. J., Ch. 237, n.; 50 L. T. 23, n.; 32 W. R. 530, n.—Jessel, M.R.

iv. Similarity—Calculated to Deceive.

Duty of Comptroller.]—Section 72, sub-s. 2, of the Patents, Designs, and Trade Marks Act, 1883, provides that, “The comptroller shall not register with respect to the same goods, or description of goods, a trade-mark so nearly resembling a trade-mark already on the register with respect to such goods, or description of

goods, as to be calculated to deceive.” The comptroller had refused to register a trade-mark in respect of linen and hemp piece-goods, on the ground that it too closely resembled three trade-marks which had been already registered in the same class in 1876 and 1884. On a summons to direct the comptroller to proceed with registration of the trade-mark:—Held, that, though it were a case in which the similarity might not be such as to induce the court on that fact alone to grant an injunction, it was the duty of the comptroller to consider, having regard to the course of trade, whether the trade-mark so nearly resembled the other as to be calculated to deceive, and he would be justified in refusing to register a trade-mark so nearly resembling another that registration would encourage litigation; and that this trade-mark was likely to mislead persons wishing to buy linen stamped with one of the earlier trade-marks. *Speer, In re*, 55 L. T. 880—Kay, J. See also *Price's Patent Candle Company, In re*, post, col. 1849.

Old Mark.]—An application made in November, 1884, by an American firm of oil manufacturers for the registration under the Act of 1883 of a trade-mark for illuminating oils, which mark had been used by them in America since 1872, and had been known in England as the “White Rose” mark prior to 1875, was refused by the comptroller upon the ground that there had been on the register since 1878 a similar mark for illuminating oils called the “Rosaline” mark, of which an English firm were the proprietors:—Held, that although there was enough similarity between the two marks to render it possible for the public to mistake the one for the other, yet as the “White Rose” was to all intents and purposes an old mark, it ought to be admitted to registration. “*White Rose*” *Trade-mark, In re*, 30 Ch. D. 505; 54 L. J., Ch. 961; 53 L. T. 33; 33 W. R. 796—Kay, J.

Mode of Comparison.]—When comparing a trade-mark tendered for registration with another mark already on the register or assigned by the Cutlers' Company, Sheffield, for the purpose of ascertaining whether the new mark so nearly resembles the old one as to be calculated to deceive, the court will have regard to the nature of the goods, to the nature and size of the mark, to the mode of affixing it to the goods, to the probable result in practice, and to all the circumstances of the case, and if, having regard to such circumstances, the new mark would be likely to be mistaken for the old one, registration will be refused. *Rosing's Application, In re*, 54 L. J., Ch. 975 (n.)—C. A.

R. applied for the registration of a new mark for cutlery and metal goods included in classes 12 and 13, such trade-mark representing a part of his armorial bearings, and consisting of a curved horn, with a twist in the middle, and surmounted by two roses. The application was opposed by the Cutlers' Company of Sheffield, on the ground that the mark so nearly resembled a Sheffield mark for similar articles assigned forty-five years previously to H., as to be calculated to deceive. H.'s mark consisted of a curved horn, suspended by a looped cord. The marks were sufficiently distinct when printed in a large size, but the Court of Appeal being of opinion that, in practice, when the two marks

were stamped in a small size on small metal articles, and having regard also to the probability of blurring taking place in the process of stamping, the one mark would be likely to be mistaken for the other :—Held, that registration must be refused. *Id.*

L. had used from 1864, in respect of goods included in class 13, a trade-mark consisting of the head of Minerva, down to and including the shoulders, the head bearing a helmet with ringlets hanging down behind. In 1884, being about to extend his business to class 12, he applied to register for that class the same head with the word "Athena" under it. This application was opposed by B., who had used from 1869 a cutler's mark, consisting of a head with the word "way" under it. The head had a sort of wig upon it, with small curls behind, and included the neck and part of the shoulders. In 1884 B. registered this mark under the Act of 1883, as an old cutler's mark, but the design actually registered departed from the old mark which he used, the head on the register being an uncovered head with a few sparse hairs upon it, and taking in only a small portion of the neck and no part of the shoulders :—Held, that the question whether a new mark is so like another as to be calculated to deceive is to be decided by considering whether the new mark is so like the other that when both are fairly used one is likely to be mistaken for the other, regard being had to size, the material on which the mark is to be impressed, the effects of wear and tear, and other surrounding circumstances; that L.'s mark was to be compared with the mark B. had put on the register, not with the mark which he had used; and that B., whose evidence was directed to a comparison between L.'s mark and the mark which B. had used, which was much more like L.'s mark than B.'s registered mark was, had not made out that the new mark was calculated to deceive. *Lyndon's Trade-mark, In re*, 32 Ch. D. 109; 55 L. J., Ch. 456; 54 L. T. 405; 34 W. R. 403—C. A. *Cp. Lambert's Trade-mark, In re*, post, col. 1848.

Under Act of 1875.]—The prohibition of s. 6 of the Trade Marks Registration Act, 1875, against registering, in connexion with a trade-mark, words the exclusive use of which would not, "by reason of their being calculated to deceive, or otherwise, be deemed entitled to protection in a court of equity," refers to deceptiveness inherent in the words themselves, and not to deceptiveness arising from similarity to words comprised in other trade-marks. A device having been registered together with the word "Valvoline" as a trade-mark for lubricating oil :—Held, that a different firm might register for the same article the word "Valvoleum" in combination with a different device. *Horsburgh's Application, In re, supra.*

The plaintiffs, who were manufacturers and vendors of condensed milk and other similar articles in 1876 registered, in respect of their goods, a trade-mark, the distinctive feature of which was the representation of a milk-maid. Previous to this their goods had become known and were ordered by the public under the description of "Milk Maid" or "Dairy Maid" brand, and in 1884 they registered the same mark in conjunction with the words "Milk Maid Brand." In 1882 the defendant, who carried on a similar business, registered a

mark which, though not altogether like the plaintiff's mark, consisted of a drawing of a dairy-maid or milk-maid in conjunction with the words "Dairy Maid," the registration being in respect of a class of goods which covered those sold by the plaintiffs. He afterwards used this mark in the sale of condensed milk in tins like those of the plaintiffs :—Held, that the plaintiffs were entitled to an injunction restraining the defendant from infringing their mark, and also to have the register rectified by limiting the defendant's mark to goods other than those in respect of which the plaintiff's mark was registered. *Anglo-Swiss Condensed Milk Company v. Metcalf*, 31 Ch. D. 454; 55 L. J., Ch. 463; 34 W. R. 345—Kay, J. *See Jones's Trade-mark, In re, ante*, col. 1835.

Fraudulent User of Foreign Trade Mark.]—*See Heaton's Trade-mark, In re, ante*, col. 1838.

v. Three-mark Rule.

Common to the Trade.]—A mark which had been registered as a trade-mark, is at the time of registration "common to the trade" when similar (though not in each case identical) marks are then in use by more than three persons engaged in the same trade, although in some of the cases the mark is not actually placed on the goods, but is only used on billheads, trade circulars, advertisements, or show-cards. *Wragg's Trade-mark, In re*, 29 Ch. D. 551; 54 L. J., Ch. 391; 52 L. T. 467—Pearson, J.

When a trade-mark has been used by more than three persons engaged in the same trade, it is common to the trade, and cannot be registered by any one. *Hyde & Co.'s Trade-mark, In re*, 7 Ch. D. 724; 54 L. J., Ch. 395, n.; 38 L. T. 777—Jessel, M.R.

When a trade-mark has been used by more than three different persons in the same trade, it is not distinctive, but common to the trade, and cannot be registered by any of them. *Walkden's Aërated Waters Company's Application, In re, infra.*

Old Mark.]—When a trade-mark has been used by not more than three different persons in the same trade as an old-mark—that is, before the 13th of August, 1875—each may register it. *Walkden Aërated Waters Company's Application, In re*, 54 L. J., Ch. 394, n.—Jessel, M.R.

When it has been used by one or two persons as an old mark, it can only be registered by another person as a new mark if the consent of the prior owner or owners is obtained. *Id.*

Resemblance.]—Semble, that marks which so closely resemble one another that the use of the one might be restrained in an action by the owner of the other, will be treated as identical for the purposes of the above rules. *Id.*

Foreign User.]—In 1844 the predecessors in business of L. & K. invented a trade-mark and used it on all the articles manufactured by them. L. & K. registered this in 1880. M. now applied for the registration of a trade-mark identical with that of L. & K., with the exception that he substituted his own name for that of "Murray and Lanman," which appeared in the original trade-mark. He alleged foreign user since 1869, and that he had registered abroad, and claimed

to have his trade-mark registered here as an old mark under the "three-mark rule."—Held, that the resemblance between the two trade-marks was so close that the later one must have been copied from the earlier one; that foreign user alone could not entitle the applicant to registration, or bring him within the operation of the "three-mark rule" as being contemporaneous user before the Trade Mark Act, 1875. *Munch's Application, In re*, 50 L. T. 12—Chitty. J.

vi. *Words Publici Juris.*

New Article named by Inventor.—If a person who invents a process for making a new article invents at the same time a new name for describing such article, and the article comes to be known by that name only, he cannot afterwards, when everybody is at liberty to make that article, claim a monopoly in the name; therefore, the defendants were not, by using the name "Valvoline," which was the only name by which the substance in question was known, infringing any rights of the plaintiffs, or representing their goods as made by the plaintiffs, and that the fact that the plaintiffs had in consequence of the registration enjoyed a practical monopoly of the name for five years did not, as the name had been improperly put in the register, give them any better right than they would otherwise have had. *Leonard v. Wells, Leonard's Trade-mark, In re*, ante, col. 1843.

Name of Patented Article.—Semble, that the name by which a patented article is generally known, and which is therefore descriptive of it, becomes publici juris at the expiration of the patent, and cannot properly be registered as a trade-mark. *Ralph's Trade-mark, In re*, 25 Ch. D. 194; 53 L. J., Ch. 188; 49 L. T. 504; 32 W. R. 168; 48 J. P. 135—Pearson, J.

A patentee has no exclusive right to the use of words properly descriptive of a patented article, after the patent has expired. *Palmer's Trade-mark, In re*, 24 Ch. D. 504; 50 L. T. 30; 32 W. R. 306—C. A.

c. *Practice.*

i. *Generally.*

Registration not completed within Twelve Months—Abandonment.—An application for registration of a trade-mark was made in the year 1879, but registration was not effected until February, 1885, after the commencement of the Patents, Designs, and Trade Marks Act, 1883. S. 63 of that act provides that "where the registration of a trade-mark has not been and shall not be completed within twelve months from the date of the application, by reason of default on the part of the applicant, the application shall be deemed to be abandoned;" and s. 113 provides that the repeal of previous enactments therein contained shall not affect any application pending.—Held, that the effect of s. 63 and s. 113 read together was that such pending applications for registration as were not completed by registration within the period of twelve months prescribed by s. 63 came within the operation of the last-mentioned section, that the registrar of trade-marks was therefore bound to treat the application as abandoned, and that the mark was improperly

registered. *Hayward's Trade-mark, In re*, 54 L. J., Ch. 1003; 53 L. T. 487—Kay, J.

Section 63 of the Trade Marks Act of 1883 is retrospective in its operation. S., a foreigner, entered in 1876, through an English trade-mark society, for registration of a trade-mark. The Cutlers' Company gave notice of a similar mark which had been assigned by them, and the registrar thereupon wrote to S., at the society's address, to say that he could not proceed with the application until S. had obtained the leave of the court. This letter was never communicated to S. by the society, who proceeded no further with the application; but S. having seen the advertisement of his application in the "Trade Marks Journal," believed that his mark had been registered, and N., an agent of his, sold goods in England marked with his mark. In the year 1877 the plaintiffs registered a mark resembling the Cutlers' mark, and in 1883 brought an action against N. to restrain him from infringement, and S., finding his mark was not on the register, then made a fresh application for registration.—Held, that S. was "in default," and that his original application must be deemed to have been "abandoned" within the meaning of s. 63 of the Act of 1883, and could not now be proceeded with. *Jackson v. Napper, infra.*

Appointment of Agent—Notices—Fresh Application.—There is nothing in the Trade Marks Act of 1883 to take away the common law right of an applicant for registration who is sui juris to appoint an agent for all the purposes of his application, and if he does so the notices required by the Act may properly be sent to him through such agent. If such agent does not inform the applicant of notices received the applicant is entitled to make a fresh application for registration notwithstanding s. 76 of the Act of 1883. *Jackson v. Napper, Schmidt's Trade-mark, In re*, 35 Ch. D. 162; 56 L. J., Ch. 406; 55 L. T. 836; 35 W. R. 228—Stirling, J.

Sheffield Register—Old Corporate Mark—Jurisdiction of Cutlers' Company.—The Cutlers' Company, on the application of L., registered in the Sheffield Registry an old corporate mark of a pipe and dart, of which he was primâ facie owner, notwithstanding notice of opposition by W., the owner of the mark of a pipe only, and without hearing W. W. appealed to the comptroller, who decided that no appeal lay to him against the registration. W. then applied to the court.—Held, that the Cutlers' Company acted rightly in registering L.'s mark without hearing W. in opposition, as the registration was a ministerial duty under sub-s. 2 of s. 81 of the Patents, Designs, and Trade Marks Act, 1883; that there was no appeal to the comptroller; and that L.'s mark was not so similar to that of W. as to be calculated to deceive. *Lambert's Trade-mark, In re*, 37 W. R. 154—North, J.

On an application for registration for metal goods in class 5 which were not included in the Cutlers' Company's Act.—Held, that the Cutlers' Company were not entitled to oppose with respect to goods not included in their acts, and that registration in class 5, limited to the specified articles, should be allowed. *Roxing's Application, In re*, 54 L. J., Ch. 975, n.—C. A.

Refusal by Comptroller to register—Appeal—Board of Trade.]—A person whose application to register a trade-mark has been refused by the comptroller cannot appeal direct to the court from such refusal, as a person aggrieved by the omission of his name from the register under s. 90 of the Patents, Designs, and Trade Marks Act, 1883, but must take the special course prescribed by s. 62, sub-s. 4, of appealing to the Board of Trade from the comptroller's decision. "*Normal*" *Trade-mark*. *In re*, 35 Ch. D. 231; 56 L. J., Ch. 513; 56 L. T. 246; 35 W. R. 464—C. A.

Opposition to Application—Jurisdiction of Court.]—Where, upon opposition to an application to register a trade-mark, the case stands for the determination of the court under s. 69, sub-s. 4, of the Patents, Designs, and Trade Marks Act of 1883, the court has jurisdiction to enter into and determine all questions arising upon the objections, including, in a case where the comptroller has already registered the mark, the question whether the mark has been rightly admitted on the register. *Arbenz*, *In re*, 35 Ch. D. 248; 56 L. J., Ch. 524; 56 L. T. 252; 35 W. R. 527—C. A.

An application was made by the Sanitas Company to register the word "Sanitas" as a trade mark for goods in class 3, under the Patents, Designs and Trade Marks Act, 1883. The Comptroller-General refused to proceed with the registration, on the ground that there were already on the register two trade-marks comprising the word "Sanitas." On the matter being referred to the court, in addition to the objection taken by the Comptroller-General, two further objections were raised, and it was contended that no objections ought to be raised that had not been taken by the comptroller:—Held, that any objection could be entertained by the court, and that the refusal to register, based on the previously registered trade-marks, was perfectly right. "*Sanitas*" *Trade-mark*, *In re*, 58 L. T. 166—Kay, J.

Duty of Comptroller.]—The comptroller is justified in refusing to register a label so nearly resembling another label already on the register as to be calculated to deceive, until the opinion of the court should have been obtained authorising him to do so. *Price's Patent Candle Company*, *In re*, 27 Ch. D. 681; 54 L. J., Ch. 210; 51 L. T. 653—Pearson, J. *See also* *Speer*, *In re*, ante, col. 1844.

Costs of Appeal to Court.]—The costs of a successful appeal to the court from a refusal by the Comptroller-General to register a trade-mark must be paid by the appellant. "*Alpine*" *Trade-mark*, *In re*, 29 Ch. D. 877; 54 L. J., Ch. 727; 53 L. T. 79; 33 W. R. 725—Chitty, J.

Jurisdiction to Order Comptroller to pay Costs.]—Where the Comptroller-General of Patents unsuccessfully opposes an application for registration, the court has no jurisdiction to order him to pay the costs of the applicant, but may refuse to give him any costs. *Leaf's Trade-mark*, *In re*, 33 Ch. D. 477; 55 L. J., Ch. 740; 55 L. T. 254; 35 W. R. 99—V.-C. B.

ii. Rectification of Register.

Application within what Time—Registration for Five Years.]—The right to the exclusive use of a trade-mark, after the expiration of five years from the date of registration, given by the Trade Marks Act, 1883, s. 76, is subject to and controlled by s. 90, and therefore any person who considers himself aggrieved by any entry made in the register without sufficient cause is not precluded by the expiration of five years from the date of such registration from showing that the mark ought not to have been registered. *Lloyd's Trade-mark*, *In re*, *Lloyd v. Bottomley*, 27 Ch. D. 646; 54 L. J., Ch. 66; 51 L. T. 898—Chitty, J.

Sections 3 and 4 of the Trade-marks Registration Act, 1875, do not confer on the first or subsequent registered proprietor of a trade-mark who has been on the register for five years the absolute right to the exclusive use of his trade-mark as against all the world; the intention of the sections is merely to afford him assistance in bringing an action for infringement by dispensing with the necessity of his adducing evidence in that action of exclusive user; and the sections are no bar to an application under s. 5 to rectify the register on the ground that the trade-mark is improperly on the register or should be restricted to certain goods. *Edwards v. Dennis*, *Edwards' Trade-mark*, *In re*, 30 Ch. D. 484; 55 L. J., Ch. 125; 54 L. T. 112—C. A. Reversing 1 C. & E. 428—A. L. Smith, J.

The registration of a mark as a trade-mark and the lapse of five years do not, under s. 76 of the Trade Marks Act, 1883, confer on the person who has made the registration an indefeasible title to the use of the mark as a trade-mark if, by reason of its being at the time of registration in common use in the trade, it ought not to have been registered. The lapse of five years cannot make good a registration which was in its inception invalid. A trade-mark which was originally improperly registered ought even after the lapse of five years, to be removed from the register, because the registration might enable the person who has made it to commit a fraud. *Wraggs' Trade-mark*, *In re*, 29 Ch. D. 551; 54 L. J., Ch. 391; 52 L. T. 467—Pearson, J.

Onus of Proof.]—Where a person seeks to remove a trade-mark from the register, the onus is upon him to shew that it ought to be removed, but though his own evidence may be insufficient for the purpose, the onus is discharged if it appears from the evidence of the owner of the mark that it ought not to be on the register. *Leonard v. Wells*, *Leonard's Trade-mark*, *In re*, 26 Ch. D. 288; 53 L. J., Ch. 603; 51 L. T. 35—C. A.

Common Mark—Costs.]—A person who registers a trade-mark does so at his own risk, and if he registers one which is common to the trade it will be removed from the register on the application of the parties aggrieved, and he will have to pay the costs of the application. It makes no difference that he was the person who was the first to adopt the trade-mark if it had become common at the date of registration. *Hyde and Company's Trade-mark*, *In re*, 7 Ch. D. 724; 52 L. J., Ch. 395, n.; 38 L. T. 777—Jessel, M.R.

Overlooking Advertisement.]—There is no obligation on persons interested to see an advertisement in the *Trade-marks Journal* of an application for registration, and the fact that they have not seen such an advertisement or opposed the application is no bar to their applying to have the mark removed from the register after the registration is complete. *Id.*

Calculated to Deceive.]—A firm of distillers registered, as a trade-mark for their cherry brandy, a hunting-scene in connexion with the word "Sportsman." Their cherry brandy consequently became generally known as "The Sportsman's" and also as "Huntsman's" and "Hunter's" cherry brandy. Some years afterwards another firm of distillers registered a trade-mark consisting of a hunting scene, and the words "Huntsman's cherry brandy." There was, however, no resemblance between the two hunting scenes:—Held, that, notwithstanding the dissimilarity in the designs, the latter trade-mark was got up for the purpose of passing off cherry brandy as that manufactured by the proprietors of the first trade-mark, and was calculated to deceive; and that the register must be rectified by striking out the latter trade-mark. *Barker's Trade-mark, In re, 53 L. T. 23—Kay, J. See also Blair v. Stock, ante, col. 1840.*

Where a trade-mark contained the words "sole maker" immediately preceding words descriptive of an article, and it was admitted that the persons registering the mark were not the sole makers of that article, the court ordered the mark to be expunged from the register as being calculated to deceive. *Hayward's Trade-mark, In re, 54 L. J., Ch. 1003; 53 L. T. 487—Kay, J.*

Y. & Co. registered a trade-mark for fermented liquors, consisting of three triangles, two placed on a third, the space in the centre being blank. **J. B.** subsequently registered another mark for bottled beer, consisting of three triangles interlaced, the space in the centre containing a stag's head:—Held, on the authority of *Worthington's Trade-mark, In re (14 Ch. D. 8)*, that, having regard to the use which the mark subsequently registered might be put to by being coloured, it was calculated to deceive, and that so much of the mark as consisted of the triangular arrangement must be expunged from the register. *Biegel's Trade-mark, In re, 57 L. T. 247—Chitty, J. Cp. cases, ante, col. 1843 et seq.*

Limiting Mark to Particular Goods.]—*See Anglo-Swiss Milk Company v. Metcalf, ante, col. 1846.*

Extension of Time.]—Where an application for registration of a trade-mark was abandoned within the meaning of s. 63 of the Trade Marks Act, 1883, the court, in exercise of the discretion given by s. 90 of the act, instead of directing the mark to be expunged, ordered that the register should be rectified by inserting an entry directing that the five years mentioned in s. 76 should begin to run from the date of such entry. *Hayward's Trade-mark, In re, supra.*

Clerical Errors—Essential Particulars.]—A trade-mark for sewing-cotton, as registered, consisted of a lion surrounded with the inscription

in Russian, "Ermen and Roby, Manchester." The initial "E" was, however, in the English and not in the Russian character. The owners of the mark had for two years used it in the Russian trade, with the alteration of the English E to the Russian E, and with the insertion of the word "of" in Russian before the word "Manchester." The comptroller having declined to alter the register under s. 91, application to the court was made by the owners, under s. 92 of the Patents, &c., Act, 1883, for leave to add to and alter the registered mark in the manner in which it had been used, and the court acceded to the application on the ground that the addition and alteration were non-essential particulars. *Ermen & Roby's Trade-mark, In re, 56 L. J., Ch. 177; 56 L. T. 230—Chitty, J.*

Substitution of one Name for another.]—**R. & Co.**, wine and spirit merchants at Cognac, for some years exported to **M. & Co.**, wine and spirit merchants at Madras, brandy, which was sold by **M. & Co.** in India, with a label affixed, bearing a trade-mark of a red Maltese cross, and the name **M. & Co.** This trade-mark was first put on the bottles in 1875 by **R. & Co.** at the instance of **M. & Co.**, but the court found that so much of the mark as consisted of a red Maltese cross had been previously used by **R. & Co.**, and that the intention of **R. & Co.** was that this mark should be exclusively used by **M. & Co.** so long only as they took their brandies from **R. & Co.**, after which it should be the mark of **R. & Co.** In April, 1879, **M. & Co.** wrote to **R. & Co.**, requesting them to register the mark in England for **M. & Co.**, but in September, 1879, **R. & Co.** registered the mark of the red Maltese cross in their own names. **M. & Co.** only discovered this in 1882, after the business relations between the two firms had come to an end, when they applied for rectification of the register by striking out the names of **R. & Co.** and substituting the names of **M. & Co.** as owners of the trade-mark, but the court refused to strike out the names of **R. & Co.** on the ground that they had only registered their old mark, and not the mark used by **M. & Co.**:—Held, also, that even if the names of **R. & Co.** had been expunged from the register, the court would not, on their application, have inserted the names of **M. & Co.**, inasmuch as the requirements of the Trade Marks Registration Act, 1875, and the rules thereunder as to advertisements, &c., in case of an application to register a trade-mark, had not been complied with. *Rivière's Trade-mark, In re, 55 L. J., Ch. 545; 53 L. T. 237—C. A. See also Wellcome's Trade-mark, In re, ante, col. 1835.*

"Person aggrieved"—Trade Mark used by Foreign Trader.]—**R. & Co.** registered a trade mark for brandy in England. **M. & Co.**, who carried on business at Madras, but neither carried it on nor intended to carry it on in England, applied to rectify the register by striking out the name of **R. & Co.** and substituting that of **M. & Co.** as owners of the trade-mark, alleging that they, **M. & Co.**, were the owners of the trade-mark, and had instructed **R. & Co.** to register it in the name of **M. & Co.**, instead of which **R. & Co.** had registered it in their own name:—Held, that assuming **M. & Co.** to have no right to register the trade-mark in England, it did not follow as a necessary consequence that they could not be aggrieved by its being registered here in

the name of another person, and that the case must be dealt with on the merits. *Rivière's Trade-mark, In re*, 26 Ch. D. 48; 53 L. J., Ch. 578; 50 L. T. 763; 32 W. R. 390—C. A.

— **Proprietor not "Engaged in any Business, &c."**—The assignee of a patent for a washing machine applied to it the name of "The Home Washer," and registered the name as his trade-mark in respect of it. He did not manufacture the machines, or any other goods in the same class, but granted an exclusive right to a manufacturing firm who paid him royalties. They invented and patented various improvements in the machine, and after the expiration of the patent (six years from the registration of the trade-mark) they continued to manufacture the improved machines, and to describe them by the old name, but paid no royalties, and the registered proprietor had not, after a year and nine months from the expiration, begun to manufacture, though he had been in negotiation with manufacturers to do so in conjunction with him:—Held, that the former licensees (against whom the registered proprietor was moving for an injunction) were "persons aggrieved" within r. 33, and that the mark must be removed from the register on the ground that, notwithstanding the negotiations, the registered proprietor was not "engaged in any business concerned in the goods within the same class as the goods in respect to which the mark was registered." *Ralph's Trade-mark, In re*, 25 Ch. D. 194; 53 L. J., Ch. 188; 49 L. T. 504; 32 W. R. 168; 48 J. P. 135—Pearson, J.

Semble, that a patentee is "engaged in any business, &c.," so long as he receives royalties under his patent, even though he does not himself manufacture. *Ib.*

Non-user—Abandonment.—In order to deprive a manufacturer of his right to a trade-mark, the use of which has been practically given up for a period of five years, mere discontinuance of user for lack of demand, though coupled with non-registration, and non-assertion of any right, is not enough; there must be evidence of distinct intention to abandon. In 1874, A., a German soap manufacturer, adopted a trade-mark for a particular kind of soap, which for about two years was manufactured and sent to this country in large quantities for exportation to Australia, but from 1876 until 1882 the manufacture and sale of soap thus marked fell off, until it practically ceased, and the existence of the particular mark was in May, 1882, forgotten by A. In 1880, B., a manufacturer of soap in the same part of Germany, adopted, in complete ignorance of A.'s mark, a precisely similar mark for soap sent to this country for exportation to Australia, and in August, 1880, he registered his mark under the Trade Marks Acts in this country. In July, 1882, after the commencement of proceedings by B. to restrain an infringement of his registered trade-mark by A., A. applied for registration of his mark of 1874. Upon application (1) by B. to restrain this infringement of his trade-mark; (2) by A. to have his trade-mark registered; (3) by A. to have B.'s trade-mark removed from the register:—Held (1), that mere non-user by A. of his mark between 1876 and 1882, though coupled with non-registration, did not, having regard to the fact that he had not ceased to carry on his business, and had not broken up the mould,

and that a number indicating soap thus marked was retained on his price lists, did not amount to an abandonment by A. of the mark, so as to give B. any exclusive right to his registered mark. (2) That the existence upon the register of B.'s mark did not prevent the court from granting leave for the registration of A.'s mark. (3) That previous bona fide registration of B.'s mark in ignorance of any claim by A., followed by large dealings under that mark, prevented A., after the lapse of two years, from getting B.'s mark expunged from the register. *Mousson v. Boehm*, 26 Ch. D. 398; 53 L. J., Ch. 932; 50 L. T. 784; 32 W. R. 612—Chitty, J.

iii. *Common Elements—Disclaimer.*

Practice as to.—H. applied on the 28th of December, 1883, to register as a trade-mark a label surrounded by a pattern of ornamental design, and containing in the centre a rectangular black space, bearing the words "Hudson's Carbolic Acid Soap Powder," in white letters. On the outside of the rectangular space were other words descriptive of the purposes and advantages to be derived from the use of the soap powder. This label had not been used before the application:—Held, that the application must be treated as being made under the act of 1875, and the court could not enforce as a term of registration, disclaimer of the words "Carbolic Acid Soap Powder," which were common to the trade and merely descriptive—that act having no provision similar to that contained in s. 74 of the act of 1883; that the label was a distinctive label and capable of registration as a trade-mark under the act of 1875, but that only the label as a whole could be claimed as a trade-mark, and that no right could be acquired by such registration to the exclusive use of those common words, however long might be the user of them; that, whether under the act of 1875 or of 1883, the fact of there having been no previous user did not prevent the registration—the act of 1875 having effected a change in the law previously existing by making the mere act of registration, as regards any of the particulars specified in s. 10, equivalent to the public user which before that act was the essence of a trade-mark. *Hudson's Trade-marks, In re*, 32 Ch. D. 311; 55 L. J., Ch. 531; 55 L. T. 228; 34 W. R. 616—C. A.

When an application is made for the registration of a trade-mark composed in part of distinctive elements and in part of elements common to the trade, the proper form of registration is to register the entire mark, and to add a note disclaiming the exclusive right to the common elements. *Kuhn's Trade-marks, In re*; 53 L. J., Ch. 238, n.—Jessel, M.R.

Objections having been raised by the owner of a registered trade-mark to the proposed registration of another trade-mark for use in connexion with goods included in classes for which the first mark was used, but no formal opposition having been lodged to the application for registration, an agreement was entered into between the registered owner and the applicant that no formal opposition should be lodged; that the applicant should use his mark in connexion only with goods actually exported to certain specified countries; and that he would, in connexion with the registration, cause a note of

this restriction on the use of his trade-mark to be entered on the register. Upon an *ex parte* application by the applicant, in pursuance of this agreement, the court directed the comptroller of trade-marks to enter such a note on the register. *Keep's Trade-mark, In re*, 26 Ch. D. 187; 54 L. J., Ch. 637; 50 L. T. 453; 32 W. R. 427—Pearson, J.

Where a trade-mark, not otherwise objectionable, contained words which were admitted to be common in the trade, the court directed the register to be rectified by entering thereon a disclaimer of the intention to claim any right of exclusive use of such words. *Hayward's Trade-mark, In re*, 54 L. J., Ch. 1003; 53 L. T. 487—Kay, J.

Two manufacturers of whiskey applied for registration of a trade-mark consisting of (amongst other things) the words "Cruiskeen Lawn," and entered into an agreement that they should respectively be at liberty to register their trade-marks, but that the user should be restricted, and that a note of the restriction should be entered on the register, with liberty for either party to apply as a person aggrieved for rectification of the register. The marks were registered without a note of the restriction. On the application of both parties an order was made for the rectification of the register by adding a note that the user was limited by the agreement. Notice of the rectification to be given to the comptroller. *Mitchell's Trade-mark, In re*, 28 Ch. D. 666; 54 L. J., Ch. 216; 51 L. T. 900; 33 W. R. 148—Chitty, J.

The entry on the register of two similar trade-marks in the same class, of a note that the use of the marks registered is restricted by an agreement between the respective owners (the effect of which is not stated) is irregular, and contrary to the provisions of the Patents, Designs, and Trade-marks Act, 1883; but a note of the mutual undertakings not to use the marks except in a certain manner and within specified districts may be entered on the register. *Mitchell's Trade-mark, In re*, 28 Ch. D. 666; 54 L. J., Ch. 809; 52 L. T. 575; 33 W. R. 480—Chitty, J.

Costs.—Where the registration of certain trade-marks, composed in part of elements common to the trade, was ordered to be rectified, and the registered proprietor did not consent to the rectification but appeared by counsel on the hearing of the motion:—Held, that the respondents must pay the costs of the application, notwithstanding that no previous notice of it had been given them, and that they had sent notice to all the trade when their registration was effected, after which a year and a half had passed before the motion to rectify was made. *Barrows, In re* (5 Ch. D. 353) commented on. *Kuhn's Trade-marks, In re*, 53 L. J., Ch. 238, n.—Jessel, M.R.

But, semble, that if it had been proved that the common elements in the marks had become common solely by the former common piracy of the applicants for rectification, the respondents being foreigners, the latter would not have been made to pay the costs. *Id.*

2. INFRINGEMENT.

Non-registration — Label — Injunction.—In July, 1885, M., of Dizy, in France, commenced

the consignment to the plaintiff in London of champagne under the label "Le Court et Cie., Reims," which had then recently been registered in France as his trade-mark, and to which in December, 1886, his right was established in proceedings against X. before the French tribunal. Further consignments were made to the plaintiff down to July, 1886, and advertised and sold by him as Le Court et Cie.'s champagne. In March, 1886, the defendant, trading under the name of Short & Co., began to sell (chiefly at a wine bar across the counter) champagne which was sent to him from France by X. as Le Court et Cie.'s champagne; and it appeared that in 1882 he had proposed to register in France a label with the name Le Court et Cie. as corresponding to his own trade-name of Short & Co., but from difficulties in obtaining registration abandoned the idea. Upon motion by the plaintiff to restrain the use of the name and brand by the defendant:—Held, that the plaintiff was not entitled to an injunction against the defendant; because, the label being capable of registration in this country and not having been registered, the plaintiff was precluded by s. 77 of the Trade-marks Act, 1883, from instituting proceedings to restrain infringement of a trade-mark. *Goodfellow v. Prince*, 35 Ch. D. 9; 56 L. J., Ch. 545; 56 L. T. 617; 33 W. R. 488—C. A.

Assignment not Registered.—Where a trade-mark has been registered, an assignee of the registered proprietor can bring an action to prevent the use of the trade-mark, without having registered the assignment. *Thlee v. Henshaw*, 31 Ch. D. 323; 55 L. J., Ch. 273; 53 L. T. 949; 34 W. R. 269—North, J.

Sale by Manufacturer in Bulk—Sale by Retail Dealer—Right to use Trade-mark.—A manufacturer who sells to a dealer, in bulk, an article usually sold and used in small quantities, without any restriction as to its disposal, must be taken to authorise the dealer to sell it as being his vendor's manufacture. The dealer may therefore call the article by the name registered by the manufacturer as his trade-mark. *Condy v. T aylor*, 56 L. T. 891—Kekewich, J.

Name calculated to Deceive.—The plaintiffs registered the word "Sanitas" as a trade-mark, under the Patents, Designs, and Trade Marks Act, 1883, for goods manufactured and sold by them. The defendant advertised and sold under the name of "Condi-Sanias" articles of a similar nature to those manufactured by the plaintiffs:—Held, that the word adopted by the defendant so resembled the plaintiffs' trade-mark as to be calculated to deceive and mislead; and that, therefore, an interlocutory injunction must be granted to restrain the defendant from using the word "Sanitas" in conjunction with "Condi," or in any other way which would infringe the plaintiffs' trade-mark. *Sanitas Company v. Condy*, 56 L. T. 621—Kay, J.

Plaintiffs' Conduct barring Remedy.—The plaintiffs, who were manufacturers of and dealers in cigars in England, imported from Germany cigars made of Havannah tobacco. There was no direct evidence as to the place where they were manufactured, but the court found as a fact that they were also manufac-

tured in Germany. Plaintiffs sold these cigars in England in boxes on which was a label containing their trade-mark (registered under the Trade Marks Registration Act, 1875), and consisted of the words "La Puraza," and a pictorial representation of an Indian woman in a state of semi-nudity holding up a bundle of cigars, two winged boys each holding a shield, and a background representing a portion of some tropical country. On one shield was depicted the arms of Spain, and on the other those of Havannah. In the trade-mark as registered the shields were blank. A smaller label contained what was apparently the lithographed signature of "Ramon Romnedo." On each box were branded the words "La Puraza" and "Habana." It was proved that "La Puraza" was an old brand, long disused, of Havannah cigars, and that there was no known existing person of the name of "Ramon Romnedo." The court held, that, it having been a general custom in the tobacco trade for over twenty-five years to mark cigar-boxes with the word "Habana," though the cigars had not been imported from Havannah, such a marking did not disentitle the owner of a trade-mark for cigars from seeking to prevent infringement; and that, the defendants having used similar marks on their cigar-boxes, the plaintiffs were entitled to an injunction and an account:—Held, on appeal, that, as the trade-mark and other marks on the plaintiffs' boxes together amounted to a "dressing-up" of the plaintiffs' cigars, and a misrepresentation that they were cigars manufactured in the Havannah, the action must be dismissed, but without costs, the defendants being entitled only to the costs of the appeal. *Newman v. Pinto*, 57 L. T. 31—C. A.

In 1876 A. registered as his trade-mark the word "Eton," which had been used since 1869, and become known in the trade as denoting cigarettes of his manufacture. He had also been in the habit of selling, and supplying for the purposes of sale, "Eton" cigarettes in boxes so labelled (in conformity with an alleged custom in the trade) as to imply that such cigarettes were manufactured at St. Petersburg by a Russian firm:—Held, that A., by so acting in connexion with the word "Eton" as to suggest to persons not in the trade that the cigarettes were not of his making, had destroyed the value of the word as "special and distinctive" within the Trade-marks Act, 1875, s. 10, and accordingly that at the time of registration it had ceased to be his special and distinctive mark capable of registration. And as five years on the register does not (on the authorities) give an indefeasible title to a mark which, from not properly constituting a trade-mark within the meaning of the act, ought not to have been registered, A.'s action to restrain an infringement of the mark by B. was dismissed, and rectification of the register by removing the mark on B.'s application allowed. *Wood's Trade-mark, In re, Wood v. Lambert*, 32 Ch. D. 247; 55 L. J., Ch. 377; 54 L. T. 314—C. A.

Costs—Apology after Writ.—On 12th June, 1886, an order was received by the defendant for certain goods with labels attached which infringed the plaintiff's registered trade-mark, and on 6th July, 1886, a writ was issued to restrain the infringement. On the 7th July, 1886, the defendants offered to compensate the

plaintiff without the necessity of legal proceedings, and to destroy the labels and comply with any reasonable request of the plaintiff; on 16th July the plaintiff moved for an injunction:—Held, that notwithstanding the defendant's offer the motion was not an unnecessary proceeding, and the defendants must pay the costs caused by what they had done. *Fennessy v. Day*, 55 L. T. 161—V.-C. B.

— **On Higher or Lower Scale.**—A submission to a perpetual injunction with costs by a defendant in an action for the infringement of a trade-mark does not afford a special ground upon which the court will direct taxation of the costs upon the higher scale under the provisions of Ord. LXV. r. 9. *Hudson v. Osgerby*, 50 L. T. 323; 32 W. R. 566—Pearson, J.

III. MERCHANDISE MARKS.

False Trade Description.—S., the original patentee, without fraud, sold in packets S.'s patent refined isinglass, a well-known article, which was really only gelatine:—Held, that he ought not to be convicted under s. 2 of the Merchandise Marks Act, 1887, of a "false trade description" merely because the description was not in the strict sense of the words an accurate indication of the material in the packet. To constitute the offence there must be an intention to mislead. *Gridley v. Swinborne*, 52 J. P. 791—D.

A patentee, who, after the expiration of his patent, continues selling the same articles under the description of patent articles, and with the royal arms on the wrappers, is not necessarily guilty of describing the goods falsely as the subject of an existing patent; it is a question of fact for the jury or the magistrate to determine. *Id.*

IV. DESIGNS.

Previous Publication — Samples — Marking registered Designs.—The inventor of a design for trimmings for corsets submitted it, before taking any steps to obtain registration, to his commission agent, who, in his turn, showed it to certain customers, and obtained orders to be executed at a future time. Registration was effected before any orders were executed. The trimming to which the design was applied was sold in lengths of several yards wrapped round with a paper band, on which were printed the word "Rd." and the registration number:—Held, that the design had been published in the United Kingdom previously to registration, and that the trimming was marked in accordance with the statutory requirements. *Blank v. Footman*, 39 Ch. D. 678; 57 L. J., Ch. 909; 59 L. T. 507; 36 W. R. 921—Kekewich, J.

New or Original Design.—A design is not a proper subject of registration under the Patents, Designs, and Trade-marks Act, 1883, unless there is a clearly marked and defined difference involving substantial novelty between it and any design previously in use. *Le May v. Welch*, 28 Ch. D. 24; 54 L. J., Ch. 279; 51 L. T. 867; 33 W. R. 33—C. A.

A design for a shirt collar was registered, the advantages claimed for which were—the height of the collar above the stud which fastened it in front, the cutting away the corners in the segment of a circle, and the absence of a band. A collar was shown to have been previously in use which had no band, in which the corners were cut away in arcs of circles; but the cutting away was not so wide, and the height above the stud was not so great, as in the registered design:—Held, that the registered design was not new or original within the meaning of the act, and must be removed from the register. *Id.*

Registration—"Proprietor."—In May, 1885, G., who was acting as the sole agent and consignee in the United Kingdom, during the year 1885, of toys manufactured in the United States by an American company, and consigned to him by them, registered in his own name the designs in accordance with which some of such toys were manufactured. The company had authorised him to register the designs in his own name, but had not assigned to him the designs, or the right to apply them to goods, the only arrangement between them and G. being that G. should sell in the United Kingdom goods manufactured and consigned to him by the company:—Held, that G. was not the proprietor of the designs within s. 61 of the Patents, &c., Act, 1883, and that the registration in his name was therefore wrongful and must be expunged. *Guterman's Registered Designs, In re*, 55 L. J., Ch. 309—Pearson, J.

Infringement—"Obvious Imitation."—A firm of calico printers copied the general effect of a design registered by a rival firm, but carefully avoided copying the exact details of the design:—Held, a "fraudulent and obvious imitation" within the meaning of this section of the Patents, Designs, and Trade Marks Act, 1883, and an injunction was granted on the balance of convenience in preference to defendant's keeping an account. *Grafton v. Watson*, 51 L. T. 141—C. A.

Article erroneously marked—Proper Steps to insure Marking.—S. 51 of the Patents, Designs, and Trade Marks Act, 1883, applies to the delivery on sale of articles to which a design registered under the act 5 & 6 Vict. c. 100, has been applied, and the marking of such goods since the Act of 1883 came into operation is regulated by that act. Consequently, the proprietor of a design registered under the act 5 & 6 Vict. c. 100, is in a proper case entitled to the benefit of the proviso contained in s. 51, which relieves him from the forfeiture of his copyright resulting from the omission to mark the articles with the prescribed mark, if he shows that he "took all proper steps to ensure the marking." The proprietor of a registered design instructed the manufacturer, who made for him the articles to which the design was applied, to stamp the proper mark upon them, and furnished him with a die for the purpose. By inadvertence the manufacturer marked some of the articles with a mark which belonged to another design registered by the same proprietor, the copyright of which had expired, using for the purpose by mistake an old die which remained in his possession, and the proprietor, after the Act of 1883 came into operation, sold some of the articles thus wrongly marked, with-

out observing the error. The letters Rd. formed part of both the marks:—Held, that the proprietor had not forfeited his copyright, but that he was protected by the proviso in s. 51. *Upmann v. Forester* (24 Ch. D. 231) followed. *Wittman v. Oppenheim*, 27 Ch. D. 260; 54 L. J. Ch. 56; 50 L. T. 713; 32 W. R. 767—Pearson, J.

Costs.—An innocent infringer of a registered design must pay the costs of a motion for an injunction to restrain him from infringing, though the plaintiff had given him no notice of the infringement before serving him with the writ in the action. *Id.*

V. TRADE UNIONS.

Rules—Legality—Winding up—Distribution of Funds.—Members of a trade association were expelled for breach of rules in restraint of trade. The association passed a resolution to wind up, with a direction to their trustees to divide the surplus assets among the persons entitled under the rules. An inquiry was directed on summons as to who were the persons entitled, and in what proportions:—Held, that the expelled members were properly excluded in the chief clerk's certificate made in answer to the inquiry. *Strick v. Swansea Tin Plate Company*, 36 Ch. D. 558; 57 L. J., Ch. 438; 57 L. T. 392; 35 W. R. 831—North, J.

Trade Protection Society—Rule in Restraint of Trade.—A society established for the protection of a particular trade contained a rule that no member should employ any traveller, carman, or outdoor employé who had left the service of another member without the consent, in writing, of his late employer, till after the expiration of two years:—Quære, whether such a society was to any and what extent within the Trade Union Acts, 1871 and 1876. *Mineral Water, &c., Society v. Booth*, 36 Ch. D. 465; 57 L. T. 573; 36 W. R. 274—C. A.

Misapplication of Money by Officer—Summary Conviction—Extinguishment of Debt.—The treasurer of a local branch of a trades union fraudulently misapplied certain moneys belonging to his society, and was summarily proceeded against and ordered to pay the amount claimed, and 5*l.* by way of penalty. He made default in payment of the two sums and was sentenced to two months' imprisonment with hard labour. He was afterwards proceeded against by the general secretary of the union in the county court for the amount originally claimed, but the county court judge nonsuited the plaintiff on the ground that he was not entitled to maintain the action. The plaintiff moved to set aside the nonsuit:—Held, on the motion to set aside the nonsuit, that, as the plaintiff had had recourse to the remedy provided by s. 12 of 34 & 35 Vict. c. 31, and the defendant had been punished, the punishment suffered by him operated as an extinguishment of the debt. *Knight v. Whitmore*, 53 L. T. 233; 33 W. R. 907—D.

Right of Guardians to Reimbursement.—A trade union is not a "benefit or friendly society" from which guardians of the poor can

claim reimbursement under s. 23 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), s. 23, in respect of the maintenance of a pauper. *Winder v. Kingston-upon-Hull*, 20 Q. B. D. 412; 58 L. T. 583; 52 J. P. 535—D.

TRAMWAYS.

Liability for Accident — Promoters or Lessees.]—The Tramways Act, 1870 (33 & 34 Vict. c. 78), regulating tramway companies authorised by statute to use tramcars in the public streets, enacts by s. 55 that "The promoters or lessees, as the case may be, shall be answerable for all accident, damages, and injuries happening through their act or default, or through the act or default of any person in their employment, by reason or in consequence of any of their works or carriages. . . ."—Held, that s. 55 applies only to a wrongful act or default, and does not make the promoters or lessees answerable for mere accident caused without negligence by their use of tramcars. *Brooklehurst v. Manchester Steam Tramways Company*, 17 Q. B. D. 118; 55 L. T. 406; 34 W. R. 568; 51 J. P. 55—D.

Removal of Lines — "Road Authority" — Who to Replace.]—A railway company, which had repaired and maintained for forty years a bridge with its approaches over which the plaintiff tramway company had acquired by statute the right to lay, maintain, and use their tramway lines, found it necessary to reconstruct the bridge in the interests of the public safety, and gave to the plaintiff company statutory notices under section 32 of the Tramways Act, 1870. They then reconstructed the bridge, and the road over it, with the sanction and approval of the local authorities in whom the road was vested, and for the purposes of such reconstruction removed the plaintiffs' tramways. After the reconstruction the railway company restored the roadway over the bridge and its approaches, and the plaintiffs restored the tramways under protest as to the cost of such restoration:—Held, that the railway company had authority to remove the tramway lines for the purposes aforesaid, and were not under liability to the plaintiffs, provided that they caused as little detriment or inconvenience as possible in carrying out the said repairs. *Wolverhampton Tramways Company v. Great Western Railway*, 56 L. J., Q. B. 190; 56 L. T. 892—D.

Paving—Control of Local Authority—Reference to Arbitration.]—By a local Tramway Act, passed after and incorporating the Tramways Act, 1870, the space between the rails and for a distance of eighteen inches beyond each external rail was to be paved by the company to the satisfaction of the local authority for the district with wood or other paving to be approved of by the local authority. On an application by the company the local authority declined to approve of a particular paving, and the company thereupon laid it down without such approval. On an application by the local authority for a

mandamus to the company to take up the paving so laid down:—Held, that the powers given to the local authority were subject to the provisions of the Tramways Act, 1870, that a difference had arisen within s. 33 of that Act which ought to be determined by a referee appointed by the Board of Trade, and that the mandamus ought not to be granted. *Reg. v. Croydon and Norwood Tramways Company*, 18 Q. B. D. 39; 56 L. J., Q. B. 125; 56 L. T. 78; 35 W. R. 299; 51 J. P. 420—C. A.

Repair of Road—Agreement with Local Authority — Liability of County Authority.]

By a local Tramways Act it was provided that in case steam power should be used on the tramway, the tramway company should repair the whole extent of that part of a main road over which their lines passed, but that the company might make such contracts and agreements for the repair of the road with the local authority of the borough as might be approved by the Board of Trade. It was also provided that no contract or agreement to be entered into under the act should operate to lessen the liability of the company under s. 28 of the Tramways Act, 1870. The road authority of the borough entered into a contract with the company, by which the expenses of maintenance and repair of the road were divided between them. In an action by the borough road authority against the county authority for contribution under s. 13 of the Highways and Locomotives Act, 1878:—Held, that the county authority were liable to pay out of the county rate one-half of the expenses incurred by the borough authority under the contract. *Over-Darwen (Mayor) v. Lancashire JJ.*, 58 L. T. 51; 36 W. R. 140—D.

Liability for Non-repair of Road—Contract with Road Authority.]

Where a tramway company enters into a contract with the road authority under s. 29 of the Tramways Act, 1870, whereby the road authority undertakes the repair of the portion of the road upon which the tramway is laid, the liability for damage occasioned by the non-repair of that part of the road, which would but for such contract be cast by s. 28 upon the tramway company, is transferred to the road authority. *Hovitt v. Nottingham and District Tramways Company*, 12 Q. B. D. 16; 53 L. J., Q. B. 21; 50 L. T. 99; 32 W. R. 248—D.

Liability for Obstruction in Road.]

—See *Barham v. Ipswich Dock Commissioners*, post, WAX.

Use of Steam Engines—Licence of County Authority.]

The steam engines authorised by statute to be used on tramways are not locomotives within the meaning of the Highways and Locomotives (Amendment) Act, 1878, s. 32, and, therefore, do not require to be licensed by the county authority. *Bell v. Stockton Tramways Company*, 51 J. P. 804—D.

Liability for Acts of Servants—Scope of Employment.]—Section 52 of the Tramways Act, 1870, which enacts that "it shall be lawful for any officer or servant of the promoters or lessees of any tramway" to detain any person defrauding the company of his fare, must be construed as limited to any officer or servant appointed for that purpose. A tramway company gave to

their conductors printed instructions, in which it was ordered that, except in cases of assault, conductors were not to give passengers into custody without the authority of an inspector or timekeeper. The conductor of a car, in which the plaintiff was a passenger, detained the plaintiff, and gave her into custody on a charge of passing bad money:—Held, in an action for false imprisonment against the company, that the defendants were not liable. *Charleston v. London Tramways Company*, 36 W. R. 367—D. Affirmed 32 S. J. 557—C. A.

A passenger on a tramway tendered a half sovereign to the conductor of the car in payment of the fare. The conductor, supposing the coin to be counterfeit, gave the passenger in charge to the police. Sections 51 and 52 of the Tramways Act, 1870, empower officers or servants of the promoters or lessees of any tramway, to seize and detain any person seeking to avoid payment of his fare:—Held, that the tramway company were liable in an action against them by the passenger for false imprisonment. *Furlong v. South London Tramways Company*, 48 J. P. 329; 1 C. & E. 316—Stephen, J.

Bye-laws — Emission of Steam.]—H. was driver of a steam-engine on a tramway; one of the bye-laws enacting that no steam shall be emitted from the engine, so as to be a reasonable ground of complaint to passengers or the public. H. as driver was resting the engine, which was not in good repair, and he could not help emitting steam, and one passenger only, when passing, complained of it:—Held, that H. was rightly convicted, as the bye-law was imperative and the evidence was sufficient, though he had no mens rea, and one passenger only complained. *Hartley v. Wilkinson*, 49 J. P. 726—D.

Reasonableness—Delivery of Ticket.]—The bye-law of a tramway company which provides that each passenger shall deliver up his ticket when required to do so, or pay the fare for the distance travelled over, is a reasonable bye-law. A passenger travelling under such circumstances, who shows his ticket, but refuses to deliver it up on the ground that his journey has not terminated, is liable to the penalty prescribed by the bye-law. *Heap v. Day*, 34 W. R. 627; 51 J. P. 213—D.

Regulating number of Passengers.]—It is competent to the local authority of any borough to make and to enforce a bye-law under s. 48 of the Tramways Act, 1870, for regulating the number of passengers to be carried in and upon tramcars, and the extent of accommodation to be afforded to them. The assent of the lessees of the line (under s. 46) is not necessary to the validity of such bye-law. *Smith v. Butler*, 16 Q. B. D. 349; 34 W. R. 416; 50 J. P. 260—D.

Winding-up Unregistered Company.]—An unregistered tramway company incorporated by a special act does not fall within the exception of "railway companies incorporated by Act of Parliament" in s. 199 of the Companies Act, 1862, and it may therefore be wound up under that section. *Brentford and Isleworth Tramways Company, In re*, 26 Ch. D. 527; 53 L. J., Ch. 624; 50 L. T. 580; 32 W. R. 895—V.-C. B.

TREES.

See TIMBER.

TRESPASS.

To Land—Right of Owner to Eject.]—Where a person has gained possession of property, but has no title to it, being in fact a trespasser, the rightful owner is entitled to use force in ejecting him, so long as he does him no personal injury. *Scott v. Brown*, 51 L. T. 746—Kay, J.

Animals — Liability of Owner.]—The plaintiff, a labourer, was digging a hole in the garden of a house adjoining that of the defendant. A low wall belonging to the defendant divided the gardens. While the plaintiff was at work at the bottom of the hole a dog belonging to the defendant, going over land belonging to third persons on his way to the defendant's garden, leaped into the hole and, falling on the defendant, injured him severely:—Held, that as the dog was not shown to be mischievous to the knowledge of the owner, no action would lie either for trespass or any breach of duty. *Sanders v. Teape*, 51 L. T. 263—D.

Sending back Infected Horses to Vendor.]—A purchaser of a horse sent it back to the seller on the ground of non-compliance with a warranty. The horse did comply with the warranty, and, whilst in the purchaser's stables, contracted a contagious disease. Of this the purchaser was unaware when he sent back the horse. On arriving back at the seller's stables other horses of the seller's contracted the disease from it, and died:—Held, that the seller could not recover damages from the purchaser for the loss of those other horses. *Wright v. Hetton Downs Co-operative Society*, 1 C. & E. 200—Hawkins, J.

To Person and Goods—Same wrongful Act—Estoppel.]—Damage to goods, and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and therefore the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person. The plaintiff brought an action in a county court for damage to his cab occasioned by the negligence of the defendant's servant, and, having recovered the amount claimed, afterwards brought an action in the High Court of Justice against the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence:—Held (Lord Coleridge, C.J., dissenting), that the action in the High Court was maintainable, and was not barred by the previous proceedings in the county court. *Brunsdon v. Humphrey*, 14 Q. B. D. 141; 53 L. J., Q. B. 476; 51 L. T. 529; 32 W. R. 944; 42 J. P. 4—C. A.

Criminal Proceedings.]—See CRIMINAL LAW, II. 20, and *Cole v. Miles*, ante, col. 1551.

TRIAL.

Of Criminal Cases.]—See CRIMINAL LAW.

Of Civil Matters.]—See PRACTICE.

TRINIDAD.

See COLONY.

TRINITY HOUSE.

See SHIPPING, XVI.

TROVER.

Power of County Court to order return of Chattel.]—In an action of detainue brought in the county court, the county court judge has jurisdiction to make an order for the delivery by the defendant of the specific chattel wrongfully detained, without giving him the option of paying its assessed value as an alternative. *Winfield v. Boothroyd*, 54 L. T. 574; 34 W. R. 501—D.

Sale of Stolen Goods in Market Overt.]—The defendants were public sale masters, and carried on business in a legally established cattle market, where a market overt for the sale of cattle and sheep was held once a week. A number of sheep, which had been stolen from the plaintiff, were brought on a market day to the stand of the defendants by the thief, who employed the defendants to sell the sheep for him. The defendants in ignorance of the theft placed the sheep in their stand, and sold and delivered them to a purchaser by whom they were removed:—Held, that the defendants were liable in an action of trover for the value of the sheep. *Delaney v. Wallis*, 14 L. R., Ir. 31; 15 Cox, C. C. 525—C. A.

Against Auctioneer for Goods Sold.]—See *Turner v. Hockey*, ante, col. 1589.

Goods in Custody of Police.]—The police have power under a warrant for the arrest of a person charged with stealing goods, to take possession of the goods for the purposes of a prosecution. A person is, therefore, justified in refusing to hand over goods to one claiming to be the owner, if such person has been entrusted with them by the police who have taken possession of them under such circumstances. *Tyler v. London and South Western Railway*, 1 C. & E. 285—Huddleston, B.

Right of Owner to follow Proceeds of Sale.]—Where a person wrongfully obtained goods and

sold them, and the proceeds of sale were paid into a colonial bank for the purpose of transmission to its London branch, he receiving bills of exchange to the amount of the proceeds drawn by the colonial bank on its London branch:—Held, that the owners of the goods were entitled to follow the proceeds in the hands of the bank, and to be paid the amount of the bills, as bills, as they became possessed of them. *Comité des Assureurs Maritimes v. Standard Bank of South Africa*, 1 C. & E. 87—Stephen, J.

Measure of Damages.]—The plaintiff warehoused hops with the defendants. The warehouse rent not being paid, the defendants on the 7th of July sold the hops to R. On the 29th July R. sold them back to the defendants, who, on the same day, sold them to L. On the 16th of August L. sold them to K., who, on the 20th of September removed them from the defendants' warehouse, where they had remained up to that time, not having been removed by any of the purchasers. None of these sales was in market overt. A letter was sent by the defendants to the plaintiff on the 5th of July, giving him notice of their intention to sell, and a second letter was sent on the 22nd of July informing the plaintiff of the sale, and inclosing a cheque for the balance of the purchase-money, after deducting the warehouse rent. The plaintiff never received either of these letters:—Held, in an action to recover damages for the conversion of the hops, that the measure of damages was not to be restricted to the value of the hops on the 7th of July, but was their value on the 20th of September, when K. removed them from the defendants' warehouse. *Johnson v. Hook*, 31 W. R. 812; 1 C. & E. 89—Stephen, J.

TRUST AND TRUSTEE.

I. CREATION AND DECLARATION OF TRUSTS, 1867.

II. RIGHTS AND LIABILITIES OF TRUSTEES.

1. *Investments*, 1872.
 - a. *Mortgages*, 1872.
 - b. *In Other Cases*, 1876.
2. *Right to Indemnity*, 1877.
3. *Right of Contribution from Co-Trustee*, 1877.
4. *Discretion of Trustees*, 1879.
5. *Powers of Sale*, 1882.
6. *Dealings between Trustee and Cestui que Trust*, 1885.
7. *Breach of Trust*, 1886.
8. *Liability for Acts of Agents*, 1889.
9. *Getting in Trust Funds*, 1890.
10. *Management of Trust—Carrying on Business*, 1891.
11. *Payments to Trustees*, 1892.
12. *Preservation and Repair of Premises*, 1893.
13. *Payment of Costs*, 1895.
14. *Notice to Trustees*, 1898.
15. *Production of Title Deeds*, 1899.
16. *Other Proceedings by and against*, 1899.

III. TRUSTEE ACTS.

1. *Payment into Court*, 1900.
2. *Appointment of Person to Convey*, 1901.
3. *Vesting Order*—See *infra*, IV.

IV. VESTING ORDERS.

1. *In what Cases*, 1903.
2. *Practice as to*, 1909.

V. APPOINTMENT AND REMOVAL OF TRUSTEES.

1. *Exercise of Power*, 1911.
2. *In what Cases*, 1912.
3. *Who Appointed Trustees*, 1917.
4. *Practice*, 1918.

VI. FOLLOWING TRUST MONEY, 1919.

VII. THE TRUST ESTATE, 1921.

VIII. EFFECT OF STATUTE OF LIMITATIONS
—See LIMITATIONS (STATUTE OF), I. 1.

I. CREATION AND DECLARATION OF TRUSTS.

"By Operation of Law"—New Lease.—In 1865, A. by a post-nuptial settlement, in consideration of natural love and affection, assigned a lease for a term expiring in 1905 to trustees in trust for the benefit of his wife. In 1870, without disclosing the settlement, A. obtained a lease of the same premises for forty years in consideration of a premium of 91l. and the surrender of the old lease. The old lease, cancelled, and the new lease, were delivered by A. to his wife:—Held, that although there was no written declaration of trust of the new lease, such lease was "by operation of law" subject to the trusts of the settlement declared in respect of the old lease. *Lulham, In re, Brinton v. Lulham*, 53 L. T. 9; 33 W. R. 788—C. A. Affirming 53 L. J., Ch. 928—Kay, J.

Leaseholds—Tenant for Life Purchasing Reversion.—The doctrine that a renewal of leaseholds by a tenant for life enures for the benefit of the remainderman applies equally to a purchase of the reversion. *Phillips v. Phillips*, 29 Ch. D. 673; 54 L. J., Ch. 943; 53 L. T. 403; 23 W. R. 863—C. A.

—Renewal becoming Impossible—Purchase of Reversion by Assignee of Tenant for Life.—A leasehold for lives was devised by a testator who died in 1820 to trustees, on trust for a tenant for life and other persons in remainder, the ultimate remainder in fee being given to the tenant for life. The first trust was to renew the lease from time to time, paying the necessary fines and expenses out of the rents, or raising them by mortgage. In 1825, the trustees obtained a renewed lease for three lives, one of which was that of the tenant for life. In 1855, and 1859, respectively, the other two lives dropped. In October, 1876, the tenant for life contracted to sell all his interest in the property to B., and a conveyance was executed in March, 1879. In December, 1876, the Ecclesiastical Commissioners, in whom the reversion subject to the lease was then vested, and who would not

renew the lease, contracted to sell the reversion to B., and in August, 1879, they executed a conveyance to him, the conveyance being expressly made subject to "such trusts, equities, estates, and interests," as then affected the leasehold interest. In June, 1878, the School Board for London, under their statutory powers, took part of the property, and in January, 1880, they paid the purchase-money and compensation money into court. The legal estate in the lease was outstanding in the representatives of the last surviving trustee of the will:—Held, that, irrespectively of the form of the conveyance of the reversion to B., it was, according to the ordinary doctrine of a Court of Equity, impossible for him to purchase the reversion otherwise than as a trustee for the persons interested in the lease under the trusts of the will, and that, subject to his right to be recouped the purchase-money, he was only entitled to an order for payment of the interest on the fund in court during the life of the tenant for life under the will. *Hardman v. Johnson* (3 Mer. 347) distinguished. *Ranelagh's (Lord) Will, In re*, 26 Ch. D. 590; 53 L. J., Ch. 689; 51 L. T. 87; 32 W. R. 714—Pearson, J.

Bequest—Condition in Nature of a Trust.—A bequest of a capital sum was made to the Royal National Lifeboat Institution on condition of its constructing and keeping up two lifeboats, and coupled with a gift over in the event of non-compliance with the condition:—Held, that the bequest was in the nature of a trust. *Richardson, In re. Shuldham v. Royal National Lifeboat Institution*, 56 L. J., Ch. 784; 57 L. T. 17; 35 W. R. 710—Chitty, J.

Executor—Mistake—Residuary Account.—Where an executor had passed his residuary account, stating that a legacy was "retained in trust" out of the residue:—Held, that he was not entitled to show that he had since discovered that the account had proceeded on a mistake, and that there were not in fact assets for the legacy. *Breuster v. Prior*, 55 L. T. 771; 35 W. R. 251—Kekewich, J.

Direction to Executors of Donor—Retention of Gift.—Some time before his death a testator informed his daughter's companion F. P. that he intended to give her a debenture bond for 1,000l. in the M. S. and L. Railway Company. Shortly afterwards he signed the following memorandum: "I wish to communicate to my executors that I have to-day given to Miss F. P. my 1,000l. debenture bond of the M. S. and L. Railway Company; but, as I shall require the annual dividends to meet my necessary expenses, I retain the document in my own possession for my lifetime, requesting you, on my decease, to hand it over to Miss F. P., and communicate to the secretary of the railway company at the Manchester office, relative to the transfer of the said bond being entered in their books. Given under my hand this 9th day of February, 1882. As witness my hand.—G. S. P.S.—You will find the bond in my deed-box attached to this memorandum." After the testator's death a certificate of debenture stock for 1,000l. in the M. S. and L. Railway Company was found with the memorandum in the deed-box:—Held, that the memorandum was an ineffectual attempt to assign the debenture stock, and did not amount to a good

declaration of trust, and that F. P. had no interest in the debenture stock. *Shield, In re, Pethybridge v. Burrow*, 53 L. T. 5—C. A.

Will—Trust not communicated till after Testator's Death.]—A testator cannot by imposing a trust upon his devisee or legatee, the object of which he does not communicate to him, enable himself to evade the Statute of Wills by declaring those objects in an unattested paper found after his death. In order to make such a trust binding, it is essential that it should be communicated to the devisee or legatee during the testator's lifetime, and that he should accept that particular trust. *Boyes, In re, Boyes v. Carritt*, 26 Ch. D. 531; 53 L. J., Ch. 654; 50 L. T. 581; 32 W. R. 630—Kay, J.

The testator, by his will, made shortly before going abroad, gave all his property to C., his sole executor, who was a solicitor and drew the will. In an action in the Probate Division, C. admitted that he was only a trustee of the property, and said that the intention of the testator was that he should hold upon certain trusts of which he would inform him when he arrived abroad. No direction was given to C. by the testator during his lifetime, but after his death two letters were found among his papers addressed to C., and naming a person whom he wished to be the object of his bounty :—Held, that C. was a trustee for the next-of-kin of the testator. *Id.*

Bequest of 200*l.* to A. and B. "to spend as I" (the testatrix) "shall, by word of mouth, direct during my lifetime." The testatrix verbally informed A. that she wished to leave "something to J., and something to the Lord's work," and suggested C. and D. as persons to whom she proposed to give the last-mentioned bequest. After the testatrix's death A. found a letter in her handwriting, which, after reciting the bequest in the will of the 200*l.*, proceeded as follows :—"I would ask you to give or send 100*l.* to J.; the second I wish sent for the Lord's work, 50*l.* to C., and 50*l.* to D.; I would ask them to lay it out :—Held, that no valid trust was created affecting any portion of the 200*l.* *King's Estate, In re*, 21 L. R., Ir. 273—Monroe, J.

Delivery of Promissory Note to Third Person on Condition.]—A testatrix made her will in 1873, and thereby bequeathed a legacy of 150*l.* to E. H., who was living with her as a domestic servant. In August, 1877, the testatrix handed to C., her solicitor (whom she had appointed one of her executors), a promissory note for 200*l.*, signed by herself and payable on demand to E. H., telling C. not to mention the note to any one but E. H., but to retain it till the death of the testatrix, and then to give it to E. H., if she should remain in the service of the testatrix until her death. E. H. was informed of the note soon after it had been handed to C. The testatrix had previously told E. H. that, if she should continue in her service until her death, she would leave in the care of C. a present for her, beyond what she might leave to her in her will. E. H. remained in the service of the testatrix until the death of the latter, and the promissory note continued in the possession of C. The testatrix died in 1881. She had never revoked the direction which she had given to C. about the note :—Held, that C. was constituted a trustee of the note, that he might after the death of the testatrix hand it over to

E. H. if she had fulfilled the prescribed condition, and that, as the testatrix had never revoked the direction which she had given to C., E. H. was entitled to prove for the amount of the note in the administration of the estate of the testatrix. *Richards, In re, Shenstone v. Brock*, 36 Ch. D. 541; 56 L. J., Ch. 923; 57 L. T. 249; 36 W. R. 118—North, J.

Money to pay Dividends in hands of Agents for Foreign Government.]—A foreign government issued a public loan under a decree and an agreement providing for a mortgage to the defendants of certain estates on behalf of bondholders. The defendants received instructions to pay coupons for interest falling due on the 1st of June, less five per cent. tax, pursuant to a decree of the government which was to take effect subject to the promulgation of a decree modifying the Law of Liquidation. The defendants having received from the government a sum of money to meet the half-yearly interest less five per cent., advertised that they would make such payments. Subsequently the defendants received 10,000*l.*, being the amount of the five per cent., from the commissioners of the government who managed the mortgaged estates, but it did not appear that such commissioners were authorised to remit such sum. The defendants, however, issued a further advertisement that the coupons would be paid in full. Finally, they issued an advertisement that in accordance with directions of the government the coupons would be paid less five per cent., notwithstanding that the amount required to pay the same in full had been duly remitted to them by the commissioners. After such last advertisement the decree modifying the Law of Liquidation was passed. The plaintiff, a bondholder, brought this action claiming payment of his coupon in full by the agents pursuant to the second advertisement :—Held, that the 10,000*l.* was not remitted to the agents by persons who had authority to do so on behalf of the government, and that therefore it was not impressed with a trust in favour of the bondholders. *Henderson v. Rothschild*, 56 L. J., Ch. 471; 56 L. T. 98; 35 W. R. 485—C. A. Affirming 33 Ch. D. 459—V.-C. B.

Agreement before Marriage—Not signed by Party.]—Shortly before marriage M., the intended husband, signed and delivered to C., the intended wife, an agreement for the separate use by the latter of certain tenements held by her in fee. The agreement, however, was not signed by C. After the marriage she made a will devising the said property to the defendants who, upon her decease took possession of the same. In an action by the plaintiff, C.'s heir-at-law, to establish his title to and recover possession of the property :—Held, that the agreement not having been signed by C., it was by reason of s. 7 of the Statute of Frauds, void as a declaration of trust for separate use of the fee simple, M. having only an estate for the joint lives of himself and C., with a possible estate by curtesy, and that the plaintiff was, therefore, entitled to recover; the mere renunciation by M. of his marital rights in C.'s real property not being sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee. *Dye v. Dye*, 13 Q. B. D. 147; 53 L. J., Q. B. 442; 51 L. T. 145; 33 W. R. 2—C. A.

Trust for Accumulation—Trust for benefit of Mortgagees.]—By a voluntary settlement certain freehold estates were settled, subject to the mortgages subsisting thereon, to the use of the settlor for life, with remainder to the use of trustees for 500 years, and subject thereto in strict settlement. And the trusts of the term were declared to be that the trustees should during the period of twenty-one years from the death of the settlor receive out of the rents of the estate the annual sum of 1,000*l.* and accumulate it at compound interest, and should at the expiration of that period, or from time to time during that period, as they might think fit, apply the accumulated fund in satisfaction of the mortgages then charged on the estate, and should pay the surplus of the rents to the person entitled to the immediate reversion of the estate. Seven years after the death of the settlor the first tenant in tail in possession barred the entail and acquired the fee simple subject to the mortgages; and he then claimed the right to stop the accumulations and to receive the accumulated fund and the whole future rents of the estate:—Held, that the mortgagees were *cestuis que trust* under the deed equally with the owner of the estate, and that he could not stop the accumulations or receive the accumulated fund without their consent. The doctrine of *Garrard v. Lauderdale* (2 Russ. & M. 451) does not apply to provisions for creditors which do not come into operation till after the death of the settlor. *Fitzgerald's Settlement, In re*, 37 Ch. D. 18; 57 L. J., Ch. 594; 57 L. T. 706; 36 W. R. 385—C. A.

Covenant to Pay Annuity for Benefit of Widow of Deceased Partner.]—Articles of partnership between two solicitors provided that the partnership should be for the term of ten years from the 1st of May, 1875, if both the partners should so long live. The partnership was also made determinable by notice. There was a further provision that from the determination of the partnership the retiring partner, his executors or administrators, or the executors or administrators of the deceased partner, should be entitled to receive out of the net profits of the partnership business, during so much (if any) of the term of five years from the 1st of May, 1880, as should remain after the determination of the partnership, the yearly sum of 350*l.*, and during so much (if any) of the term of five years from the 1st of May, 1885, as either the retiring partner, or a widow of the retiring or deceased partner, should be living, the yearly sum of 250*l.*, any sum which might under this provision for the time being become payable to the executors or administrators of a deceased partner to be applied in such manner as such partner should by deed or will direct for the benefit of his widow and children, and in default of such direction to be paid to such widow, if living, for her own benefit. It was further provided that the annuity should, so far as legally might be, be constituted a charge on the net profits of the business. One of the partners died in 1883, leaving a widow, but without having given any direction as to the application of the annuity. By his will he appointed his widow his universal legatee and sole executrix. He died insolvent, and an action was brought by a creditor to administer his estate:—Held, that the annuity did not form part of the testator's estate, but that by the articles a trust of it was

created in favour of the widow, and that she was entitled to it free from the claims of the testator's creditors. *Flacell, In re, Murray v. Flacell*, 25 Ch. D. 89; 53 L. J., Ch. 185; 49 L. T. 690; 32 W. R. 102—C. A.

Money handed to Solicitor for Investment—Representation that Money advanced on Mortgage.]—A client left moneys for investment in the hands of his solicitors. The solicitors represented that the sum of 11,000*l.*, part of these moneys, was invested on mortgage of freehold property at A., belonging to a firm, and the client made no further inquiry. The solicitors were in fact the holders of a mortgage for 55,000*l.* upon property X. at A., belonging to the firm, and they repaid themselves 11,000*l.* of the 55,000*l.* with the client's money. The firm afterwards bought property Y. at A., and mortgaged it in fee to a bank. The solicitors released the firm from the mortgage debt of 55,000*l.* on property X. and took from them a mortgage for 50,000*l.* on properties X. and Y., subsequently, by arrangement with the firm, purchasing the equity of redemption in both properties, and selling them for shares to a limited company into which the firm was, through their instrumentality, converted. These transactions all took place without the knowledge of the client:—Held, that the solicitors must be treated as having become trustees for the client of 11,000*l.* out of the 55,000*l.* secured by mortgage on property X.; and having improperly, as against the client, given up that mortgage in exchange, the client had a right under the circumstances to claim a charge for 11,000*l.* and interest upon property Y. (in which the legal estate was outstanding) as well as upon property X. *Vernon, Ewens & Co., In re*, 33 Ch. D. 402; 56 L. J., Ch. 12; 55 L. T. 416; 35 W. R. 225—C. A.

II. RIGHTS AND LIABILITIES OF TRUSTEES.

1. INVESTMENTS.

a. Mortgages.

Contributory Mortgage.]—It is a breach of trust, in the absence of express authority in the instrument creating the trusts, where the trustees are directed to invest in their own names, to invest trust moneys upon a contributory mortgage. *Webb v. Jonas*, 39 Ch. D. 660; 57 L. J., Ch. 671; 53 L. T. 882; 36 W. R. 666—Kekewich, J.

Trade Premises—Insufficient Security—Valuation.]—Trustees, having a power to invest on real securities, invested 3,500*l.* on a mortgage of a freehold brickyard with buildings, machinery, and plant. Before doing so they obtained a report from a competent surveyor that the property formed a good security for the amount of the advance. The report did not state, and the trustees did not inquire, what value the surveyor placed upon the property, nor how that value was arrived at. In fact the valuation was based on the brick business being carried on as a going concern, and the land was taken as worth 2,000*l.* only. The security having turned out insufficient, an action was brought against the trustees to

have the trust fund replaced:—Held, that the trustees had not acted with proper care, and were liable to make good the loss, with interest at four per cent. from the last payment by the mortgagor:—Held, also, that the tenant for life could not be required to bring into account interest in excess of four per cent. received under the mortgage before default was made. *Leary v. Wierley*, 12 App. Cas. 727; 57 L. J., Ch. 390; 58 L. T. 93; 36 W. R. 721—H. L. (E.).

A trustee advanced trust moneys to a brick-making firm upon the security of a first mortgage of their premises, freehold and leasehold, and some of the plant. In so doing he acted upon the advice of his solicitor, and upon a favourable report and valuation made by a respectable firm of architects and surveyors. A bank of good standing, moreover, consented to postpone a charge of theirs to his mortgage. The mortgagors failed three years afterwards, whereby their lease of that part of the property upon which was found most of the clay and shale necessary for the carrying on of the business, became forfeited. The remainder of the property proved unsaleable, and rapidly went to ruin. An action was subsequently brought by the cestui que trust to make the trustee liable for the loss sustained by them, and it appeared that the report and valuation proceeded, ex facie, in some respects upon faulty principles:—Held, nevertheless, that the trustee had acted as a prudent man would have acted in dealing with his own property, and was therefore not liable. *Pearson, In re, O'wley v. Scarth*, 51 L. T. 692—Pearson, J.

Trade Premises and Personal Security—Power to lend on "Personal" Security—Immunity Clause—Law Agent acting for both Parties.]—

Trustees sold a tenement, the property of the trust, to one of seven beneficiaries under the trust deed, the price according to the terms of the contract being payable in May, 1874. In November, 1874, the purchaser being unable to pay 12,000*l.* of the price, was allowed to retain it on loan. As security for the loan, he conveyed to the trustees three houses, including his purchase from the trust, upon each of which there were prior incumbrances, to an amount exceeding two-thirds of the estimated value as stated by the borrower. Besides these securities the trustees held the personal obligation of the borrower and his father-in-law, both of whom were engaged in trade. Some of the other beneficiaries remonstrated in 1874, and again in 1880: but the money was allowed to remain on these securities until 1884, when the borrower and his father-in-law became bankrupt, and about 10,000*l.* was lost to the trust. The trust deed contained (1), a clause empowering the trustees to lend out the proceeds and other funds of the trust on "such securities heritable or personal" as they might think proper; and (2), an immunity clause declaring that the trustees should not be liable for "omissions, errors, or neglect of management." The same law agent acted for the trustees and the borrower:—Held, that the trustees had not acted with perfect impartiality between the beneficiaries, nor had they brought to the management the same care and diligence which a man of ordinary prudence would have exercised in his own concerns, that in these circumstances neither the immunity clause nor the authority to lend on personal security were suffi-

cient to protect them, and that they were personally liable to make good the deficiency in the trust funds. *Know v. Mackinnon*, 13 App. Cas. 753—H. L. (Sc.).

House Property—Valuation—One-half Rule.]

Trustees, who were empowered to invest on mortgage, advanced the sum of 8,300*l.* upon the security of certain leasehold property consisting of small cottages, some of which were let to weekly tenants. The mortgagor having made default, the trustees took possession of the property, which would not realise the sum advanced, the value of the property having greatly depreciated. Evidence was adduced to show that, at the date of the mortgage, the sum advanced was equal to about two-thirds of the value of the property. But there was other evidence to the effect that the property was then even less valuable; and that the trustees had not obtained any formal valuation thereof:—Held, that the trustees had made a most improvident investment, and had disregarded the rule as to the limit to be observed when investing trust funds upon the security of house property; that they ought to have made a more careful examination of the security; and that, under the circumstances, they were liable to replace the sum advanced. *Olive, In re, Olive v. Westerman*, 34 Ch. D. 70; 56 L. J., Ch. 75; 55 L. T. 83; 51 J. P. 38—Kay, J.

Trustees advanced trust money upon mortgage of properties consisting of an hotel and stables, and cottages and houses which were principally let at weekly rents. Valuers were employed, and the particulars of the several properties as furnished by the mortgagors were submitted to them, but the trustees did not make inquiries for the purpose of verifying the statements made by the mortgagors as to the value or nature of the properties, or whether they were all let, or what was the amount of the outgoings payable. In their instructions to the valuers, they told them that the mortgagees were trustees, but they did not tell them, according to the rule laid down for trustees in lending on the security of house property, that they did not desire to lend more than one-half the value. Neither did they call the attention of the valuers to circumstances which might affect the value. They also omitted to instruct the valuers to ascertain whether the particulars were correct, or what were the outgoings or average amount of repairs. In each case the valuers gave it as their opinion that a sum more than one-half of the value might be advanced on the security, and such a sum was in each case advanced. Shortly afterwards the mortgagors became insolvent. The several properties were put up for sale, but failed to realise the amounts advanced:—Held, that the investments were improper; that the trustees had been guilty of negligence in not making inquiries as to the particulars, and in not giving proper instructions to the valuers, and in acting upon valuations which under the circumstances they ought not to have acted upon, and they were jointly and severally liable for the money lost. *Partington, In re, Partington v. Allen*, 57 L. T. 654—Stirling, J.

In 1873 trustees advanced 3,800*l.* trust moneys to B. upon the security of a freehold house and appurtenances in the occupation of B., and carried on by him as a school in partnership with S. By the deed of partnership, B. as owner

of the freehold, was to receive 300*l.* a year out of the profits of the school, and in the event of his death, S. was to take a lease at the same rental. The advance was made in reliance upon the report of a surveyor, instructed by one of the trustees in his capacity of solicitor to B., such report being made for the purposes of a previous mortgage negotiation with other trustees, which fell through. By this report the property was estimated at 5,800*l.* on the assumption that a responsible tenant was willing to take a lease of the property at a rental of 400*l.* a year. The security having proved insufficient:—Held, that the trustees had not acted as prudent men in making such an advance upon a valuation made on behalf of the borrower, and must restore the trust funds. *Walcott v. Lyons*, 54 L. T. 786; 50 J. P. 772—V.-C. B.

— **Sub-mortgage — Building Estate.** — Under a settlement S. was tenant for life with an ultimate trust, in default of children (which happened), for her testamentary appointees. The trustees, having power to invest on leasehold securities, invested the trust funds, with S.'s consent, on separate sub-mortgages of leasehold houses, unfinished and unlet, on a building estate of which the roads and drainage were in a defective condition. The investment was made without an independent or reliable valuation, and more than half the value of the house was lent on each sub-mortgage. S. died, having by will disposed of the trust funds, and appointed executors. The executors, with the sanction of the chief clerk in an action establishing S.'s testamentary appointment, had the sub-mortgages transferred to them by the trustees, and subsequently, finding them an insufficient security, brought an action against the trustees to make them personally liable for the deficiency:—Held, that, although the sub-mortgages were not improper investments in point of form, the trustees having invested the trust funds on insufficient security of a speculative character, and without proper precautions, must make good the loss; and that the executors, having taken the transfers in ignorance of the circumstances attending the investment, were not bound by adoption or acquiescence. *Smethurst v. Hastings*, 30 Ch. D. 490; 55 L. J., Ch. 173; 52 L. T. 567; 33 W. R. 496—V.-C. B.

Valuation by Mortgagor's Surveyor. — Trustees empowered to invest on mortgage lent under the advice of their solicitors a sum of 5,000*l.* upon mortgage of a freehold house and grounds at Liverpool, valued to them at from 7,000*l.* to 8,000*l.* The trustees did not exercise their own judgment as to the choice of a valuer, but accepted the suggestion of their solicitors, that a London surveyor who had introduced the security to them, and was in fact the agent of the mortgagor with a pecuniary interest in the completion of the mortgage, should value the property for the trustees, and they acted upon the report of this valuer, which was of an inflated character. The mortgagor afterwards became bankrupt, and the property would not realise the sum advanced:—Held, that the trustees were jointly and severally liable to replace the sum advanced, with interest at 4 per cent. from the date of the loan. *Fry v. Tapson*, 28 Ch. D. 268; 54 L. J., Ch. 224; 51 L. T. 326; 33 W. R. 113—Kay, J.

Introduction of Valuer to Mortgagor. — Trustees ought not to introduce the valuer, who is valuing property with a view to a mortgage by the trustees, to the mortgagor, or the mortgagor's agent, for the purpose of negotiating the amount of the fee for the valuation. *Partington, In re, Partington v. Allen*, supra.

b. In other Cases.

"Irish Land"—**Liverpool Corporation Stock.** — Where a testator gave all his personal estate to executors to be sold, and directed them out of the proceeds to buy land in Ireland, and in the meantime the executors had invested part of the proceeds in Liverpool Corporation stock; on an originating summons, asking for directions as to the investments, and for an order permitting the applicant to delay or postpone making any investment in Irish land:—Held, that the Liverpool Corporation stock was not an investment authorised by the joint operation of s. 21 of the Settled Land Act, 1882, and s. 17 of the Local Authorities Loans Act, 1875. Further, that it was imprudent for the trustees to invest money in Irish land, and it was their duty to retain it until such time as it was prudent to carry out the directions of the testator, and that the court had jurisdiction to postpone such investment under s. 33 of the Settled Land Act, 1882. *Maberly, In re, Maberly v. Maberly*, 33 Ch. 455; 56 L. J., Ch. 54; 55 L. T. 164; 34 W. R. 771—V.-C. B.

"Real Securities"—**Long Leaseholds.** — A power to invest in "real securities" does not authorise trustees to invest the trust funds upon long terms of years created in real estate for the purpose of raising portions. *Leigh v. Leigh*, 56 L. J., Ch. 125; 55 L. T. 634; 35 W. R. 121—Stirling, J.

Consols—**National Debt Conversion.** — Trustees of a will containing directions to invest in consols, but no direction to change or vary the investment, may, under the National Debt (Conversion) Act, 1888, sell original stock and invest the proceeds in authorised securities. *Tuckett's Trusts, In re*, 57 L. J., Ch. 760; 58 L. T. 719; 36 W. R. 542—Chitty, J.

Bank Shares—**Foreign and Colonial Bonds.** — A testator directed that his trustees should invest the moneys coming to their hands in respect of his estate in their names, or under their control, in such mode or modes of investment as they in their uncontrolled discretion should think fit. Before the commencement of an action to administer the testator's estate, the trustees (who were also executors) invested moneys forming part of it in the purchase of bonds of a foreign government, bonds of a colonial railway company, and shares of a bank on which there was a further liability. The chief clerk, in taking the accounts of the testator's estate, disallowed the trustees the sums which they had expended in the purchase of these bonds and shares. The shares in the bank had been previously sold at a profit:—Held, that though the investments in question ought not to be retained by the trustees, yet, as they had acted bona fide, and no loss had resulted to the trust estate, they ought not to be disallowed the sums

which they had laid out in making the investments. *Brown, In re, Brown v. Brown*, 29 Ch. D. 889; 54 L. J., Ch. 1134; 52 L. T. 853; 33 W. R. 692—Pearson, J.

—**Altered Conditions.**—Where fully paid-up shares in a banking company were bequeathed to trustees, with power to retain the investment, and the shares after the testator's death were altered in amount and became liable to calls:—Held, that by reason of the changes that had taken place, the shares were no longer in the same state of investment as at the testator's death, but were in a state of investment unauthorised by the will, and that the trustees must convert them. *Morris, In re, Bucknill v. Morris*, 54 L. J., Ch. 388; 52 L. T. 462; 33 W. R. 445—Pearson, J.

2. RIGHT TO INDEMNITY.

Proceedings to Recover Property not lost by Trustees.—*See Tudball v. Medlicott*, post, col. 1891.

By Cestui Que Trust—Shares—Action before Call.—Certain moneys belonging to A. were invested in shares in a banking company in the joint names of A. and B., the ultimate trust being for the estate of A., who predeceased B. The company went into liquidation and calls would be made upon the shareholders, on the list of whom the executor of B. would be put:—Held, that the executor of B. was entitled to be indemnified by the estate of A., and might bring an action for and obtain a declaration of indemnity before he was placed on the list and before any call was made on him. *Fraser v. Murdoch* (6 App. Cas. 855) discussed. *Hughes-Hallett v. Indian Mammoth Gold Mines Company* (22 Ch. D. 561) distinguished. *Hobbs v. Wayet*, 36 Ch. D. 256; 57 L. T. 225; 36 W. R. 73—Kekewich, J.

Within what Limits.—The right of a trustee to be indemnified out of his trust fund for money expended by him in its preservation, is strictly limited to the trust fund. *Leslie, In re* (23 Ch. D. 552) explained. *Winchelsea's (Earl) Policy Trusts, In re*, 39 Ch. D. 168; 58 L. J., Ch. 20; 59 L. T. 167; 37 W. R. 77—North, J.

The right of a trustee to be indemnified out of the trust estate covers not only payments actually made by him, but also his liability to pay; and by virtue of this right of indemnity a trustee is entitled to resort in the first instance to the trust estate for necessary expenses. *Blundell, In re, Blundell v. Blundell*, 40 Ch. D. 370; 57 L. J., Ch. 730; 58 L. T. 933; 36 W. R. 779—Stirling, J.

Effect of—Breach of Trust.—*See Evans v. Benyon*, post, col. 1886.

3. RIGHT OF CONTRIBUTION FROM CO-TRUSTEE.

In what Cases.—H., C., and T., trustees, invested a sum on mortgage. The security turned out to be insufficient, and a loss was sustained. In a suit instituted by the beneficiaries

it was declared that T., C. and her husband, and the estate of H. were jointly liable to make this loss good, and numerous orders were made directing C. and her husband and T. to pay certain sums into court, and eventually the plaintiffs, who were the trustees of a settlement which comprised certain portions of H.'s estate, paid the whole sum into court. The plaintiffs then sued T. for his one-third contribution, and obtained judgment, but by reason of his insolvency recovered nothing. They then sued Mr. and Mrs. C. for half contribution. There was an arrangement between the trustees that Mr. and Mrs. C., who were resident abroad, should not be troubled about the trusts, and, as a fact, they did nothing therein:—Held, that this was no bar to contribution, for where one trustee acts honestly though erroneously, the other trustee who by doing nothing neglects his duty more than the acting trustee, is not entitled to indemnity. *Bacon v. Camphansen*, 58 L. T. 851—Stirling, J.

Trustees were held liable to replace sums improperly invested by them. One of the trustees, A., was a solicitor, authorised to make professional charges for work done for the trust. The other was the widow of the testator, and the tenant for life under his will of the trust funds. A. took the more active part in making the investments, and was paid costs for his professional work, charging scale fees both for negotiating the loans, deducing the title, and preparing and completing the mortgages; and he did not, in the opinion of the court, communicate what he did to his co-trustee in such a way as to enable her to exercise her judgment upon the investments, and make them her acts as well as his own:—Held, that A. had undertaken to find proper investments, and that the widow had joined in advancing the fund on the faith that the investments were proper ones which had been looked into by A., as solicitor; that she had been misled by him, and he had been guilty of negligence in his duty as a solicitor; and that, as between A. and the widow, A. was primarily liable for the breach of trust. *Partington, In re, Partington v. Allen*, 57 L. T. 654—Stirling, J.

Directors — Breach of Trust — Liability of Executor.—The directors of a company advanced moneys of the company upon an unauthorised security, and two sums of 600*l.* and 400*l.* so lent were lost. The 600*l.* formed part of a loan of 800*l.*, and the 400*l.* formed part of a loan of 1,000*l.* which was granted by the board of directors, and of which 400*l.* was actually advanced and repaid, and a second 400*l.* was advanced and not repaid. In an action by the company against one of the directors who had taken part in granting the loans, he was held liable to pay the two sums of 600*l.* and 400*l.* to the company, and, having paid them, he sued three of his co-directors for contribution. One of the defendants was not present at the meeting at which the loan of 800*l.* was granted, and at which a cheque for the 800*l.* was drawn, but he was present at a subsequent meeting at which the minutes of the former meeting were read and confirmed. The 800*l.* had been already paid to the borrower:—Held, that, whether the defendant would or would not have been liable to the company, there was no equity to compel him to contribute to the plaintiff in respect of the

600*L. Ramskill v. Edwards*, 31 Ch. D. 100; 55 L. J., Ch. 81; 53 L. T. 949; 34 W. R. 96—Pearson, J.

The same defendant was present at the meeting at which the loan of 1,000*l.* was granted, when he protested strongly against it. He was present at a subsequent meeting at which the minutes of the first meeting were read and confirmed, and he then signed a cheque which was drawn for the first 400*l.*:—Held, that by signing the cheque he had adopted the whole loan of 1,000*l.*, and that he was therefore liable to contribute in respect of the second 400*l.* which was lost. *Ib.*

The third defendant died after the commencement of the action, and his administrator was then made a defendant:—Held, that the liability to contribute survived against the defendant's estate. *Ib.*

4. DISCRETION OF TRUSTEES.

Trust for Benefit of Children—Authority to Pay to Parent.—A trust for the benefit of the children of A. with an authority to pay the trust funds over to their parent or guardian, does not empower the trustees to hand over the trust funds to A., without exercising any discretion in respect of his children's interest. *Gainsborough (Earl) v. Watcombe Terra Cotta Co.*, 54 L. J., Ch. 991; 53 L. T. 116—North, J.

Trust for Maintenance of Children—Ability of Father to Maintain.—J. B. M. having absolute power to dispose of property, devised it to her husband J. M. for life, in trust that he should "apply the same, or as much thereof as he should from time to time think proper, for or towards the maintenance and education, or otherwise, for the benefit of my son D. M., and shall and do invest the unapplied income, &c., in such stocks, &c., as the said J. M. in his absolute and uncontrolled discretion shall think fit, with power to him at any time, and from time to time, to use and apply all or any part of such accumulated income for the benefit of my said son, or to pay the same over to him, as the said J. M. may from time to time think proper;" and after the death of J. M. she devised the property, and all accumulations which should not have been applied or paid over in trust for his son D. M. absolutely; and if he should die in the lifetime of his father, J. M., to J. M. absolutely. After the testatrix's death, J. M. received the rents and maintained his son in a manner suitable to his rank until his own death. Independently of the testatrix's property he was during his life of ability to maintain his son. J. M. having died, his administratrix in an action brought by D. M. claimed credit for a considerable sum for the maintenance and education, &c., of the minor by J. M., during several years. It was sought, on behalf of the plaintiff, to have this credit disallowed on the ground that the father, having been of sufficient ability to maintain and educate his child, was not entitled to apply any of the trust funds for that purpose: Held, that J. M. was under the testatrix's will entitled (notwithstanding his own ability) to apply so much of the income of the trust funds as he should from time to time think proper for and towards the maintenance and education, or otherwise for the benefit, of his son D. M.

Malcomson v. Malcomson, 17 L. R., Ir. 69—C. A.

— **Child Assigning Interest.**—A testator directed his trustees, after the death of his wife, to apply the income of his estate "in and towards the maintenance, education, and advancement of my children in such manner as they shall deem most expedient until the youngest of my said children attains the age of twenty-one years," and on the happening of that event he directed them to divide his estate equally among all his children then living. The testator left four children, two of whom at the death of the widow in 1884 were of age, and the youngest was in his seventh year. After the decease of the widow the trustees paid each of the adult children one-fourth of the income, and applied the other two-fourths for the benefit of the minors equally till 1886, when J. S. C., the eldest son, made an absolute assignment for value of all his interest under the testator's will to H. The trustees declining to pay one-fourth of the income to H. he took out a summons to have the construction of the will determined:—Held, that no child of the testator was entitled, prior to the attainment of twenty-one by the youngest of the testator's children, to the payment of any part of the income, and that the trustees were entitled to apply the income for the maintenance, education, or advancement of the children, including J. S. C., in their absolute discretion; that H. was entitled to no interest in the income except such moneys or property, if any, as might be paid or delivered or appropriated for payment or delivery by the trustees to J. S. C., and that the trustees could not pay or deliver to J. S. C. money or goods forming part of the income or purchased out of the income, for that such moneys and goods so paid or delivered, or appropriated to be paid or delivered, would pass by the assignment. *Coleman, In re, Henry v. Strong*, 39 Ch. D. 443; 58 L. J., Ch. 226; 60 L. T. 127—C. A.

To Advance Money—Payment into Court—Effect upon Discretion.—A testator by his will devised and bequeathed his residuary estate to trustees, and gave thereout a legacy of 10,000*l.* to each of his five daughters, and directed that the legacies should be held upon certain trusts for the benefit of his daughters, their husbands and children respectively, and he provided that, on the request of any of his daughters, it should be lawful for the trustees, if they should think fit, to advance to the husband or husbands of any one or more of his daughters, part of her legacy (not exceeding 5,000*l.*) for the purpose of setting up the husbands in business, or otherwise promoting the advancement or benefit of his said daughter and her husband and family. The trustees paid the legacy of one of the daughters into court under the Trustee Relief Act. Application was now made for the advance of a sum of 3,000*l.* to the husband of the daughter whose share had been so paid in, for the purpose of furnishing him with a professional residence. The surviving trustee of the will consented to the advance being made:—Held, that the trustees, by paying into court, had terminated their discretion, and that the discretion being a personal one could not be exercised by the court, and the advance could not therefore be made to

the husband. *Nettlefold's Trusts, In re*, 59 L. T. 315—North, J.

See Ashburnham's Trust, In re, post, col. 1901.

Application of Income in Payment of Interest on Mortgage.]—*See Hotchkys, In re*, post, col. 1894.

Power to Release.]—A marriage settlement executed in 1843 contained a proviso that if the husband should survive the wife it should be lawful for the trustees at their option to withhold the income from him, and to appropriate it as they might think most proper for the benefit of him or his children. After the death of the survivor of the husband and wife, the property was to go as the wife should by deed or will appoint:—Held, that the power, being in the nature of a trust, could not be released. *Saul v. Pattinson*, 55 L. J., Ch. 831; 54 L. T. 670; 34 W. R. 561—Pearson, J.

Jurisdiction of Court to Interfere—Sale of Leaseholds.]—A testator gave leaseholds, some of which were held on short terms, to two trustees, one of whom was his wife, upon trust for his wife for life, and after her death upon trust that the whole should be sold, and the proceeds divided between four persons. And he authorised his trustees, provided that they should deem it advisable, to sell his short leaseholds and invest the proceeds and allow his wife to receive the income during her life. The leaseholds were in a bad state of repair at the death of the testator; the widow kept them up in the same state of repair, but declined to do more than this. The remaindermen applied for an order to oblige the tenant for life to maintain the leaseholds in such a state of repair as to satisfy the covenants in the leases, so as to avoid a forfeiture, or else to concur in selling the short leaseholds:—Held, that the court had no jurisdiction to interfere with the discretion of the widow, who had then become surviving trustee, and to order her to exercise her power of selling the leaseholds. *Tempest v. Lord Camoys* (21 Ch. D. 576, n.) distinguished. *Courtier, In re*, *Coles v. Courtier*, 34 Ch. D. 136; 56 L. J., Ch. 350; 55 L. T. 574; 35 W. R. 85; 51 J. P. 117—C. A.

Trust for Sale.]—Where real estate is devised to trustees in trust for sale, with a discretionary power to postpone the sale, the court will not interfere with a bonâ fide exercise of their discretion as to the time and mode of sale. *Blake, In re, Jones v. Blake*, 29 Ch. D. 913—C. A.

Maintenance of Infant.]—A female infant was entitled contingently on her attaining twenty-one, or marrying, to a fund of which her deceased mother had been tenant for life. The trustees had power to "apply all or any part" of the income (about 538*l.* a year) for her maintenance and education. On a summons in the matter of the infant, Bacon, V.-C., held that he had jurisdiction to control the discretion of the trustees as to the quantum to be allowed, and made an order on them to pay 400*l.* a year to the father for her maintenance and education. The trustees appealed, and in answer to an inquiry by the court, stated their intention to allow 250*l.* to the father for her maintenance

and education:—Held, that the order of the Vice-Chancellor was irregular, and must be discharged, the court having no jurisdiction on a summons in the matter of an infant to make any order for payment by trustees or other persons. *Lofthouse, In re*, 29 Ch. D. 921; 54 L. J., Ch., 1087; 53 L. T. 174; 33 W. R. 668—C. A.

Whether the court could control the discretion of the trustees as to the amount to be allowed for maintenance and education, so long as such discretion was honestly exercised. *Quære. Ib.*

5. POWERS OF SALE.

Jurisdiction of Court to Interfere with Discretion.]—*See cases, supra.*

Death of Parties to Concur.]—Real property was vested in trustees upon trust at the request of A. and B. and the survivor, and after their death at discretion, to sell and hold the proceeds upon trust for A. and B. successively for life, and then for the children equally. After the deaths of A. and B. there were three adult children:—Held, that the trust for sale was not spent, but was exercisable by the trustees without the concurrence of the beneficiaries. *Tweedie and Miles, In re*, 27 Ch. D. 315; 54 L. J., Ch. 71; 33 W. R. 133—Pearson, J.

Power to increase Capital employed in Business—Mortgage to secure Business Debts.]—A testator, who died in 1866, devised and bequeathed all his real and personal estate upon trust for sale and conversion, and empowered his trustees to carry on his business for such time as they should see fit, and to employ in the business all the capital which might be invested therein at the time of his decease, and the profits thereof, and to increase or abridge the business and his capital therein, and generally to transact all matters and concerns respecting the business, and to do all acts relative thereto, in the same manner as if they were absolutely entitled to the same. The personal estate of the testator comprised nearly the whole of the capital of the business. His real estate consisted of the manufactory and buildings upon which the business was carried on, and for which he received a rent. The trustees carried on the business after the testator's death in partnership with other persons; but the firm ultimately became bankrupt. In 1869 one of the trustees advanced to his co-trustees 2,000*l.*, and the title-deeds relating to the manufactory and premises were deposited with him for securing the repayment of the advance with interest. The money was applied for the purposes of the business. This transaction had not been disclosed. In January, 1882, an action was commenced for the administration of the testator's estate. In pursuance of an order made in that action, the business was sold in 1883. In September, 1882, certain of the beneficiaries mortgaged all their respective shares under the will to secure the repayment to a banking company of 4,600*l.* The banking company applied by petition for leave to intervene in the action, and obtained payment of their debt. The question raised was, whether the trustees had power to make an equitable mortgage of real estate, which did not form part of

the assets employed in the business; for the purposes of the business:—Held, that power to employ other assets in the business was conferred upon the trustees by the authority to increase the capital of the business; that, as they could have sold the real estate and used the proceeds in the business, they were not wrong in using the property itself to assist in carrying on the business; and that the mortgage of 1869 had priority over the mortgage of 1882. Held also, that, as the banking company were not creditors of the testator, they had taken the most convenient course in applying to intervene by petition. *Dimmock, In re, Dimmock v. Dimmock*, 52 L. T. 494—Kay, J.

Extinguishment — Disentailing Deed.]—An estate was devised to uses to secure certain annuities, and subject thereto in strict settlement, with power to the trustees to sell at the request of the tenant for life under the will. The estate was disentailed and resettled (the existing life estate being postponed to certain charges, and the powers of the will being expressed to be kept alive):—Held, that the trustees for sale and the tenant for life could make a good title. *Wright and Marshall, In re*, 28 Ch. D. 93; 54 L. J., Ch. 60; 51 L. T. 781; 33 W. R. 804—Pearson, J.

Depreciatory Conditions of Sale.]—When trustees sell property with depreciatory conditions, which render the sale liable to be impeached by the cestui que trust, the trustees cannot maintain an action for specific performance against the purchasers. *Dunn v. Flood*, 28 Ch. D. 586; 54 L. J., Ch. 370; 52 L. T. 699; 33 W. R. 315—C. A.

Trustees for sale sold by auction certain leaseholds. The conditions of sale provided that every recital in any abstracted document should be conclusive evidence of the fact stated; and that the lots were sold "subject to the existing tenancies, restrictive covenants, and all easements and quit-rents (if any) affecting the same," and that the purchasers were to indemnify the vendors against the breach of any restrictive covenants contained in the abstracted muniments of title. The sale was made also subject to certain general conditions restricting the occupation of the land. The abstracted documents contained no other restrictive covenants than those comprised in the general conditions; and the vendors stated that they knew of no other restrictive covenants, and of no existing tenancies, easements, or quit-rents affecting the property:—Held, that the condition as to existing tenancies and restrictive covenants was depreciatory, and that the objection was a good defence to an action for specific performance by the trustees against a purchaser. *Id.*

Trustees for sale sold by auction certain leasehold properties. One of the conditions of sale stipulated that no objection should be made if any lease was an underlease, or that the premises were held on the same lease with other property, or that the same were liable to superior rents or covenants. A purchaser objected to this condition as depreciatory:—Held, that the solicitor who prepared the conditions should have ascertained whether the leases were underleases or not; that there should have been a statement of fact as to each lot, and not, as this was, a statement which might apply to any of the

lots; and that this was a depreciatory condition, and ought not to have been inserted by the trustees. *Rayner's Trustees and Greenwood, In re*, 53 L. T. 495—Kay, J.

Trustees for sale under a will put up for sale by auction certain lands in numerous small lots, with conditions providing that the title should commence with the conveyance to the testator ten years before:—Semble, that this condition, having regard to the number and smallness of the lots, was not unreasonable. *Dunn v. Flood*, 28 Ch. D. 586; 54 L. J., Ch. 370; 52 L. T. 699; 33 W. R. 315—C. A.

Implied Power — Discretionary Power to invest Estate.]—A testator devised and bequeathed the residue of his estate and effects to trustees upon certain trusts; and he declared that it should be lawful for his trustees, at their absolute and uncontrolled discretion, to continue the whole or any part of his estate in the firm in which he was a partner, or "to invest, re-invest, and lend any part" of his estate to the firm on such terms as the said trustee should, at such discretion as aforesaid, think proper:—Held, that there was no implied power to sell the real estate. *Holloway, In re, Holloway v. Holloway*, 60 L. T. 46; 37 W. R. 77—North, J.

Free from Portions.]—A tenant for life and a tenant in remainder having power under a settlement to appoint to uses, by a deed-poll indorsed on the settlement, appointed that the settlement should be read and construed as if the words "with any gross sum or sums (other than portions)" had been inserted after the word "charging." The intention was to enable the trustees of the settlement to sell any part of the land free from portions charged on the estate by the tenant for life:—Held, that the tenants for life and in remainder having power to appoint to new uses, the deed-poll operated as a due exercise of such power, and that therefore the trustees of the settlement had power to sell the lands, the subject of a certain contract, free from portions. *McAuliffe and Balfour, In re*, 50 L. T. 353—V.-C. B.

Executor of Surviving Trustee—Conveyancing Act, s. 30.]—A testator appointed A. and B. executors and trustees of her will, and devised certain specified properties, and all other estates or interests belonging to her in Ireland, to and to the use of A. and B., upon trust for sale of such part or parts thereof as might in their judgment be necessary for the discharge of debts and legacies, and as to the remainder thereof upon trust that they, or the survivors of them, should receive the rents, and pay them to A. for life, and after his death, sell the same and divide and pay the proceeds to or among her nieces. A. died before the testatrix. B. survived her, and died without exercising either trust for sale:—Held, that B.'s executors could not give a good title, notwithstanding the Conveyancing and Law of Property Act, 1881, s. 30. *Ingleby and Norwich Union Insurance Company, In re*, 13 L. R., Ir. 326—M. R.

Receipt of Purchase-Money—Power to delegate.]—On the sale of land by trustees with power of sale, the purchasers made a requisition that either the vendors should attend personally to receive the purchase-money, or the purchase-

money should be paid into a bank to the joint account of the vendors under a written direction, to be signed by them and given to the purchasers. The vendors refused to comply with the requisition, alleging that it was inconvenient so to do, and proposed that one of them should attend and receive the purchase-money under a written direction to that effect, to be signed by them all:—Held, that the purchasers were entitled to insist upon their requisition. *Flower v. Metropolitan Board of Works*, 27 Ch. D. 592; 53 L. J., Ch. 955; 51 L. T. 257; 32 W. R. 1011—Kay, J.

6. DEALINGS BETWEEN TRUSTEE AND CESTUI QUE TRUST.

Mortgage from Cestui que trust—Priority over Prior Incumbrance.—A trustee who takes, without notice of a prior equitable incumbrance, a mortgage from his cestui que trust upon the property in which he holds the legal estate, is entitled to the advantage given by that legal estate, and by virtue thereof obtains priority for his mortgage over the prior incumbrance. Dictum of James, V.-C., in *Phipps v. Lovegrove* (16 L. R., Eq. 80) approved and followed. *Newman v. Newman*, 28 Ch. D. 674; 54 L. J., Ch. 598; 52 L. T. 422; 33 W. R. 505—North, J.

Sale—Setting aside—Inadequate Price—Concealment of Value.—Part of the estate of a testator consisted of two-thirds shares of the money to arise from the sale of certain messuages and hereditaments in Sydney, which during the life of the testator had, by deed in 1846, been vested in trustees there upon trust for sale, with power to suspend the sale and to manage and to lease the property. The testator, at the time of his death in 1868, was supposed by the trustees of his will in England, and the beneficiaries, to be seised in fee simple of the two-thirds shares. As the property was expected to increase in value, all the beneficiaries agreed that the sale should be postponed, and under the mistaken impression as to the nature of the testator's interest they, by deed in 1869, requested the trustees of the will to postpone the sale. In 1870 the sum of 10,000*l.* was offered for the entire property, but was refused. In 1875 one of the beneficiaries sold his one-fifth share of the testator's two-thirds for 1,000*l.* In March, 1880, A., another of the beneficiaries, being ill, and in pecuniary difficulties, sold his one-fifth share to S., one of the trustees of the will, for 900*l.* Shortly afterwards, both A. and S. died. In September, 1881, the entire property was sold for 30,000*l.*, and consequently A.'s share therein proved to be worth over 4,000*l.* eighteen months after the sale of it to S. for 900*l.* In an action by A.'s wife against L., the executor of S., to set aside the sale of A.'s share to S., she did not aver that A. had been guilty of fraud in the transaction, or that A. was not fully aware of what he was doing at the time of the sale; but she prayed for relief on the ground that S. stood in the position of trustee to A., who at the time of the sale was in very embarrassed circumstances, as S. knew; that the price was considerably below the real value of the share, as S. also knew; and that A. had no independent advice in the transaction:—Held,

that as the purchaser and vendor stood in the positions of trustee and cestui que trust, although the trustee was not the donee of a power of sale, his duty was to see that the property realised its full value; and that the vendor being in embarrassed circumstances to the knowledge of the trustee, and the price given by the trustee for the property being greatly inadequate, the relief asked for must be granted. Held, also, that L. must pay the costs of the action, and was not entitled to deduct them from the share sold to S. *Plowright v. Lambert*, 52 L. T. 646—Field, J.

—Purchase by Executor who has not Proved.—A sale is not to be avoided merely because, when entered upon, the purchaser has the power to become trustee of the property purchased, as for instance by proving the will which relates thereto, though in point of fact he never does become such. Such a purchaser is under no disability, and in order to avoid such sale it must be shown that he in fact used his power in such a way as to render it inequitable that the sale should be upheld. *Clark v. Clark*, 9 App. Cas. 733; 53 L. J., P. C. 99—P. C.

—Sale to Stranger—Re-purchase by Trustee.—The fact that a trustee has sold trust property in the hope of being able to re-purchase it for himself at a future time is not of itself a sufficient ground for setting aside the sale, where the price was not inadequate or the sale improper in other respects. In a case of suspicion of improper dealings with trust property, when the parties suspected and who might have been able to give a satisfactory explanation, are all dead, if a reasonable explanation of the evidence, consistent with the honesty of the suspected transaction, can be found, the court will adopt it rather than draw inferences from the evidence which are unfavourable to the good faith of those who are no longer able to explain their acts and written words. That a transaction was legal and honest is a presumption of law which is strengthened by lapse of time. *Postlethwaite, In re, Postlethwaite v. Rickman*, 60 L. T. 514; 37 W. R. 200; 53 J. P. 357—C. A. Reversing 59 L. T. 58; 36 W. R. 808—Kekewich, J.

7. BREACH OF TRUST.

Indemnity—Concurrence in Breach of Trust.]

—A trustee who distributes a trust fund among strangers at the request of one of the beneficiaries, from whom he takes a covenant of indemnity, cannot afterwards recover under the covenant for the loss of a beneficial interest, to which he has subsequently become entitled, in the fund. The effect of active concurrence by a person in a breach of trust upon a beneficial interest to which he subsequently becomes entitled in the trust fund considered. *Evans v. Benyon*, 37 Ch. D. 329; 58 L. T. 700—C. A.

A. was sole trustee of a fund held in trust for B. for life, then for Mrs. B. for life, then if she died in B.'s lifetime, in trust as she should appoint by will, and in default for her next of kin. A., at the request of B. and his wife, raised 5,000*l.* out of the fund, paid 1,000*l.* to each of the four adult daughters of C., and 1,000*l.* to C.

in trust for his infant daughter. B. covenanted with A. to indemnify him against "all consequences" of this distribution of the 5,000*l.* Mrs. B. died in B.'s lifetime intestate, and her next of kin were A. and C. On the death of B., A.'s representative sued B.'s representative to compel him to replace the 5,000*l.*:—Held, that the object of the covenant was only to indemnify A. from demands against him, as trustee, for breach of trust, and that it ought not to be construed as an undertaking to make good to him any loss which he, as a beneficiary, might sustain by the diminution of the trust fund; and that since A., as next of kin, could not have made a claim against himself as trustee in respect of the breach of trust, there was no claim against A.'s estate in respect of which his representative could claim indemnity from B.'s estate so far as regarded A.'s interest as one of the next of kin; that C., having actively concurred in the distribution, could not have made any claim against A. or his estate in respect of it, even if he had not known, as the court was satisfied he did know, that he had a possible interest in the trust fund, and that the distribution of it was a breach of trust; and, therefore, that as regarded C.'s interest as one of the next of kin, there was no claim against B.'s estate under the covenant. *Ib.*

Where a cestui que trust, who is party to a breach of trust, is a married woman, and the trustees claim a right of retainer against her life interest in the settled funds to indemnify them against their breach of trust, they are bound to show that she acted for herself in the breach of trust, and was fully informed of the state of the case. *Sawyer v. Sawyer*, 28 Ch. D. 595; 54 L. J., Ch. 444; 52 L. T. 292; 33 W. R. 403—C. A.

Relation between Co-trustees.—The relation between co-trustees in regard to the trust funds in their charge cannot be considered as that of creditor and debtor. *Taylor, Ex parte, Goldsmid*, *In re*, 18 Q. B. D. 295; 56 L. J., Q. B. 195; 35 W. R. 148—C. A.

Right of Action by Trustee.—A trust fund, with the concurrence of the trustees and in breach of the trust, was invested in erecting three houses on ground held under a lease to S., the tenant for life of the fund. One of the trustees brought an action against S. and the other trustee for a restoration of the fund by sale of the houses. The court ordered S. to bring the trust fund into court, or, in default, a sale of the houses, holding that a trustee may follow property in which a trust fund has been wrongly invested, though he has actively concurred in the breach of trust. The costs of an action for that purpose were decreed to the plaintiff trustee on the facts of the case. *Carson v. Sloane*, 13 L. R., Ir. 139—M. R.

Fraud of one Trustee—Purchaser for Value without notice.—C., trustee with the plaintiff of a will, and also trustee with the defendant of a settlement, having misappropriated a portion of the settlement fund, applied an equal portion of the will fund in the purchase of stock, which he transferred into the names of himself and the defendant. The plaintiff and defendant were both innocent of C.'s fraud, and the defendant and the cestuis que trusts under the settlement

had no notice that the stock was purchased with part of the will fund. C. died insolvent. In an action by the plaintiff to compel the defendant to transfer the stock to him:—Held, that the defendant having by accepting the transfer of the stock given up his right to sue C. for his debt to the trust, was entitled to be treated as a purchaser for value without notice, and consequently to retain the stock as part of the settlement fund. *Taylor v. Blakelock*, 32 Ch. D. 560; 56 L. J., Ch. 390; 55 L. T. 8—C. A. Affirming 34 W. R. 175—V.-C. B.

Character in which Plaintiff Sues—Acquiescence.—Under a settlement certain funds were held by trustees upon trust for the issue of L. S. in such manner as she should by will appoint. L. S., by her will, appointed the funds to trustees—as to two-fifths, upon trust to pay the income to her son until he should attain the age of forty years, and when and as soon as he should attain that age she directed that the trust premises should be held in trust for her said son, his executors and administrators, and provided that if her said son should sell, assign, or otherwise part with his said share, the appointment in his favour should be void, and the said share should be held upon the trusts declared of the remaining three-fifth parts for the benefit of her daughter. The son died under forty without having forfeited his interest. N., the surviving trustee of the will of L. S., and who was also co-trustee with L. of the original settlement, got possession of the two-fifths and misappropriated it, and the beneficiaries under the will of the son obtained judgment for the amount against B., who was the surviving executor and trustee of the son's will, on the ground of his negligence and wilful default in not getting in the trust fund. B. having died, his executor brought this action against L. and N., seeking a declaration that they were jointly and severally liable to replace the amount so found due from B. N. had become bankrupt:—Held, that L. was not liable, on the ground that the plaintiff must be treated as representing B.; and it appearing upon the evidence that B. had, in 1872, treated N. as solely accountable to him for the two-fifths, and had done nothing to recover the fund, the plaintiff was barred by the delay and acquiescence of B. *Scotney v. Lomer*, 31 Ch. D. 380; 55 L. J., Ch. 443; 54 L. T. 194; 34 W. R. 407—C. A.

Bankrupt Trustee entitled to Equitable Interest.—A testator devised real estate to his nine children, nominatim as tenants in common, giving a power to three of them to sell the whole to avoid the difficulties of partition. W., one of the three, conducted certain sales under the power, retained more than his share of the purchase-moneys, and went into liquidation. Further sales were effected, and out of the proceeds a further sum was paid to W.'s trustees in liquidation in respect of, and in excess of, his share:—Held, that all purchase-moneys received by the trustees were impressed with a trust under the will, and that W.'s equitable interest therein was liable to recoup the other beneficiaries. *Brown, In re, Dixon v. Brown*, 32 Ch. D. 597; 55 L. J., Ch. 556; 54 L. T. 789—Kay, J.

In other Cases.—See various sub-heads.

8. LIABILITY FOR ACTS OF AGENTS.

Ordinary Scope of Business.—The rule that trustees, acting according to the ordinary course of business, and employing agents as prudent men of business would do on their own behalf, are not liable for the default of the agent so employed, is subject to the limitation that the agent must not be employed out of the ordinary scope of his business. *Fry v. Tapson*, 28 Ch. D. 568; 54 L. J., Ch. 224; 51 L. T. 326; 33 W. R. 113—Kay, J.

—**Stockbroker.**—A trustee investing trust funds is justified in employing a broker to procure securities authorised by the trust and in paying the purchase-money to the broker, if he follows the usual and regular course of business adopted by ordinary prudent men in making such investments. *Speight v. Gaunt*, 9 App. Cas. 1; 53 L. J., Ch. 419; 50 L. T. 330; 32 W. R. 435; 48 J. P. 84—H. L. (E.).

A broker employed by a trustee to buy securities of municipal corporations authorised by the trust, gave the trustee a bought note which purported to be subject to the rules of the London Stock Exchange, and obtained the purchase-money from the trustee upon the representation that it was payable the next day, which was the next account day on the London Exchange. The broker never procured the securities, but appropriated the money to his own use and finally became insolvent. Some of the securities were procurable only from the corporations direct, and were not bought and sold in the market, and there was evidence that the form of the bought note would have suggested to some experts that the loans were to be direct to the corporations; but there was nothing calculated to excite suspicion in the mind of the trustee or of an ordinary prudent man of business; and such payment to a broker was in accordance with the usual course of business in purchases on the London Exchange.—Held (Lord Fitzgerald) doubting, that the trustee was not liable to the cestui que trust for the loss of the trust funds. *Ib.*

Semble, by the Earl of Selborne, L. C., that if the broker had represented to the trustee that the contracts were with the corporations for loans direct to them from the trustee, he would not have been justified in paying the money to the broker, for which in such a case there would have been no moral necessity or sufficient practical reason. *Ib.*

A trustee must, in order to escape liability for a loss of the trust property, show that in connexion with the transaction in which the loss occurred he acted not only in the ordinary mode of business, but also in the mode in which a prudent man of business would act in such a transaction. *Bullock v. Bullock*, 56 L. J., Ch. 221; 55 L. T. 703—Kekewich, J.

B., one of the trustees of a marriage settlement, was employed by his acting co-trustee to make a change of investment of part of the trust property; but although he sent to his acting co-trustee contract-notes for the new investments, the latter were never completed, and the moneys were misappropriated by a third party. B.'s co-trustees made no inquiries at all for the securities to which the contract-notes related for over eighteen months, and made no efficient inquiries until three years after the transaction had taken

place; and when the loss was discovered B. had shortly before become bankrupt, having up to within a few months of that time been in good credit:—Held, that B.'s co-trustees were liable for the loss, having been guilty of negligence in not prosecuting early inquiries, which would have resulted in information upon which they might have recovered the trust moneys from B. *Speight v. Gaunt* (9 App. Cas. 1) distinguished. *Ib.*

Money allowed to remain in Solicitor's Hands.]

—Trustees are not justified in allowing trust money to get into the hands of a solicitor, or in allowing him to hold the securities upon which the trust fund is invested; and the law is the same where the estate is being administered by the court. *Dewar, In re, Dewar v. Brooke*, 54 L. J., Ch. 830; 52 L. T. 489; 33 W. R. 497—Kay, J.

Trustees of an estate which was being administered by the court employed a solicitor to manage the trust estate, and allowed him to receive the trust moneys for the purpose of investment. The solicitor represented that he had duly made investments, and he rendered periodical accounts to the trustees purporting to show such investments, and paid the interest upon them. He had, in fact, never made any investments, but had misappropriated the money, and ultimately he filed a liquidation petition, and a part of the trust fund was thus lost:—Held, that the trustees were liable to make good the loss to the trust estate. *Ib.*

Agent employed to Collect Money—Onus probandi.]

—A common order having been made for the administration of a testator's estate, the district registrar by his certificate found the outstanding personal estate to consist in part of book debts amounting nominally to 291*l.*, as to 113*l.* part of which he certified that it represented a portion of book debts which the executors had employed H. to collect, and for which H. had not accounted, and had claimed to deduct 55*l.* for remuneration, but that 25*l.* was enough. The certificate went on to say that H. had gone into liquidation, and that no part of the 113*l.* was likely to be recovered. No application was made to vary this certificate. It appeared that H. had collected in all 168*l.*, had paid to the executors in April, May, and June, 1880, sums amounting in all to 55*l.*, and had gone on collecting without making any further payment to the executors till July, 1881, when a receiver was appointed in the action, but it did not appear when he became insolvent, nor at what times the moneys received came to his hands:—Held, that where an executor or trustee employs an agent to collect money under circumstances which make such employment proper, and the money collected is lost by the agent's insolvency, the burden of proof is not on the executor to shew that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was. *Brier, In re, Brier v. Evison*, 26 Ch. D. 238; 51 L. T. 133—C. A.

9. GETTING IN TRUST FUNDS.

Duty to enforce Payment.]—It is the duty of trustees to press for the payment of the trust funds to them, and if they are not paid within a

reasonable time, to enforce payment by legal proceedings. And it is especially their duty to take action promptly if by the terms of the trust payment has been deferred to the expiration of a specified time. The only excuse for not taking action to enforce payment is a well-founded belief on the part of the trustees that such action would be fruitless; and the burden of proving the grounds of such belief is on the trustees. *Brogden, In re, Billing v. Brogden*, 38 Ch. D. 546; 59 L. T. 650; 37 W. R. 84—C. A.

— **Property not Lost by Trustees—Indemnity.**—Trustees are not bound at their own expense to take proceedings for the recovery of trust property not lost by their own default. *Tudball v. Medicott*, 59 L. T. 370; 36 W. R. 886; 52 J. P. 659—Kekewich, J.

A testator by his will left certain freehold property to trustees in trust for certain beneficiaries; a short time after the testator's death a mortgage of the devised property was discovered, but was suspected by the trustees to be a forgery. They had not funds with which to institute proceedings.—Held, that they were not bound to take proceedings at their own expense to recover the trust estate. *Id.*

Loss by Non-conversion—Form of Order.—Where there has been a loss to the trust estate by reason of a non-conversion of a security forming part of the trust property, but the trustees allege that they could at no time have realised the full value of the security, they will be allowed the benefit of an inquiry to show the actual amount which would have been realised by a conversion at the proper time, and their liability will be limited accordingly. *Gainsborough (Earl) v. Watcombe Terra Cotta Company*, 54 L. J., Ch. 991; 53 L. T. 116—North, J.

Deposit at Bank—Delay—Failure of Bank.—A will appointing trustees only authorised them to invest in parliamentary stocks or funds, or in freehold, copyhold, or leasehold hereditaments. The will contained a provision that no trustee should be answerable for any banker, broker, or other person in whose hands any moneys might be deposited for safe custody or otherwise. The trustees left the sum of 500*l.* on deposit at a bank, by way of interim investment, whilst they looked for a mortgage, for fourteen months, when the bank failed. Upon the question whether the trustees were liable for the loss thereby occasioned:—Held, that fourteen months was too long for the trustees to leave trust money on deposit at a bank; that if after six months they could not get a mortgage, they ought to have invested the money in Consols; that, from the moment they left it too long on deposit, they became responsible for the consequences of their default, and were therefore liable for the sum lost to the trust estate. *Cunn v. Cunn*, 51 L. T. 770; 33 W. R. 40—Kay, J.

10. MANAGEMENT OF TRUST—CARRYING ON BUSINESS.

Solicitor Trustee—Right to Costs.—*See SOLICITOR*, VI., 2, d.

Trust to receive Rents and manage Estate—Salary.—Where estates were devised to a near relative and a family solicitor until B. attained the age of twenty-eight years, upon trust to receive the rents and manage the estate, and the will empowered any trustee being a solicitor to charge and be paid for all business done by him as a solicitor in respect of such estate, and a legacy of 100*l.* was given to each trustee, and the trustees managed the estates consisting of 2,000 acres partly unlet for fifteen years, paying themselves a salary of 100*l.* a year each for the trouble of such management, amounting in all to 3,000*l.*; on an originating summons on behalf of the tenant for life and the infant remainderman:—Held, that such payments of 200*l.* a year were unauthorised by the will; the trustees might at any time have applied to the court, but they neglected to do so; that it was not a case to follow the course adopted in *Marshall v. Holloway* (2 Sw. 432), where an inquiry was directed as to whether any and what sum should be allowed to the trustees for their trouble. The salary was disallowed, and an order made for payment into court, without interest, within six months. *Bedingfield, In re, Bedingfield v. D'Eye*, 57 L. T. 332—Kay, J. *See also Freeman's Settlement Trusts, In re*, post, col. 1918.

Carrying on Business—Advances—Right of Creditor against Trust Funds.—By a marriage settlement, a lunatic asylum was assigned to trustees on trust, at the request of the husband and wife, to sell and stand possessed of the proceeds of the sale for the benefit of the wife and children; but the trustees were to allow the husband to carry on the business of the asylum without paying any rent, but paying certain premiums and other moneys. The husband became bankrupt, and thereupon the surviving trustee of the settlement entered into possession of the asylum and carried on the business until the asylum was sold for a large sum of money. A tradesman had supplied the trustee with goods for the use of the asylum, and brought an action claiming payment out of the trust funds of the settlement.—Held, that, whether the trustee would or would not have been entitled to be indemnified for moneys advanced by him for the purposes of the asylum, the tradesman had no right to recover his debt out of the trust funds, no special part of the estate having been appropriated for carrying on the asylum. *Garland, Ex parte* (10 Ves. 110) considered. *Strickland v. Symons*, 26 Ch. D. 245; 53 L. J., Ch. 582; 51 L. T. 406; 32 W. R. 889—C. A.

— **Increase of Capital—Mortgage.**—*See Dimmock, In re*, ante, col. 1883.

11. PAYMENTS TO TRUSTEES.

Income—Form of Order.—It is not desirable as a general rule to order income to be paid to trustees, "or either of them," according to the form in Seton on Decrees, p. 88, s. 4, No. 2. *Clinton, In re* (8 W. R. 492), not followed. *Carr, In re, Carr v. Carr*, 36 W. R. 688—Kekewich, J.

To Co-trustee—Maintenance of Infant—Vouching Into Items of Expenditure.—H. and C. were trustees and executors of a will, and guardians of the testator's daughters. The daughters

during their infancy were maintained by C., and H. allowed him to receive the income for that purpose. After they attained majority judgment was given for administration of the testator's estate, in which the usual accounts of the personal estate were directed, and an inquiry how and by whom each of the daughters was maintained during infancy, and what was proper to be allowed and to whom out of the income of her share for her maintenance and education. A dispute having arisen in taking the accounts and inquiry, H. applied for a declaration that the receipts by C. of the income of the shares of the daughters for maintenance were a good discharge to H., and that H. was not to be called upon to produce vouchers in respect of the particular manner in which the income was applied. Kay, J., made an order expressing the opinion of the court that the accounts of the trustees should be taken as directed by the judgment as between guardian and ward, and ordering H. to pay the costs of the application:—Held, on appeal, that H., as trustee, was not discharged by mere evidence of payment of the income to C., his co-guardian, but that under the inquiry H. was not bound to vouch the items of expenditure; and if it was shown that C. had properly maintained and educated the children, the sum proper for that purpose would be allowed against the balance found due on the account, without vouching the details of the application. *Evans, In re, Welch v. Channell*, 26 Ch. D. 58; 53 L. J., Ch. 709; 51 L. T. 175; 32 W. R. 736—C. A.

Sale by Trustees — Purchase-money.—See *Flower v. Metropolitan Board of Works*, ante, col. 1885.

Salary.—See *Bedingfield, In re, supra*.

12. PRESERVATION AND REPAIR OF PREMISES.

Power as to Repair.—By his will a testator gave to his trustees his house and all the furniture, &c., therein at the time of his death in trust to permit B. to use and occupy the house and furniture for and during her life, free of all rent or compensation for the same, and free from all obligation to repair or insure (which he expressly directed his trustees to do), and free of all rates, taxes and other outgoings (all of which he directed his trustees to discharge); and after the death of B., the house and furniture were to fall into and form part of his residuary estate:—Held, that the trustees were not bound to do more than repair and insure the premises, and pay the rates, taxes, tithes, and other outgoings during B.'s life; but that, if in their opinion it should be necessary to do more than this to prevent the property from becoming deteriorated, their proper course would be to come to the court for direction. *Colyer, In re, Millikin v. Snelling*, 55 L. T. 344—Kay, J.

A testatrix gave "all my real and personal estate" to trustees "upon trust at their discretion to sell all such parts thereof as shall not consist of money," and out of the produce to pay her debts and funeral and testamentary expenses, and invest the residue, "and shall stand possessed of such real and personal estate, moneys,

and securities" upon trust "to pay the rents, interest, and dividends and annual produce thereof" to T. during her life, with a clause of forfeiture on alienation, and after the decease of T. the testatrix devised and bequeathed "my said real and personal estate and the securities on which the same may be invested unto and to the use of V. C., his heirs, executors, administrators, and assigns for ever, according to the nature and quality thereof respectively." At her death she was entitled in fee to the P. estate, which was unincumbered. Some time after her death a remainder in fee to which she was entitled in the B. estate, which was subject to mortgages made by prior owners and was out of repair, fell into possession, and its income was only sufficient to pay the interest on the mortgages. The trustees took out a summons for directions as to interest and repairs. The tenant for life contended that she could disclaim the B. estate; the remainderman contended that the rents of the P. estate were liable for the interest on the mortgages of the B. estate and for repairs of that estate:—Held, that the will did not create a trust for conversion, but only gave a power of sale; that no power of management and applying rents in repairs was conferred on the trustees; that T. as equitable tenant for life was not bound to repair; and that the rents of the P. estate could not be applied by the trustees in repairing the B. estate, though the court, if applied to, could sanction the doing such repairs as were expedient on terms which would be equitable as between the tenant for life and the remainderman. Held, further, that under a trust of this nature the trustees had a discretionary power to apply, if expedient, the income of the unincumbered estate in paying such part of the interest on the mortgages as the rents of the mortgaged estate were insufficient to pay, but whether in case of their doing so there would not be equities to be adjusted between the tenant for life and the remainderman, *quære*. *Hotchkiss, In re, Freke v. Calmady*, 32 Ch. D. 408; 55 L. J., Ch. 546; 55 L. T. 110; 34 W. R. 569—C. A.

Action against Tenant for Life for Non-repair.]

—A testator gave his real estate to trustees upon trust for his widow for life, with remainder over, in events which happened, to A. for life, &c. The will contained a direction that each tenant for life should during such estate keep the buildings thereon in substantial repair, and if any such person should neglect to effect such repairs within six months after being requested so to do by the trustees, the trustees should be at liberty to effect such repairs. The widow of the testator was in possession of the premises till her death, and she had omitted to repair the buildings. A claim was carried in against her estate in an administration action, in respect of the omission to repair, the claimants being the trustees of the will, and the then equitable tenant for life. The claim was resisted, on the ground that the right to recover, if any, was in the remainderman, and that therefore the claim was preferred by the wrong parties:—Held, that as the trustees had an interest in protecting the ultimate equitable estate, the claim was properly brought by them. *Williamses, In re, Andrew v. Williamses*, 54 L. T. 105—C. A.

Trust Money for Preservation of Estate.]—See ante, cols. 1610, 1611.

13. PAYMENT OF COSTS.

Charge on Capital and Income, when properly Incurred.]—The trustees of a freehold estate, of which the plaintiff was equitable tenant for life under a will, brought actions under the advice of counsel against two persons for interfering with the property, and compromised them before trial. The plaintiff had no notice of the proceedings, but had some time previously warned the trustees, on the occasion of an injury done by persons other than the defendants to these actions, that he should hold them liable if they did not take all necessary steps to protect the property. In December, 1881, the plaintiff applied to the trustees for the rents accrued since May, 1880. The trustees' solicitor answered, stating the amount of the rents received, and saying that it was less than the costs incurred by the trustees in the action, and that they were out of pocket. A correspondence ensued, in the course of which the trustees expressed their willingness to concur in any arrangement for raising the costs out of the estate, but the plaintiff insisted on having the rents paid to him irrespective of any arrangement for raising the costs, and brought his action to enforce payment. The Vice-Chancellor of the Lancaster Court made an order, declaring that as the actions were brought without the knowledge or consent of the plaintiff, the costs were not chargeable against the income. And the court "being of opinion that the actions were commenced under the advice of counsel," ordered the trustees' costs of them to be raised and paid out of the estate, but ordered the trustees to pay the plaintiff his costs of the present action up to the hearing. The plaintiff appealed against the direction to raise the costs of the former actions out of the estate, and the trustees from the order as to the costs of the present action:—Held, on appeal, that the direction to raise the costs of the trustees of the old actions out of the estate ought to be affirmed, for that the actions appeared to have been brought bona fide and to have been beneficial to the estate, but that the reason given in the decree for allowing them ought to be varied, as that result did not necessarily follow from their having been commenced under the advice of counsel. But held, that the order on the trustees to pay costs must be reversed, and directions given for raising their costs of this action out of the estate, for that the costs of trustees properly incurred in the administration of the trust are a first charge on both the capital and income of the trust estate, and that the trustees were not bound to part with the income till their costs had been otherwise provided for, and they therefore had been guilty of no misconduct. *Stott v. Milne*, 25 Ch. D. 710; 50 L. T. 742—C. A.

Priority of Trustees.]—Trustees in an administration action brought by their cestui que trust, where an order has been made for payment of costs out of the estate, and it appears probable that the estate will not be sufficient to pay all their costs in full, are entitled to an order directing the payment of their costs, charges, and expenses in priority to the costs of all other

parties to the action. *Dodds v. Tuke*, 25 Ch. D. 617; 53 L. J., Ch. 598; 50 L. T. 320; 32 W. R. 424—V.-C. B.

Attempt to uphold Settlement—Lien on Fund.]—Trustees of a settlement, originally valid, but which becomes void on the bankruptcy of the settlor, are entitled as against the trustee in bankruptcy to a lien on the trust property for expenses properly incurred in the performance of their duty as trustees. *Official Receiver, Ex parte, Holden, In re*, 20 Q. B. D. 43; 57 L. J., Q. B. 47; 58 L. T. 118; 36 W. R. 189—D.

The settlor of a post-nuptial settlement brought an action to set it aside. The trustees of the settlement defended the action, which was dismissed with costs, but the costs were not paid.—The settlor became bankrupt within two years after the date of the settlement, which accordingly became void under s. 47 of the Bankruptcy Act, 1883:—Held, that, as the settlement was originally valid, and as the costs of the action had been incurred by the trustees in the performance of their duty as trustees, they were entitled, as against the official receiver, to a lien on the trust fund for such costs. *Id.*

In an action against the trustees of a voluntary settlement for rectification:—Held, that as they did not set up any claim, but represented absent parties, who could not be ascertained, it was their duty to attempt to maintain the settlement, and therefore the costs of the trustees were declared to be a charge on the trust estate. *James v. Couchman*, 29 Ch. D. 212; 54 L. J., Ch. 838; 52 L. T. 344; 33 W. R. 452—North, J.

As between Solicitor and Client.]—One of two executors and trustees commenced an action against the other for the administration of the estate, and a decree was made. There was no allegation of any misconduct on the part of the defendant. On the action coming on for further consideration, the court gave the plaintiff his costs as between solicitor and client, but gave the defendant costs only as between party and party, holding that two sets of costs as between solicitor and client ought not to be allowed to the trustees:—Held, on appeal, that a trustee is entitled to costs as between solicitor and client in an administration action, unless a case of misconduct is made out against him, and that the defendant must have costs as between solicitor and client. *Love, In re, Hill v. Spurgeon*, 29 Ch. D. 348; 54 L. J., Ch. 816; 52 L. T. 398; 33 W. R. 449—C. A.

Exercise of Powers without sanction of Court.]—On the hearing on further consideration of an administration action, an order was made by which all the questions raised were practically disposed of, but liberty to apply was reserved. Subsequently the trustees of the will of the testator in the action, in exercise of the powers under the will, and with the consent of the tenant for life, sold land forming part of the estate, and carried out other transactions, without applying for or obtaining any sanction of the court:—Held, that the trustees were entitled to their proper costs of carrying out such transactions. *Mansel, In re, Rhodes v. Jenkins*, 54 L. J., Ch. 883; 52 L. T. 806; 33 W. R. 727—Pearson, J.

Action to set aside Sale by Cestui que trust to Trustee.]—*See Plowright v. Lambert*, ante, col. 1886.

New Trustees liable to pay Costs preliminary to Appointment—Costs of old Trustees—Costs of Donee of Power.]—In a partition action an order was made directing the taxation of the costs of the parties, including in the costs of the defendants, the trustees, "one moiety of any costs, charges, and expenses properly incurred by them as trustees of the will of the testator beyond their costs" of the action. The taxing-master disallowed the costs of former trustees, who were dead, paid to the executor of the survivor in consideration of his transferring the trust property, also costs of examining into the state of the trust property, and the validity of the power, before the appointment, also costs of the donee of the power in appointing. On summons to review taxation:—Held, that the trustees were bound to pay the costs of the old trustees properly incurred; that the burden of proof that the payments were wrong lay on the objectors:—Held, also, that it was not only the right, but the duty, of the new trustees to see what the estate consisted of, and that the power was properly exercised; also that they were entitled to the costs of the donee of the power which they had paid. The trustees were therefore on principle entitled to the costs disallowed, subject to the discretion of the taxing-master as to items. *Harvey v. Oliver*, 57 L. T. 239—Kay, J.

Defaulting Trustee—Payment into Court.]—Where in a Chancery action money has been found due from a trustee, the proper form of order is to direct the money due to be paid into court before the trustee in default is allowed to receive his costs out of the trust estate, or even to receive any share in the trust estate to which he is entitled. *Stanier v. Evans*, 34 Ch. D. 470; 56 L. J., Ch. 581; 56 L. T. 87; 35 W. R. 286—North, J.

A. and B., executors and trustees of a testator, set apart a fund to answer an annuity bequeathed to the plaintiff. A. and B. committed a breach of trust by means whereof the fund came into the name of B. alone, who misappropriated it. A. died, and by his will gave a legacy to B. and J. on certain trusts. B. having become bankrupt, in an action by the annuitant, J., was ordered to refund the trust legacy in his hands, which was insufficient to answer the breach of trust committed by his testator:—Held, that neither J. nor the trustee in bankruptcy of B. was entitled to have his costs out of the fund before it was paid into court. *Knott, In re, Baw v. Palmer*, 56 L. J., Ch. 318; 56 L. T. 161; 35 W. R. 302—Stirling, J.

Refusal to Transfer Trust Funds.]—A surviving trustee who, without sufficient reason, declined to transfer trust funds to new trustees, duly appointed under a power in the instrument creating the trust, was ordered to pay the costs of an action to compel such transfer. *Coppinger v. Shekleton*, 15 L. R., Ir. 461—V.-C.

Depriving of—Misconduct.]—A trustee is not, in the absence of misconduct, to be deprived of costs by reason of his having invested in what is not, strictly speaking, an authorised security, if

at the time of the judgment the fund has been replaced without loss. *Peacock v. Colling*, 54 L. J., Ch. 743; 53 L. T. 620; 33 W. R. 528—C. A.

Costs out of Trust Fund—Tacit Obstruction to Cestui que trust.]—The executors of the sole executor of a deceased sole trustee whose sole executor had never acted in the trust were applied to in April, 1883, to take steps to enable the tenant for life of a small sum of stock standing in the name of the deceased trustee to receive the dividends. In May, 1883, the executors handed to the solicitor of the tenant for life the probate of their testator's will, that he might produce it at the Bank of England, which he did. After some correspondence, in the course of which the executors asked for evidence of the title of the cestuis que trust, which did not appear to have been produced, the solicitor of the tenant for life, about the end of May, sent a power of attorney to be executed by the executors, to enable her to receive the dividends. The executors did not execute or return the power. In July the solicitor of the tenant for life applied to the executors to appoint new trustees under the Conveyancing and Law of Property Act, 1881, to which the executors replied, stating their ignorance of the title of the cestuis que trust. Ultimately, in November, 1883, the cestuis que trust presented a petition for the appointment of new trustees and a vesting order:—Held, that the conduct of the executors, who appeared to have accepted the trust by taking a transfer of the stock into their own names, had been vexatious, and that they must pay the costs which would have been occasioned by a petition simply asking for payment of dividends to the tenant for life, and that they could not be allowed any costs out of the fund. But held, on appeal, that as the cestuis que trust had not taken proper steps to satisfy the executors as to their title, the executors had not been guilty of any such misconduct as is necessary to deprive a trustee of his right to costs out of the trust fund, and that they must have their costs below, but that as the Court of Appeal was not satisfied with their conduct, they ought to have no costs of their appeal. *Knight's Trusts or Knight's Will, In re*, 26 Ch. D. 82; 50 L. T. 550; 32 W. R. 417—C. A. Reversing 53 L. J., Ch. 223—Pearson, J.

Solicitor Trustee, Rights of.]—*See SOLICITOR*, VI., 2, d.

Right to set off Debt due against Costs.]—Where a person at the time of an order being made for payment of his costs by trustees on a petition in the matter of a trust is indebted to the trust estate, although the amount is not then ascertained, he cannot get any of such costs until he has paid the amount due from him to the trust, and the trustees, therefore, can set off the costs payable by them against the amount due from him. *Harrauld, In re, Wilde v. Walford*, 53 L. J., Ch. 505; 51 L. T. 441—C. A.

14. NOTICE TO TRUSTEES.

New Trustees—Notice to original Trustees—Constructive Notice.]—Persons appointed new trustees under a will or settlement are bound to

inquire what the trust property consists of, and what the trusts are, and to look into the trust documents to see what incumbrances their predecessors had notice of. But if there was nothing among the trust documents which would have given them notice of an incumbrance, they will not be held liable for loss arising from their ignorance of it, even though they have in fact omitted to look into those documents. *Hallows v. Lloyd*, 39 Ch. D. 686; 58 L. J., Ch. 105; 59 L. T. 603; 37 W. R. 12—Kekewich, J.

15. PRODUCTION OF TITLE-DEEDS.

To Cestui que trust.—*Primâ facie*, and in the absence of any special circumstances, a cestui que trust, even though he be only interested in the proceeds of the sale of land, is entitled to the production and inspection of all title-deeds and other documents relating to the trust estate which are in the possession of the trustees. One cestui que trust can enforce this right against the trustees, without bringing before the court the other persons beneficially interested in the property when they have no higher right than himself. *Covin, In re, Covin v. Gravett*, 33 Ch. D. 179; 56 L. J., Ch. 78; 34 W. R. 735—North, J.

16. OTHER PROCEEDINGS BY AND AGAINST.

Account of Moneys received by Trustee during Infancy.—In an action against trustees of a settlement, asking (inter alia) that each should furnish and vouch their accounts of the trust declared thereby, one of the trustees (R.) had only recently attained twenty-one. Bacon, V.-C., directed that in taking the account, the same was, as regards R., to be limited to any moneys and properties received by him since he attained twenty-one. On appeal, the court, without then determining the liability of such infant trustee, held that the proper form of decree was to order the account against the adult trustee in the usual form, directing an inquiry whether all or any and what parts of the trust property had come to the hands of R., and what had been his dealings and transactions in respect of the same, and as to the dates of, and circumstances attending, such receipts, dealings, and transactions. *Garnes, In re, Garnes v. Appin*, 31 Ch. D. 147; 55 L. J., Ch. 303; 54 L. T. 141; 34 W. R. 127—C. A.

Sufficiency of Interest to maintain Administration.—A member of a class, designated as the objects entitled to a trust fund in the event of the happening of one or more contingencies, has a sufficient interest to maintain an action for the protection of the fund if at the time of action brought the maximum number of the class is ascertained, although it be still uncertain whether he will ultimately form one of the members of that class. *Peacock v. Colling*, 54 L. J., Ch. 743; 53 L. T. 620; 33 W. R. 528—C. A.

Originating Summons—Act done outside Trust.—Rule 3 (e) of Ord. LV. only relates to the doing, or the abstaining from doing by

trustees, of some act within the scope of their trusts; and an originating summons ought not to be taken out under that rule for the purpose of obtaining a direction to trustees to do, or to abstain from doing, an act which is outside the scope of their trust. *Suffolk v. Lawrence*, 32 W. R. 899—Pearson, J.

Trustees acting under Special Case—Protection.—By the combined effect of Ord. XXXIV., r. 8, and the saving clause in the Statute Law Revision Act, 1883, the protection given to trustees and others acting on the declaration of the court on a special case is preserved, notwithstanding the repeal of the act. *Forster v. Schlesinger*, 54 L. T. 51—Pearson, J.

Refusal of Trustee to Sue—Right of Cestui que trust.—See ante, cols. 1398, 1399.

III. TRUSTEE ACTS.

1. PAYMENT INTO COURT.

Jurisdiction—Repayment by Trustees of Costs.—On applications for payment out of a fund which has been paid into court under the Trustee Relief Act, the jurisdiction of the court is limited to the fund which has been actually brought into court; and repayment by the trustees of costs and expenses deducted by them from the fund before payment in cannot be ordered. If it can be shown that in such a case the costs and expenses have been improperly retained separate proceedings must be taken against the trustees to recover the amount. *Parker's Will, In re*, 39 Ch. D. 303; 58 L. J., Ch. 23; 60 L. T. 83; 37 W. R. 313—C. A.

Service out of—Petition for Payment out.—The court has no jurisdiction to allow service out of the jurisdiction of a petition under the Trustee Relief Act for payment of money out of court. *Gordon's Settlement Trusts, In re* (W. N. 1887, p. 192) not followed. On appeal from this decision, it appearing that the order sought by the petition was only for carrying into full effect an order which had recently been obtained by the respondents, the Court of Appeal, without deciding that leave was necessary, gave leave to serve the petition on the solicitors who had presented the former petition, and who were willing to accept service. *Jelland, In re*, 39 Ch. D. 424; 60 L. T. 83—North, J., and C. A.

To exercise Discretion to make Advances for Maintenance.—Where money vested by a deed-poll in trustees upon trust to apply it in such manner in every respect as they in their uncontrolled discretion should think fit for or towards the maintenance, education, advancement, or benefit in any way of all or any one or more exclusively of the other or others of the children of a certain person, and, as to all or any part of the said sum which should not have been applied as hereinbefore mentioned previously to the youngest attaining the age of twenty-one years, in trust for all the children in equal shares, is paid into court under the Trustee Relief Acts, it is competent for the court to exercise the discretion as to advances for main-

tenance, education, advancement, or benefit originally given to the trustees, and the residue of the fund, after making such advances, will be divisible among the beneficiaries in equal shares without taking such advances into account. *Ashburnham's Trust, In re*, 54 L. T. 84—D. But see *Nettlefold's Trusts, In re*, ante, col. 1881.

Payment out to Master in Lunacy in New South Wales.—See *Barlow, In re*, ante, col. 1161.

Service of Affidavit.—The affidavit to be made on a lodgment of funds in court should be served forthwith on "the persons interested in or entitled to them," i.e., in the same way and upon the same parties as if the Chancery Funds Rules, 1874, remained in force, and had not been repealed by the Supreme Court Funds Rules, 1884. *Stenning's Trusts, In re*, 50 L. T. 586—Pearson, J.

Costs—Originating Summons.—Trustees who pay money into court under the provisions of the Trustee Relief Act, when the question arising might be decided upon an originating summons under Ord. LV. of the Rules of Court, 1883, will in future not be allowed the costs occasioned by such payment into court. *Giles, In re*, 55 L. J., Ch. 695; 55 L. T. 51; 34 W. R. 712—Kay, J.

Costs of Appearance.—Executors who paid into court under the Trustee Relief Act, a fund representing part only of a share, the title to which was disputed, and retained the remainder in their hands, were made respondents to a petition for payment out of the fund in court, and accepted a tender of 30s. for their costs, under Ord. LXV. r. 27, sub-r. 19:—Held, that they were entitled to their costs of appearance out of the remainder of the share. *Vardon's Trusts, In re*, 33 W. R. 297—Kay, J.

Practice in General as to.—See ante, cols. 1429, 1430.

2. APPOINTMENT OF PERSON TO CONVEY.

Order for Sale—Vendor found Lunatic.—An order was made in a partition action for sale of the leasehold estate in respect of which the action was brought. After a sale had been made it was discovered that one of the beneficiaries was a lunatic so found, but that no committee had been appointed. The court then made an order declaring the other beneficiaries seised of the property upon a trust within the meaning of the Trustee Act, 1850, and the Trustee Extension Act, 1852, and appointing another party to the action to convey the property to the purchaser for the estates of the beneficiaries therein other than the lunatic. A petition was then presented to the Lord Chancellor, intitled in Lunacy and in the Chancery Division, asking for a declaration that the lunatic was to be deemed seised of his share upon a trust within the meaning of the Trustee Act, 1850, and that the same person might be appointed to

convey such property to the purchaser for all the estate and interest of the lunatic:—Held, that, as the order for sale had been made, the lunatic was, under s. 1 of the Trustee Act, 1852, to be deemed to be possessed upon a trust within the meaning of the Act of 1850, and that, although the rest of that section only gave jurisdiction to the Chancery Division, the court sitting in Lunacy could, under ss. 3 and 20 of the Trustee Act, 1850, appoint a person to convey the lunatic's interest. *Watson, In re*, 58 L. T. 509—C. A.

Specific Performance—Refusal to obey Order.—A decree was made for specific performance of an agreement to grant a new lease of certain premises, and the defendant was ordered to execute such new lease to the plaintiff. The defendant having refused to obey the order, the plaintiff moved for leave to issue a writ of attachment against her:—Held, that there having been a decree for specific performance, the court had jurisdiction, under s. 30 of the Trustee Act, 1850, to appoint a person to execute the lease in place of the defendant, and the motion was directed to be amended accordingly. The motion having been amended, an order was made declaring the defendant a trustee of the premises within the meaning of the Trustee Act, and a person was appointed in place of the defendant to execute the lease to the plaintiff. *Hall v. Hale*, 51 L. T. 226—Kay, J. See now 47 & 48 Vict., c. 61, s. 14.

Mortgagee a Lunatic—Direction to Transfer.—Section 3 of the Trustee Act, 1850, is not confined to a case where the lunatic or person of unsound mind is a sole trustee or mortgagee, but extends to the case where he is one of several trustees or mortgagees. One of two trustees being of unsound mind, a new trustee was appointed in his place under a power:—Held, that the court has jurisdiction to appoint a person to convey the interest of the trustee of unsound mind in a mortgage, forming part of the trust estate, for the purpose of vesting the mortgaged estate in the continuing trustee and the new trustee. *Jones, In re*, 33 Ch. D. 414; 56 L. J., Ch. 272; 55 L. T. 498; 35 W. R. 172—C. A.

Where a person of unsound mind is possessed of an estate by way of mortgage, the court can, under the Trustee Act, 1850, s. 3, appoint a person to convey the estate for the purpose of effectuating a transfer of the mortgage. *Nicholson, In re*, 34 Ch. D. 663; 56 L. J., Ch. 1036; 56 L. T. 770; 35 W. R. 569—C. A.

The court has jurisdiction under s. 3 of the Trustee Act, 1850, where a mortgagee is a lunatic, to direct the committee to transfer the mortgage. *Peel, In re*, 55 L. T. 554; 35 W. R. 81—C. A.

The master in lunacy having reported that it was desirable that property of which the lunatic was mortgagee should be sold under a power of sale in the mortgage, the court declined to make an order authorising the committee to sell and to convey the estate to the purchaser, but only directed him to sell, leaving the transfer of the legal estate to be dealt with on a subsequent application under the Trustee Act, 1850. *Harwood, In re*, 35 Ch. D. 470; 56 L. J., Ch. 974; 56 L. T. 502; 36 W. R. 27—C. A.

IV. VESTING ORDERS.

1. IN WHAT CASES.

Land in Ireland.—Where a trustee of land in Ireland becomes a lunatic, the judges of the Court of Appeal in England can, on a petition intitled in the Chancery Division and in Lunacy, appoint a new trustee under their jurisdiction in lunacy, and make a vesting order under their jurisdiction as additional judges of the Chancery Division. *Smyth, In re*, 55 L. T. 37; 34 W. R. 493—C. A.

"Wilful" Refusal to Convey.—Section 2 of the Trustee Extension Act, 1852, only applies to cases where the title to the lands of the person requiring a conveyance thereof is free from doubt. Where there is a bonâ fide doubt as to such title, the refusal of a trustee to convey the lands is not "wilful" within that section, and there is therefore no jurisdiction under it in such a case to grant a vesting order. *Mills' Trusts, In re*, 40 Ch. D. 14; 60 L. T. 442; 37 W. R. 81—C. A.

Refusal to Convey Land in Ireland.—The court has jurisdiction, under s. 2 of the Trustee Extension Act, 1852, to vest land in the beneficiaries absolutely entitled thereto, where the trustee thereof wilfully refuses to convey to them, although the land and the trustee are both in Ireland, and the trusts were created by an Irish settlement. *Steele, In re, Gold v. Brennan*, 53 L. T. 716—Chitty, J.

Trustee out of Jurisdiction—Mortgage Debt and Stock.—The property comprised in a settlement consisted of money lent upon a mortgage of freeholds vested in the two surviving trustees, and of a sum of consols standing in their names. One of these two surviving trustees was a lunatic, and the other was resident out of the jurisdiction; and under a power in the settlement two persons were appointed new trustees in their places. Upon a petition by these two new trustees and by all the beneficiaries praying for an order re-appointing the new trustees as trustees of the settlement, and vesting in them the trust property:—The court declined to reappoint the new trustees, but under s. 3 of the Trustee Act, 1850, vested the lands subject to the mortgage in the new trustees, and under s. 5 of the same act vested the mortgage debt and the right to call for a transfer of the consols in the trustee of sound mind resident out of the jurisdiction, and, it appearing that he was out of the jurisdiction, vested the mortgage debt and the right to call for a transfer of the consols in the new trustees. *Batho, In re*, 39 Ch. D. 189; 58 L. J., Ch. 32; 59 L. T. 882—C. A.

Trustee of Mortgage Money.—On the 1st July, 1881, a house was mortgaged to B. for 350l. On the 15th July, 1887, this mortgage was transferred to D. in consideration of 385l. This money was in fact found by S. and T., and the transfer was taken to D. as trustee for them, but there was no declaration of trust. Soon after the transfer D. was adjudicated bankrupt, and absconded. At the date of the petition he was out of the jurisdiction, and could not be found. The mortgagor and S. and T. presented a petition under the Trustee Act, 1850, for an

order vesting D.'s estate in S. and T. D.'s trustee in bankruptcy admitted that he took no beneficial interest:—Held, that the court had jurisdiction to make the vesting order. *Barber's Mortgage Trusts, In re*, 58 L. T. 303—North, J.

Death of Sole Trustee—No Personal Representative.—The sole trustee of land appointed by a will died in the lifetime of the testator. The testator's heiress-at-law died intestate (after the Conveyancing Act, 1881, had come into operation), and there was no representative of her estate:—Held, that, on a petition for the appointment of new trustees of the will, which was served on the testator's heir, an order could be made vesting the property in the new trustees for such estate as was vested in the heiress-at-law at the time of her death. *Williams' Trusts, In re*, 36 Ch. D. 231; 56 L. J., Ch. 1088; 56 L. T. 884; 36 W. R. 100—North, J.

The last survivor of three trustees of real estate died, and no legal personal representative of his estate had been appointed. Upon a petition for the appointment of new trustees, and a vesting order of the trust property, an order was made vesting the estate in the new trustees for all the estate and interest which the deceased trustee had in him immediately before his death. *Rackstraw's Trusts, In re*, 52 L. T. 612; 33 W. R. 559—Kay, J.

Upon the death of a sole surviving trustee intestate the court made an order for the appointment of new trustees, and ordered certain lands forming part of the estate to vest in the new trustees "for the estate now vested in the heir-at-law of the deceased trustee." After the order had been passed and entered, administration was taken out to the estate of the deceased trustee. Upon motion that the order of the court might be altered by substituting the legal personal representative for the heir-at-law of the intestate trustee in accordance with s. 30 of the Conveyancing Act, 1881, the court made a new order that, notwithstanding the previous order, the land should vest in the new trustees "for all the estate therein now vested in the legal personal representative of the deceased trustee." *Pilling's Trusts, In re*, 26 Ch. D. 432; 53 L. J., Ch. 1052; 32 W. R. 853—Pearson, J.

Form of Vesting Order.—In 1883 a lease for three lives of a certain manor was granted to A., B., and C., subject to the trusts declared by the will of a testator. C. survived his co-trustees A. and B., but afterwards died intestate as to the trust property. C. left a brother, D., who died intestate, leaving co-heiresses. A petition was presented for the appointment of new trustees of the lease and a vesting order. A question then arose as to the persons in whom the lease would be legally vested and the proper wording of the vesting order. It was sought to amend the petition by varying the proposed vesting order so as to vest the manor in the new trustees "for the same estate as C. would have had if he had been alive," and reference was made to the form in Seton (vol. 1, p. 539):—Held, that no form ought to be adopted in which the heir was not named, except in cases where it was in fact inconvenient or impossible to identify the heir; and that the court, on a broad view, ought to regard the fact that the estate might have been dealt with, since the death of the last surviving

trustee in such a way that parties not before the court might be prejudiced by a vesting order in the form proposed. But held, that under the circumstances of the case and the court being satisfied that no parties could be prejudiced, the vesting order might be made in the form proposed. *Sarum (Bishop of), In re*, 55 L. T. 313—Chitty, J.

Intestacy—Escheat.—Where the Crown has become entitled to the whole of the trust estate of a testator, and also to a part of the beneficial interest therein, the court cannot, upon an application under the Trustee Acts for the appointment of new trustees of the will and a vesting order, make a vesting order against the Crown, but an application must be made to the court under s. 5 of the Intestates' Estates Act, 1884. *Pratt's Trusts, In re*, 55 L. T. 313; 34 W. R. 757—Chitty, J.

Absconding Trustee—Refusal to join in Appointment.—The persons having power to appoint new trustees of a marriage settlement, viz., the husband and wife, appointed a new trustee in the place of one who had absconded abroad, and jointly with the continuing trustee. The trustee who had absconded declined to join in the appointment, and to execute the necessary transfers. The property subject to the trusts of the settlement consisted of policies of insurance and mortgages. It became therefore impracticable, having regard to sub-s. 3 of s. 34 of the Conveyancing Act, 1881, to vest such property in the trustees without the assistance of the court. A petition for a vesting order was accordingly presented, under the Trustee Acts, 1850 and 1852, by the husband and wife and the continuing trustee:—Held, that the order asked for might be made; but that the petition must be amended by adding the name of the proposed new trustee as a co-petitioner. *Keeley's Trusts, In re*, 53 L. T. 487—Kay, J.

Absconding Liquidator—Appointment of New Liquidator.—After an order had been made for the compulsory winding-up of a company A. B. was appointed official liquidator. A. B. afterwards absconded, and he was removed from the post of official liquidator, and in his place C. D. was appointed official liquidator. It was found that a sum of consols, part of the assets of the company, was standing in A. B.'s name as official liquidator. An application, under the Trustee Act, 1850, ss. 22 and 43, was therefore made by motion ex parte for an order to vest such sum of consols in C. D. as official liquidator. A. B. had become bankrupt and could not be found:—Held, that the court had jurisdiction to make the order asked for upon motion; but that, except in simple cases like the present, the application should be made by petition:—Held, also, that the order asked for should be made, but not drawn up, within a week, and that the trustee in bankruptcy of the absconding liquidator should forthwith be served with notice of the order. *Capital Fire Insurance Association, In re*, 55 L. T. 633—Chitty, J. See also *Hulme's Trusts, In re*, infra.

"Trustee," who is—Infant—Maintenance—Appointment of Guardian.—Under the will of her father (a domiciled Scotchman, who made his will in the Scotch form), an infant was

entitled to a legacy. The will contained no express trust for maintenance. The Court of Session in Scotland appointed a curator bonis to the infant, who received the legacy, and invested it in the purchase of some New Zealand stock, in the sole name of the infant. This stock was transferable at the Bank of England. It was the only property of the infant, and the income derived from it was not sufficient to provide for her maintenance and education. The Court of Session authorised the curator bonis to advance from time to time sums out of capital, not exceeding in all 100%, for the purpose of supplementing the income of the infant, and enabling her to be placed at a suitable school. The curator bonis as next friend, presented a petition, asking that the right to transfer 100% of the New Zealand stock might vest in him, and that he might be at liberty to sell and transfer the same, and to apply the proceeds in or towards the maintenance or education of the infant; that the dividends which had accrued, and which might, during the minority of the infant, accrue on the stock, or on the residue thereof after the transfer, might be paid to him, he undertaking to apply them in or towards the maintenance or education of the infant; and that he might be appointed guardian:—Held, that the infant was a "trustee" of the stock, within the meaning of the Trustee Acts, and an order was made vesting the right to transfer 100% of the stock in the next friend (who was appointed guardian to the infant), and liberty was given to him to sell and transfer the same, and to apply the proceeds in or towards the maintenance or education of the infant; and that the dividends, accrued and to accrue during the minority of the infant, should be paid to the guardian, he undertaking to apply them in or towards her maintenance or education. *Gardner v. Cowles* (3 Ch. D. 304) followed. *Findlay, In re*, 32 Ch. D. 221, 641; 55 L. J., Ch. 395—North, J.

Contract for Sale of Realty—Death of Vendor before Completion.—By an order under the Lunacy Regulation Act, 1862, the guardians of the poor of N. were authorised to sell a freehold belonging to A. C., a person of unsound mind, and to receive the purchase-money and execute a conveyance. The property was sold in May, 1885, the sale to be completed in November. An abstract of title was delivered, and no objection was taken to the title. On the 28th of June A. C. died. The guardians now presented a petition, asking that A. C. might be declared a trustee within the meaning of the Trustee Act, 1850, and that their clerk might be appointed a trustee of the property and the estate vested in him in trust to complete the sale:—Held, that A. C. could not be held a trustee within the meaning of the Trustee Act, 1850, and that the order could not be made. *Carpenter, In re* (Kay, 418) approved. *Culling, In re*, 32 Ch. D. 333; 55 L. J., Ch. 486; 54 L. T. 809; 34 W. R. 464—C. A.

Covenant to surrender Copyholds to Uses of Marriage Settlement.—By their marriage settlement, husband and wife covenanted with the trustee to surrender copyholds of the wife to the uses of the settlement. The marriage was solemnised, but the wife died without ever having surrendered the copyholds, and upon her death they became vested in the youngest child

of the marriage as her customary heir. Upon a petition presented by the trustee of the settlement, the eldest child, who was of age, and the other children of the marriage, infants, by their father and next friend, it was ordered by the court that the copyholds, without any surrender or admittance, should vest in the trustee of the settlement upon the trusts of the settlement for all estate of the customary heir. *Bradley's Settled Estate, In re*, 54 L. T. 43; 34 W. R. 148—Chitty, J.

"Seised Jointly"—Coparceners.]—The words "seised jointly" in s. 10 of the Trustee Act, 1850, are not limited strictly to a legal joint tenancy, but are used in the widest sense, and they include the case of land vested in coparceners, one of whom is out of the jurisdiction of the court. *Templer's Trusts, In re* (4 N. R. 494), and *McMurray v. Spicer* (5 L. R., Eq. 527), considered. *Greenwood's Trusts, In re*, 27 Ch. D. 359; 54 L. J., Ch. 623; 51 L. T. 283; 33 W. R. 342—Pearson, J.

Agreement to grant Building Leases—Covenant for Quiet Enjoyment.]—The defendant agreed to grant to the plaintiff leases of houses built by the plaintiff on the defendant's land. Before leases were granted the defendant became of unsound mind, though he had not been so found by inquisition, nor had any committee of his estate been appointed. In an action for specific performance, the defendant offered to submit to a decree, and to have himself declared a trustee for the plaintiff under the Trustee Act, 1850, and to have a person appointed to execute the leases on his behalf, or to have the houses vested in the plaintiff on the terms of the agreement:—Held, that the proposed order would vest a legal term in the plaintiff pursuant to the contract, but would not give him the benefit of the express covenant for quiet enjoyment. *Cowper v. Harmer*, 57 L. J., Ch. 460; 57 L. T. 714—Stirling, J.

No New Trustee—Jurisdiction.]—A new trustee was appointed, under a power, in place of a trustee who had become incapable:—Held, that there was no jurisdiction under the Trustee Acts to reappoint the new trustee and vest the trust estate in the continuing trustees and the new trustee. *Dagleish's Settlement, In re* (4 Ch. D. 143) overruled. *Dewhurst's Trusts, In re*, 33 Ch. D. 416; 55 L. J., Ch. 842; 55 L. T. 427; 35 W. R. 147—C. A. See also *Batho, In re*, ante, col. 1903.

Where there is no doubt that existing trustees of an instrument have been duly constituted, the court will not reappoint them, with a view to making under the Trustee Act, 1850, s. 34, a vesting order which will not sever the joint tenancy. *Pearson, In re* (5 Ch. D. 982) not followed. *Vicat, In re*, 33 Ch. D. 103; 55 L. J., Ch. 843, n.; 54 L. T. 891; 34 W. R. 645—C. A.

A., B., and C. were named trustees in a will. A. died, B. became of unsound mind, and C. appointed E. and F. trustees in the place of A. and B. Part of the trust estate consisted of a mortgage of freeholds. The appointment of E. and F. being unquestionably valid, the court refused to reappoint them and make an order vesting the mortgage estate in C., E. and F., but made an order appointing C. in the place of B.

to convey the mortgaged property for the estate of himself and B. to himself, E., and F. upon the trusts of the will. *Id.*

One of two trustees was convicted of felony and sentenced to penal servitude, and upon an application to the Palatine Court a new trustee was appointed, jointly with the remaining trustee. The trust property consisted of land partly within and partly without the jurisdiction of the Palatine Court. On the appointment of the new trustee, the Palatine Court made an order, vesting such part of the land as lay within that court's jurisdiction in the new trustee and the remaining trustee. A petition was then presented to this court, asking for an order vesting the remaining land in the new trustee and the remaining trustee. The evidence showed that the convict trustee could not be found:—Held, that inasmuch as there was no appointment of new trustees to be made on the present petition, no vesting order could be made under s. 8 of the Trustee Extension Act, 1852, having regard to the decision of *Dewhurst's Trusts, In re* (33 Ch. D. 416). But held, that as there was sufficient evidence that the convict trustee could not be found, the court had jurisdiction, under s. 10 of the Trustee Act, 1850, to make a vesting order, and would accordingly make such an order. *Hulme's Trusts, In re*, 57 L. T. 13—Chitty, J.

Continuing Trust.]—It is the settled practice of the court under the Trustee Acts, when there is a continuing trust, not simply to remove or discharge a trustee, without appointing a new trustee in his place, by appointing the remaining trustees to be sole trustees in place of themselves and him. And though the court will deviate from this rule and make such an appointment if the trustees have no duty to perform but to distribute a fund which is immediately divisible, it will adhere to the ordinary rule if there is a continuing trust as regards even a relatively small part of the trust fund. *Lamb's Trusts, In re*, 28 Ch. D. 77; 54 L. J., Ch. 107; 33 W. R. 163—Pearson, J.

Although, where one of the trustees of a trust fund becomes lunatic, the court will not in general vest the right to deal with the trust funds in the trustees of sound mind, but will require a new trustee to be appointed in the place of the lunatic, an order vesting the right to the fund in the trustees of sound mind will be made where the fund is immediately divisible. *Martyn, In re, Toutt's Will, In re*, 26 Ch. D. 745; 54 L. J., Ch. 1016; 50 L. T. 552; 32 W. R. 734—C. A.

Where one of three trustees was an absconding bankrupt, the court refused, notwithstanding evidence of great difficulty in getting a third person to act as trustee, to appoint the solvent trustees in place of themselves and the bankrupt, and to make an order vesting the trust estate in the solvent trustees alone, on the ground that the court will not reduce the number of trustees of a continuing trust; and also that there is no power to appoint existing trustees to be new trustees. *Gardiner's Trusts, In re*, 33 Ch. D. 590; 55 L. J., Ch. 714; 55 L. T. 261; 35 W. R. 28—North, J.

Special Circumstances.]—One of the four trustees of a settlement having been adjudicated

a bankrupt and having absconded, an action was brought by one of the cestui que trust against the other three trustees claiming to have the trusts carried into execution, and to have it declared that the defendants were bound to make good any loss which might accrue on three mortgages on which part of the trust funds had been invested, and which the plaintiff alleged to be insufficient securities. He also alleged that the fourth trustee had acted fraudulently. The legal estate in the mortgaged properties was vested in all the four trustees, and the stocks, in which the remainder of the trust funds had been invested, stood in the names of the four trustees. Before issue was joined in the action the defendants, in pursuance of an order of the court, gave notice to call in two of the mortgages, and one of the notices had expired. Owing to the pendency of the action no one could be found willing to accept the trusts in place of the bankrupt:—Held, that under these circumstances, the court could properly appoint the defendants trustees in the place of themselves and the bankrupt. An order was accordingly made appointing the defendants, and vesting in them the mortgaged properties, and the right to sue for and receive the mortgage debts, and to call for a transfer of, and to transfer, the stocks into their own names, and to receive the dividends thereon, the defendants to pay into court the mortgage money when received. *Davies v. Hodgson*, 32 Ch. D. 225—North, J.

By a settlement made in 1859 four trustees were appointed, one of whom disclaimed. The existing three trustees desired to retire, and in the events that had happened the power to appoint new trustees contained in the settlement was not exercisable. A petition was accordingly presented for the appointment of three new trustees in place of the three who had acted and now wished to retire. Great difficulty was found in obtaining the consent of other persons to act as trustees, and this was alleged as a ground for the application that three new trustees should be appointed in the room of the original four:—Held, that on an appointment of new trustees by the court, assuming it was necessary to prove special circumstances to enable the court to appoint three new trustees when there had originally been four trustees, the disclaimer by one and the difficulty of obtaining new trustees constituted special circumstances. Whether special circumstances were actually necessary to be shown, *quære*. *Fowler's Trusts*, *In re*, 55 L. T. 546—Chitty, J.

2. PRACTICE AS TO.

Form and Contents of Petition.—A petition presented under the Trustee Act should mention the sections under which it is proposed that the order asked for should be made. *Hall's Settlement Trusts*, *In re*, 58 L. T. 76—Kay, J.

Petitions under the Trustee Acts should contain a statement indicating the particular sections of the acts under which the court is asked to make an order. *Moss's Trusts*, *In re*, 37 Ch. D. 513; 57 L. J., Ch. 423; 58 L. T. 468; 36 W. R. 316—Kay, J.

Originating Summons—Jurisdiction.—The court has no jurisdiction, upon an originating

summons in chambers, to make an order appointing new trustees, and vesting in them the trust estate. *Gill, In re, Smith v. Gill*, 53 L. T. 623; 34 W. R. 134—Kay, J.

Infant Heir of surviving Trustee—Service of Petition.—A petition for vesting in beneficiaries lands of which the legal estate had descended to the infant heir of the last surviving trustee, ordered to be served on the infant. *Adams' Trusts*, *In re*, 57 L. T. 337; 35 W. R. 770—Kay, J.

Slip—Second Petition—Further Vesting Order.—An order was made, upon a petition, appointing new trustees of the will of a testator, and vesting in them the property mentioned in the petition, subject to the trusts of the will. After the order had been drawn up, passed, and entered, it was discovered that one part of the trust property had been inadvertently omitted in the order, and another part, by an accident, had not been mentioned in the petition. The new trustees were not able, therefore, to obtain a transfer of such property into their own names. A second petition was accordingly presented by the same persons, who were the petitioners in the first petition. ss. 22 and 35 of the Trustee Relief Act were referred to as giving jurisdiction to the court to make a further order. The court made an order vesting in the new trustees all the property which had been omitted, and directing the costs of the application to be paid out of the trust estate. *Hopper's Trusts*, *In re*, 54 L. T. 267; 34 W. R. 392—Chitty, J.

In Chambers—Right to Transfer Stock.—On a petition for the appointment of new trustees and a vesting order, an order was made in court on the 28th of June, 1884, that two or more proper persons should be appointed trustees, and that an inquiry should be made of what the trust funds consisted; and the parties were to be at liberty to apply in chambers for an order to vest the trust property in the new trustees when appointed. On the 22nd of July, before any certificate as to the trust funds had been made, an order was made in chambers appointing new trustees, and directing that the right to call for a transfer of, and to transfer into their own names, certain sums of stock specified in the order "may" vest in the new trustees. This order mentioned, but did not recite, the order of the 28th of June. The Bank of England refused to act on it, and Bacon, V.-C., on the 28th of November, made an order directing them to do so. The bank appealed:—Held, that the matter having been properly brought before the court on petition, the judge had power, under the provisions of the Masters Abolition Act, 1852 (15 & 16 Vict. c. 80), to dispose in chambers of such parts of the matters brought before him on the petition as he thought could be more conveniently disposed of in chambers than in court, and that there was therefore jurisdiction to make the order of the 22nd of July. *Frodsham v. Frodsham* (15 Ch. D. 317) distinguished. *Tweedy, In re*, 28 Ch. D. 529; 54 L. J., Ch. 331; 52 L. T. 65; 33 W. R. 313—C. A.

But held, that the order was so irregular in form that the bank were justified in declining to act upon it, they being entitled to require a vesting order to be in such a form as to show that the statutory requirements have been

satisfied. Statement of the recitals which ought to be contained in a vesting order made in chambers under the Trustee Act. *Ib.*

V. APPOINTMENT AND REMOVAL OF TRUSTEES.

1. EXERCISE OF POWER.

Recital in Deed.—A will contained a power for the trustees or trustee thereof to appoint new trustees. The trust property comprised a renewable lease. After the death of the testator a renewal of the lease was granted to four persons, who had not been appointed trustees of the will, but who in the lease granted to them were described as “the present trustees” of the will. The surviving trustee and executor of the will was a party to this deed, and the demise was expressed to be made by his direction:—Held, on the authority of *Poulson v. Wellington* (2 P. Wms. 533), that this statement in the renewed lease operated as an appointment of the four lessees to be trustees of the will. *Farnell's Settled Estates, In re*, 33 Ch. D. 599; 35 W. R. 250—North, J.

During Pendency of Administration Action.—After judgment in an action for the administration of the trusts of a will, the person having by the terms of the will or by statute the power of appointing new trustees, retains such power so far as it does not conflict with the order which has been made, but subject to the control of the court; and the proper course is for such person, before exercising the power, to submit the name of the proposed new trustee to the chief clerk in chambers for approval. *Hall, In re, Hall v. Hall*, 54 L. J., Ch. 527; 51 L. T. 901; 33 W. R. 508—Pearson, J.

Refusal of Sole Trustee to appoint Co-trustee.—A sole continuing trustee under a will which contained a power to appoint new trustees so worded as to contemplate the possibility of there being a sole trustee, was held justified in refusing to appoint a co-trustee with himself, although required to do so by a *cestui que trust*; and a trust fund which, under an order of the court below, he had paid into court, was ordered to be paid out to him alone. *Pracock v. Colling*, 54 L. J., Ch. 743; 53 L. T. 620; 33 W. R. 528—C. A.

Person to exercise Power.—A settlement executed in 1878 contained no express power to appoint new trustees, but there was a declaration that the husband and wife during their joint lives, and the survivor of them during his or her life, “shall have power to appoint new trustees or a new trustee for this settlement.” There was no express reference to the power of appointing new trustees conferred by s. 27 of Lord Cranworth's Act, which was then in force:—Held, that after the commencement of the Conveyancing Act, 1881, the husband and wife were the proper persons to exercise the power conferred by s. 31 of that act of appointing a new trustee in place of one of the trustees who had remained out of the United Kingdom for more than twelve months, though s. 27 of Lord Cranworth's act did not provide for, and the parties

when they executed the settlement probably did not contemplate, the occurrence of a vacancy in that event. *Walker and Hughes' Contract, In re*, 24 Ch. D. 698; 53 L. J., Ch. 135; 49 L. T. 597—North, J.

—Alienation of Interest by Donee of Power.—A power to appoint new trustees may be exercised by a tenant for life after alienating his interest. By a settlement, property partly real and partly personal was conveyed to trustees upon trust to provide an annuity for A., a widow, for life, and subject thereto, for B., her son, absolutely. The settlement provided that B. during his life, and after his death the trustees or trustee for the time being, or the executors or administrators of the last acting trustee, should have power to appoint new trustees, if necessary. B. mortgaged his whole interest under the settlement, and the real estate (subject to A.'s annuity) was sold by the mortgagees to C. The personal estate was not sold by the mortgagees:—Held, that B. could still exercise the power to appoint new trustees, without the consent of C. *Hardaker v. Moorhouse*, 26 Ch. D. 417; 53 L. J., Ch. 713; 50 L. T. 554; 32 W. R. 638—North, J.

Provision in Private Act—Approval of the Court.—A private act, passed in the year 1869, enacted that s. 27 of Lord Cranworth's Act should be deemed and taken to apply to the trusteeship of the “Manchester estates” comprised therein; “provided that every new trustee of the said estates shall be appointed with the approval of the Court of Chancery.” In the year 1886, a deed was executed by the continuing trustees appointing new trustees under the power “vested in them by statute.” This deed contained the usual declaration vesting the estates in the new trustees; but the appointment was not made with the approbation of the court:—Held, that the deed must be construed as if the special provision contained in the private act had formed part of Lord Cranworth's Act; that, as Lord Cranworth's Act had been repealed, the court could not add that special provision to the general power of appointment given by the Conveyancing Act, 1881; and that, therefore, the new trustees were well appointed. *Lloyd's Trustees, In re*, 57 L. J., Ch. 246—North, J.

Removal, in what Cases.—There is a jurisdiction in Courts of Equity to remove old trustees and substitute new ones in cases requiring such a remedy. The main principle on which such jurisdiction should be exercised is the welfare of the beneficiaries and of the trust estate. The court below refused to remove certain trustees on the application of the *cestui que trust*. On appeal:—Held, that the trustees must, in the special circumstances of the case, be removed without costs of appeal, the appellant having persisted in charges of fraud which the evidence did not sustain. *Letterstedt v. Broers*, 9 App. Cas. 371; 53 L. J., P. C. 44; 51 L. T. 169—P. C.

2. IN WHAT CASES.

Death of Sole Trustee in Lifetime of Testator.—Where a sole trustee for sale of a will had died in the lifetime of the testator, a petition

was presented by the administrator of the testator, and the executors and trustees of the trustee of the will who had died, asking for the appointment of two new trustees and for a vesting order:—Held, that s. 31 of the Conveyancing Act, 1881, did not apply, and that therefore the petition was necessary. *Ambler's Trusts, In re*, 59 L. T. 210—Kay, J.

Representative of Sole Trustee.]—The power of appointing new trustees, given by s. 31 of the Conveyancing Act, 1881, to “the personal representatives of the last surviving or continuing trustee” includes the case of an executor of a sole trustee. *Shafto's Trusts, In re*, 29 Ch. D. 247; 54 L. J., Ch. 885; 53 L. T. 261; 33 W. R. 728—Pearson, J.

The representative of a deceased trustee is not bound at the request of the cestuis que trustent to exercise the power of appointing new trustees given by the Conveyancing and Law of Property Act, 1881, and the refusal to do so is not a sufficient reason for ordering the executors to pay the costs of a petition for the appointment of new trustees. *Knight's Trust, or Will, In re*, 26 Ch. D. 82; 53 L. J., Ch. 223; 49 L. T. 774; 32 W. R. 336—Pearson, J.

“Continuing Trustees”—“**Contrary Intention**”—**Conveyancing Act, 1881, s. 31.**—On a summons under the Vendor and Purchaser Act, 1874, an objection was taken by a purchaser from trustees that an appointment of one of their number, under the power given by s. 31 of the Conveyancing Act, 1881, in the place of a trustee who had been abroad for more than twelve months, was invalid because that trustee had not joined in making the appointment:—Held, that there being no evidence that the absent trustee was either willing or competent to join in making the appointment, the objection could not be sustained. *Coates to Parsons, In re*, 34 Ch. D. 370; 56 L. J., Ch. 242; 56 L. T. 16; 35 W. R. 375—North, J.

The instrument creating a trust cannot be taken to have expressed a contrary intention within sub-s. 7 of s. 31 of the Conveyancing Act, 1881, merely because it does not provide for filling up a vacancy in the number of the trustees upon the happening of an event not contemplated by the parties to that instrument. *Ib.*

Consent of Persons beneficially Interested.]—A settlement of real estate of which there were four trustees, provided that if the trustees thereby appointed, “or any future trustee or trustees to be appointed in the place of them or any of them as hereinafter mentioned,” should die or be desirous of being discharged, &c., it should be lawful for “the surviving or continuing trustee or trustees for the time being,” with the consent of the tenant for life or in tail for the time being entitled in possession, to appoint a new trustee or new trustees in the place of the trustee or trustees so dying, &c. In 1872, four new trustees were appointed under the Trustee Act, 1850, in the place of two deceased and two retiring trustees. After this a decree was made for carrying the trusts of the settlement into execution. Two of the trustees of 1872 being dead, and another desiring to retire, the plaintiff, who was an infant tenant in tail in possession, took out a summons to ap-

point new trustees. W., the continuing trustee, took out a summons, asking that he might be at liberty to appoint new trustees. A reference to chambers being directed, W. proposed new trustees whom the court considered to be proper persons, but to whom all the persons beneficially interested objected:—Held, that the persons nominated by W. must be appointed, though the tenant in tail in possession did not consent, for that as the power in the settlement only applied to filling up vacancies in the number of original trustees, or trustees appointed under the power, it had come to an end when new trustees were appointed by the court in 1872, and that the fetter imposed by the settlement on the exercise of that power did not apply to the new power given to the continuing trustee by the Conveyancing and Law of Property Act, 1881, which enabled him to fill up vacancies in a body of trustees not coming within the scope of the power in the settlement. *Cecil v. Langdon*, 28 Ch. D. 1; 54 L. J., Ch. 313; 51 L. T. 618; 33 W. R. 1—C. A.

Retiring Trustee joining in Appointment.]—Semble, that if a trust deed contained a power to appoint new trustees expressed in the same words as sub-s. 1 of s. 31, without anything more, it would not be necessary that a retiring trustee should join in the appointment of his successor. In such a case the words “continuing trustee” would mean only a trustee who is to continue to act in the trusts after the completion of the appointment. *Travis v. Illingworth* (2 Dr. & Sm. 344), and *Norris, In re* (27 Ch. D. 333), approved. Opinion of Bacon, V.-C., in *Glenny and Hartley, In re* (25 Ch. D. 611), dissented from. *Coates to Parsons, In re*, supra.

A trustee who has made up his mind to retire, may be a “continuing” trustee, until he has executed the deed appointing new trustees. By a settlement in 1867 (Lord Cranworth's Act having been passed in 1860), it was declared that it should be lawful for “the surviving or continuing trustees,” in the event of any trustees declining to act, to discharge such trustees, and to appoint any new trustees; and it was provided that nothing should authorise the discharge of the only continuing trustees without the substitution of others. Of three original trustees, one having died, the other two by deed in 1874, after reciting that they themselves “declined to act” and “desired to be discharged,” and had “determined to appoint” three other persons to be trustees, “in exercise of the power for this purpose vested in them” by the settlement, appointed the three persons “to be trustees in the place of” themselves and the deceased trustee respectively:—Held, that the appointment was good. *Travis v. Illingworth* (2 Dr. & Sm. 344) not followed. *Glenny and Hartley, In re*, 25 Ch. D. 611; 53 L. J., Ch. 417; 50 L. T. 79; 32 W. R. 457—V.-C. B.

When a power of appointing new trustees authorises the continuing trustee or trustees to appoint a new trustee or trustees in the place of a trustee or trustees becoming unwilling to act, an appointment by a sole continuing trustee, in the place of a trustee who desires to retire, is valid; it is not necessary that the retiring trustee should join in making the appointment. *Glenny and Hartley, In re* (25 Ch. D. 611), commented on. *Travis v. Illingworth* (2 Dr. & Sm. 344) approved and followed. *Norris, In re*,

Allen v. Norris, 27 Ch. D. 333; 53 L. J., Ch. 912; 51 L. T. 593; 32 W. R. 955—Pearson, J.

Separate Sets of Trustees for distinct Trusts.]

—Under the trusts of a will different parts of the testator's property were subject to distinct trusts, but in a certain event the trusts would coalesce:—Held, that there was power to appoint separate sets of trustees for the different parts of the property. *Hetherington's Trusts*, *In re*, 34 Ch. D. 211; 56 L. J., Ch. 174; 55 L. T. 806; 35 W. R. 285—North, J.

Section 5, sub-s. 1, of the Conveyancing Act, 1882, authorises the appointment of a separate set of trustees for a part of the trust property held on distinct trusts only when an appointment is being made of new trustees of the whole property. It does not enable the existing trustees of the whole property to retire from the trusts as to part by means of an appointment of new trustees of that part. *Savile v. Couper*, 36 Ch. D. 520; 56 L. J., Ch. 980; 56 L. T. 907; 35 W. R. 829—North, J.

A testator devised properties in two different parishes in strict settlement in favour of different families, and appointed two trustees of the whole. The powers entrusted to the trustees were very wide. One trustee having died, a petition was presented for the appointment of two new trustees to act with the surviving trustee as to one property only:—Held, that the court had power to make the appointment under the Conveyancing Act, 1882, s. 5, though the surviving trustee was trustee for both properties. *Paine's Trusts*, *In re*, 28 Ch. D. 725; 54 L. J., Ch. 735; 52 L. T. 323; 33 W. R. 564—Pearson, J.

Independently of s. 5 of the Conveyancing Act, 1882, the court has power under the Trustee Acts to allow trustees to retire from the trusts of a part of the trust property, held upon trusts distinct from those affecting the remainder, and to appoint a separate set of trustees of such part. *Savile v. Couper* (36 Ch. D. 520) considered. *Moss's Trusts*, *In re*, 37 Ch. D. 513; 57 L. J., Ch. 423; 58 L. T. 468; 36 W. R. 316—Kay, J.

Section 5, sub-s. 1, of the Conveyancing Act, 1882, does not authorise the appointment of a separate set of trustees for a part of the trust property held on distinct trusts, except on an appointment of new trustees of the entire property. *Nesbitt's Trusts*, *In re*, 19 L. R., Ir. 509—M. R.

Additional Trustees—Trustee Act, 1850, s. 32.]

—The sole trustee of a will who had acted, and was in no way personally disqualified from continuing to act, in the trusts, was desirous of being discharged from the trusts of a particular fund, forming portion of the trust property, and had expressed his intention of lodging such fund in court unless new trustees were appointed in respect of it, whom he declined to appoint himself:—Held, not to be a case of expediency for the appointment of additional trustees within s. 32 of the Trustee Act, 1850. *Nesbitt's Trusts*, *In re*, 19 L. R., Ir. 509—C. A.

Under s. 32 of the Trustee Act, 1850, the court has jurisdiction to appoint an additional trustee, even though there is no vacancy in the trusteeship. *Brackenbury's Trusts*, *In re* (10 L. R., Eq. 45) followed. Semble, that the power conferred by sub-s. 2 of s. 31 of the Conveyancing Act, 1881, to increase the number of trustees, "on an appointment of a new trustee," only arises when an appointment is being made to

supply a vacancy in the trusteeship. *Gregson's Trusts*, *In re*, 34 Ch. D. 209; 56 L. J., Ch. 286; 35 W. R. 286—North, J.

One Trustee a Discharged Bankrupt—New Trustee substituted.]

—One of the two trustees of a will had been adjudicated a bankrupt, but had obtained his discharge. The other trustee, who was beneficially entitled also to one-third of the trust estate, petitioned for the removal of the trustee who had been bankrupt, and the appointment of a new trustee. The application was opposed by beneficiaries entitled to greater shares than the petitioner:—Held, that the bankruptcy being a recent one, the trustee must be entirely impecunious; and that it was expedient under s. 147 of the Bankruptcy Act, 1883, to appoint a new trustee in the place of the one who had been bankrupt, notwithstanding that he had obtained his discharge. *Foster's Trusts*, *In re*, 55 L. T. 479—Kay, J.

Lunatic—Consent to Appointment by Committee.]

—A will contained a power of appointment of new trustees exercisable with the consent of the tenant for life. The trustees having died, the tenant for life who had been found lunatic, presented a petition in Lunacy and Chancery by the committee of her estate as next friend for the appointment of new trustees:—Held, that there was no jurisdiction in lunacy to appoint new trustees, and that the only proper application in lunacy was to ask for an order authorising the committee to consent on behalf of the lunatic to an appointment of trustees under the power. *Garrod*, *In re*, 31 Ch. D. 164; 55 L. J., Ch. 311; 54 L. T. 291; 34 W. R. 157—C. A.

Denial of Lunacy—Jurisdiction.]

—The court will not, on a petition under the Trustee Act, 1850, remove a trustee against his wish. Where the ground for a petition for the appointment of a new trustee is the alleged insanity of a trustee, and the insanity is denied by him, the court will not try the question whether the trustee is of sound mind, nor will it (under s. 52) direct a commission in the nature of a writ de lunatico inquirendo to issue concerning such person, the proper mode of establishing the lunacy in such a case being on a petition in lunacy or in an action in the High Court to remove the trustee. *Combs*, *In re*, 51 L. T. 45—C. A.

"Person of Unsound Mind."]—The clause in s. 2 of the Trustee Act, 1850, which declares that the expression "person of unsound mind" shall mean "any person, not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs," must be construed as referring to a person who, although not found a lunatic, is nevertheless in such a state of mind as to render him liable to be so found if an inquisition were held upon him. The case of a trustee who is from great age and its infirmities practically incapable of transacting business (though not otherwise of unsound mind) is within s. 32 of the Trustee Act, 1850. *Phelps' Settlement Trusts*, *In re*, 31 Ch. D. 351; 55 L. J., Ch. 465; 54 L. T. 480—C. A.

A paralytic deprived of the power of speech, and unable to read or write or attend to business, but apparently not suffering from any mental

disease, is not a person of unsound mind within the Trustee Act, 1850. *Barber, In re*, 39 Ch. D. 187; 57 L. J., Ch. 756; 58 L. T. 756; 37 W. R. 182—C. A.

A person is of "unsound mind" within the meaning of the Trustee Act, 1850, where from permanent incapacity of mind he is incapable of managing his affairs, though his state of mind is not such that he would be found lunatic on inquisition. *Phelps' Settlement Trusts, In re* (31 Ch. D. 351), not followed. In an action in the Chancery Division, the court gave a judgment removing a trustee of unsound mind, and appointing a new trustee in his place, but declined to make an order under s. 34 of the Trustee Act, 1850, vesting the estate in the new trustee, considering that it ought to be applied for in Lunacy. The Lords Justices sitting in Lunacy made the vesting order. *Martin's Trusts, In re*, 34 Ch. D. 618; 56 L. J., Ch. 695; 56 L. T. 241; 35 W. R. 524—C. A.

Under Settled Land Act.]—See SETTLEMENT.

Policies of Insurance—Benefit of Wife and Children.]—See INSURANCE, I., 4.

3. WHO APPOINTED TRUSTEES.

Interested Parties.]—The court refused to appoint as trustee the remainderman entitled on the death of an infant tenant in tail in possession, the powers being very wide. *Paine's Trusts, In re*, 28 Ch. D. 725; 54 L. J., Ch. 735; 52 L. T. 323; 33 W. R. 564—Pearson, J.

The original trustees of a will being dead, a petition was presented for the appointment of new trustees, and for a vesting order. The persons proposed to be appointed were both beneficially interested under the will, but it was found impossible to obtain the services of independent persons. All the beneficiaries, except one who was abroad, were co-petitioners, and were desirous that the persons proposed as trustees should be appointed. The court made the order, subject to an undertaking by the new trustees that if either became sole trustee he would use every endeavour to obtain the appointment of a co-trustee; and dispensed with service on the absent beneficiary. *Lightbody's Trusts, In re*, 52 L. T. 40; 33 W. R. 452—Kay, J.

On a petition for the appointment of a new trustee of a will in substitution for one who had died, the court (declining to lay down any hard-and-fast rule that under no circumstances will a cestui que trust and one of the donees of a power to appoint new trustees be appointed as trustee) directed the appointment as trustee of one of several persons beneficially interested in the estate of the testator, who had nominated as trustees of his will persons to whom he had given beneficial interests, and on their death or retirement had empowered the persons beneficially entitled for the time being "to appoint one or more persons to supply the vacancy." *Tempest v. Camoys (Lord)*, 58 L. T. 221; 52 J. P. 532—Chitty, J.

Solicitor Trustee appointing Son.]—On the retirement of one of two trustees of a will, the continuing trustee, who was the solicitor to the trustees, appointed his son, who was his partner

in his business, to be a new trustee. The trusts of the will were being administered by the court:—Held, that, without any reference to the personal fitness of the son, by reason of his position the appointment was one which the court ought not to approve, though it would not have been invalid if the court had not been administering the trusts. *Norris, In re, Allen v. Norris*, 27 Ch. D. 333; 53 L. J., Ch. 912; 51 L. T. 593; 32 W. R. 955—Pearson, J.

Two Trustees out of, and one within, the Jurisdiction.]—The cestui que trust (some of whom were infants) under a settlement of free-hold farms in Wales (dated in 1840), were all resident out of the jurisdiction either in Canada or the United States. The settlement contained a power of sale exercisable with the consent of the equitable tenant for life, and a power of appointing new trustees exercisable by the surviving or continuing trustee, or the heirs or assigns of the last surviving or continuing trustee. In 1874, when both the original trustees of the settlement were dead, the executrix of the last surviving trustee, erroneously believing herself empowered in that behalf, purported to appoint two persons resident in Canada to be trustees of the settlement. These two persons, believing themselves to be duly appointed, had acted as trustees since 1874, and had employed an English agent to receive the rents of the farms, paying him a commission for so doing. The heir of the last surviving trustee could not be found, and there was no one capable of exercising the power of appointing new trustees contained in the settlement. Upon a petition by all the cestuis que trust for the appointment by the court of the two Canadians and the English agent as new trustees, and for authority to pay the English trustee a commission on the rents while acting as manager and receiver, the court appointed the two persons resident in Canada and the English agent to be new trustees of the settlement, but required an undertaking by the trustees out of the jurisdiction in case the power of appointing new trustees should become exercisable by them, or either of them, not to appoint any new trustee resident out of the jurisdiction without the consent of the court. The court also, subject to the production of evidence as to the number of the holdings, the rents and dates of payment, the necessity of paying a commission for collecting the rents, and that the proposed remuneration was proper, sanctioned the payment of a commission to the English trustee. *Freeman's Settlement Trusts, In re*, 37 Ch. D. 148; 57 L. J., Ch. 160; 57 L. T. 798; 36 W. R. 71—Stirling, J.

4. PRACTICE.

Originating Summons.]—Upon an originating summons asking for general administration of an estate and the appointment of new trustees, the court can make an order for the appointment of new trustees, all the parties interested in the appointment being before the court *Allen, In re, Simes v. Simes*, 56 L. J., Ch. 779; 56 L. T. 611—Stirling, J.

The court has no jurisdiction upon an originating summons in chambers, to make an order appointing new trustees. *Gill, In re, Smith v. Gill*, 53 L. T. 623; 34 W. R. 134—Kay, J.

Service of Petition—Cestuis que Trust out of Jurisdiction.]—Upon a petition presented by the persons entitled to the residue of a testator's estate for the appointment of new trustees of his will in the place of a deceased trustee and a lunatic trustee, the court dispensed with the service of the petition upon one out of four persons entitled to the proceeds of sale of certain real estate devised by the will who was resident in Australia. *Wilson, In re*, 31 Ch. D. 522; 55 L. J., Ch. 632; 54 L. T. 263—C. A. See also *Lightbody's Trusts, In re*, supra.

Affidavit of Fitness of New Trustee—Description.]—In support of a petition for the appointment of a new trustee in the place of a trustee who had become lunatic, two affidavits were filed as to the fitness of the person proposed to be appointed. The deponent of one affidavit was described as a "gentleman," the other deponent being described as an accountant. Each affidavit described the proposed new trustee as a "gentleman," but also stated that he was a person of independent means:—Held, that the description of the deponent as a "gentleman" was insufficient, that the position in life of the deponent ought to be stated, so as to enable the court to judge whether his evidence was reliable, but that the other affidavit was sufficient. *Horwood, In re*, 55 L. T. 373—C. A.

Verification of Consent of New Trustee.]—Although the Rules of December, 1885, do not apply to lunacy proceedings, and, therefore, when a petition is presented in lunacy for the appointment of new trustees, the consent of the new trustees must be verified by affidavit, yet when a petition is presented intitled in the Chancery Division and in Lunacy, asking for the appointment of new trustees under the jurisdiction of the Lords Justices as additional judges of the Chancery Division, and a vesting order under the jurisdiction in Lunacy, the Rules of December, 1885, apply, and the consent to act is sufficiently verified by the signature of the solicitor. *Hume, In re, Trenchard's Will, In re*, 55 L. T. 414—C. A.

The persons entitled to the residuary estate of a testator presented a petition for appointment of new trustees of his will in the place of the original trustees, one of whom had died, and the other was a lunatic:—Held, that the signature of a new trustee to his consent to act must in lunacy be verified by affidavit according to the old practice, the Ord. XXXVIII., r. 19a, not applying to proceedings in lunacy. *Wilson, In re*, 31 Ch. D. 522; 55 L. J., Ch. 632; 54 L. T. 263—C. A. *S. P. Needham, In re*, 54 L. T. 263—C. A.

Where a new trustee is appointed in Chancery as well as in Lunacy, his signature to his consent to act may be verified in manner provided by Ord. XXXVIII., r. 19 a, and need not be verified by affidavit according to the old practice. *Secus*, where the order is made in Lunacy only. *Wilson, In re* (31 Ch. D. 522) explained. *Hume, In re*, 35 Ch. D. 457; 56 L. J., Ch. 1020; 56 L. T. 351; 36 W. R. 84—C. A.

VI. FOLLOWING TRUST MONEY.

Money advanced for Particular Purpose — Non-application by Borrower—Right of Lender.]

—Money had been advanced by the plaintiff to the defendant for the purpose of purchasing a certain business, and on an undertaking of the defendant so to apply it, the defendant did not apply it to that purpose, but spent some of it in paying debts of his own. He then became bankrupt. The plaintiff was able to trace the remainder of the money advanced by him:—Held, that a duty had been imposed on the defendant of applying the money in a particular way, and a fiduciary relation created, so that, the money not having been applied in the specified way, the plaintiff could recover in full so much as remained of it, notwithstanding the bankruptcy of the defendant. *Gibert v. Gonard*, 54 L. J., Ch. 439; 52 L. T. 54; 33 W. R. 302—North, J.

Money handed to Solicitor — Right of Defrauded Person.]—A solicitor took money of his clients, and pretended to have invested it on mortgage; after the death of the solicitor there was money in the hands of his representative which could be identified as part of the money received by him from his client:—Held, that the client could follow this money, and require it to be applied in payment of the money of which he had been defrauded. *Hallett's Estate, In re, Knatchbull v. Hallett* (13 Ch. D. 696) followed. *Murray, In re, Dickson v. Murray*, 57 L. T. 223—Stirling, J.

Sale of Goods wrongfully obtained—Proceeds.]—Where a person wrongfully obtained goods and sold them, and the proceeds of sale were paid into a colonial bank for the purpose of transmission to its London branch, he receiving bills of exchange to the amount of the proceeds drawn by the colonial bank on its London branch:—Held, that the owners of the goods were entitled to follow the proceeds in the hands of the bank, and to be paid the amount of the bills, as bills, as they became possessed of them. *Comité des Assureurs Maritimes v. Standard Bank of South Africa*, 1 C. & E. 87—Stephen, J.

Breach of Trust—Fraud of one Trustee.]—C., trustee with the plaintiff of a will, and also trustee with the defendant of a settlement, having misappropriated a portion of the settlement fund, applied an equal portion of the will fund in the purchase of stock, which he transferred into the names of himself and the defendant. The plaintiff and defendant were both innocent of C.'s fraud, and the defendant and the cestuis que trusts under the settlement had no notice that the stock was purchased with part of the will fund. C. died insolvent. In an action by the plaintiff to compel the defendant to transfer the stock to him:—Held, that the defendant having by accepting the transfer of the stock given up his right to sue C. for his debt to the trust, was entitled to be treated as a purchaser for value without notice, and consequently to retain the stock as part of the settlement fund. *Taylor v. Blakelock*, 32 Ch. D. 560; 56 L. J., Ch. 390; 55 L. T. 8—C. A. Affirming 34 W. R. 175—V.-C. B.

Payment by Auctioneer into Bank.]—An auctioneer received moneys from a sale of live stock, and paid them into his private account at the defendants' bank. His account was over-

drawn to an amount not exceeding 2,500*l.*; but under an arrangement which was then subsisting, he was permitted to overdraw up to 2,500*l.*, and he had no suspicion at the time when he paid in such moneys of any intention on the part of the bank to close his account. The bank shortly afterwards closed the account, and applied the proceeds of the sale in reduction of the overdraft. The bank had notice that the moneys so paid in were substantially the produce of the sale of stock. An action was brought by the plaintiff, on behalf of all the vendors at the sale, against the bank, to recover their respective purchase-moneys, less the auctioneer's commission:—Held, that the auctioneer paid the proceeds of the sale to his private account in the ordinary course of business, and was not guilty of a breach of trust in so doing, and that therefore the plaintiff had no remedy against the bank. *Marten v. Roche*, 53 L. T. 946; 34 W. R. 253—North, J.

VII. THE TRUST ESTATE.

Accretion to—Devise to first Mortgagees—Mortgage held on Trust.—B., by will dated the 24th March, 1884, devised his freehold ground rent arising out of the house and premises, No. 7, W. Terrace, and all his interest in the said premises, "to the present mortgagees thereof." At the date of the will, and of B.'s death, there was no mortgage of the freehold ground rent in existence, but the leasehold premises out of which the rent arose were mortgaged by demise to the trustees of a certain settlement to secure moneys advanced by them out of the trust funds. These trustees and the beneficiaries under the settlement were alike strangers to B.:—Held, that the ground rent passed under the devise to the trustees of the settlement, but that they took upon the trusts of the settlement, and not beneficially. *Payne's Settlement, In re, Kibble v. Payne*, 54 L. T. 840—North, J.

Assignment—Fund partly in Court and partly in Hands of Trustees.—When an assignment is made of an interest in a trust fund, part of which is in court and part in the hands of the trustees, the assignee, in order to complete his title, must, as regards the fund in court, obtain a stop order, and as regards the fund in the hands of trustees, give notice to the trustees. *Mutual Life Assurance Society v. Langley*, 32 Ch. D. 460; 54 L. T. 326—C.A. Affirming 53 L. J., Ch. 996; 32 W. R. 791—Pearson, J.

TURNPIKE.

See WAY.

UNCONSCIONABLE BARGAINS AND UNDUE INFLUENCE.

Setting Aside Deed—Gift to Solicitor.—See SOLICITOR, IV., 2.

Convent—Rules of Poverty and Obedience—Voluntary Gift—Laches—Acquiescence.—In 1868 A. was introduced by N., her spiritual director and confessor to S., the lady superior of a sisterhood, and became an associate of the sisterhood. N. was one of the founders and also the spiritual director and confessor of the sisterhood, which was an association of ladies who devoted themselves to charitable works. In 1871, A., having passed through the grades of postulant and novice, became a professed member of the sisterhood, and bound herself to observe (*inter alia*) the rules of poverty, chastity, and obedience, by which the sisterhood was regulated, and which were made known to her when she became an associate. These rules were drawn up by N. The rule of poverty required the member to give up all her property, either to her relatives, or to the poor, or to the sisterhood itself, but the forms in the schedule to the rules were in favour of the sisterhood, and provided that property made over to the lady superior should be held by her in trust for the general purposes of the sisterhood. The rule of obedience required the member to regard the voice of her superior as the voice of God. The rules also enjoined that no sister should seek advice of any extern without the superior's leave. A., within a few days after becoming a member, made a will bequeathing all her property to S.; and in 1872 and 1874, having become possessed of considerable property, handed over and transferred several large sums of money and railway stock to S. In May, 1879, A. left the sisterhood and immediately revoked her will, but made no demand for the return of her property until 1885, when she commenced an action against S., claiming the return of her property on the ground that it was made over by her while acting under the paramount and undue influence of S., and without any independent and separate advice:—Held, that although A. had voluntarily and while she had independent advice entered the sisterhood with the intention of devoting her fortune to it, yet as at the time when she made the gifts she was subject to the influence of S. and N., and to the rules of the sisterhood, she would have been entitled on leaving the sisterhood to claim the restitution of such part of her property as was still in the hands of S., but not of such part as had been expended on the purposes of the sisterhood while she remained in it:—But held (*dissentiente Cotton, L.J.*), that under the circumstances the plaintiff's claim was barred by her laches and acquiescence since she left the sisterhood. *Allead v. Skinner*, 36 Ch. D. 145; 56 L. J., Ch. 1052; 57 L. T. 61; 36 W. R. 251—C.A.

Sale of Reversion—Independent Advice—Undervalue.—Where the circumstances attending the sale of a reversion raise a presumption of fraud, the onus of proof is on the purchaser,

and if it appears that the sale was made by a poor and ignorant man, at a considerable under-value and without independent advice, the court will set it aside. *Fry v. Lane*, 40 Ch. D. 312; 58 L. J., Ch. 113; 60 L. T. 12; 37 W. R. 135—Kay, J.

— **Setting Aside—Terms.**—The purchaser of a contingent reversionary interest insured the life of the vendor and paid premiums for some years. The sale was subsequently set aside:—Held, that the purchaser was entitled to repayment of the purchase money and interest, but not to repayment of the premiums. *Ib.*

UNDERWRITER.

See INSURANCE.

UNIVERSITY.

Right of Undergraduates to Vote.—The undergraduates of Oxford and Cambridge are not permitted to reside in their rooms during the vacations, which comprise nearly six months of the year, without special leave from the college authorities, who are accustomed to let and otherwise make use of their rooms during their absence:—Held, that such compulsory absence amounted to a break of residence disqualifying them for the exercise of the franchise. *Tanner v. Carter*; *Banks v. Mansell*, 16 Q. B. D. 231; 55 L. J., Q. B. 27; 53 L. T. 663; 34 W. R. 41; 1 Colt. 435—D.

Jurisdiction of Chancellor's Court.—In an action for libels alleged to have been published in London, the defendant was a resident undergraduate member of Oxford University; the plaintiff resided in London and had no connexion with the university. The Chancellor of the University having claimed consuance of the action in his court under the Oxford charter of 14 Hen. 8, confirmed by statute 13 Eliz. —Held, that the privilege of the charter extended to cases in which the plaintiff resided outside the limits of the city of Oxford, and therefore that the claim must be allowed. *Ginnett v. Whittingham*, 16 Q. B. D. 761; 55 L. J., Q. B. 409; 34 W. R. 565—D.

UNLAWFUL ASSEMBLY,

What is.—See *O'Kelly v. Harvey*, ante, col. 1066.

VACATION.

See PRACTICE.

VACCINATION.

Summons—Default of Appearance of Parent.]—By the Vaccination Act of 1867 (30 & 31 Vict. c. 84, s. 31), upon an information that a notice to the parent of a child to procure its being vaccinated has been disregarded, a justice may summon such parent to appear with the child before him, and “upon the appearance” the justice may make an order directing such child to be vaccinated. By s. 33, the 11 & 12 Vict. c. 43 (*Jervis's Act*), except s. 11 thereof, shall apply to all proceedings to be taken under the act:—Held, that an order for the vaccination of a child may be made under s. 31 of the Vaccination Act, 1867, on a parent duly summoned, even when he has failed to appear upon the summons. *Reg. v. Cinque Ports (Justice) or Crawford*, 17 Q. B. D. 191; 55 L. J., M. C. 156; 34 W. R. 789—D.

VAGRANTS.

“Wandering abroad to beg and gather Alms” —Colliers “on Strike.”—Colliers “on strike,” who were householders in a colliery district, and had wives and families, went from house to house in a street of a town four miles distant, with a waggon inscribed “children's bread waggon,” and begged for assistance in money or kind. They were not disorderly. Having been convicted under the Vagrant Act (5 Geo. 4, c. 83), s. 3, which enacts that every person wandering abroad in any public highway to beg or gather alms shall be deemed an idle and disorderly person:—Held, that, as it was not their habit and mode of life to wander abroad and beg, they were not within the meaning of the act, and the conviction was wrong. *Pointon v. Hill*, 12 Q. B. D. 306; 53 L. J., M. C. 62; 50 L. T. 268; 32 W. R. 478; 48 J. P. 341; 15 Cox, C. C. 461—D.

“Frequenting” a Public Thoroughfare with Intent to Commit a Felony.—A man who “frequents” a public street, having in his mind the intent to commit a felony when and wheresoever opportunity arises, is liable to the penalties of the Vagrant Act, 5 Geo. 4, c. 83, s. 4, even though no opportunity should arise, and may be committed as a rogue and vagabond, if the justices are satisfied on sufficient evidence, first, that he frequented the street, and secondly, that he did so with intent to commit a felony. The overt act, or the attempt to carry out the intent, is not an essential part of the offence against the act. The appellant was found and apprehended by two constables at about two o'clock in the morning in a public thoroughfare called Victoria Road, having in his possession a portion of a brass pump which appeared to have been wrenched off from the continuation pipe. Being stopped and questioned as to how he became possessed of it and whither he was taking it, he gave an account which proved to be false, and also a false name and address. Being charged before two justices on suspicion of having stolen the pump, and the proof failing, he was then

charged under 5 Geo. 4, c. 83, s. 4, with frequenting the street in question with intent to commit a felony; and on proof that he was an associate of thieves, and had four years before been convicted and sentenced to imprisonment for a felony,—although there was no proof that he had ever before been seen in the street in question, or that the pump had been stolen,—he was convicted as a rogue and vagabond under the 4th section of the Vagrant Act, for “frequenting the public thoroughfare with intent to commit a felony,” and sentenced to be imprisoned:—Held, that the evidence did not warrant the conviction, inasmuch as it did not show a frequenting of Victoria Road with intent to commit a felony. *Clark v. Reg.*, or *Reg. v. Clark*, 14 Q. B. D. 92; 54 L. J., M. C. 66; 52 L. T. 136; 33 W. R. 226; 49 J. P. 246—D.

Rogue and Vagabond—Astrology—Professing to tell Fortunes.]—The appellant was convicted under 5 Geo. 4, c. 83, s. 4, which makes punishable as a rogue and vagabond “every person pretending or professing to tell fortunes . . . to deceive and impose on any of his Majesty’s subjects.” He had published advertisements in various newspapers offering to cast nativities, give yearly advice, and answer astrological questions. A detective wrote to him and received from him a circular setting forth the appellant’s views of astrology as a science, and stating that by the positions of the planets in the nativity, and their aspects to each other, he was able to tell any applicant’s fortune in the various events of life in return for certain remuneration. He never actually told anything to the detective, and there was no evidence to show whether or not he believed in the truth of his professions:—Held, that on this evidence the appellant was rightly convicted. *Penny v. Hanson*, 18 Q. B. D. 478; 56 L. J., M. C. 41; 56 L. T. 235; 35 W. R. 379; 51 J. P. 167; 16 Cox, C. C. 173—D.

VALUER.

Who is.]—See *Wilson and Green*, *In re*, ante, col. 52, and *Dawdy*, *In re*, ante, col. 48.

Liability for Negligence.]—See *Cann v. Willson*, ante, col. 1300.

Valuation—For Purposes of Rating.]—See POOR LAW.

— **Metropolis Valuation Act.**]—See METROPOLIS.

VENDOR AND PURCHASER.

I. THE CONTRACT AND MATTERS RELATING THERETO.

1. *Parties*, 1926.
2. *Formation of the Contract*, 1927.

3. *Particulars and Conditions of Sale.*
 - a. Description of Property, 1927.
 - b. Non-disclosure of Restrictive Covenants, 1930.
 - c. Time, 1932.
 - d. In Other Cases, 1933.
4. *Title.*
 - a. In General, 1936.
 - b. Expenses in Making, 1938.
5. *Jurisdiction under Vendor and Purchaser Act*, 1939.
6. *Effect of Notice.*—See NOTICE.

II. RESCISSION OF THE CONTRACT, 1940.

III. SPECIFIC PERFORMANCE OF THE CONTRACT.—See SPECIFIC PERFORMANCE.

IV. RIGHTS AND DUTIES OF VENDOR AND PURCHASER.

1. *In General*, 1943.
2. *Conveyance*, 1944.
3. *Purchase Money.*
 - a. Payment of, 1946.
 - b. Interest on, 1947.
 - c. Lien for, 1949.
4. *Deposit*, 1950.
5. *Right to Compensation.*—See cases, ante, I. 3.

V. COVENANTS BINDING ON PURCHASER, 1951.

VI. SALE UNDER LANDS CLAUSES ACT.—See LANDS CLAUSES ACT.

VII. SALE BY ORDER OF THE COURT.—See PRACTICE, ante, col. 1488.

I. THE CONTRACT AND MATTERS RELATING THERETO.

1. PARTIES.

Death of Vendor before Completion—Whether a Trustee.]—Where a vendor has died before completion of the contract the court will not on a petition under the Trustee Act, 1850, make an order vesting the property in the purchaser and thereby in effect decree specific performance. Per Fry, L.J., a decree for sale or specific performance is a condition precedent to such a vesting order under the Trustee Act. *Colling*, *In re*, 32 Ch. D. 333; 55 L. J., Ch. 486; 54 L. T. 809; 34 W. R. 464—C. A.

— **Defective Title—Trust for Sale—Equitable Conversion.**]—Testator (who married after 1834), by his will, gave all his real estate to trustees, on trust to convert and invest 1,000*l.* out of the proceeds of sale and pay the income to his widow for life, and then gave certain legacies, but did not dispose of the residuary proceeds of sale. The testator at the date of his death had contracted to sell certain lands for 3,000*l.* After his death his trustees found that no title could be made to part of the lands, and rescinded the contract. They then put up the lands to which they had a title for sale by auction, and sold them for 2,500*l.* to the same purchaser:—Held, that there was no conversion of the testator’s real estate beyond the purposes declared by the will, and that the undisposed of

proceeds of sale resulted to the heir. *Thomas, In re, Thomas v. Howell*, 34 Ch. D. 166 ; 56 L. J., Ch. 9 ; 55 L. T. 629—Kay, J.

Sale by Tenant in Tail.—*See* TENANT, 5.

Sale by Executors.—*See* EXECUTOR AND ADMINISTRATOR, I., 1.

Sale by Trustees.—*See* TRUST AND TRUSTEE, II., 5.

Sale under Power in Mortgage.—*See* MORTGAGE, VI., 1.

Sale under Settled Estates Act.—*See* SETTLEMENT, II.

To Conveyance.—*See* post, IV. 2.

2. FORMATION OF THE CONTRACT.

"Interest in Land"—Statute of Frauds.]—*See* CONTRACT, I., 6, c.

Sufficiency of Note or Memorandum.—*See* CONTRACT, I., 6, a.

3. PARTICULARS AND CONDITIONS OF SALE.

a. Description of Property.

Value of Rental—Compensation after Conveyance completed.—The plaintiff purchased certain freehold property at a sale by auction. The particulars of sale erroneously stated the value of the rental, in consequence of which mistake the plaintiff gave more for the property than he otherwise would have done. The conditions of sale contained a provision that if any error should be discovered in the particulars the purchaser should be entitled to compensation. The plaintiff did not find out the error until after he had paid the purchase-money, and had accepted the conveyance of the property:—Held, that the acceptance of the conveyance did not bar the right of the plaintiff to recover compensation, and that he was entitled to receive it. *Palmer v. Johnson*, 13 Q. B. D. 351 ; 53 L. J., Q. B. 348 ; 51 L. T. 211 ; 33 W. R. 36—C. A. Affirming 48 J. P. 87—A. L. Smith, J.

— **"Estimated annual value"**—Compensation.]—Property was described in the particulars of sale as "of the estimated annual value of 400*l*." There was a condition entitling the purchaser to compensation, if any error or misstatement should appear to have been made in the particulars. The purchaser adduced evidence to show that the property was only worth 200*l*. a year ; he did not, however, allege that the estimate was a dishonest one:—Held, that, as the property was of the "estimated" value stated, and the estimate was admitted not to be a dishonest one, the condition did not apply ; and that, therefore, the purchaser was not entitled to any compensation. *Huribatt and Chaytor, In re*, 57 L. J., Ch. 421—North, J.

Underlease described as Lease—Error in Description of Property.—Houses offered for

sale were stated in the particulars to be held for ninety years from the 24th of June, 1844, at a ground rent of 21*l*. The 4th condition provided that the title should commence "with the lease under which the vendor holds, dated 11th July, 1845." The 5th condition stated that "the description of the property in the particulars is believed to be correct, but if any error shall be found therein the same shall not annul the sale, nor shall any compensation be allowed in respect thereof." The vendor was in fact entitled to an underlease for the residue of the term of ninety years less two days at a peppercorn rent, and the owner of the two days could not be found:—Held, that the representation that the property was held by lease, when it was in fact held by underlease, was a fatal misdescription, unless it was cured by the 5th condition, and that the 5th condition did not apply, for that "error in description of the property" meant a misdescription of the corporeal property, not a mistake in the description of the vendor's title ; and therefore that a good title was not shown. Dictum of Jessel, M.R., in *Camberwell and South London Building Society v. Holloway* (13 Ch. D. 760) disapproved. *Beyfus and Masters, In re*, 39 Ch. D. 110 ; 59 L. T. 740 ; 37 W. R. 261 ; 53 J. P. 293—C. A.

Term of Fifty Years—Condition not to take Objections.—The plaintiff on the 12th March, 1880, entered into an agreement by private contract to buy certain leasehold houses in Walworth for 700*l*. The agreement contained a statement that the property was held for a term of fifty years, less ten days, from Christmas 1856, and also a condition that the title should commence with two underleases, dated the 20th and 27th April, 1857, under which the vendor held the property, and that the purchaser should make no requisition or objection in respect of the prior title or the right to grant the said underleases. The purchase was completed. Four years afterwards the purchaser brought an action to set aside the conveyance, having discovered the underleases to be invalid. The court held, though this was disputed, that the lessor of the underleases had not sufficient interest to support them, and that the assignment to the purchaser only gave him the property for a term, which would expire in Sept. 1889:—Held, that the purchaser had a right to rely on the statement that the property was held for a term of fifty years, and that the condition could not prevail against it ; that the purchaser was entitled to have the conveyance set aside, but the parties agreeing that damages should be paid him instead, the proper measure of such damages was the difference between 700*l*. and the true value of the property for a term with only nine and a half years to run from the date of the contract, calculated on the assumption that 700*l*. was its true value if held for the longer term. *Nash v. Wooderson*, 52 L. T. 49 ; 33 W. R. 301—North, J.

Deficiency in Quantity—Compensation—Right to Rescind.—Certain hereditaments were put up for sale in lots by auction subject to certain conditions of sale. The following conditions of sale were material:—3. Each lot is believed and shall be taken to be correctly described as to quantity and otherwise . . . and the respective purchasers . . . shall be deemed to buy with

full knowledge of the state and condition of the property as to repairs and otherwise, and no error, misstatement, or misdescription shall annul the sale, nor shall any compensation be allowed in respect thereof. 6. Each purchaser shall send his objections and requisitions (if any) to or in respect of the title, and of all matters appearing upon the abstract or the particulars or conditions, of sale, to . . . the vendor's solicitors" within a limited time. "7. If any purchaser shall insist on any objection or requisition which the respective vendors shall be unable, or on the ground of expense or otherwise unwilling to answer, comply with, or remove, the respective vendors may . . . at any time, and notwithstanding any intermediate or pending negotiations, proceedings or litigation, annul the sale." Lot 3 consisted of buildings and land, and was stated in the particulars of sale to contain 4a. 3r. 37p., and to be let at annual rents amounting to 27l. At the auction lot 3 was sold, and a deposit was paid. The abstract of title having been delivered, the purchaser by his requisitions objected that lot 3 was much smaller in extent than was stated in the particulars, the deficiency amounting to an acre and a half, and the true acreage being 3a. 1r. 37p. The misstatement in the particulars of sale as to the acreage was inserted innocently, and the rentals of the property comprised in lot 3 were correctly stated. The purchaser claimed that the contract should be carried out with compensation; the vendor refused any compensation, but offered to annul the sale. The purchaser having refused to withdraw his requisition or to consent to the annulment of the sale, the vendor gave notice that in pursuance of the seventh condition she annulled the sale. The purchaser having taken out a summons under the Vendor and Purchaser Act, 1874, for specific performance with compensation:—Held, that the vendor might lawfully annul the sale by virtue of the seventh condition, for the requisition as to the deficiency in the quantity was a requisition as to a matter appearing upon the particulars or conditions of sale within the meaning of the sixth condition. By Lord Esher, M.R., and Lindley, L.J.:—That even without the sixth and seventh conditions the purchaser would have been prevented by the third condition from obtaining specific performance with compensation. By Lopes, L.J.:—That without the sixth and seventh conditions the purchaser would not have been prevented by the third condition from obtaining specific performance with compensation; for that condition applied only to trivial errors and not to a deficiency amounting to one-third in the quantity of the land purported to be sold. *Whittemore v. Whittemore* (8 L. R., Eq. 603), and *Cordingley v. Cheeseborough* (4 D. F. & J. 379), commented on. *Terry and White, In re*, 32 Ch. D. 14; 55 L. J., Ch. 345; 54 L. T. 353; 34 W. R. 379—C. A.

— **Rescission—Compensation after Conveyance.**—A. purchased for building purposes three lots stated in the particulars of sale to contain as to one lot thereof 348 square yards, with a road frontage of 39 feet 3 inches. Each lot was stated to be sold "subject to re-admeasurement." There was a condition to the effect that "any error, misstatement, or omission should not annul the sale, but compensation should be

allowed, the amount of such compensation to be settled by the auctioneer." Subsequent to the conveyance and the payment of the purchase-money, the lot in question was found to contain only 135 square yards, and a frontage of 18 feet, the property of the vendors. A. claimed rescission of the contract and conveyance, and repayment of the purchase-money with interest, or in the alternative damages by way of compensation:—Held, that the purchaser was not entitled to rescission, but that he was entitled to compensation at the rate of 22s. 6d. per square yard for every square yard of the deficiency (that being the rate per yard at which the land was purchased by him), and to damages for the actual loss sustained by him in the preparation of plans and specifications for building, on the footing that he was getting the larger area, but not to an inquiry for damages as to any estimated loss that he might sustain by the non-completion of the projected buildings. *Flewitt v. Walker*, 53 L. T. 287; 33 W. R. 894—V.-C. B.

Excessive Quantity—Reference to Plan—Compensation to Vendor.—Vendors agreed to sell a parcel of land "containing forty acres or thereabouts, be the same more or less, delineated in the plan hereunto annexed, and therein edged pink," for 9,000l. The agreement provided for the purchaser taking partial conveyances from time to time at prices fixed with reference to quantity, and also that "if any mistake or omission be made in the description of the property the same shall not vitiate or annul the sale, but a compensation or an allowance shall be made" as therein provided. The purchaser had taken conveyances of part of the land; but the vendors, having discovered that the acreage was 41 acres, 1 rood, 10 perches, instead of 40 acres, refused to convey the residue without compensation being made for the excess of 1 acre, 1 rood, 10 perches:—Held, that the vendors were not entitled to any compensation, and must convey the residue on payment of the balance of the purchase-money. *Orange to Wright*, 54 L. J., Ch. 590; 52 L. T. 606—V.-C. B.

b. Non-disclosure of Restrictive Covenants.

Constructive Notice of Onerous Covenants.—When an agreement has been entered into for the purchase of an existing lease, the purchaser is not affected with constructive notice of the covenants contained in the lease, and is not bound to complete the contract if the lease is subject to onerous covenants of an unusual character, unless before the agreement was made he had a fair opportunity of ascertaining for himself the terms of such covenants.—The principle of the decision in *Hyde v. Warden* (3 Ex. D. 72) applies to an agreement to purchase an existing lease, as well as to an agreement to take an underlease. *Reeve v. Berridge*, 20 Q. B. D. 523; 57 L. J., Q. B. 265; 58 L. T. 836; 36 W. R. 517; 52 J. P. 549—C. A.

Silence equivalent to Representation.—The vendor of a leasehold interest is bound to know what covenants are in his lease; and if an intending purchaser state the object which he has in purchasing, the vendor is bound to communicate such knowledge to him, provided such covenants can be reasonably interpreted as

affecting the object which he is aware the purchaser has in view in purchasing the premises; and if the vendor is silent as to a covenant in the lease prohibiting or interfering with that object, his silence is equivalent to a representation that there is no such prohibitory covenant, even though he is not aware of its extent or operation. *Flight v. Barton* (3 My. & K. 282) followed and applied. *Power v. Barrett*, 19 L. R., Ir. 450—V.C.

Return of Deposit — Conditions precluding Objection.—The owner in fee of land sold and conveyed it, during the years 1865, 1866, and 1867, in thirteen lots to different purchasers, each lot being subject to covenants entered into by the purchasers, restricting the use of the land as a brick-yard, and in other respects. The defendant subsequently became the purchaser of lot 11, but the deed of conveyance to him did not contain the restrictive covenants. In 1882 the plaintiffs, a company for manufacturing bricks, contracted to purchase lot 11 from the defendant under conditions of sale which stated that the property was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not; and provided that any error or omission in the particulars should not annul the sale, nor entitle the purchaser to compensation. The existence of the restrictive covenants was not mentioned in the contract, but during the negotiations the defendant stated that there were covenants restricting the use of the land as a brickyard, but his solicitor, who was present, and to whom the plaintiffs' solicitor applied for information, stated that he was not aware of any such covenants. The plaintiffs paid a deposit upon the purchase-money, and having subsequently discovered that there were restrictive covenants, claimed to rescind their contract and sued the defendant to recover the amount of the deposit:—Held, that the plaintiffs, if their contract with the defendant were carried out, would be bound by the restrictive covenants, and that the owners of the other twelve lots purchased from the original vendor would be entitled to enforce those covenants against the plaintiffs; that the plaintiffs were not precluded by the terms of the conditions of sale, nor by s. 3, sub-s. 3, of the Conveyancing Act, 1881, from refusing to complete the purchase, and that they were therefore entitled to recover the amount of the deposit. *Nottingham Patent Brick and Tile Company v. Butler*, 16 Q. B. D. 778; 55 L. J., Q. B. 280; 54 L. T. 444; 34 W. R. 405—C. A.

"Shop" not including "Tavern."—Land had been conveyed to the defendant by an indenture which contained a covenant on the part of the defendant not to use any house to be erected on the land for any other purpose than that of a private dwelling-house, "with the exception of shops which might be built fronting the L. road." The defendant put up parts of the property for sale in lots, the lot purchased by the plaintiff being described in the particulars as Lot 1, "a valuable tavern lot." The fourth condition of sale was to the effect that the trade of an innkeeper, victualler, &c., was not to be carried on save upon Lot 1. Lot 1 fronted the L. road:—Held, that the word "shop" did not include "tavern," and that the plaintiff was

entitled to recover his deposit with interest and costs. *Coombs v. Cook*, 1 C. & E. 75—Huddleston, B.

Knowledge of Purchaser of Defective Title.]—

A railway company agreed to demise to E. for building purposes certain lands which they had acquired under their compulsory powers. E. was restrained from assigning without licence. The property had formerly belonged to a building society, which had sold it in lots, each purchaser entering into restrictive covenants for the benefit of the owners of the other lots, and the conveyance to the company was expressly made subject to these covenants. E. agreed to sell his interest under the contract to R. R. at the time of the contract knew of the restrictive covenants, but believed that the compulsory purchase by the railway company had extinguished them. E. did not know of their existence. R.'s solicitors having discovered the existence of the covenants, objected to the title. E.'s solicitors replied that the compulsory purchase had extinguished them. R. then refused to proceed with the purchase. E. brought a bill for specific performance, but having afterwards resumed possession, and built, in order to avoid a forfeiture, the action came on as an action for damages. E. had never obtained a licence to assign:—Held, by Kay, J., that as E. had not either at the time of the repudiation of the contract by the defendant, or subsequently, obtained a licence to assign, he never was in a position to perform his part of the contract, and therefore could not recover damages. Semble, also, that R. had not such knowledge that the property was still subject to the covenants as to debar him from requiring a title free from them. Held, on appeal, that R. was entitled to object to the title on the ground of the restrictive covenants, for that in order to take a case out of the general rule that a purchaser is entitled to require a good title, it must be shown that at the time of the contract he knew that a good title could not be made, and that here such knowledge was not shown, as R. believed that the covenants had been extinguished. Semble, that R.'s objection on the ground that a licence to assign had not been obtained was not valid, inasmuch as he had repudiated the contract before the time had arrived at which it was necessary for the vendor to produce a licence. *Ellis v. Rogers*, 29 Ch. D. 661; 53 L. T. 377—C. A.

c. Time.

Requisitions—When to be Delivered.]—By the conditions of sale of certain property it was stipulated that all objections and requisitions in respect of the title should be delivered within fourteen days from the delivery of the abstract. An abstract of title was duly delivered containing a full abstract of a will under which the property was sold. After the fourteen days had elapsed the purchaser made an objection as to the construction of the will. The question was, whether the purchaser could make any requisition after the expiration of the time agreed upon by the conditions of sale:—Held, that the objection did not go to the root of the title, and the requisition, being out of time, failed. *Thompson to Curzon, In re*, 52 L. T. 498—Kay, J.

When Essence of Contract—Defect of Conveyance—Repudiation.—Where a contract for sale between a vendor and purchaser fixes a day for completion, and provides that if the purchase is not completed on that day the purchaser shall pay interest from that day until completion, time is not of the essence of the contract so as to entitle the purchaser immediately to repudiate the contract if, in consequence of a defect of conveyance merely and not of title, the vendor is unable on his part to complete the contract on the day fixed. Where the defect is simply one of conveyance and time is not of the essence of the contract, the purchaser is not entitled to repudiate after the day fixed by the contract for completion until he has given the vendor notice to remove the defect within a reasonable time, and the vendor has failed to do so. *Hatten v. Russell*, 38 Ch. D. 334; 57 L. J., Ch. 425; 58 L. T. 271; 36 W. R. 317—Kay, J.

—Sale by bare Trustee—Rescission.—The rule that where time is not made of the essence of the contract for the purchase of land, the purchaser cannot, in the absence of unreasonable delay on the part of the vendor, arbitrarily fix a short day after which he will not be bound, does not apply to a case where, at the date of the contract, the vendor had not power to sell the estate. *Lee v. Soames*, 59 L. T. 366; 36 W. R. 884—Kekewich, J.

A. being seised of the bare legal estate in freeholds without any power of sale, contracted to sell to B. B. on discovering that there were several beneficial owners, required that they should ratify the contract, and eventually fixed a short day for rescission of the contract, unless ratification should be previously obtained. Ratification not having been obtained by the day named:—Held, that B. was entitled to rescind and to have his deposit returned. *Id.*

d. In other Cases.

"Most desirable Tenant."—The plaintiffs put up an hotel for sale on the 4th of August, 1882, stating in the particulars that it was let to "F. (a most desirable tenant), at a rental of 400l. for an unexpired term of 27½ years." The L. Co. sent M., their secretary, to inspect the property. M. reported that F., from the business he was doing, could hardly pay the rent, and that the town in which it was situate seemed to be in the last stage of decay. The directors, on receiving this report, directed M. to bid up to 5,000l. M. went and bought for 4,700l. Before completion, F. went into liquidation, and the L. Co. refused to complete. The plaintiffs sued for specific performance. It was proved that on the 1st of May, 1882, the Lady Day quarter's rent was wholly unpaid; that a distress was then threatened, and that F. paid 30l. on the 6th of May, 40l. on the 13th of June, and the remaining 30l. shortly before the auction, and that no part of the quarter's rent due at Midsummer had been paid. The chairman of the company was orally examined, and deposed most positively that the company would not have bought but for the representation in the particulars that F. was a most desirable tenant. The judge of first instance held, that there was a material misrepresentation, and that the contract had been entered into in reliance

upon it, and accordingly dismissed the action, and on a counter-claim by the defendants, rescinded the contract:—Held, on appeal, that the description of F., as a most desirable tenant, was not a mere expression of opinion, but contained an implied assertion that the vendors knew of no facts leading to the conclusion that he was not; that the circumstances relating to the Lady Day rent showed that he was not a desirable tenant; and that there was a misrepresentation. *Smith v. Land and House Property Corporation*, 28 Ch. D. 7; 51 L. T. 718; 49 J. P. 182—C. A.

Easement not mentioned—Statement in Auction-Room.—A dwelling-house and offices were put up for sale by public auction, under a printed condition in a common form, that the lot was sold subject to any existing rights and easements of whatever nature—and the printed particulars made no mention of any easement, or of any claim to an easement. As the result of evidence, it appeared that the house was subject to an easement belonging to the owner of a neighbouring tenement to use the kitchen for particular purposes, and that the vendor's solicitor knew of the rumoured existence of some such easement, but forebore to make inquiries. No grant of an easement appeared from the abstract, and its existence was, in fact, disputed on the pleadings. In the auction-room the plaintiff's solicitor said he had heard of some such claim, but had no definite information about it, and the auctioneer, in the hearing of the plaintiff's solicitor, on being questioned, told the audience that they might dismiss the subject of the rumoured claims from their minds, as nobody would probably ever hear of them again:—Held, that the conditions were misleading, and the statements in the auction-room insufficient, and specific performance of the contract was refused. *Heywood v. Mallalieu*, 25 Ch. D. 357; 53 L. J., Ch. 492; 49 L. T. 658; 32 W. R. 538—V.-C. B.

Notice to Quit by Tenant not disclosed.—An agreement was entered into for the purchase of a freehold estate of 4,400 acres upon the terms of certain particulars and conditions of sale. In the particulars it was stated that the Y. farm, a farm on the estate of 605½ acres, was in the occupation of H. on a yearly tenancy. H. had before the sale written to the vendor informing him that he intended to give up the farm at the end of the current year, but this was written before the proper time for giving notice to determine the tenancy. The vendor answered this letter, and wrote, "You will of course send me a formal notice at the right time." No mention of this correspondence was made in the particulars, or at the time of the sale. After the sale H. gave formal notice to quit. The purchaser refused to complete his purchase:—Held, that the non-disclosure of the intimation of the tenant that he intended to leave at the end of the year, he not having given formal notice to quit, did not make the statement in the particulars false or misleading, and the purchaser was not entitled to have the contract rescinded, but must complete his purchase. *Davenport v. Charsley*, 54 L. T. 372; 34 W. R. 391—Kay, J.

Road made up and Sewered—Measure of Compensation.—The particulars of sale under

which land was sold described it as "approached by Cuddington Avenue, a new road, made up and sewered, which is continued across the property"; and the plan attached to the particulars indicated the continuance of Cuddington Avenue across the property. It turned out, however, that the road across the property was not made up and sewered like Cuddington Avenue:—Held, that there was a misdescription, and that the measure of compensation to which the purchaser was entitled was the difference between the actual value of the property at the date of the purchase and what would have been its actual value at that date if the road across it had been made up and sewered like Cuddington Avenue, and not the sum it would cost to have the road across the property made up and sewered like Cuddington Avenue. *Chifferiel, In re, Chifferiel v. Watson*, 40 Ch. D. 45; 58 L. J., Ch. 263; 60 L. T. 99; 37 W. R. 120—North, J.

Condition that Vendor may Rescind if Requisitions not complied with.—*See*, post, II.

Condition as to Limited Title.—*See Marsh and Granville (Earl), In re, infra.*

Incumbrance appearing on Searches made by Purchaser.—By a contract of sale dated 3rd May, 1884, S. agreed to purchase certain leasehold property for 240l., subject to the following condition amongst others:—No requisition to be made in respect of the title prior to the conveyance of the 12th of May, 1869, being a deed of conveyance to the vendors' testator. S., having discovered through searches made by himself, two judgment mortgages registered in 1858 and 1859 against the property, required proof that they had been discharged, with which requisition the vendors declined to comply:—Held, that S. was not precluded from objecting to the title, on the ground that these judgment mortgages appeared on the registry searches. A condition so framed only precludes a purchaser from making requisitions upon the vendor as to title, but does not prevent the purchaser from showing alunde that the title is in fact defective. *Davys and Saurin, In re*, 17 L. R., Ir. 334—V.-C.

Condition as to Parties to Conveyance.—*See* post, IV., 2.

Condition as to Payment of Interest on Purchase Money.—*See* post, IV., 3, b.

Non-disclosure of Property in Wall—Rescission—Compensation.—The vendor contracted to sell a freehold villa and garden, between which and a certain road there was a wall. The particulars contained a statement that the garden was tastefully laid out and enclosed by a rustic wall with tradesmen's side entrance. The wall, as the vendor knew, did not belong to him, but he did not disclose that fact to the purchaser. There was in the wall a tablet bearing the name of the villa, as well as a tradesmen's side entrance. The vendor knew that the purchaser intended to build cottages upon the property with access to the road. The frontage of the property upon that side was 181 feet. The conditions of sale provided for compensation for mistake in the particulars:—Held, that the vendor could not avail himself of the condition providing for

compensation, and that the purchaser was entitled to rescind the contract. *Brewer v. Brown*, 28 Ch. D. 309; 54 L. J., Ch. 605—North, J.

Compensation—Waiver of Objection.—M. & Co. bought the benefit of a contract for purchase of certain property which was sold in an administration action, and, in investigating the title, discovered a misdescription in the particulars, in respect of which they forthwith claimed compensation in accordance with the terms of the contract. After an order had been made (but not drawn up) on a summons taken out by M. & Co. for liberty to pay the whole of the purchase-money into court, a correspondence took place with the vendors' solicitors, in which the latter, in reply to inquiry as to whether they intended to take advantage of the order in meeting the question of compensation, stated that personally they intended to take no advantage, but that, since they were acting for an infant, the matter must proceed strictly. The purchase-money was paid into court, and the conveyance executed, the property being therein correctly described:—Held, that the vendees were not estopped from prosecuting their claim for compensation. *Perriam, In re, Perriam v. Perriam*, 49 L. T. 710; 32 W. R. 369—Pearson, J.

4. TITLE.

a. In General.

Abstract of—Insufficiency—Costs.—An abstract of title ought to set out every part of the documents abstracted which may affect the judgment of the purchaser, and the purchaser is entitled to consider that no part of the documents which is not so set out has any bearing upon the title. An abstract of title contained an abstract of a settlement in which the property to be sold was included, but did not set out the part of the settlement by virtue of which it was so included. In a vendor's action for specific performance of a contract to purchase, in which the vendor was successful:—Held, that no costs could be given but such as had been incurred after the abstract had been amended by setting out the material part of the settlement. *Burnaby v. Equitable Reversionary Interest Society*, 54 L. J., Ch. 466; 52 L. T. 350; 33 W. R. 639—Pearson, J.

Limited Title—Condition—Voluntary Deed.—A contract entered into in 1882 for the sale of a freehold estate provided that the title should commence "with an indenture dated the 18th of October, 1845," and made between persons whose names were mentioned, and that the earlier title should not be investigated or objected to. From the abstract of title delivered by the vendors to the purchaser it appeared that the deed of 1845 was a conveyance by a person, who purported to be the absolute owner, of freehold and leasehold property to trustees, on trust for himself for life, and after his death on trust to sell the property, and to hold the proceeds of sale on the trusts declared by a deed of even date. An express power was reserved to the grantor to revoke the trusts. The deed was a voluntary one, except for the consideration which resulted from the liability assumed by the trustees in respect to

the leaseholds:—Held, that inasmuch as the fact that the deed of 1845 was a voluntary one would influence the purchaser in determining whether he would agree to accept a title commencing within forty years, the vendors ought to have stated in the condition of sale the nature of the deed; that the omission to state this rendered the condition a misleading one; and that the purchaser was not bound by the contract to accept a title commencing with that deed. *Marsh and Granville (Earl), In re*, 24 Ch. D. 11; 53 L. J., Ch. 81; 48 L. T. 947; 31 W. R. 845—C. A. See *Davys and Saurin, In re*, ante, col. 1935.

Production of Receipt—Underlease.—On the sale of an underlease the production of the ground landlord's receipt for rent paid by the vendor to the ground landlord under threat of distress for the ground rent, is not the "production of the receipt for the last payment due for rent under the underlease," within the meaning of the Conveyancing Act, 1881, s. 3, sub-s. 5. *Higgins and Percival, In re*, 57 L. J., Ch. 807; 59 L. T. 213—Kay, J.

Peppercorn Rent.—The Conveyancing Act, 1881, s. 3, sub-s. 4, does not apply to a peppercorn rent so as by the production of a receipt for a peppercorn to relieve the vendors of a building lease from the obligation of showing that the covenants with their lessor (to finish the house within a certain time to the satisfaction of the lessor's surveyor) have been duly performed and observed. *Moody and Yates, In re*, 30 Ch. D. 341; 54 L. J., Ch. 886; 53 L. T. 845; 33 W. R. 785—C. A.

What may be forced on Purchaser.—A twelve years' possessory title can be forced on a purchaser though the vendor had no title at the date of the contract. Such a title can be proved in chambers by less than the strictest evidence if the purchaser does not raise an objection. *Games v. Bonnor*, 54 L. J., Ch. 517; 33 W. R. 64—C. A.

G., the lessee of a house, contracted with his lessor's representatives to buy the reversion. G. afterwards sought rescission on the ground that part of the premises contracted to be sold to him was in fact part of the waste of the manor, and did not belong to the vendors:—Held, that as this piece of land had been inclosed by the vendors and had been in possession of G. as their lessee from 1872 to 1884, a good possessory title had been shown to it, and that G. therefore was not entitled to rescission. *Grover v. Loomes*, 55 L. J., Ch. 52; 53 L. T. 593; 34 W. R. 94—V. C. B.

A railway company, upon a sale of superfluous lands, arranged with the purchasers for the postponement of the payment of the purchase money until a given date, which was beyond the period prescribed for the sale by the railway company of its superfluous lands. Part of the arrangement consisted in a declaration by the parties that the railway company should have a lien on the lands sold until payment of the purchase moneys. The purchasers from the railway company having contracted to sell the lands to another person:—Held, on a summons under the Vendor and Purchaser Act, 1874, that the court would not compel the person, who agreed to purchase from the purchasers from the railway company, to complete. Whether the

sale by the railway company was an absolute sale, quare. *Thackuray and Young, In re*, 40 Ch. D. 34; 58 L. J., Ch. 72; 59 L. T. 815; 37 W. R. 74—Chitty, J.

b. Expenses in Making.

Sale under Power in Mortgage—Evidence of Subsistence of Security.—In 1818 certain freehold property was mortgaged by the then owner, the form of the mortgage being a conveyance of the fee simple to trustees upon trust, at any time after the expiration of six months from the date named for repayment of the principal, to sell the property, and discharge the debt, &c., out of the proceeds, and to pay the residue to the mortgagor, his executors, administrators, or assigns. The deed contained a proviso for redemption, and also provisions making the receipt of the trustees, their heirs, or assigns, a sufficient discharge to a purchaser of the property, and exonerating any purchaser from seeing to the application of the purchase money, and rendering unnecessary the concurrence of the mortgagor, or his heirs, in any conveyance under the trust for sale. The deed, however, did not contain any provision exonerating a purchaser from inquiring whether default had been made in payment of principal or interest, nor as to whether anything was owing on the security. The mortgagor died in 1839, having by his will devised the property comprised in the mortgage to several of his children in succession, as tenants for life with remainders over. The last surviving tenant for life died in 1887, and shortly afterwards A. and B., in whom the mortgage had become vested by transfer (there having previously been several mesne transfers), contracted to sell the property. The vendors sold as mortgages, in pursuance of the trust contained in the mortgage. The purchasers having raised an objection to the validity of the title, a summons was taken out, under the Vendor and Purchaser Act, 1874, by the vendors asking for a declaration that a good title had been shown:—Held, that, without the concurrence of all the persons at present entitled to the equity of redemption, it was necessary, in order to enable the vendors to make a good title to the property, that they should, by obtaining statutory declarations, furnish evidence of the subsistence of the mortgage from the death of the mortgagor down to the date of the sale:—Held, also, that as to the costs of the proceedings, according to the ordinary practice, the costs of the statutory declarations furnished by the vendors would, under s. 3, sub-s. (6), of the Conveyancing Act, 1881, be payable by the purchasers—the conditions of sale being silent as to such expenses—while the costs of the summons would be payable by the vendors. But held, that in the present case the proper order would be that the vendors' expenses in procuring and furnishing the purchasers with the evidence of payment of the interest on the mortgage should be considered as part of the vendors' costs of the summons, and that no costs of the summons should be given to either side. *Edwards and Green, In re*, 58 L. T. 789—Kay, J.

Abstract of Deed not in Vendor's Possession.]

—A vendor is bound at his own expense to produce to the purchaser a proper abstract of title,

either for the statutory period of forty years, or for such other period as may be agreed upon, and s. 3, sub-s. 6, of the Conveyancing Act, 1881, is not intended to interfere with the performance by the vendor of that duty, but proceeds on the assumption that the vendor has produced such an abstract. Therefore on an open contract the vendor must bear the expense of procuring and making an abstract of any deed forming part of the forty years' title, although such deed be not in his possession. The word "abstract" in that sub-section is to be distinguished from the "abstract" of title to which the purchaser is entitled; and a purchaser cannot be said to "require an abstract of a particular deed," merely because he requires an abstract of title for the prescribed length of time, which involves the abstracting of that deed. *Johnson and Tustin, In re*, 30 Ch. D. 42; 54 L. J., Ch. 89; 53 L. T. 281; 33 W. R. 737—C. A.

Certificate of Lessor's Surveyor.—The certificate of the lessor's surveyor that the house has been finished to his satisfaction is not a "certificate" or "evidence" within s. 3, sub-s. 6, the expense of obtaining which must be borne by the purchaser, but it is part of the title itself. *Moody and Yates, In re*, 30 Ch. D. 344; 54 L. J., Ch. 886; 53 L. T. 845; 33 W. R. 785—C. A.

Registry Searches.—Where freehold or chattel real property is offered for sale under conditions which do not provide for the expense of the registry searches, the vendor is bound, notwithstanding s. 3, sub-s. 6, of the Conveyancing and Law of Property Act, 1881, to furnish such searches at his own expense. *Murray and Hegarty, In re*, 15 L. R., Ir. 510—V.-C.

5. JURISDICTION UNDER VENDOR AND PURCHASER ACT.

Return of Deposit—Interest—Costs of Investigating Title.—In exercising the summary jurisdiction given by s. 9 of the Vendor and Purchaser Act, 1874, the court has power not only to answer the question submitted to it, but to direct such things to be done as are the natural consequence of the decision. Therefore, where the court decided that the vendor had not shown a good title or answered the requisitions, the court ordered the vendor to return the deposit, with interest at 4 per cent. from the day when it was paid, and to pay the purchaser's costs of the investigation of the title. *Higgins and Hitchman, In re* (21 Ch. D. 95), and *Yeilding and Westbrook, In re* (31 Ch. D. 344), approved. *Hargreaves and Thompson, In re*, 32 Ch. D. 454; 56 L. J., Ch. 199; 55 L. T. 239; 34 W. R. 708—C. A.

On making an order, upon a summons by a purchaser under the Vendor and Purchaser Act, 1874, declaring that the vendor has not shown a good title to the property, the court has jurisdiction to order the vendor to pay the purchaser's costs of investigating the title, and to charge them upon the vendor's interest in the property. *Higgins and Hitchman, In re* (21 Ch. D. 95), followed. *Yeilding and Westbrook, In re*, 31 Ch. D. 344; 55 L. J., Ch. 496; 54 L. T. 581; 34 W. R. 397—Pearson, J.

Whether the court has jurisdiction upon sum-

mons under s. 9 of the Vendor and Purchaser Act, 1874, to order interest which has been erroneously paid by a purchaser to be repaid to him—*Quære. Young and Harston, In re*, 31 Ch. D. 168; 53 L. T. 837; 34 W. R. 84; 50 J. P. 245—C. A. S. C. cor. V.-C. B. 54 L. J., Ch. 1144.

Validity of Notice to Rescind Contract.—Upon a summons under s. 9 of the Vendor and Purchaser Act, 1874, the court has jurisdiction to determine the validity of a notice given by a vendor to rescind his contract for sale. Such a question is not "a question affecting the existence or validity of the contract" within the meaning of s. 9, those words referring only to the inception of the contract. *Jackson and Woodburn, In re*, 37 Ch. D. 44; 57 L. J., Ch. 243; 57 L. T. 753; 36 W. R. 396—North, J.

Payment of Purchase Money to Married Woman or Trustees.—A married woman contracted to sell a leasehold vested in trustees for her under a will. The purchaser objected to the title on the ground that she was by the will restrained from anticipation. She took out a summons under the Vendor and Purchaser Act, 1874, to have the point decided. The judge made an order under the Conveyancing and Law of Property Act, 1881, s. 39, binding her interest in the property, and adjourned into court the question whether she was restrained from anticipation, directing the trustees to be served. The court decided that she was restrained from anticipation, and that the purchase money must not be paid to her, but to the trustees. From this she appealed:—Held, that as the question whether the purchase money was to be paid to her or the trustees did not concern the purchaser, the court had no jurisdiction to decide it on a vendor and purchaser summons; but the court gave the vendor leave to amend the summons so as to make it an originating summons under Ord. LV., rule 3, and the proper parties being before the court, the appeal was allowed to proceed on her undertaking so to amend it. *Tippett and Newbould, In re*, 37 Ch. D. 444; 58 L. T. 754; 36 W. R. 597—C. A.

II. RESCISSION OF THE CONTRACT.

For Misdescription, &c., in Particulars and Conditions.—*See ante*, I. 3.

Vendor unable or unwilling to Comply with Requisitions.—Land was contracted to be sold under a condition that "if the purchaser should take any objection or make any requisition" which the vendor was "unable or unwilling to remove or comply with," the vendor might rescind the contract. The purchasers made requisitions, and the vendor, for reasons stated, declined to comply with several of them. The purchasers insisted, and the vendor served them with notice that "being unable or unwilling to remove or comply with" the requisitions, he rescinded the contract. The purchasers in reply denied the vendor's right to rescind, withdrew their requisitions, and stated that they were willing to complete:—Held, that the contract had been duly rescinded. *Dames and Wood, In re*, 29 Ch. D. 626; 54 L. J., Ch. 771; 53 L. T. 177; 33 W. R. 685—C. A.

A railway company contracted to sell some superfluous land, "free from incumbrances," for 868*l*. The contract provided that, if the purchaser should decline to waive any valid objection to the title, the company might at any time rescind the contract, without paying the purchaser any costs or compensation. The abstract of title showed that the land was subject to a perpetual rent-charge of 63*l*. issuing out of it, this being the consideration for which the company had purchased it under their statutory powers, for the making of a railway, which by a subsequent act they were authorised to abandon. The purchaser required the company to procure the release of the land from the rent-charge. This they declined to do, but offered to indemnify him against it. He declined to waive his requisition :—Held, that the company were entitled to rescind the contract under the condition. *Great Northern Railway and Sanderson, In re*, 25 Ch. D. 788 ; 53 L. J., Ch. 445 ; 50 L. T. 87 ; 32 W. R. 519—Pearson, J.

By conditions of sale, it was provided that if any purchaser should insist on any requisition as to title, &c., which the vendors should consider themselves unable, or on the ground of expense, or for any other reason should be unwilling, to remove or comply with, the vendors might by writing annul the sale. On the 4th July, 1884, after receipt of the abstract of title, and before comparing the deeds, the purchaser sent in requisitions, by one of which he required a copy of plans and certain leases to be furnished. By another requisition he required an abstract of certain deeds recited in an abstracted deed. By a third he required a copy of the schedule to another deed to be furnished. The vendors replied that they would furnish the copy plans at the purchaser's expense, that they must decline to furnish the abstract required, that the schedule did not appear to affect the property, and that they could not comply with this requisition. The purchaser, before receiving these answers, inspected the deeds, which were at the office of the solicitors of the mortgagees of the property, and not in the possession of the vendors. In reply to the answers, his solicitors on the 22nd August, 1884, wrote that the plans must be furnished at the vendor's expense, that the requisition as to the further abstract must be complied with, and that the copy schedule must be supplied. The vendors then gave a notice rescinding the contract :—Held, that there were good reasons for refusing to comply with the requisitions, that the conduct of the vendors was not unreasonable or capricious, that they were not bound to state such reasons when answering the requisitions, and that they had the right to rescind. *Glenton to Haden, In re*, 53 L. T. 434 ; 50 J. P. 118—C. A.

Vendors agreed to sell a piece of land, containing about four acres, under conditions of sale which provided that the vendors might rescind the contract if they could not comply with any requisition. They could make out a title only to three and a-half acres of land :—Held, that they were entitled to rescind the contract. *Heppenstall v. Hose*, 51 L. T. 589 ; 33 W. R. 30 ; 49 J. P. 100—North, J. See *Terry and White, In re*, ante, col. 1929.

— **No Requisition made.**—A sale took place under a condition providing that all objections and requisitions should be sent to the

vendor's solicitors within fourteen days from the delivery of the abstract, and if any objection or requisition should be made and insisted upon which the vendors should be unable or unwilling to receive or comply with, the vendors should be at liberty (notwithstanding any intermediate negotiation in respect thereof, or attempts to remove or comply with the same), by notice in writing to the purchaser, by whom such objection or requisition should be made, or his solicitor, to rescind the sale. The purchaser sent the conveyance to the vendors for approval, and they requested that it should be stated in the conveyance that the property was sold subject to a restrictive covenant contained in a deed dated prior to the commencement of title, and which did not therefore appear on the face of the abstract. The purchaser objected to the restrictive covenant being inserted in her conveyance, and asked for a copy of the deed containing it. The vendors then gave notice that they rescinded the contract :—Held, that there was no requisition made or insisted upon, and that the vendors must specifically perform, the conveyance to be according to the purchaser's draft. *Monckton to Gilzean*, 27 Ch. D. 555 ; 54 L. J., Ch. 257 ; 51 L. T. 320 ; 32 W. R. 973—V.-C. B.

— **Proper Condition.**—Semble, that a condition of sale giving the vendor a right to rescind the contract, in the event of his being unable or unwilling to comply with a purchaser's requisition as to conveyance, is not in general a proper condition. *Hardman v. Child*, or *Hardman and Child, In re*, 28 Ch. D. 712 ; 54 L. J., Ch. 695 ; 52 L. T. 465 ; 33 W. R. 544—Pearson, J.

— **Covenant to Repair not Disclosed.**—Trustees of a will put up land for sale, subject to a condition that, if any objection or requisition as to (inter alia) title, or abstract, or conveyance should be insisted on, and the vendors should be unable or unwilling to remove or comply therewith, they should be at liberty to annul the sale. The abstract delivered to the purchaser showed that the conveyance to the vendor's testator was of the land, together with a wall on the east side of it, "which wall is to be ever hereafter repaired and kept in repair" by the testator, his heirs and assigns. This obligation was not mentioned in the particulars and conditions of sale, and the purchaser did not know of it until the delivery of the abstract. He accepted the title, and tendered to the vendors the draft of a conveyance to himself of the land with the wall, omitting all reference to the obligation to repair the wall. The vendors' solicitors added the words "subject to and with the liability for ever to repair the wall" by the purchaser, his heirs and assigns. The purchaser would not agree to the addition, and the vendors thereupon gave notice to rescind the contract. The purchaser then brought an action for specific performance of the contract, claiming the right to a conveyance without the additional words :—Held, that, if the obligation to repair the wall ran with the land, it was immaterial whether it was mentioned in the conveyance or not, because the purchaser would be bound by it in either case ; but that if it did not run with the land, the vendors, not having mentioned it in

the particulars of sale, could not impose it on the purchaser. Consequently, the vendors were not entitled to rescind the contract. *Id.*

III. SPECIFIC PERFORMANCE OF THE CONTRACT.—See SPECIFIC PERFORMANCE.

IV. RIGHTS AND DUTIES OF VENDOR AND PURCHASER.

1. IN GENERAL.

Sale with Possession—Advantage incidental to Reversion — Dilapidations.]—A dwelling-house was put up for auction on the 2nd March, 1887. The particulars announced the sale as “with possession,” and stated that the purchaser could take the late tenant’s fixtures at a valuation if he desired. The conditions provided that the purchase should be completed on the 25th March. There was no mention, except as above, in the particulars and conditions of any tenancy. B. purchased the house at the auction. It was in evidence that the auctioneer stated at the auction that the house was not in good decorative repair. It appeared from the abstract delivered to the purchaser that the house had been let upon a lease, which had been determined by notice expiring on the 25th March, 1887, and which contained covenants by the lessee to keep and deliver up the premises in good repair. On the 20th January, 1887, a receiving order in bankruptcy had been made against the lessee, and an arrangement had afterwards been come to giving the vendor power to take immediate possession. The vendor had carried in a proof in the lessee’s bankruptcy for damages for breach of the repairing covenants. The purchaser delivered a requisition claiming to be entitled to any sum recovered by the vendor from the lessee in respect of his breach of covenant to repair. This was a summons taken out by the vendor under the Vendor and Purchaser Act, 1874, to determine whether the purchaser was entitled to the sum so claimed:—Held, that the purchaser had contracted for the purchase of the possession of the house as it stood, and could not be entitled to the claim for damages for breach of the covenant to repair, because that claim was incident to the reversion of the lease, which he had not purchased. *Eddie and Brown, In re*, 58 L. T. 307—North, J.

Payment of Paving Expenses in Metropolis.]
—See *Egg v. Blayney*, ante, col. 1220.

— **Under Public Health Act.]** — See *Bettesworth and Richer, In re*, ante, col. 866.

Discharge of Incumbrance.]—A vendor who contracts to sell only such right or interest, if any, as he has, is bound to convey such right or interest free from an existing incumbrance. *Gould v. Birmingham, Dudley and District Bank*, 58 L. T. 560—Kekewich, J.

— **Conveyancing Act, 1881, s. 5.]**—The court will not, under the power given to it by s. 5 of the Conveyancing Act, 1881, compel a vendor of land to pay money

into court for the purpose of discharging an incumbrance upon the land, when the result of so doing would be to inflict a great hardship on him, as, for instance, if the incumbrance is a perpetual rent-charge, and the sum necessary to procure its discharge would far exceed the amount of the purchase-money payable to the vendor. *Great Northern Railway and Sanderson, In re*, 25 Ch. D. 788; 53 L. J., Ch. 445; 50 L. T. 87; 32 W. R. 519—Pearson, J.

A railway company contracted to sell some superfluous land, “free from incumbrances,” for 868*l.* The abstract of title showed that the land was subject to a perpetual rent-charge of 63*l.* issuing out of it, this being the consideration for which the company had purchased it under their statutory powers, for the making of a railway, which, by a subsequent act, they were authorised to abandon. The purchaser required the company to procure the release of the land from the rent-charge. This they declined to do, but offered to indemnify him against it. He declined to waive his requisition:—Held, that the company were not bound to apply to the court, under s. 5 of the Conveyancing Act, 1881, to declare the land freed from the rent-charge, or to take any other steps to procure the release of the rent-charge. *Id.*

Enlargement of Long Term into Fee—“Rent having no Money Value.”]—Land was demised for a term of 500 years from Michaelmas, 1646, at the yearly rent of “one silver penny, if lawfully demanded”:—Held, that this rent was a “rent having no money value,” within the meaning of s. 65 of the Conveyancing Act, 1881, and that the owner of the term in 1884 had power under that section to enlarge the term into a fee. *Chapman and Hobbs, In re*, 29 Ch. D. 1007; 54 L. J., Ch. 810; 52 L. T. 805; 33 W. R. 703—Pearson, J. *S. P. Smith and Stott, In re*, 29 Ch. D. 1009, n.; 48 L. T. 512; 31 W. R. 411—Fry, J.

2. CONVEYANCE.

Parties—Sale by Trustees—Equitable Tenant for Life.]—Certain property having been purchased by a company from trustees who had a power of sale, the purchasers required that the equitable tenant for life of the property, at whose request the sale was made, should enter into covenants for title. One of the conditions of sale was, that “the vendors, being trustees, are to be required only to give the statutory covenant against incumbrances implied by reason of their being expressed to convey as trustees:”—Held, that the purchasers were entitled to require the equitable tenant for life to enter into the usual limited covenants for title, and that the conditions of sale did not deprive them of this right. *Sawyer and Baring’s Contract, In re*, 53 L. J., Ch. 1104; 51 L. T. 356; 33 W. R. 26—Kay, J.

— **“Bare Trustees”—Married Woman.]**—A testator devised his real estate to trustees for sale, who were married women, one of them having married before and the other after the Married Women’s Property Act, 1882. Both of them also took beneficial interests in the proceeds of sale. Under the judgment in an action

for the administration of the testator's estate, part of the real estate was sold by the trustees, the purchaser paying his purchase-money into court:—Held, that the married women were "bare trustees" within s. 6 of the Vendor and Purchaser Act, 1874, and that the conveyance to the purchaser did not require the concurrence of the husbands, or acknowledgment under the Fines and Recoveries Act. *Docwra, In re, Docwra v. Faith*, 29 Ch. D. 693; 54 L. J., Ch. 1121; 53 L. T. 288; 33 W. R. 574—V.-C. B.

— **Condition — Legatees not to be.**—A testator died in April, 1868, and left all his property to trustees upon trust to pay his debts, and subject thereto in trust for his wife and children in equal shares. In October, 1885, R., one of the trustees, who had alone proved the will, put up for sale, as executrix, a portion of the assets, consisting of a house in Dublin held for a term of years. One of the conditions of sale provided that the purchaser should not require any of the legatees to be parties to the conveyance. C. having purchased the premises, objected to the title, upon the ground that a good title could not be made without the concurrence of the legatees of the leasehold and the other trustee:—Held, that the purchaser was precluded by the condition of sale from raising the point. *Ryan and Cavanagh, In re*, 17 L. R., Ir. 42—V.-C.

Validity—Perpetuity—Covenant to reconvey.—By his will a testator devised his property to trustees upon trust for his eldest son for life, with remainder in trust for his first and other sons in tail male, with remainder in trust for the testator's second and third sons successively for life with the like limitations to their first and other sons respectively, with remainder in trust for his grandson for life, with remainder to his first and other sons in tail male, with remainders over. In accordance with a power to that effect in the will, the trustees sold a portion of the settled land to a tenant for life, and by a separate deed he covenanted with the trustees that he would not, "during the continuance of the strict settlement," sell or dispose of the land otherwise than as therein mentioned; and that he would, in case he should at any time thereafter "during the continuance of the aforesaid settlement," be called upon by the trustees so to do, and upon being reimbursed the purchase-money and costs, reconvey all such of the lands so sold to him as might then remain unsold or undisposed of:—Held, that the covenant was void as tending to a perpetuity. *Trevelyan v. Trevelyan*, 53 L. T. 853—V.-C. B.

Restrictive Covenant between Purchasers—Two Lots—Withdrawal of One Lot.—Two lots of land were put up for sale under conditions which, after reciting that the vendor was possessed of adjoining property not included in the sale, provided that each purchaser should, in his conveyance, enter into a covenant with the vendor and the purchaser of the other lot not to use any building on his lot as a public-house, and to the conditions was annexed a form of covenant to that effect. No provision was made for the case of a lot remaining unsold. Lot 2 was purchased at the sale, and the purchaser signed a contract embodying the conditions. Lot 1 remained unsold:—Held, that the pur-

chaser was bound to enter into the restrictive covenant with the vendor. *Mordy and Cowman, In re*, 51 L. T. 721—C. A.

Leaseholds—Right of Indemnity against other Lots—Custody of Original Lease.—A leasehold, subject to the yearly rent of 12l. 10s., was put up for sale by auction in five lots, under conditions of sale, one of which provided that each lot would be sold subject to the entire rent, but "with right of indemnity against the other lots, save as to 12l. 10s.," and another, that the original lease would be handed to "the purchaser of the largest lot in amount." At the auction only two lots were sold, one to O. for 200l., and the other to S. at the same price. A few days afterwards, O. sent in a proposal to purchase another lot for 160l., subject to the same conditions of sale, which offer was accepted. S. subsequently executed an agreement with O., surrendering in his favour a claim which he (S.) might have to the original lease. The two other lots remained unsold. O. claimed the custody of the original lease, and to have inserted in the conveyance of his two lots to him a clause creating a rent-charge upon the other three lots equivalent to the amount of their aliquot share of the rent, with powers of distress and entry for its enforcement:—Held, upon a summons issued by O., under the Vendor and Purchaser Act, 1874, that he was entitled to insist upon his requisition, save as to the creation of a rent-charge. *Doherty's Contract, In re*, 15 L. R., Ir. 247—C. A.

Covenant for Quiet Enjoyment—Breach—Decree—No Disturbance in Possession.—In a conveyance of land by the defendant to the plaintiff, the defendant covenanted for title and quiet enjoyment notwithstanding any act or thing done or suffered by him or any of his ancestors or predecessors in title. After the conveyance a decree was made in a suit in Chancery in which the plaintiff, though not a party, was represented as being one of a class of persons against whom the suit was brought, and by the decree the land so conveyed by the defendant was declared to be subject to a general right of common over it:—Held, that the decree alone, without any entry or actual disturbance of the plaintiff in his possession, was no breach of the defendant's covenant for quiet enjoyment. *Howard v. Maitland*, 11 Q. B. D. 695; 53 L. J., Q. B. 42; 48 J. P. 164—C. A.

Held, also, that the court, in the absence of evidence of a grant of such right of common by some predecessor in title of the defendant, would not infer that there must have been such grant so as to be a breach of his covenant for title within the meaning of the covenant. *Ib.*

Reservation of Easements in.—See EASEMENT.

3. PURCHASE MONEY.

a. Payment of.

Attendance of Trustees—Authority to Co-trustee.—Where trustees are vendors a purchaser from them has, as a general rule, a right to insist upon paying the purchase-money in the presence of all the trustees, or into a bank to their joint account, and is not bound to pay the

money to one of their number on a written authority from his co-trustees. Payment in the presence of all is payment to all if they accept the payment. Freehold and leasehold property having been agreed to be purchased by the Metropolitan Board of Works from the trustees (three in number) of a certain will, the board made a requisition that the trustees should attend personally, on completion of the purchase, to receive the purchase-moneys, or that they should give to the board a written direction, signed by the trustees, for payment of the same purchase-moneys to the joint account at some bank. The trustees objected to this, and desired that the moneys should be paid to one of their number, to whom they proposed to give their written authority to receive it:—Held, that the principle in *Bellamy and Metropolitan Board of Works* (24 Ch. D. 387) applied to the case, and that the requisition must be complied with. *Flower v. Metropolitan Board of Works, In re*, 27 Ch. D. 592; 53 L. J., Ch. 955; 51 L. T. 257; 32 W. R. 1011—Kay, J.

Apportionment of—Sale under power in Mortgage—Separate Receipts.—Trustees advanced money on mortgage, a deed containing the usual power of sale and a declaration that the receipts of the mortgagees or their assigns should be sufficient discharges to purchasers, and that the power of sale might be exercised by any person who for the time being should be entitled to receive and give a discharge for the moneys for the time being owing upon the security of the mortgage. By a memorandum of even date it was declared that the mortgage-money belonged to the mortgagees in certain unequal shares. Subsequently the mortgagees assigned their shares separately to two sets of trustees, who, in exercise of the power of sale, offered part of the property for sale by auction. The purchaser of one of the lots accepted the title, but required that the purchase-money should be apportioned between the two sets of trustees, and that each set of trustees should give a separate receipt, and that this should appear on the conveyance. On a summons taken out for the opinion of the court, the court held that a joint receipt of the vendors was sufficient, and that no apportionment was necessary. On appeal from that decision:—Held, by Cotton, L.J., that, as there might be a question whether the vendors had a power to sell at all, the appeal ought to be dismissed on the ground that it had not been brought before the court in such a manner that the court could properly adjudicate upon it. Held, by Lindley, L.J., and Lopes, L.J., that the appeal ought also to be dismissed on its merits, as upon the true construction of the power of sale in the mortgage the persons beneficially entitled to the money had power to sell and to give receipts, and that the joint receipt of the vendors was therefore sufficient, and that no apportionment was necessary. *Parker and Beech, In re*, 56 L. J., Ch. 358; 56 L. T. 95; 35 W. R. 353—C. A.

b. Interest on.

Vendor's Delay.—Where there is a condition that the purchaser should pay interest from the day fixed for completion in case of delay from any cause "except the wilful neglect or default

of the vendor," the purchaser cannot relieve himself from the liability to pay interest by setting apart the unpaid purchase-money and giving the vendor notice of such appropriation. *Golds and Norton, In re*, (33 W. R. 333) not followed. *Riley to Streetfield, In re*, 34 Ch. D. 386; 56 L. J., Ch. 442; 56 L. T. 48; 35 W. R. 470—North, J.

Where the delay in the completion of a purchase by the stipulated day arises from the default of the vendor, and the purchaser then deposits his purchase-money in a bank to a separate account, and gives notice of the fact to the vendor, the purchaser is relieved, as from the receipt of such notice by the vendor, from payment of interest on his purchase-money, notwithstanding that he has been in possession or receipt of the rents under the contract, and that the contract provides that he shall pay interest "if from any cause whatever" the purchase is not completed on the day named. The vendor is, however, entitled to the interest (if any) allowed by the bank on the deposit. *Golds and Norton, In re*, 52 L. T. 321; 33 W. R. 333—Kay, J.

— "**Wilful Default.**"]—Conditions of sale provided that the purchase was to be completed by the 8th of September, and that "if from any cause whatever other than wilful default on the part of the vendor" completion of the purchase was delayed beyond that day, the purchase-money was to bear interest from that day to the day of actual payment. The property was in mortgage, and the draft conveyance was not returned approved by the mortgagees to the purchasers until the 6th of September. On the 8th of September the engrossment was sent to the vendor's solicitors, but the vendor had gone abroad for his autumn holiday on the 6th of September, and the engrossment executed by him was not returned until the 18th of September. The mortgagees were also out of town, and the vendor's solicitors declined to incur the expense of a special messenger to procure execution by them. The purchase was not completed until the 14th of October:—Held, on summons by the purchaser under the Vendor and Purchaser Act, 1874, s. 9, for recovery of interest on the purchase-money paid by them under protest, that by his going abroad two days before the time known by him to have been fixed for completion of the purchase, there had been so far "wilful default on the part of the vendor" within the exception contained in the conditions of sale, that the purchasers were entitled to recover out of the interest paid by them a sum proportionate to the day. *Young and Harston, In re*, 31 Ch. D. 168; 53 L. T. 837; 34 W. R. 84; 50 J. P. 245—C. A.

Deduction of Rents and Profits.—An order was made in an administration action directing the freehold property of the testator to be put up for sale by auction. The conditions of sale provided that each purchaser should pay the balance of his purchase-money (after deducting the amount paid as deposit) into court to the credit of the action, on or before 21st July, 1885, or in default, should be charged interest at the rate of 5 per cent. per annum until payment of the purchase-money; and that upon such payment the purchaser should be entitled to possession, or to the rents and profits, as from 21st July, 1885. The purchaser of one of the lots

having refused to comply with this condition, a summons was taken out, upon which an order was made that on or before the 7th April, 1886, or subsequently within seven days after service of the order, the purchaser should lodge in court the balance of his purchase-money, after deducting the deposit, with interest thereon, from the 21st July, 1885. The purchaser then asked that, after the direction for the payment of the money, less the deposit, there should be inserted in the order the words, "Less the rents and profits of the said premises from the 21st July, 1885." He contended that there ought to be no difference made between a completion of a purchase where the property was being sold under the direction of the court and where sold outside the court in the usual way, the course then adopted invariably being to allow the rents and profits to be set off against the interest, the balance being either paid or received by the purchaser:—Held, that the practice, in circumstances like the present, was not to allow the addition of the words referred to; and that, therefore, the purchaser's application must be refused. *Smith, In re, Day v. Bonaini*, 55 L. T. 329—C. A.

c. Lien for.

Express Stipulation—Substitution.—A banking company entered into an agreement dated the 29th May, 1886, to sell certain paper-mills and machinery to the L. Company for 20,000*l.* to be paid by instalments. By clause 2 of the agreement it was provided that upon payment of the first two instalments the bank should convey the premises to the L. Company, upon their executing a mortgage for the balance of the purchase-money, and that the mortgage should contain a clause enabling the bank, in case the business of the L. Company should be suspended, to re-enter and take possession of the premises, and of everything which should have been built or placed thereon, and which should not require registration within the Bills of Sale Act, 1878, and to hold the same for their own use and benefit absolutely, but without prejudice to the liability of the L. Company for the unpaid balance of the purchase-money. This agreement was not registered as a bill of sale. The first two instalments of the purchase-money were paid, but no conveyance or mortgage of the property was executed in pursuance of the agreements. The L. Company entered into and held possession of the property until a winding-up order was made on the 7th February, 1887. The bank thereupon re-entered on the property. The official liquidator of the L. Company asked by summons for delivery up of a paper-making machine and all other trade machinery attached to the mills. The bank claimed possession of the fixtures and trade machinery under their vendors' lien:—Held, that the position of the parties under the agreement was the same as if a conveyance and mortgage of the property had been actually executed, and that the bank had no vendor's lien for unpaid purchase-money, as an express stipulation had been substituted for such lien. *London and Lancashire Paper Mills Company, In re*, 58 L. T. 798—North, J.

Land in Register County—Purchasers without Notice.—Trustees of a charity conveyed land in Yorkshire to R. and W., part of the purchase-

money remaining unpaid, and allowed R. and W. to register the conveyance, knowing that they wanted to do so in order to re-sell the land in lots:—Held, that the trustees had, by their conduct, precluded themselves from asserting their lien for unpaid purchase-money against bona fide sub-purchasers from R. and W. without actual notice, though the sub-purchasers had not examined, as it was their duty to have done, the conveyance to R. and W., a memorial of which was registered, and though the estate of one of the sub-purchasers was equitable only. *Kettlewell v. Watson*, 26 Ch. D. 501; 53 L. J., Ch. 717; 51 L. T. 135; 32 W. R. 865—C. A.

Registration.—A vendor's lien for unpaid purchase-money need not be registered under 2 & 3 Anne, c. 4. *Ib.*

Notice.—The mortgagee of a sub-purchaser's lot left it to R. and W. "to manage the business":—Semble, he was not affected with constructive notice of the lien. *Ib.*

Sale to Railway Company—Injunction.—An unpaid vendor of land taken by a railway company is entitled to the usual relief of unpaid vendors; therefore in an action by him against the company for the enforcement of his lien on the land, and in default for possession, the court, in event of such default, will, without requiring the land to be offered for sale, grant an injunction against the company from using the land, and make an order for delivery up of possession to the vendor. *Allgood v. Merrybent and Darlington Railway*, 33 Ch. D. 571; 55 L. J., Ch. 743; 55 L. T. 835; 35 W. R. 180—Chitty, J.

4. DEPOSIT.

Forfeiture—Purchaser's Failure to Complete.]

—On a sale of real estate the purchaser paid 500*l.*, which was stated in the contract to be paid "as a deposit, and in part payment of the purchase-money." The contract provided that the purchase should be completed on a day named, and that if the purchaser should fail to comply with the agreement, the vendor should be at liberty to re-sell and to recover any deficiency in price as liquidated damages. The purchaser was not ready with his purchase-money, and after repeated delays, the vendor re-sold the property for the same price. The original purchaser having brought an action for specific performance:—Held, that the deposit, although to be taken as part payment if the contract was completed, was also a guarantee for the performance of the contract, and that the plaintiff, having failed to perform his contract within a reasonable time, had no right to a return of the deposit. *Palmer v. Temple* (9 Ad. & E. 508) distinguished. *Howe v. Smith*, 27 Ch. D. 89; 53 L. J., Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773—C. A.

An agreement for sale contained the two following provisions:—(9) As an earnest hereof the purchaser has this day paid into the hands of S. the sum of 500*l.* as a deposit, the deposit to form part of the purchase-money to be paid on the day of possession; and (10) should either vendor or purchaser refuse or neglect to carry out the above arrangement on her or his part,

the one so refusing or neglecting shall pay to the other the sum of 500*l.* as or in the nature of liquidated damages. The purchaser was unable to carry out his part of the agreement. The vendor brought this action for specific performance of the agreement, or, in the alternative, payment of the 500*l.* as liquidated damages:—Held, that the meaning of the agreement was that the 500*l.* should be recoverable, not if some minute provision were not carried out, but if, owing to the fault of either party, the agreement were not carried out at all, and that that sum could be recovered in this case as liquidated damages:—and further, that it could also be recovered if the action were looked upon as an action to enforce the forfeiture of the deposit. *Catton v. Bennett*, 51 L. T. 70—Kay, J.

— **Rescission—Defect of Title subsequently discovered.**—A purchaser of land is not entitled to have the contract set aside for defect of title after completion, or after rescission consequent upon the purchaser's default. The conditions in a contract for sale of land provided that the purchaser should pay a deposit, and that if he failed to comply with the conditions his deposit should be forfeited, and the vendors should be at liberty to resell. The purchaser paid the deposit, accepted the title, and prepared draft conveyance, which was approved, but when the time for completion arrived he could not find the residue of the purchase-money. The vendors therefore rescinded the contract. Three years afterwards, on a sale to another purchaser, it was decided that the title of the vendors was bad, owing to a defect which appeared on the face of the abstract delivered to the first purchaser. The first purchaser therefore brought an action to recover his deposit on the ground of mutual mistake and failure of consideration:—Held, that he was not entitled to recover the deposit. *Want v. Stallibrass* (8 L. R., Ex. 175) and *Hart v. Swaine* (7 Ch. D. 42) distinguished. *Soper v. Arnold*, 37 Ch. D. 96; 57 L. J., Ch. 145; 57 L. T. 747; 36 W. R. 207; 52 J. P. 374—C. A. Affirmed in H. L., W. N. 1889, p. 156.

Return of—Misdescription in Particulars.—*See cases ante*, I., 3.

V. COVENANTS BINDING ON PURCHASER.

Building Land—Plots—Rights of Purchaser.]

—An estate was laid out for building, and a great part of it had been sold. In 1882 some of the unsold part was put up for sale by auction, with a condition that the purchaser of certain lots was to covenant to expend on each of the dwelling-houses built not less than 1,200*l.* As to some lots there were other restrictions; and some were free from restriction. One of the plaintiffs bought one of the free lots, and also a restricted lot, not being one of the first-named. Next year the unsold lots, together with another piece of land forming together the whole of the unsold parts of the estate, were put up for sale, with similar conditions as to the first-named lots; but as to other lots free from restrictions. All the lots were then sold, except the first-named lots, both plaintiffs being purchasers of free lots. The first-named lots were in the following year sold to the defendant, who entered into a covenant with the vendors not to build

houses of less value than 1,200*l.* He now proposed to build houses of less value:—Held, that the doctrine of *Nottingham Patent Brick and Tile Company v. Butler* (16 Q. B. D. 778), ought to be extended to cover the present case, and that the plaintiffs were entitled to restrain the defendant from building houses of less value. The plaintiff in such a case is not obliged to prove damage in order to obtain an injunction. *Collins v. Castle*, 36 Ch. D. 243; 57 L. J., Ch. 76; 57 L. T. 764; 36 W. R. 300—Kekewich, J. *See also Nottingham Patent Brick and Tile Company v. Butler*, ante, col. 1931.

Assignees of Purchasers.—Sites of a row of houses in a town were conveyed by the same vendors to various persons, all about the same time, and the conveyances were substantially in the same form. In each case a rent charge was reserved, and the purchasers covenanted that they would build the houses according to a plan, and that the outside of the houses should not after it was finished ever be altered. The assignees of a purchaser were making an addition to the front of one house and the assignees of the purchaser of an adjoining house sought to restrain the alteration:—Held, that it was a question of fact in each case whether the restrictions were merely matters of agreement between the vendor and the several purchasers for the protection of the vendor, or were intended to be for the common advantage of the several purchasers, and that in this case it was not shown that they were intended to be otherwise than for the benefit of the vendor, and the plaintiffs could not enforce them. *Western v. MacDermott* (2 L. R., Ch. 72) discussed. *Sheppard v. Gilmore*, 57 L. J., Ch. 6; 57 L. T. 614—Stirling, J.

An estate was sold in plots for building purposes, according to a scheme. The conveyances contained restrictive covenants as to the buildings to be erected, entered into by the several purchasers with the vendors, their heirs and assigns:—Held, that the successor in title of the purchaser of one of such plots was entitled to enforce such restrictive covenants against the successor in title of an earlier purchaser of an adjoining plot. *Brown v. Inskip*, 1 C. & E. 231 Mathew, J.

Personal to Vendor—Not binding on Assignee.]

—G., a lessee of a house, contracted with the trustees of his lessor's will to purchase the reversion of his leasehold. Prior to the contract, the trustees had sold the adjoining house, known as "Verulam House," to W., and had covenanted with W. that they, the vendors, "would not, either alone or jointly with any other person or persons take proceedings to prevent the said 'Verulam House,' or any other house or erections that might thereafter be constructed on the said premises, being used or occupied by convalescent fever or other patients." After the contract, G. was informed by W.'s solicitors of the existence of this covenant. In an action by G. to rescind his contract, on the ground that this covenant would be binding on him as purchaser with notice:—Held, that the covenant was a mere personal covenant binding the vendors only and did not in any way bind G. *Grover v. Loomes*, 55 L. J., Ch. 52; 53 L. T. 592; 34 W. R. 94—W.-C. B.

Breach—"House" to be Built of not less Value than £400—Two Houses or One.]—The defendants were the assignees of a piece of land which adjoined the plaintiff's, and which was subject to a covenant entered into with the plaintiff that no house should be erected upon the land of less value than 400l. The defendants commenced to build two houses or shops, each two stories high, upon the land, but on an objection of the local board, the two houses were thrown together by making a communication between them on the ground floor. As altered, the houses had two separate doors opening to the road, and two separate shop windows fronting to the road. They had separate staircases, but one of them had no kitchen, and in the yard behind, which was common to the two houses, there was only one water-closet and ashpit. It was admitted that each of the two houses, if they were to be considered as separate, was of less value than 400l., but that the value of the two exceeded that sum:—Held, that the building substantially formed two houses, and not one, and that therefore a breach of the covenant had been committed. *Snow v. Whitehead*, 51 L. T. 253—Kay, J.

Enforcement of—Delay—Alterations in the Property.]—The plaintiff and defendant were owners in fee of two houses, situate in one block, forming part of a property which was laid out as a building estate in 1877, and sold with restrictive covenants as to the user of the houses as shops. The defendant had purchased his house in 1879, with full notice of the existence of the restrictive covenant from a previous purchaser whose deed of conveyance contained the covenant; but in the deed of conveyance to the defendant no mention was made of the existence of any such covenants. The defendant immediately after his purchase commenced to sell, and had ever since sold, beer in his house under an "off" licence. The plaintiff, who had purchased his house, which was only four doors off the defendant's, in 1878, also with full notice of the covenants, was aware of the fact of the defendant's so trading, and he had for nine months or a year bought beer himself at the defendant's house. In March, 1882, the plaintiff brought this action, claiming an injunction to restrain the defendant from using his house as a beer-shop in breach of the contract. The character of the property had completely changed since 1877, several houses situate in the block in which the plaintiff's and defendant's houses stood having been for a considerable time, and still being used as shops and places of business. Pearson, J., held that the change in the character of the property precluded the defendant from enforcing his covenant within the principle of *Bedford (Duke) v. British Museum Trustees* (2 Myl. & K. 552), and that the plaintiff had incurred no damages, and dismissed the action with costs:—Held, on appeal, that the plaintiff had been guilty of such an amount of acquiescence as made it inequitable in him to enforce the covenant. *Sayers v. Collyer*, 28 Ch. D. 103; 54 L. J., Ch. 1; 51 L. T. 723; 33 W. R. 91; 49 J. P. 244.—C. A.

—Enforcing by Injunction—Delay—Acquiescence.]—*See Northumberland (Duke) v. Bowdler*, ante, col. 987.

VENUE.

See PRACTICE (TRIAL).

VESTED INTEREST AND VESTING.

See WILL.

VESTRY.

See ECCLESIASTICAL LAW.

VICTORIA.

See COLONY.

VICE-ADMIRALTY COURTS.

See SHIPPING.

VOLUNTARY DEED.

See FRAUD—SETTLEMENT.

VOTE.

See ELECTION LAW.

WAGER.

See GAMING AND WAGERING.

WAGES.

Of Servants.]—See MASTER AND SERVANT.

Of Seamen.]—See SHIPPING, IV.

Proof in Bankruptcy.]—See BANKRUPTCY, IX., 1.

On Winding-up of Companies.]—See COMPANY, XI., 8, b.

WAIVER AND ACQUIESCENCE.

General Principles.]—Delay is not waiver, inaction is not waiver, though it may be evidence of waiver. Waiver is consent to dispense with the notice—*Per Bowen, L.J. Selwyn v. Garfit, infra.*

A testator mortgaged leaseholds. On his death his executors took possession of his estate, including the leaseholds, and received the rents, and for a long time paid the interest on the mortgages, and applied the surplus of the rents for the benefit of the beneficiaries. The mortgaged property proved insufficient to pay the mortgage debt, and in an action for the administration of the testator's estate the executors claimed to be credited with the payments made to the beneficiaries on the ground of acquiescence on the part of the mortgagees.—*Held*, that the onus of proving acquiescence is on the person alleging it, and to show acquiescence he must show a standing by with a full knowledge of what was being done, and an acquiescence in the devastavit; and that as this had not been proved, acquiescence by the mortgagees had not been established. *Marsden, In re, Bowden v. Layland, Gibbs v. Layland*, 26 Ch. D. 784; 54 L. J., Ch. 640; 51 L. T. 417; 33 W. R. 28—*Kay, J.*

The manager of a bank, being in the habit of obtaining advances for the bank, obtained an advance for himself on his personal credit. The bank having gone into liquidation, the accounts were debited with this advance as made to the bank, and the bank, in ignorance of the facts, acquiesced in this statement of account.—*Held*, that acquiescence and ratification must be founded on a full knowledge of the facts, and must be in relation to a transaction which may be valid in itself, and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction, and that there was no ratification by the bank. *Banque Jacques Cartier v. Banque D'Epargne*, 13 App. Cas. 111; 57 L. J., P. C. 42—*P. C.*

What amounts to in general. See judgment of Fry, L.J., citing *Willmott v. Barber* (15 Ch. D. 96), in *Russell v. Watts*, 25 Ch. D. 559; 50 L. T. 673; 32 W. R. 626—*C. A.*

Company — Memorandum of Association — Special Resolutions—Ratification.]—The memorandum of association of a company incorporated under the Companies Act, 1862 (25 & 26 Vict. c.

89), stated that a portion of the shares were to have a right of receiving a dividend by preference to the other shares, and that the preference shares should have a right to a dividend of 7 per cent. per annum in priority over the ordinary shares, and to one-fifth of the remainder of the net revenue after a deduction of a sum sufficient for paying 7 per cent. per annum on the ordinary shares; and also that those shares should have a right to the rest of the dividend, whatever it might be, up to 7 per cent. after paying 7 per cent. to the preference shares and to four-fifths of the remainder of the net revenue, after deduction of a sum sufficient to pay the dividends on the preference and ordinary shares. The directors applied the profits of the company in substantial accordance with the provisions in the articles of association till November, 1872, when the company passed special resolutions which altered the priorities and payments of the net revenue as between the preference and ordinary shareholders, and which provided for the redemption of shares out of the surplus profits, and they were acted upon without any objection being raised to them by any of the members of the company till July, 1883, when the company passed a special resolution by which the original appropriation of the revenue as provided by the memorandum of association was restored.—*Held*, that even if the resolutions of 1872 would be valid if ratified by every member of the company, there was no evidence on which the court, acting as a jury, ought to infer that every member of the company had ratified such resolutions with full knowledge of what had been done. *Ashbury v. Watson*, 30 Ch. D. 376; 54 L. J., Ch. 985; 54 L. T. 27; 33 W. R. 882—*C. A.*

— Waiver of Misrepresentations in Prospectus.]—See Hale, Ex parte, ante, col. 349.

— Allowing Name to remain on Share Register.]—See Yeoland Consols, In re, ante, col. 454.

— In Registration of Company.]—See Poppleton, Ex parte, ante, col. 353.

Forfeiture by Crown.]—See Middleton (Lord) v. Power, ante, col. 596.

By Legatee—Payments wrongly made.]—See Hulkes, In re, ante, col. 792.

Injunction — Effect of Acquiescence.]—See ante, cols. 986, 987.

Mortgage — Waiver, by whom.]—After a mortgagor has assigned his interest in the property mortgaged he cannot waive a notice as against the other persons interested. *Selwyn v. Garfit*, 38 Ch. D. 284; 57 L. J., Ch. 609; 59 L. T. 233; 36 W. R. 513—*Per Cotton, L.J.*

— By Mortgagor of Provision in Mortgage for his Benefit.]—See Selwyn v. Garfit, ante, col. 1258.

— Delay in following Assets—Claim against Residuary Legatees.]—The right of mortgagees of real estate whose security proves insufficient, to come against the residuary legatees of the mortgagor, amongst whom his personal estate

has been distributed, is a purely equitable right, and the court will not enforce it if there are circumstances which would make it inequitable to do so. *Blake v. Gale*, 32 Ch. D. 571; 55 L. J., Ch. 559; 55 L. T. 234; 34 W. R. 555—C. A.

A testator devised his freehold farm to two of his sons upon trusts for his children and issue, and directed that his unmarried daughters should be at liberty to carry on his farming business upon it, paying a rent of 600*l*. He gave his residuary personal estate, in the events which happened, equally among his six children, the above two sons (who were executors as well as trustees) and his four daughters. The testator had made a first mortgage for 12,000*l*., and a second mortgage for 2,400*l*., and his personal estate was under 11,000*l*. Shortly after the death of the testator in 1859, the solicitors of the mortgagees made inquiry as to his affairs, and the solicitor of the trustees informed them of the state of the assets, and stated that the two unmarried daughters would probably carry on the farm for a time, and that their shares of the personal estate would no doubt afford them sufficient means to do so. The solicitors of the mortgagees wrote back to say that they should be glad to hear that the daughters were able to continue at the farm. The two daughters carried on the farm till 1863, when one of them married, and the farm was then let by the trustees to her husband. The interest was duly paid till 1880, when, owing to agricultural depression, the security proved insufficient. The mortgagee for 2,400*l*. in 1882 commenced an action to enforce his security, and to prove for the deficiency against the mortgaged estate, seeking to charge the executors with a *devastavit* in distributing the personality without providing for his mortgage debt. The court held the executors not guilty of *devastavit*, they were charged with their own shares of the residuary personality as assets in hand, and the balance found due from them was applied in payment of the mortgage debt, without prejudice to any proceeding to make the other residuary legatees refund. The plaintiff then brought this action against the four daughters to recover the shares of personality which they had received:—Held, that the plaintiff could not recover, for that the mortgagees having assented to the distribution of the personal estate among the residuary legatees, could not, after this lapse of time, claim it back from them. *Id*.

Parent and Child—Entailed Estate—Exclusion of Heir.—See *Kintore (Countess) v. Kintore (Earl)*, ante, col. 1604.

Patent—Effect of—Action for Infringement.]—See *Proctor v. Bennis*, ante, col. 1344.

Surety—Action against—Acquiescence in Irregularities.]—See *Durham (Mayor) v. Fowler*, ante, col. 1532.

Statutory Rights by Person Benefited.]—Edward III., with the consent of parliament, granted by charter to the citizens of London that no market within seven miles round about the city should be granted by the king or his heirs to any one. In 1682 (after an inquiry under a writ of *ad quod damnum*), by charter, Charles II. granted to the predecessors in title of the plaintiffs

the right to hold a market in or about Spital Square on Thursdays and Saturdays. In 1683, in a proceeding in quo warranto, Charles II. obtained a judgment cancelling the rights and privileges of the City of London. In 1688, James II. granted to the then owner of the Spital Square market the right of holding the market on Mondays, Wednesdays and Saturdays, in lieu of Thursdays and Saturdays. By 2 Will. & Mary, sess. 1, c. 8, s. 4, all grants made in derogation of the rights of the city since the judgment in quo warranto were declared null and void. This act abrogated the grant of James II.:—Held, that the charter of Edward III. had the validity of a private act of Parliament; that its intention was that no market should be granted for seven miles round the city in derogation of the city's privileges; that there being evidence of long-continued user of the market at the least since 1723, the city must be taken to have waived their rights under the charter of Edward III. and to have assented to the charter of Charles II. *Great Eastern Railway v. Goldsmid*, 9 App. Cas. 927; 54 L. J., Ch. 162; 52 L. T. 270; 33 W. R. 81; 49 J. P. 260—H. L. (E.).

Statutory Contracts—Rights under.]—See *Price v. Bala and Festiniog Railway*, ante, col. 1542.

Trustees—Transfer of Securities to Executors of Cestui que trust.]—The trustees of a settlement advanced a sum of 6,887*l*., part of the trust estate, upon separate sub-mortgages of leasehold houses. This advance was made upon a valuation and report of 2nd May, 1881, which purported upon the face of it to have been made at the request of the borrower, and which founded the supposed value of the houses upon a statement of rent which was merely prospective, all the houses being unlet at the time, and only just finished, nor were any deductions made in the valuation for insurance or repairs. On 18th December, 1883, the sub-mortgages were transferred by the trustees to the executors of the deceased cestui que trust under the settlement. The houses were then found to have so deteriorated in value that their selling value was considerably less than the amount advanced upon them. On the 22nd May, 1884, the executors commenced an action against the trustees. The evidence showed that the executors, when accepting the transfers, had no information of the circumstances under which the investment had originally been made:—Held, that the executors, by accepting the transfers under the circumstances which existed, must not be taken to have acquiesced in or adopted the securities. *Smethurst v. Hastings*, 30 Ch. D. 490; 55 L. J., Ch. 173; 52 L. T. 567; 33 W. R. 496—V.-C. B.

—Acquiescence in Possession of Fund.]—See *Sootney v. Lome*, ante, col. 1888.

Vendor's Lien.]—Trustees of a charity conveyed land in Yorkshire to R. and W., part of the purchase-money remaining unpaid, and allowed R. and W. to register the conveyance, knowing that they wanted to do so in order to re-sell the land in lots:—Held, that the trustees had, by their conduct, precluded themselves from asserting their lien for unpaid purchase-money

against bona fide sub-purchasers without actual notice. *Kettlewell v. Watson*, 26 Ch. D. 501; 53 L. J., Ch. 717; 51 L. T. 135; 32 W. R. 865—C. A.

Voluntary Gift.—*Alloard v. Skinner*, ante, col. 1922.

WAR.

Foreign Enlistment Act—Fitting out of Expedition.—The offence of fitting out and preparing an expedition within the Queen's dominions against a friendly state, under s. 11 of the Foreign Enlistment Act, 1870, is sufficiently constituted by the purchase of guns and ammunition in this country, and their shipment for the purpose of being put on board a ship in a foreign port, with a knowledge of the purchaser and shipper that they are to be used in a hostile demonstration against such state, though the shipper takes no part in any overt act of war, and the ship is not fully equipped for the expedition within any port belonging to the Queen's dominions. *Reg. v. Sandoval*, 56 L. T. 526; 35 W. R. 500; 51 J. P. 709; 16 Cox, C. C. 206—D.

WARD OF COURT.

See INFANT.

WARRANTY.

On Sale of Goods.—See SALE.

Of Truth of Answers—Life Policy.—See *Thomson v. Weems*, ante, col. 995.

In Policies of Marine Insurance.—See INSURANCE, III. 5.

In Bills of Lading.—See SHIPPING, VI. 3.

WASTE.

Liability of Tenant for Life.—See TENANT, I.

Covenant to Repair in Leases.—See LANDLORD AND TENANT.

WATER.

I. WATER COMPANY.

1. *General Powers and Duties*, 1960.

2. *Supply of Water*.

a. Generally, 1963.

b. *Cutting off Water*, 1964.

c. *Rates*.

i. *Amount how Calculated*, 1965.

ii. *Persons Liable*, 1967.

iii. *Recovery of*, 1968.

3. *Income Tax*.—See REVENUE.

4. *Rating to Poor Rate*.—See POOR LAW.

II. CANAL COMPANY, 1969.

III. RIVERS AND STREAMS, 1970.

IV. INJURIES BY WATER, 1972.

I. WATER COMPANY.

1. GENERAL POWERS AND DUTIES.

Compensation—Interests injuriously affected—Apparent ambiguity.—The appellant granted to D. certain mills on a stream forming the outlet to two lochs nearly surrounded by his property, with his "whole rights of water and water-power connected with the said mills;" "reserving" all his "rights in the lochs" and stream "except the rights therein connected with the mills." The storage capacity of the lochs had been increased by embankments made within the appellant's ground. The respondents, who were waterworks commissioners under a special act, acquired by agreement the rights of D. in the water, and under their compulsory powers took from the appellant a small piece of ground and a way-leave for a pipe, which they inserted in the stream and diverted the waters of the lochs to supply a town. S. 9 of the special act provided that a certain quantity of water sent down the stream daily should be held to be a sufficient compensation to the mill-owners and others. S. 10 reserved, inter alia, any rights the appellant had in Loch Humphrey. In a claim for compensation the arbitrator found the appellant entitled (1) to 50%. for the land and wayleave; and (2) "In the event of it being determined that the appellant had retained any right or interest in the waters of the lochs and the streams or any of them, and that he is now entitled to compensation in respect of such right or interest, I find 3,000%. to be the amount to be paid" in respect of the right or interest to be acquired from the appellant "in the aforesaid waters and the embankments" at the lochs, including in the said sum of 3,000% the sum of 1,650% as the estimated price or value of the embankments:—Held, that the award was valid, inasmuch as the arbitrator had valued only one thing, the enhanced value of the water in the lochs, and had not valued, as a separate subject, the embankments, but had properly included in the 3,000%, as a factor of value, the incidental right obtained by the respondents to have the embankments left standing. *Blantyre (Lord) v. Babbie*, 13 App. Cas. 631—H. L. (Sc.).

— **Minerals not Workable—Apprehended Injury.**—By the Waterworks Clauses Act, 1847, s. 25, the undertakers of waterworks shall from time to time pay for any mines or minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the works, or by reason of apprehended injury

from the working thereof. The claimants were lessees of a coal mine, comprising four seams of coal running beneath land which the corporation had, under a special act incorporating the Waterworks Clauses Act, 1847, acquired in order to make a reservoir there. The claimants were working three of the seams, and preparing to sink a shaft to work the fourth, called the Cannel seam, and they gave notice of their intention to work the seams under and within the prescribed limits of the land of the corporation, who thereupon gave notice to treat for the purchase of a part of one of the lower seams. An arbitrator found, in a special case stated for the opinion of the court, that the workings of the claimants had not yet approached the reservoir so as to cause any present risk to the mines from it, but that, assuming the corporation to purchase and retain in situ the part of the seam for which they had given notice and no other coal, the claimants, by reason of the waterworks and of apprehension of injury therefrom to the Cannel seam, could not work or get more than 50 per cent. of the Cannel coal under the reservoir or within twenty yards of its boundary, and that a prudent lessee working without right to compensation would be compelled by reason of such apprehension of injury to abstain from working or getting more than 50 per cent. of the Cannel coal:—Held (Lord Esher, M.R., dissenting), that on these findings the arbitrator was not justified in awarding compensation under the act for the 50 per cent. of the Cannel coal which could not be obtained. *Holliday and Wakefield (Mayor)*, *In re*, 20 Q. B. D. 699; 57 L. J., Q. B. 620; 59 L. T. 248; 52 J. P. 644—C. A.

Compulsory Purchase of Surface—Clay—“Other Minerals.”—The 18th section of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), provides that “the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them.” The appellants, by virtue of the act and a conveyance containing a reservation of the “whole coal and other minerals in the land in terms of the Waterworks Clauses Act, 1847,” purchased from the respondent a parcel of land for the purpose of erecting waterworks. Under the land was a seam of valuable brick clay. The respondent worked this clay in the adjoining land, and having reached the appellants’ boundary, claimed the right to work out the clay under the land purchased by the appellants:—Held (Lord Herschell, dissenting), that common clay, forming the surface or subsoil of land, was not included in the reservation in the act, and that the appellants were entitled to an interdict restraining the respondent from working the clay under the land purchased by them. *Glasgow (Lord Provost) v. Fairrie*, 13 App. Cas. 657; 58 L. J., P. C. 33; 60 L. T. 274; 37 W. R. 627—H. L. (Sc.).

Right to subjacent support of Pipes—Mines—Deposit of Plans.—The deposit of plans of their underground works, pursuant to ss. 19 and 20 of the Waterworks Clauses Act, 1847, is a condition precedent to the right of a company incorporated under that act to recover for injuries caused to their pipes by the ordinary and usual workings of a subjacent mine. *South Staffordshire Water-*

works Company v. Mason, 56 L. J., Q. B. 255; 57 L. T. 116—D.

Duty to fix proper Fire-plugs in Mains.—The 38th section of the Waterworks Clauses Act, 1847 (10 Vict. c. 17), imposes no duty on the undertakers to provide a pipe of sufficient capacity to carry a proper fire-plug in a place where their existing pipe is sufficient for that purpose, although, in the opinion of the justices empowered by the section to settle the proper position of the fire-plugs in the district, it is, as a fact, essential that a fire-plug should be placed there. *Reg. v. Wells Water Company*, 55 L. T. 188; 51 J. P. 135—D.

Fire-plug placed in Street—Duty to keep in Repair.—A fire-plug had been lawfully fixed in a highway by the defendants. Originally the top of the fire-plug had been level with the pavement of the highway, but in consequence of the ordinary wearing away of the highway the fire-plug projected half an inch above the level of the pavement. The fire-plug itself was in perfect repair. The plaintiff, whilst passing along the highway, fell over the fire-plug and was hurt:—Held, that, as the fire-plug was in good repair, and had been lawfully fixed in the highway, no action by the plaintiff would lie against the defendants. *Kent v. Worthing Local Board* (10 Q. B. D. 118) commented on. *Moore v. Lambeth Waterworks Company*, 17 Q. B. D. 462; 55 L. J., Q. B. 304; 55 L. T. 309; 34 W. R. 559; 50 J. P. 756—C. A.

Power to do Works in Street—Stop-valves in Footway.—The 28th section of the Waterworks Clauses Act, 1847, provides that the undertakers may open and break up the soil and pavement of streets within their district and lay down and place pipes, conduits, service pipes, and other works and engines, and do all other acts which they shall from time to time deem necessary for supplying water to the inhabitants of the district. The 32nd section of the same act provides that, when the undertakers open or break up the road or pavement of any street they shall, with all convenient speed, complete the work for which the same shall be broken up and fill in the ground and reinstate and make good the road or pavement so opened or broken up:—Held, that the power given by the 28th section includes any works which the undertakers may deem necessary for the purpose of regulating the supply of water, and is not confined to the laying down of apparatus underground, but enables the undertakers to place such works on the surface of the street as may not be inconsistent with the substantial reinstatement of the road or pavement in its previous condition or create a nuisance; and therefore that a water company was authorised by the section to place in the pavement of a street covers or guard-boxes to protect stop-valves placed for the purpose of regulating the supply of water in the communication pipes, by which water was supplied to premises in the street, such covers or guard-boxes not creating a nuisance or being inconsistent with the substantial reinstatement of the pavement. *East London Waterworks Company v. St. Matthew, Bethnal Green*, 17 Q. B. D. 475; 55 L. J., Q. B. 571; 54 L. T. 919; 35 W. R. 37; 50 J. P. 820—C. A. See also *Preston (Mayor) v. Fullwood Local Board*, post, col. 1978.

2. SUPPLY OF WATER.

a. Generally.

Duty to Supply Pure Water—Water Pure in Mains, but Contaminated in Consumer's Pipes.]

—Undertakers for the supply of water to Huddersfield were bound on certain conditions to cause pipes to be laid down and water to be brought to every part of the town, and by s. 35 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), "to provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town who should be entitled to demand a supply and should be willing to pay water-rate for the same." By their special act the undertakers were empowered to make bye-laws with regard to the consumers' pipes. The bye-laws made under this power prescribed lead as the necessary material for every consumer's pipe, "not being of cast iron." The undertakers in accordance with their usual practice at the consumer's request and cost laid down communication and service pipes of lead between their mains and the plaintiff's house. The effect of the bye-laws and of s. 19 of the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), was that though the lead pipes might be the property of the plaintiff they were entirely under the control of the undertakers, and could not without their consent be interfered with by the plaintiff. Water was supplied by them to the plaintiff which was pure and wholesome in the mains but was of such quality that in its passage from the mains to the plaintiff's house it became contaminated by the lead and poisoned the plaintiff. The plaintiff having brought an action against the undertakers for damages for the injury to his health alleged a breach of the statutory obligation:—Held, that the obligation imposed by s. 35 was to supply water which was pure and wholesome in the mains (and Lord Selborne and Lord Watson dissenting), that having complied with that obligation the undertakers were not (negligence being out of the case) liable to the plaintiff in this action. But held, by Lord Selborne and Lord Watson, that the undertakers were liable, on the ground that the water contained some special and peculiar solvent of lead which made it poisonous after passing through the leaden pipes, although it would have been harmless if it could have been drunk direct from the mains. *Milnes v. Huddersfield (Mayor)*, 11 App. Cas. 511; 56 L. J., Q. B. 1; 55 L. T. 617; 34 W. R. 761; 50 J. P. 676—H. L. (E.).

Duty of Owner to supply Water.]—Sect. 62 of the Public Health Act, 1875, enables rural sanitary authorities to cause houses within their districts to be provided with a proper supply of water, where there is an available supply within a reasonable distance, and is not repealed in any way by s. 6 of the Public Health (Water) Act of 1878. The latter section enables such authorities to cause houses within their districts to be provided with a supply of water where there is not an available supply within a reasonable distance, and does not apply to cases which come within the former section. *Colne Valley Water Company v. Treharne*, 50 L. T. 617; 48 J. P. 279—D.

By Meter—"Dwelling-house."]—A person requiring a supply of water in a house for domestic purposes and also for purposes for which no rate is fixed by the New River Company's Act, 1852, is not entitled, under s. 41 of the act, to require the company to supply by meter the water for domestic purposes as well as the water for other purposes:—Semble, that any house in which water is required for domestic purposes is a "dwelling-house" within the meaning of s. 35 of the act, though no person sleeps or takes meals there. *Cooke v. New River Company*, 38 Ch. D. 56; 57 L. J., Ch. 383; 58 L. T. 830—C. A. Affirmed W. N. 1889, p. 167.

Cost of Providing or Hiring.]—The Sheffield Waterworks Company was authorised to receive payment by measure and not by a rate for water supplied to fixed baths in private houses. There is no express provision in the principal or general acts as to how the water for such a purpose is to be measured, or whether the company or the consumer shall bear the cost of providing a meter or measuring the water; but by the Waterworks Clauses Act, 1863, s. 14, where the company supply water by measure, they may let to a consumer a meter for such remuneration in money as they may agree upon:—Held, that a consumer taking water from the company for a fixed bath in his private house was bound at his own expense to measure the water so used by some automatic and self-registering meter or other instrument, or in some other equally accurate way, and to record the amount from time to time taken. *Sheffield Waterworks Company v. Bingham*, 25 Ch. D. 443; 52 L. J., Ch. 624; 48 L. T. 604—Pearson, J.

b. Cutting off Water.

Non-payment of Rate.]—P.'s landlord had agreed to pay water-rate, and had duly paid it, when P. received notice to quit. P. refused to quit, and the landlord requested the C. waterworks company to cut off the water, which they did without any notice to P.:—Held, that the magistrate was wrong in holding that the company had acted in contravention of the statute 50 & 51 Vict. c. 21, s. 4. *Chelsea Waterworks Company v. Pavlet*, 52 J. P. 724—D.

Action by Tenant for.]—Where a dispute has arisen as to the amount of the water-rate payable by an occupier of premises to a water company (whose special act incorporated the Waterworks Clauses Act, 1847), the determination of the annual value of the premises supplied, by two justices, under s. 68 of the act of 1847, is a condition precedent to the right of the occupier to sue the company for cutting off the water, and for the amount alleged to have been paid in excess. *Whiting v. East London Waterworks Company*, 1 C. & E. 331—A. L. Smith, J.

Injunction to Restrain.]—Where there is a dispute as to the annual value of a tenement for the purposes of water-rate, and the waterworks company threatens to discontinue the supply, the court has, by virtue of the powers conferred upon it by the Judicature Act, 1873, s. 25, sub-s. 3, jurisdiction to grant an injunction, notwithstanding that the Waterworks Clauses Act, 1853,

provides (s. 68) for the determination of such disputes by two justices, and imposes (s. 43) upon the company fixed penalties for refusal to supply. *Hayward v. East London Waterworks Company*, 28 Ch. D. 138; 54 L. J., Ch. 523; 52 L. T. 175; 49 J. P. 452—Chitty, J.

The court, however, in such a case, will decline to grant an injunction, except pending the proceedings before the justices for the settlement of the dispute, or upon an undertaking by the plaintiff to commence the proceedings within a short period. The discontinuation of a water supply by a London waterworks company is an injury sufficiently irreparable to support an injunction. *Id.*

c. Rates.

i. Amount how Calculated.

"Annual Value."]—A water company by a special act of 1826 were compellable to supply water to certain dwelling-houses in the metropolis for domestic purposes at certain rates per cent. per annum, payable "according to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor's-rate is computed in the parish or district where the house is situated." By a special act of 1852 the company were compellable to furnish the water "where the annual value of the dwelling-house or other place supplied shall not exceed 200*l.* at a rate per cent. per annum on such value not exceeding 4*l.*; and where such annual value shall exceed 200*l.*, at a rate per cent. per annum on such value not exceeding 3*l.*" The occupier of one of the houses was lessee for a long term at a ground rent, and paid no rent except the ground rent:—Held, that whether the later act repealed the provisions of the former or not, the case must be dealt with under the later act; and that the words "annual value" in the later act meant "net annual value" as defined in the Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 1:—Held, also, that "annual value" had the same meaning in the earlier as in the later act. *Colvill v. Wood* (2 C. B. 210) commented on. *Dobbs v. Grand Junction Waterworks Company*, 9 App. Cas. 49; 53 L. J., Q. B. 50; 49 L. T. 541; 32 W. R. 432; 48 J. P. 5—H. L. (E.).

—Annual Rack-rent.]—By the terms of its special act a water company were to supply water at certain rates on the "annual rack-rent of the house . . . if the same be let at rack-rent, and on the annual value if and while the same is not let at rack-rent." An owner and occupier contended that his house not being let at an annual rack-rent, the water-rates payable by him ought to be assessed according to the annual value; and that the annual value was the net annual value as distinguished from the gross value or gross estimated rental:—Held, that the words in the section "annual rack-rent" and "annual value" must be treated as equivalent; that the legislature never intended to lay down two scales of charges, one for tenants of houses and the other for owner occupants; and that an owner occupying his own house must pay water-rates upon the gross estimated rental as distinguished from the net annual value. *Stevens v.*

Barnet Gas and Water Company, 57 L. J., M. C. 82; 36 W. R. 924—D.

Garden attached to Dwelling-house.]—Section 68 of the Bristol Waterworks Act, 1862, enacts that the company shall furnish to every occupier of a private dwelling-house within their limits a sufficient supply of water for the domestic use of such occupier, at certain annual rents or rates according to the "annual rack-rent or value of the premises so supplied"—such supply (by s. 71) not to include, amongst other things, a supply of water "for watering gardens by means of a tap, tube, pipe, or other such like apparatus." And s. 32 of the Bristol Waterworks Amendment Act, 1865, enacts that, "if any dispute shall arise as to the amount of the annual rent or value of any dwelling-house or premises supplied with water by the company, such dispute shall be decided by two justices; provided that the amount of the annual rack-rent or value to be fixed by such justices shall not be less than the gross sum assessed to the poor-rate, or less than the rent actually paid for such dwelling-house or premises." A dwelling-house and garden in the occupation of the owner were assessed to the poor-rate as follows,—“Gross estimated rental, 240*l.*,” “Rateable value, 204*l.*.” It was proved that the value of the house without the garden would be 10 per cent. less; and that the owner contracted to pay and did pay 1*l.* 1*s.* annually for the watering by means of a pipe and tap in the garden which surrounded the dwelling-house and was occupied and assessed therewith:—Held, upon a case stated by the justices, that the words "gross sum assessed to the poor-rate" meant the "gross estimated rental," and not "rateable or net value;" and that the water-rent was chargeable upon the gross estimated rental of "the premises," including the pleasure garden occupied with the house, and not merely upon the dwelling-house itself,—the extra charge for the garden supply being for using a pipe and tap. *Bristol Waterworks Company v. Uren*, 15 Q. B. D. 637; 54 L. J., M. C. 97; 52 L. T. 655; 49 J. P. 564—D.

Premium for Lease—Public House.]—By the special act of a water company it was provided that water should be supplied for domestic purposes by the company at a rate per cent. upon the annual value of the dwelling-house or other place supplied, that a supply of water for domestic purposes should not include a supply of water for, among other things, any trade or manufacture or business requiring an extra supply of water, and that the company might furnish water for other than domestic purposes on such terms as might be agreed on between the company and the consumer. The company supplied water for domestic purposes to a house occupied as a licensed public-house. The company contended that the annual value of the premises as a licensed public-house should be taken as the basis of the water-rate payable in respect of such supply, and that therefore the fact of the premises being licensed, and a premium which had been paid for the lease of the premises as a public-house ought to be taken into consideration in fixing the value. The occupier contended that such water-rate should be based upon the value of the premises for domestic purposes only:—Held, that the contention of the company was correct. *West Middlesex Water-*

works Company v. Coleman, or Coleman v. West Middlesex Waterworks Company, 14 Q. B. D. 529; 54 L. J., M. C. 70; 52 L. T. 578; 33 W. R. 549; 49 J. P. 341—D.

Minimum Charge.—No dispute determinable by justices of the peace under s. 68 of the Waterworks Clauses Act, 1847, can arise as to the annual value of premises where a water company are making the minimum charge which they are entitled to make under their special act. *Colne Valley Water Company v. Treharne*, 50 L. T. 617; 48 J. P. 279—D.

ii. *Persons Liable.*

Owner—Unoccupied Houses not exceeding the Value of Twenty Pounds.—The respondents, relying on s. 58 of their private act (15 & 16 Vict. c. clviii.), which extended the provisions of s. 72 of the Waterworks Clauses Act, 1847, to houses not exceeding the annual value of 20*l.*, claimed water rates from the appellants as owners of certain houses under the annual value of 20*l.* each, for two quarters, during the whole of which time such houses were unoccupied:—Held, that an owner's liability for rates under s. 72 of the Waterworks Clauses Act, 1847, ceases on the quarterly day of payment next after the house has become unoccupied, and that as s. 58 of the respondents' private act merely extended the provisions of that section to houses not exceeding the annual value of 20*l.*, the respondents were not entitled to recover. *British Empire Mutual Life Assurance Company v. Southwark and Vauxhall Water Company*, 59 L. T. 321; 36 W. R. 894; 52 J. P. 758—D.

—Notice to obtain proper Supply—Non-compliance.—A local authority caused a supply of water to be brought in main water-pipes along the street in which a house was situate, and gave notice to the owner of the house, under s. 62 of the Public Health Act, 1875, to obtain a proper supply and do all such works as might be necessary for that purpose. That notice was not complied with, and the local authority did not exercise the power given to them by that section of executing the works necessary to connect the house with the main. In an action by the water company for water-rates:—Held, that the defendant was liable, and that it was not a condition precedent to such liability that the works necessary to bring the water into the house should have been executed. *Southend Waterworks Company v. Howard*, 13 Q. B. D. 215; 53 L. J., Q. B. 354; 32 W. R. 923; 48 J. P. 469—D.

Landlord or Tenant.—In a lease of a shop and basement and of three rooms on the third floor of the same house, the lessor covenanted to pay "all rates and taxes chargeable in respect of the demised premises." Water was separately supplied by a water company to the shop and basement, and paid for by the tenant. In an action to recover from the lessor the amount so paid:—Held, that such a charge was "a rate" within the meaning of the covenant. *Direct Spanish Telegraph Company v. Shepherd*, 13 Q. B. D. 202; 53 L. J., Q. B. 420; 51 L. T. 124; 32 W. R. 717; 48 J. P. 550—D.

iii. *Recovery of.*

Dispute as to Annual Value—Jurisdiction of Justices.—Upon the hearing before justices of a summons to enforce payment of a water-rate made under a local act incorporating the Waterworks Clauses Act, 1847, the justices have power, under s. 68 of that act, to determine a dispute as to the annual value of the premises rated. It is not necessary to their jurisdiction before making an order for payment of the rate upon such summons that the dispute should have been previously determined in a separate proceeding before justices. *New River Company v. Mather* (10 L. R., C. P. 442) distinguished. *Lea v. Abergavenny Improvement Commissioners*, 16 Q. B. D. 18; 55 L. J., M. C. 25; 53 L. T. 728; 34 W. R. 105; 50 J. P. 165—D. See *Colne Valley Water Company v. Treharne*, supra.

Right of Distress—Power under Private Act—Subsequent Public Act.—A private act passed in 46 Geo. 3, gave the West Middlesex Waterworks Company power to levy a distress on default of payment by consumers of water of the water-rates mutually agreed upon in accordance with 46 Geo. 3, c. 119, s. 59. By an act passed four years later the company was empowered to charge a reasonable amount for the water, but there was no express enactment as to the mode of recovering that amount. Subsequently to the Waterworks Clauses Consolidation Act, 1847, another private act, 15 & 16 Vict. c. clx., was passed in part incorporating that act, but expressly stipulating that, "except as by this act is expressly provided, this act or anything therein contained shall not repeal, alter, interpret, or in any manner affect any of the provisions in force at the commencement of this act, of the recited acts, or any of them; and, except only so far as is requisite for the execution of this act, all those provisions, and all powers, privileges, exemptions, and immunities of or for the benefit of any person or corporation thereby respectively created, conferred, or saved shall be and continue as valid and effectual as if this act had not passed." The act of 46 Geo. 3 was therein recited. The company issued its warrant of distress on the plaintiff's premises, and he brought an action for illegal distress:—Held, that the power of the company to distrain was not taken away either inferentially by the Waterworks Clauses Consolidation Act, 1847, or expressly by the subsequent private act incorporating that act. *Richards v. West Middlesex Waterworks Company*, 15 Q. B. D. 660; 54 L. J., Q. B. 551; 33 W. R. 902; 49 J. P. 631—D.

Overcharge — Condition Precedent — Determination of Justices.—By a borough improvement act with regard to the supply of water, it was provided that, "The following acts and parts of acts (so far as they are applicable and not inconsistent with this act) shall be incorporated with this act (that is to say): The Waterworks Clauses Acts, 1847 and 1863 (except the provisions thereof with respect to the amount of profit to be received by the undertakers when the waterworks are carried on for their benefit)." The Waterworks Clauses Act, 1847, provides: "And with respect to the payment and recovery of water-rates, be it enacted as follows." Then comes s. 68, which provides that the rates are to

be paid according to the annual value, and if any dispute arise as to such value, the same shall be determined by two justices. In the same act there are a series of sections (75 to 84) under the heading: "and with respect to the amount of profit to be received by the undertakers when the waterworks are carried on for their benefit, be it enacted as follows." Then follow ss. 75 to 84:—Held, that s. 68 of the Waterworks Clauses Act, 1847, was not incorporated in the Borough Improvement Act, and that the settlement by two justices of a dispute as to the value was not a condition precedent to the plaintiff's right to bring an action for an overcharge. *Slater v. Burnley (Mayor)*, 59 L. T. 636; 36 W. R. 831; 53 J. P. 70—D.

— **Money had and received—Compulsory Payment.**]—The defendants, as sanitary authority for the borough of B., had demanded from the plaintiff, and the plaintiff had paid, a water-rate of 8l. 15s. 4d., such rate being calculated on the "gross rental" of the plaintiff's premises. The plaintiff, contending that such rate ought to have been assessed on the "rateable value" only, brought an action in the county court to recover the difference overpaid. The defendants had no power to distrain for the rates, but they had a power to stop the water supply for non-payment; they had not stopped the water supply, and had not threatened to do so. The county court judge held that the payment was not a voluntary one, and could be recovered back, on the ground that the defendants had a power to stop the water supply:—Held, that the payment was a voluntary one, and could not be recovered back. *Id.*

II. CANAL COMPANY.

Right to Support—Mines—Compensation for not Working—Right of Action for Injury.]—By an act giving a company power to make a canal it was provided that nothing therein contained should affect the right of the owners of land to the mines and minerals lying within or under the lands to be made use of for the canal, and it should be lawful for such owners to work such mines not thereby injuring, prejudicing, or obstructing the canal; and further, that if the owner or worker of any coal or mine should in pursuing such mine work near or under the canal, so as in the opinion of the company to endanger or damage the same, or in the opinion of the owner or worker of the mine to endanger or damage the further working thereof, then it should be lawful for the company to treat and agree with the owner or worker, and in case of disagreement a jury was to be summoned to assess the amount such owner or worker ought to receive on being restrained from working such mine, and on payment of the amount assessed by the jury such owner or worker was to be perpetually restrained from working such mine within the limits for which satisfaction should by the jury be declared to extend. The defendants gave the company notice that they were going to work coal forming the support of the canal, and the company declined to purchase or pay compensation to the defendants for leaving the coal. The defendants thereupon worked the coal, and thereby damaged the

canal:—Held, that the coal-owner or worker had a right under the act to require that compensation should be assessed by a jury, but had no right to work the coal to the injury of the canal, and was liable to the company for the damage so caused. *Dudley Canal Company v. Grazebrook* (1 B. & Ad. 59) distinguished. *Lancashire and Yorkshire Railway v. Knowles*, 20 Q. B. D. 391; 57 L. J., Q. B. 150; 52 J. P. 340—C. A. Affirmed 14 App. Cas. 248—H. L. (E.).

Towing Path—Dedication to Public.]—Land acquired by a company under an act of Parliament for the purposes of their undertaking as specified by such act may be dedicated by them as a public highway, if such use by the public be not incompatible with the objects prescribed by the act. Therefore, where land was acquired and used by a canal company under their statutes for the purposes of a towing-path, and it appeared that the use of it as a public footpath was not inconsistent with its use as a towing-path by the company:—Held, that the company could dedicate the land as a public footpath subject to its use by them as a towing-path. *Rea v. Leake* (5 B. & Ad. 469) approved and followed. *Grand Junction Canal Company v. Petty*, 21 Q. B. D. 273; 57 L. J., Q. B. 572; 59 L. T. 767; 36 W. R. 795; 52 J. P. 692—C. A.

Liability for Damage by Percolation.]—See *Evans v. Manchester, Sheffield and Lincolnshire Railway*, post, col. 1973.

III. RIVERS AND STREAMS.

Construction of Conveyance—Bed of River ad medium filum—Presumption.]—The presumption that, by a conveyance describing the land thereby conveyed as bounded by a river, it is intended that the bed of the river, usque ad medium filum, should pass, may be rebutted by proof of surrounding circumstances in relation to the property in question which negative the possibility of such having been the intention. The owners of a manor by conveyances made respectively in 1767 and 1846 granted to purchasers pieces of riparian land fronting a river, the bed of which formed parcel of the manor. It was proved that, prior to the earliest of the conveyances, a fishery in the river fronting the lands conveyed had for a very long time back been from time to time let to tenants by the lords of the manor as a separate tenement, distinct from the riparian closes; and that at the date of the conveyances in 1846 such fishery was actually under lease to tenants. The grantees under the before-mentioned conveyances, and their successors in title, had, until the acts complained of in the action, never claimed or exercised any right of fishing over the bed of the river by virtue of any right of soil or otherwise, but the owners of the manor or their tenants of the fishery had always fished without interruption:—Held, that under the circumstances the conveyances ought not to be construed as passing any portion of the bed of the river to the grantees. *Devonshire (Duke) v. Pattinson*, 20 Q. B. D. 263; 57 L. J., Q. B. 189; 58 L. T. 392; 52 J. P. 276—C. A.

Though the presumption that a grant of land described as bounded by an inland river passes

the adjoining half of the bed of the river may be rebutted by circumstances which show that the parties must have intended it not to pass, it will not be rebutted because subsequent circumstances, not contemplated at the time of the grant, show it to have been very disadvantageous to the grantor to have parted with the half bed, and if contemplated would probably have induced him to reserve it; nor is the presumption excluded by the fact that the grantor was owner of both banks of the river. *Micklethwait v. Newlay Bridge Company*, 33 Ch. D. 133; 55 L. T. 336; 51 J. P. 132—C.A.

M. being entitled to lands on both sides of a river, sold and conveyed to L. a piece of land the dimensions of which were minutely given in the conveyance, and which was therein stated to contain 7752 square yards, and to be bounded on the north by the river, and to be delineated on the plan drawn on the deed, and thereon coloured pink. The dimensions and colouring extended only up to the southern edge of the river, and if half the bed had been included the area would have been 10,031 square yards instead of 7,752. The deed contained various reservations for the benefit of M., but contained nothing express to show whether the half of the bed was intended to pass or not. M. was at the time owner of a private bridge close by, from which he received tolls. Thirty years afterwards a bridge was projected to cross the river from L.'s land. The plaintiffs, who had succeeded to all M.'s property in the neighbourhood, brought their action to restrain the making of the new bridge. If the grant to L. passed half the bed, no part of the new bridge would be over land of the plaintiffs:—Held, that the presumption that the grant included half the bed was not rebutted, and that an injunction could not be granted on the ground that the erection of the bridge would be a trespass. *Id.*

Obstruction—Actual Damage not essential.]

—In an action for wrongfully obstructing the flow of a river by increasing the height of a weir, whereby the plaintiff's land abutting on the river was flooded, if the effect of the acts complained of was to raise the water of the river as it flowed past the plaintiff's land above the height at which it ought of right to have flowed, such raising would be an actionable wrong, and would entitle the plaintiff to a finding in his favour with nominal damages, actual damage not being essential in order to maintain the action. *Williams v. Morland* (2 B. & C. 910) not followed. *McGlone v. Smith*, 22 L. R., Ir. 559—Ex. D.

Riparian Proprietors—Variation of User.]—

The owner of land not abutting on a river with the licence of a riparian owner took water from the river, and after using it for cooling certain apparatus returned it to the river unpolluted and undiminished:—Held, that a lower riparian owner could not obtain an injunction against the landowner so taking the water, or against the riparian owner through whose land it was taken. *Kensit v. Great Eastern Railway*, 27 Ch. D. 122; 54 L. J., Ch. 19; 51 L. T. 862; 32 W. R. 885—C.A.

Observations on the rights which can be acquired by a riparian owner in an artificial stream. *Id.*

Liability of Conservancy Commissioners for Damage to Lands adjoining Reclaimed Lands.]

—The owner of a farm between which and a tidal river were lands that had been reclaimed by conservancy commissioners from the river, sued such commissioners for damage caused to his farm by the river overflowing a sea-wall between the reclaimed lands and the river, and flowing over the reclaimed lands on to his farm:—Held, that as the commissioners were by their acts under the obligation to maintain and repair the sea-wall, they were liable not only for damage caused to the reclaimed lands, but to lands beyond such lands, by reason of the sea-wall being insufficient in height to prevent an overflow of the river, and further that the plaintiff was not deprived of his right of action by the fact of the water having flowed from the reclaimed lands on to his farm in consequence of his landlords having made a cutting through an embankment in order to obtain access to the reclaimed lands. *Bramlett v. Tees Conservancy Commissioners*, 49 J. P. 214—D.

Navigation—Bye-law—Obstruction of Vessels.]—

The W. navigation trustees having power to make bye-laws for the ordering and good government of the navigation of the river W., made a bye-law that the person having charge of a vessel shall not lie up or moor the same so as to prevent other vessels passing. S.'s vessel was moored on one side, the I. was moored on the other side, and each said it was the other's turn to remove for a third vessel to pass, but neither moved:—Held, that S. was rightly convicted under the bye-law, and it was no answer to set up a custom about each obstructing vessel having to remove alternately, and that he had removed the time previous. *Stubbs v. Hilditch*, 51 J. P. 758—D.

Waterman's Act—Barge of 50 Tons.]—Under the Thames Conservancy and Watermen's Acts, and bye-laws thereunder, if a barge under weigh exceeds 50 tons, there must be two qualified licensed watermen on board, and one is not sufficient though assisted by another unqualified man. *Perkins v. Gingell*, 50 J. P. 277—D.

Right of Easement.]—See EASEMENT, III.

Pollution of.]—See NUISANCE.

IV. INJURIES BY WATER.

Liability of Conservancy Commissioners.]—See *Bramlett v. Tees Conservancy Commissioners*, supra.

Sending Water on adjoining Lands for Protection of Defendants' Premises.]—By reason of an unprecedented rainfall a quantity of water was accumulated against one of the sides of the defendants' railway embankment, to such an extent as to endanger the embankment, when, in order to protect their embankment, the defendants cut trenches in it by which the water flowed through, and went ultimately on to the land of the plaintiff, which was on the opposite side of the embankment and at a lower level, and flooded and injured it to a greater extent than it would have done had the trenches not

been cut. In an action for damages for such injury, the jury found that the cutting of the trenches was reasonably necessary for the protection of the defendants' property, and that it was not done negligently.—Held, that though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff, and that they were therefore liable. *Whalley v. Lancashire and Yorkshire Railway*, 13 Q. B. D. 131; 53 L. J., Q. B. 285; 50 L. T. 472; 32 W. R. 711; 48 J. P. 500—C. A.

Percolation from one House to adjoining House.]—A. allowed water to collect in the cellar of his house. The water percolated through the ground and injured the cellar of the adjoining house belonging to B.—Held, that B. had a right of action against A. in respect of the injury so done. *Ballard v. Tomlinson* (26 Ch. D. 194) dissented from. *Snow v. Whitehead*, 27 Ch. D. 588; 53 L. J., Ch. 885; 51 L. T. 253; 33 W. R. 128—Kay, J.

Percolation—Compensation—Company with Statutory Powers.]—A company with statutory powers suffered water to percolate from their canal into an adjoining mill and cause damage. Such percolation arose in the first instance from a subsidence of the land caused by the working of a mine-owner under both the canal and the mill, and could not have been foreseen or prevented by the company by any reasonable means at any reasonable cost.—Held, that the canal company were nevertheless guilty of negligence in not making good the damage when it occurred, and must pay compensation to be assessed as provided by the Canal Act, but that it was not a case for granting an injunction against the company to restrain the percolation of water. *Evans v. Manchester, Sheffield, and Lincolnshire Railway*, 36 Ch. D. 626; 57 L. J., Ch. 153; 57 L. T. 194; 36 W. R. 328—Kekewich, J.

Measure of Damages.]—See *Rust v. Victoria Graving Dock Company*, ante, col. 601.

WATERMEN.

Number required in Navigation.]—See *Perkins v. Gingell*, supra.

WAY.

I. HIGHWAYS.

1. *Creation of*, 1974.
2. *Stoppage and Diversion of*, 1975.
3. *User of*.
 - a. Obstruction, 1976.
 - b. Encroachment, 1978.
 - c. User of Locomotives, 1978.
4. *Power and Liability of Authority*, 1978.

5. Rates, 1979.

6. Repair.

- a. Obtaining Materials, 1980.
- b. Extraordinary Traffic, 1980.
- c. Liability of County Authority, 1981.
- d. Liability in other Cases, 1983.
- e. Summary Proceedings for Non-repair, 1984.
- f. Indictment for Non-repair, 1984.

II. TURNPIKE ROADS, 1985.

III. BRIDGES, 1985.

IV. RIGHTS OF WAY.—See EASEMENT, I.

V. ROAD UNDER PUBLIC HEALTH ACT.—See HEALTH, II., 2.

VI. ROAD IN METROPOLIS.—See METROPOLIS, I., 3, b.

I. HIGHWAYS.

1. CREATION OF.

Dedication to Public—Tolls.]—The promoters of an intended road by deed declared that the road should not only be enjoyed by them for their individual purposes, but “should be open to the use of the public at large for all manner of purposes, in all respects as a common turnpike road,” but subject to the payment of tolls by the persons using it.—Held, that this was not a dedication of the road to the public, and that the road was not a highway repairable by the inhabitants at large under s. 150 of the Public Health Act, 1875. *Austerberry v. Oldham Corporation*, 29 Ch. D. 750; 55 L. J., Ch. 633; 53 L. T. 543; 33 W. R. 807; 49 J. P. 532—C. A.

Seemingly, an individual cannot, without legislative authority, dedicate a road to the public if he reserves the right to charge tolls for the user; and the mere fact that a number of persons form themselves into a company for making and maintaining a road, and erect gates and bars and charge tolls, does not make the road a “turnpike road,” in the sense of a turnpike road made such by act of Parliament, and so dedicated to the public. *Id.*

— Land Vested in Company for Statutory Purposes.]—Land acquired by a company under an act of Parliament for the purposes of their undertaking as specified by such act may be dedicated by them as a public highway, if such use by the public be not incompatible with the objects prescribed by the act. Therefore, where land was acquired and used by a canal company under their statutes for the purposes of a towing-path, and it appeared that the use of it as a public footpath was not inconsistent with its use as a towing-path by the company.—Held, that the company could dedicate the land as a public footpath subject to its use by them as a towing-path. *Rew v. Leake* (5 B. & Ad. 469) approved and followed. *Grand Junction Canal Company v. Petty*, 21 Q. B. D. 273; 57 L. J., Q. B. 572; 59 L. T. 767; 36 W. R. 795; 52 J. P. 692—C. A.

Main Road—Application for Provisional Order—Ordinary Highway.]—The 16th section of the

Highways and Locomotives Amendment Act, 1878, provides as follows:—"If it appears to a county authority that any road within their county which, within the period between the 31st of December, 1870, and the date of the passing of this act, ceased to be a turnpike road, ought not to become a main road in pursuance of this act, such authority shall, before the 1st of February, 1879, make an application to the Local Government Board for a provisional order declaring that such road ought not to become a main road." The section further provides that, "Subject as aforesaid, where it appears to a county authority that any road within their county, which has become a main road in pursuance of this act, ought to cease to be a main road and become an ordinary highway, such authority may apply to the Local Government Board for a provisional order declaring that such road has ceased to be a main road and become an ordinary highway":—Held, that a road which had ceased to be a turnpike road within the period specified by the first of the above-mentioned provisions, and had become a main road, there being no application for a provisional order before the 1st of February, 1879, was not excluded from the operation of the second of the above-mentioned provisions, and that the Local Government Board had, therefore, jurisdiction to make a provisional order declaring such road an ordinary highway upon an application made subsequently to the 1st of February, 1879. *Reg. v. Local Government Board*, 15 Q. B. D. 70; 54 L. J., M. C. 104; 53 L. T. 194; 49 J. P. 580—C. A.

— **Liberties merged in Counties—County Authority—Recorder.**—Liberties merged into counties by the Highways Act, 1862, are revived by the Highways Act, 1878, and so far as that act applies are to be deemed separate "counties." The "county authority" for such liberties are the justices of those liberties in quarter sessions assembled. A recorder of a borough to which such liberties belong, when holding his quarter sessions, represents the justices of such counties in quarter sessions assembled, and he must be deemed to be the "county authority" under the Highways Act of 1878, and be required to exercise the jurisdiction of such "county authority." The plea that there is no machinery for exercising such authority is not sufficient to excuse the authority having such jurisdiction from acting when properly applied to for such purpose. *Reg. v. Dover (Recorder)*, 32 W. R. 876; 49 J. P. 86—D.

2. STOPPAGE AND DIVERSION OF.

Expenses—Right to employ Solicitor.—The charges of a solicitor employed by an urban authority to conduct proceedings at the instance of an individual for the stopping up or diverting a highway under ss. 84, 85 of the Highway Act, 5 & 6 Will. 4, c. 50, are not "expenses" within s. 84 of the act, so as to be recoverable in the manner pointed out by s. 101:—Semble, that all the steps required by s. 85 to be taken for the purpose of obtaining the order of sessions, are ministerial acts which ought to be done by the surveyor of the local authority. *United Land*

Company v. Tottenham Board of Health, 13 Q. B. D. 640; 53 L. J., M. C. 136; 32 W. R. 798—D.

3. USER OF.

a. Obstruction.

Roller left on Roadside.—The defendant left an agricultural roller between the hedge and the metalled part of the road, having removed it from a field on the opposite side of the road for his own convenience. A pony, drawing a carriage in which the plaintiff's wife was riding, shied at the roller, upset the carriage, and the plaintiff's wife was killed:—Held, that the roller was an obstruction to the highway; that it was an unreasonable user of the highway by the defendant, and that the plaintiff was entitled to recover damages for the death of his wife under Lord Campbell's Act. *Wilkins v. Day*, 12 Q. B. D. 110; 49 L. T. 399; 32 W. R. 123; 48 J. P. 6—D.

User of Traction-Engine on Narrow Road.—Persons using a traction-engine and trucks on a highway may be indicted for a nuisance, if they create a substantial obstruction and occasion delay and inconvenience to the public substantially greater than such as would arise from the use of carts and horses. *Reg. v. Chittenden*, 49 J. P. 503; 15 Cox, C. C. 725—Hawkins, J.

The owners are responsible for the general management of the engine by their servants. *Id.*

"Wilful Obstruction."—The appellant was summoned under the provisions of s. 72 of the Highway Act, 1835, for wilfully obstructing the free passage of a public highway at Sedgley. It appeared that he had marched into the Bull Ring (which was a highway) at the head of a band, and had taken up his position there, and had addressed a crowd for an hour and a half, during which period no person could, without considerable inconvenience and danger, have either walked or driven across that part of the highway where the appellant and his band and the crowd were stationed. The magistrate was of opinion that, although there was a passage round the crowd available for traffic, the appellant was not entitled to appropriate to himself any part of the highway; accordingly he was convicted:—Held, upon the above facts, that there was evidence on which the magistrate could properly convict the appellant of an offence under s. 72 of the Highway Act, 1835. *Horner or Homer v. Cadman*, 55 L. J., M. C. 110; 54 L. T. 421; 34 W. R. 413; 50 J. P. 454; 16 Cox, C. C. 51—D.

Magistrates convicted the appellant of the offence of "wilfully obstructing the free passage of a highway," under 5 & 6 Will. 4, c. 50, s. 72, although the appellant had not done any act of obstruction:—Held, that an omission to remove an obstruction after notice to remove it might amount to wilful obstruction. *Gully v. Smith*, 12 Q. B. D. 121; 53 L. J., M. C. 35; 48 J. P. 309—D.

Ditches cut at side of Road.—The right of the public to use a highway extends to the whole road, and not merely to the part used as via

trita. Therefore, ditches fifteen inches wide and ten inches deep, cut completely across the strips of grass land at the sides of roads, so as to amount to a danger to persons walking along the strips, amount to a nuisance and obstruction. *Nicol v. Beaumont*, 53 L. J., Ch. 853; 50 L. T. 112—Kay, J.

Making Fires near—Danger to Passengers.]

—H. was charged under 5 & 6 Will. 4, c. 50, s. 72, with unlawfully assisting in making a fire on the highway. He was rolling a tar-barrel that was alight, along a road, but no one was injured or endangered:—Held, that H. could not be convicted, as it was essential to the offence that passengers should be endangered or interrupted. *Hill v. Somerset*, 51 J. P. 742—D.

Highway within Metropolitan Area—Power of Police to Prosecute.]

—A person, by singing hymns, occasioned a crowd to assemble, and thereby obstructed a certain highway within the metropolitan police district. An information was accordingly preferred against him by an inspector of police, under s. 72 of the Highway Act:—Held, that the provisions of s. 72 of the Highway Act were applicable to highways within the metropolitan area:—Held, also, that a prosecution under s. 72 of the act might be initiated by anyone, and therefore that the proceedings taken by the police were valid. *Back v. Holmes*, 57 L. J., M. C. 37; 56 L. T. 713; 51 J. P. 693; 16 Cox, C. C. 263—D.

Nuisance — Statutory Right — Accident.]

The defendants were the owners of a quay, over which there was a public right of way to their docks. The Great Eastern Railway Company by their private act were empowered to, and did enter into an arrangement with the defendants to lay tramways connecting the docks with the railway system. The company were to keep the tramways in good working order, under the Tramways Act, 1870. The company, as promoters, gave notice to the defendants of their intention to open and break up the road for the purpose of doubling the rails at a particular point. The company did break up the highway for their tramway purposes. The plaintiff was injured by being thrown from his cart through the defective condition of the roadway at the place where the works were being carried out, and brought his action for compensation against the defendants as owners of the highway. The jury at the trial found that the accident to the plaintiff had been caused by the negligence of the railway company, who were in possession of the spot where the occurrence took place, and that the roadway was in a defective condition owing to a breach of duty on the part of the railway company, and gave the plaintiff substantial damages:—Held, that as the railway company were carrying out their works not under the orders or as licensees of the defendants, but under their statutory powers, and were in sole possession of the place where the accident happened, which was entirely under their control, and the negligence causing the accident was that of the railway company and not of the defendants, the verdict ought to be entered for the defendants. *Barham v. Ipswich Dock Commissioners*, 54 L. T. 23—Huddleston, B.

— **Breaking up without Statutory Authority—Prescription.]**—The corporation of P., who had no parliamentary powers for the purpose, supplied water to the adjoining urban district of F., and claimed the right to enter upon and break up the streets of F., whenever occasion should require for the purpose of repairing their water pipes, relying, as regarded some of the streets, on alleged irrevocable licences granted by the predecessors of the local board of F. (i.e., the surveyors of highways), and as regarded other streets on prescription:—Held, (1) that the claim of the corporation was to commit a nuisance; (2) that it was not in the power of the surveyors of highways to grant the alleged licences; (3) that, therefore, as a grant could not be presumed, the corporation could not obtain the right claimed by prescription. *Preston (Mayor) v. Fulwood Local Board*, 53 L. T. 718; 34 W. R. 196; 50 J. P. 228—North, J. Cp. *East London Waterworks v. St. Matthew's, Bethnal Green*, ante, col. 1962.

— **Duty to Protect.]**—See NEGLIGENCE, II., 4.

b. Encroachment.

Limitation of Time for Conviction.]—By 9 Geo. 4, c. 77, s. 18, no person may be convicted of an offence against 3 Geo. 4, c. 126, s. 118 (which enacts that any person causing an encroachment within a certain distance of the centre of a turnpike road shall be subject to a penalty), after the expiration of six months from the time when such offence shall have been committed. The period of six months mentioned in the section begins to run from the time that a substantial encroachment of the highway has been caused, and not from the final completion of the encroaching building or other encroachment. *Hyde v. Entwistle*, 52 L. T. 760; 49 J. P. 517—D.

c. User of Locomotives.

Tramway—Licence of County Authority.]—The steam engines authorised by statute to be used on tramways are not locomotives within the meaning of the Highways and Locomotives (Amendment) Act, 1878, s. 32, and, therefore, do not require to be licensed by the county authority. *Bell v. Stockton Tramways Company*, 51 J. P. 804—D.

4. POWER AND LIABILITY OF AUTHORITY.

"Drain"—"Watercourse"—Dumbwell.]—A dumbwell, or shaft sunk into a porous stratum of chalk or gravel, into which surface water from a highway is conducted by pipes, and from which it percolates away through the subsoil, is not a "drain or watercourse" within the meaning of s. 67 of the Highway Act, 1835, and a highway authority having the powers of that act is consequently not authorised by that act to construct such a dumbwell in private land near to the highway as part of its drainage system, and to clean it out when necessary. *Croft v. Rickmansworth Highway Board*, 39 Ch. D. 272; 58 L. J., Ch. 14; 60 L. T. 34—C. A.

Actions—Local Venue.]—The provisions of the Highways Act, 1835, s. 109, as to local venue are abolished by the Rules of Court, 1875, Ord. XXXVI., r. 1. *Phelips v. Hadham District Board*, 1 C. & E. 67—Coleridge, C. J.

— Notice of Action.]—The provision of the above section as to notice of action does not apply where the principal object of the action is an injunction. *Id.*

— Dissolution of Highway District.]—By the dissolution of a highway district, in respect of which a highway board had been constituted under the Highway Act, 1862, the highway board, though it ceases to have any control over the highways in its district, does not cease to exist as a corporate body for the performance of its other duties, such as those of suing or being sued, and of acting generally for the purpose of winding up its affairs. *Reg. v. Essex J.J.*, 11 Q. B. D. 704; 49 L. T. 394; 32 W. R. 220—C. A. Affirming 52 L. J., M. C. 124; 47 J. P. 725—D.

5. RATES.

Publication—Signature and Allowance.]—Where a highway rate, made by a waywarden of a highway district under 27 & 28 Vict. c. 101, s. 33, has been published like a poor-rate, it is not necessary that it should also have been signed and allowed by justices like a poor-rate. *Worthington v. Gill*, 49 J. P. 629—D.

Urban District—Part of Parish excluded—Amount.]—By s. 29 of the Highway Act, 1835, no highway rate to be levied or assessed shall exceed at any one time the sum of 10*d.* in the pound, or 2*s.* 6*d.* in the pound in the whole in any one year, without the consent of four-fifths of the inhabitants assembled at a specially called meeting. By s. 216 of the Public Health Act, 1875, where parts of a district are not rated for works of paving, water supply, and sewerage, or for some of them, the cost of repair of highways in those parts shall be defrayed out of a highway rate to be separately assessed and levied in those parts by the urban authority as surveyor of highways; provided that where part of a parish is included within an urban district, and the excluded part was, before the constitution of that district, liable to contribute to the highway rates for such parish, such excluded part shall, for all highway purposes, be treated as forming part of such district. The hamlet of G. was formerly a "parish" maintaining its own highways. Prior to 1875 part of the hamlet was formed into a local government district, called the inner district, with a local board, and became an urban district under the Public Health Act, 1875. Part of the hamlet, called the outer district, was excluded from it. The local board of the inner district repaired the highways in the outer district, and separately assessed a rate of 3*s.* 4*d.* in the pound on the inhabitants of the outer district, without first obtaining the consent of four-fifths of them. The appellants objected to the validity of the rate:—Held, that the consent of four-fifths of the inhabitants of the outer district was rendered unnecessary by s. 216 of the Public Health Act, 1875, and that the rate was valid. *Dyson v. Greetland Local Board*, 13 Q.

B. D. 946; 53 L. J., M. C. 106; 48 J. P. 596—C. A. Affirming 48 L. T. 636—D.

— County Rate—Liability—Borough extended.]—By a local act passed in 1874, the limits of the borough of Middlesborough were extended. By s. 20 of that act it was enacted that the extended area "shall be exempt from all county rates save only in respect of the purposes for which any county rates are now leviable within the existing borough." At the time of the passing of that act general county rates were leviable within the existing borough for all purposes for which general county rates could be levied in any part of the riding. By s. 13 of the Highways and Locomotives (Amendment) Act, 1878, any road which has ceased to be a turnpike road in manner described by the act shall be deemed to be a main road, and one-half of the expense incurred by the highway authority in the maintenance of such road shall be contributed out of the county rate:—Held, that as within the borough existing at the time of the passing of the local act general county rates were leviable for all purposes, the saving of such liability rendered the exemption in s. 20 inoperative; and therefore the inhabitants of the extended area of the borough were not exempt from liability to pay county rates for the maintenance of a road under s. 13 of the Highways and Locomotives (Amendment) Act, 1878. *Middlesborough Overseers v. Yorkshire (N. R.) Justices*, 12 Q. B. D. 239; 32 W. R. 671—G. A.

6. REPAIR.

a. Obtaining Materials.

Order for—Place should be Specified.]—A highway surveyor applied under 5 & 6 Wm. 4, c. 50, s. 54, for an order to take materials for highway repairs out of a wood of H. The wood consisted of thirteen acres, and was part of a larger wood of a hundred acres:—Held, that the order was bad for not specifying the part of the wood where the materials were to be taken. *Hooper v. Hawkins*, 51 J. P. 246—D.

b. Extraordinary Traffic.

What is.]—Justices having made an order upon the appellants to pay the expenses of repairing a highway as extraordinary expenses within s. 23 of the Highways and Locomotives (Amendment) Act, 1878, it appeared that the road, called Carter's Hill, was used solely for agricultural traffic, and was in the parish of S., which, with some other parishes in the respondent's district, was situate upon a range of hills. There were several stone quarries upon this range of hills within the respondent's district, from which, for many years, the surrounding country, including the appellants', had drawn stones for the repair of the highways, the stone traffic being a recognised business there; but until 1882 there had been no stone taken from the parish of S. In 1882 a stone quarry was opened in S. at the top of Carter's Hill, and the stone was conveyed by the appellants for the repair of their highways down Carter's Hill in the manner customary in the stone traffic—that

is, in heavy waggons with the wheels chained, and damage was in consequence done to the road:—Held, that the evidence warranted the justices in coming to the conclusion that the traffic was extraordinary on this particular road, and that the order therefore was right. *Turnbridge Highway Board v. Sevenoaks Highway Board*, 33 W. R. 306; 49 J. P. 340—D.

Liability for—Contractor and Sub-Contractor.]

—L. was a contractor with the government to erect a rifle-range, and employed D., a sub-contractor, to cart the stone. Nothing in the contract between L. and D. specified the mode of conveying the stone. D. used traction engines, and caused excessive injury to the highway:—Held, that L. was not the person liable under the Highways and Locomotives Act, 1878, s. 23, but that D. was liable, being the only person by whose orders the excessive weights were carried. *Laphorn v. Harvey*, 49 J. P. 709—D.

Surveyor, Appointment of—Evidence.]

—J. was not appointed district surveyor under seal, but only by minute of the rural sanitary committee signed by the chairman, but not countersigned by the clerk of the board. L. being summoned for damage caused by extraordinary traffic, set up the defence that the appointment of J. and his certificate and the proceedings were void:—Held, that as J. had acted de facto as surveyor the objection to J.'s appointment was rightly overruled, and the order on L. was valid. *Lancaster v. Harlech Highway Board*, 52 J. P. 805—D.

c. Liability of County Authority.

Turnpike Roads ceasing to be such and becoming Main Roads.]—The Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), by s. 13 enacts that any road which has "between the 31st of December, 1870, and the date of this act ceased to be a turnpike road, and any road which, being at the time of the passing of this act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road; and one-half of the expenses incurred from and after the 29th of September, 1878, by the highway authority in the maintenance of such road, shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate." The corporation of the borough of Rochdale was the highway authority of the Rochdale highway area. Under ss. 47—50 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), the obligation to repair all public highways within the area of the "town" was imposed upon the corporation, and the turnpike trustees were forbidden to collect any toll or lay out any money on any road within that area. By a local act in 1872, the boundaries of the borough were enlarged and all the provisions of the acts relating to the "town" were made applicable to the enlarged area of the borough. The effect was that further portions of turnpike roads were for the first time brought within the area of the borough and within the operation of the Towns Improvement Clauses Act, 1847:—Held, that

these further portions, being only parts of turnpike roads, had not ceased to be "turnpike roads" and were not deemed to be "main roads," within s. 13 of the Highways and Locomotives (Amendment) Act, 1878; and that the county authority were not liable to pay half the expenses of their maintenance. *Lancaster J.J. v. Rochdale (Mayor)*, 8 App. Cas. 494; 53 L. J., M. C. 5; 49 L. T. 368; 32 W. R. 65; 48 J. P. 20—H. L. (E.).

The Highways and Locomotives (Amendment) Act, 1878, s. 13, provides for the maintenance of roads which have, since the 31st of December, 1870, ceased to be turnpike roads. A provision in turnpike acts coming into operation before the 31st of December, 1870, that turnpike trustees shall not spend money or levy toll upon certain portions of turnpike roads, does not prevent such portions of the roads from being still turnpike roads on the 31st of December, 1870, within the meaning of s. 13 of the Highways and Locomotives (Amendment) Act, 1878. An agreement under the Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 41, made before the 31st of December, 1870, between turnpike trustees and a corporation, under which the turnpikes upon certain portions of turnpike roads were removed, and the repair of such portions was undertaken by the corporation, does not operate to make such portions cease to be part of a turnpike road, and therefore these portions also come under the operation of the Highways and Locomotives (Amendment) Act, 1878, s. 13. *West Riding J.J. v. Reg.*, 8 App. Cas. 781; 53 L. J., M. C. 41; 49 L. T. 786; 32 W. R. 253; 48 J. P. 229—H. L. (E.).

In 1855 a portion of a turnpike road was included in an improvement district under a local act incorporating the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34). Thereupon, by virtue of ss. 47-51 of the latter act, the maintenance of this portion of the road became vested in the improvement commissioners, and the turnpike trustees ceased to have power to collect tolls or lay out money upon it. In 1877 the turnpike trust expired. The commissioners were the "highway authority" for the district, and the district was a "highway area" within the meaning of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 13:—Held, that notwithstanding the operation of ss. 47-51 of the Towns Improvement Clauses Act, 1847, the road only "ceased to be a turnpike road" and became a "main road" within the meaning of s. 13 of the Highways and Locomotives (Amendment) Act, 1878, upon the expiration of the turnpike trust; and that since that event happened after 1870, the county authority was liable to pay to the commissioners one-half of the expenses incurred by them in the maintenance of the portion of the road within their district, as provided by s. 13. *Lancaster J.J. v. Newton Improvement Commissioners*, 11 App. Cas. 416; 56 L. J., M. C. 17; 55 L. T. 615; 35 W. R. 185; 51 J. P. 68—H. L. (E.).

Tramways—Agreement with Local Authority.]—By a local tramways act it was provided that in case steam power should be used on the tramway, the tramway company should repair the whole extent of that part of a main road over which their lines passed, but that the company might make such contracts and agreements for the repair of the road with the local authority of

the borough as might be approved by the Board of Trade. It was also provided that no contract or agreement to be entered into under the act should operate to lessen the liability of the company under s. 28 of the Tramways Acts, 1870. The road authority of the borough entered into a contract with the company, by which the expenses of maintenance and repair of the road were divided between them. In an action by the borough road authority against the county authority for contribution under s. 13 of the Highways and Locomotives Act, 1878:—Held, that the county authority were liable to pay out of the county rate one-half of the expenses incurred by the borough authority under the contract. *Over-Darwen (Mayor) v. Lancashire JJ.*, 58 L. T. 51; 36 W. R. 140—D.

"Maintenance" of Road.]—Converting a macadamized road into a paved road does not come within the term "maintenance" of the road as used in s. 13 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77); and therefore a highway authority cannot recover half the expenses thereby incurred from the county authority under that section. *Leek Improvement Commissioners v. Staffordshire JJ.*, 20 Q. B. D. 794; 57 L. J., M. C. 102; 36 W. R. 654; 52 J. P. 403—C. A.

"County Authority"—Highway in Borough.]—By the Highways and Locomotive (Amendment) Act, 1878, s. 13, half the cost of maintenance of a road that has ceased to be a turnpike road is to be paid "by the county authority of the county in which such road is situate"; and by s. 38 the word "county" in that act is to have the same meaning as it has in the Highway Act, 1862 (25 & 26 Vict. c. 61), s. 2, which provides that, for the purposes of that act, "all liberties and franchises except boroughs shall be considered as forming part of that county by which they are surrounded." The highway authority of the borough of Over Darwen in Lancashire claimed contribution in respect of the maintenance of part of a road in the borough that had ceased to be a turnpike road from the county authority of the county of Lancaster:—Held, that the word "county" in s. 13 of the act of 1878 is a geographical term; and that the county authority of Lancaster, by which county the road in question is surrounded, is liable to contribute as "the county authority of the county in which such road is situate." *Over Darwen (Mayor) v. Lancashire JJ.*, 15 Q. B. D. 20; 54 L. J., M. C. 51; 51 L. T. 739—C. A. Affirming 48 J. P. 437—D.

d. Liability in other Cases.

Alteration of Highway District—Rural Sanitary District.]—The provisions in 25 & 26 Vict. c. 61, s. 39, for altering a highway district by subtracting from it any parish by order of the county authority are not repealed by 41 & 42 Vict. c. 77, s. 3, providing for the formation of highway districts coincident in area with rural sanitary districts, and, by s. 4, for the exercise by the rural sanitary authority of the powers of a highway board within their district, and for the dissolution of the existing highway board. Therefore, although by an order made under 41 & 42 Vict. c. 77, the area of a highway district may

have become coincident with the area of a rural sanitary district, and the rural sanitary authority have been duly authorised to exercise the powers of a highway board, they cannot enforce contribution to the expenses of the board from a parish which has been duly subtracted from the district by an order under 25 & 26 Vict. c. 61, s. 39. *Sheppy Union v. Elmley Overseers*, 17 Q. B. D. 364; 55 L. J., M. C. 176; 35 W. R. 15; 50 J. P. 343—D.

Tramway Company.]—See TRAMWAYS.

e. Summary Proceedings for Non-repair.

Admission by Waywarden, how far Binding on Highway Board.]—Where proceedings are taken before justices for the non-repair of a highway in a parish forming part of a highway district under 25 & 26 Vict. c. 61, a *bonâ fide* admission by the waywarden of the parish that the road is a highway which the parish is bound to repair, is binding on the highway board, and it is not competent for them after such an admission to deny these facts so as to oust the jurisdiction of the justices. *Loughborough Highway Board v. Curzon*, 17 Q. B. D. 344; 55 L. J., M. C. 122; 55 L. T. 50; 34 W. R. 621; 50 J. P. 788—C. A.

Highway Authority in Default—Jurisdiction to order Repair.]—Complaint having been made under s. 10 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), to a county authority that the highway authority of a highway area within their jurisdiction had made default in repairing certain highways within their jurisdiction, the county authority were, after due inquiry and report by their surveyor, of opinion that it was *bonâ fide* denied by the highway authority that the ways were highways, and thereupon held that they had no jurisdiction to make an order:—Held, that by the terms of the above section it was the duty of the justices to make an order, and that a mandamus must issue ordering them so to do. *Reg. v. Farrer* (1 L. R., Q. B. 558) discussed. *Reg. v. Cheshire JJ.*, 50 L. T. 483; 48 J. P. 262—D.

Appeal to Quarter Sessions from Order.]—See Illingworth v. Bulmer East Highway Board, ante, col. 1073.

Appeal to Court of Appeal—Special Case stated by Quarter Sessions.]—See Illingworth v. Bulmer East Highway Board, ante, col. 26.

f. Indictment for Non-repair.

Urban Sanitary Authority.]—Neither s. 144 of the Public Health Act nor any other statute renders an urban sanitary authority liable to a common law indictment for neglecting duties conferred on them, either as surveyors of highways or as inhabitants in vestry assembled. If, however, this liability is to be established against such an authority in the latter capacity, it must be upon an indictment preferred in accordance with 5 & 6 Will. 4, c. 50, and after the preliminary steps thereby required have been taken. *Reg. v. Poule (Mayor)*, 19 Q. B. D. 602, 683; 56 L. J.,

M. C. 131; 57 L. T. 485; 36 W. R. 239; 52 J. P. 84; 16 Cox, C. C. 323—D.

An indictment for non-repair of a highway will lie against an urban sanitary authority under s. 10 of the Highways and Locomotives Act, 1878. *Reg. v. Wakefield (Mayor)*, 20 Q. B. D. 810; 57 L. J., M. C. 52; 36 W. R. 911; 52 J. P. 422—D.

Evidence—Wall supporting Highway out of Repair.—Where a highway is supported by a wall, and such wall becomes dangerous by reason of non-repair, the inhabitants of the place in which such highway is situate, if liable to repair the highway, can be convicted upon an indictment for non-repair, it being a question for the jury whether the wall forms part of the highway or not. Evidence of repairs to a highway by the owners of the adjoining lands is inadmissible upon an indictment against the inhabitants of the place in which such highway is situate, unless liability on the part of such owners to repair the highway in question, *ratione tenuræ*, has been specially pleaded. Evidence of a previous conviction of the inhabitants of a particular district in a parish for the non-repair of one of the highways in such district is admissible to prove that the district is liable by immemorial custom to repair all the highways within its limits, for the repair of which the inhabitants of the whole common law parish would otherwise be *primâ facie* liable. *Reg. v. Lordsmere Inhabitants*, 54 L. T. 766; 51 J. P. 86; 16 Cox, C. C. 65—C. C. R.

Acquittal—Motion for new Trial by Prosecution.—Where a verdict of not guilty has been returned upon an indictment for non-repair, a new trial will not be granted; but under very special circumstances the court may order all proceedings upon the judgment to be suspended, so as to give an opportunity for the question to be again raised upon a fresh indictment. *Rea v. Wandsworth* (1 B. & Ald. 63) approved. *Reg. v. Southampton County*, 19 Q. B. D. 590; 56 L. J., M. C. 112; 57 L. T. 261; 52 J. P. 52; 16 Cox, C. C. 271—D.

II. TURNPIKE ROADS.

Repair—When becoming Main Roads.—*See supra*, I, 6, c.

III. BRIDGES.

Liability to Repair—Bridge not Built in existing Highways—Acquiescence by County.—Upon the trial of an indictment against the inhabitants of a county for the non-repair of a bridge built by private owners, but not built in an existing highway, the true effect of the evidence as to the dedication to and the adoption of the bridge by the county is always a question for the jury. The fact that such a bridge is of public utility and is used by the public is not necessarily conclusive against the county on the question of liability, user and utility being only elements for consideration in determining that question; but there need not, in addition to evidence of public user and public utility, be proof of an overt act amounting to a formal adoption by a body capable of representing and

binding the county. *Reg. v. Southampton County* (17 Q. B. D. 424), in part dissented from. *Reg. v. Southampton County*, 19 Q. B. D. 590; 56 L. J., M. C. 112; 57 L. T. 261; 52 J. P. 52; 16 Cox, C. C. 271—D.

The owners of land on one side of a river made a road across such land, and built a bridge connecting such road with an existing highway on the other side of the river. They then dedicated both bridge and road simultaneously to the public, who afterwards used the same:—Held, that, the bridge not having been erected in an existing highway, the county was not liable for its repair, inasmuch as there was no evidence of acquiescence by the county in the building and dedication of the bridge. The effect of the 21st section of the Highway Act, 1835, is, in the case of county bridges built subsequently to that act, to throw the liability in respect of surface repairs to the roadway of the bridge and approaches upon the highway authority. Where a county of a town has been created by charter and declared to be a separate county, the county in which it was originally situated is not liable for the repair of bridges within its boundaries. *Reg. v. Southampton County*, 17 Q. B. D. 424; 55 L. J., M. C. 158; 55 L. T. 322; 35 W. R. 10; 50 J. P. 773; 16 Cox, C. C. 117—D.

Liability of Railway Company to Repair.—*See ante*, col. 1545.

Restraining Building of New Bridge.—M. being entitled to lands on both sides of a river, sold and conveyed to L. a piece of land the dimensions of which were minutely given in the conveyance, and which was therein stated to contain 7752 square yards, and to be bounded on the north by the river, and to be delineated on the plan drawn on the deed, and thereon coloured pink. The dimensions and colouring extended only up to the southern edge of the river, and if half the bed had been included the area would have been 10,031 square yards instead of 7752. The deed contained various reservations for the benefit of M., but contained nothing express to show whether the half of the bed was intended to pass or not. M. was at the time owner of a private bridge close by, from which he received tolls. Thirty years afterwards a bridge was projected to cross the river from L.'s land. The plaintiffs, who had succeeded to all M.'s property in the neighbourhood, brought their action to restrain the making the new bridge. If the grant to L. passed half the bed, no part of the new bridge would be over land of the plaintiffs:—Held, that the presumption that the grant included half the bed was not rebutted, and that an injunction could not be granted on the ground that the erection of the bridge would be a trespass:—Held, also, that a stipulation in the grant that nothing therein contained should prejudice or affect M.'s right to take tolls over his bridge did not preclude L. taking away custom from that bridge by the erection of a new bridge. *Michlethwait v. Newlay Bridge Company*, 33 Ch. D. 133; 55 L. T. 336; 51 J. P. 132—C. A.

The conveyance reserved to M., his heirs, &c., the right of entering upon the land or any part thereof for the purpose of repairing M.'s bridge:—Held, that this did not preclude L. from erecting any structures upon the land, provided he left reasonable access for the purpose of repairing the bridge. *Id.*

WEIGHTS AND MEASURES.

Sale of Bread—Delivery by Cart without Beam and Scales.—[The appellant, a baker, having received through his traveller an order from a customer for a quarter loaf, the manager of the baker's shop selected, weighed, and appropriated to the customer a loaf, which was then carried out in the cart and delivered to the customer, on credit, by a servant of the baker, without being provided with any beam and scales with proper weights:—Held, that the appellant was rightly convicted under 6 & 7 Will. 4, c. 37, s. 7, which enacts that every baker beyond certain metropolitan limits who shall "carry out bread for sale in and from any cart" shall be provided with a correct beam and scales with proper weights, in order that all bread sold by him may be weighed in the presence of the purchaser; and in case any such baker shall "carry out or deliver any bread" without being provided with such beam and scales with proper weights, he shall be liable to a penalty. *Ridgway v. Ward*, 14 Q. B. D. 110; 54 L. J., M. C. 20; 51 L. T. 704; 33 W. R. 166; 49 J. P. 150; 15 Cox, C. C. 603—D.]

Sect. 7 of 6 & 7 Will. 4, c. 37, provides that every baker or seller of bread, and every servant employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart, shall be provided with a beam and scales with proper weights, in order that all bread sold by any such baker or seller of bread, or his servant, may be weighed in the presence of the purchaser thereof: and in case any "such baker or seller of bread" or his servant shall carry out or deliver any bread without being provided with such beam and scales, every such baker or seller of bread shall be liable to a penalty. A customer bought three loaves in a baker's shop. The baker weighed the loaves in her presence, and subsequently, at her request and to oblige her, his servant carried them out in a cart and delivered them at her house, without being provided with any beam and scales:—Held, that the baker had not carried out or delivered the loaves as "such baker or seller of bread," and therefore could not be convicted of an offence under s. 7. *Daniel v. Whitfield*, 15 Q. B. D. 408; 54 L. J., M. C. 134; 53 L. T. 471; 33 W. R. 905; 49 J. P. 694—D.]

Sale of Intoxicating Liquor in marked Measure.—[By the Licensing Act, 1872, s. 8, all intoxicating liquor which is sold by retail, and not in cask or bottle, and is not sold in a quantity less than half a pint, is to be sold in measures marked according to the imperial standards. A publican, being asked for a pint of beer by a customer, went into an inner room, where he drew the beer into a marked measure and poured it into a jug, which he then brought into the room where the customer was sitting and handed to him. The customer could not see the beer drawn, and never saw it while in the measure. The publican having been convicted of an offence under s. 8:—Held, that the sale was not complete until the beer was handed to the customer, that the beer was not sold in a marked measure as required by the statute, and that the conviction was right. *Addy v. Blake*, 19 Q. B. D. 478; 56 L. T. 711; 35 W. R. 719; 51 J. P. 599; 16 Cox, C. C. 259—D.]

WHARFINGER.

Jetty in Tidal River—Vessel Grounding—Implied Representation.—[The defendants, who were wharfingers, agreed with the plaintiff for a consideration to allow his vessel to discharge and load her cargo at their wharf, which abutted upon the river Thames. It was necessary in order that the vessel might be unloaded that she should be moored alongside a jetty of the defendants which ran into the river, and that she should take the ground with her cargo at the ebb of the tide. The vessel at the ebb of the tide sustained injury from the uneven nature of the ground. The bed of the river at the point where she took ground was vested in the Conservators, and the defendants had no control over it, but it was admitted that they had taken no steps to ascertain whether it was suitable for the vessel to ground upon:—Held, that there was an implied undertaking by the defendants that they had taken reasonable care to ascertain that the bottom of the river at the jetty was not in a condition to cause danger to the vessel, and that they were liable for the damage sustained by her. *The Moorcock*, 14 P. D. 64; 60 L. T. 654; 37 W. R. 439—C. A. Affirming 58 L. J., P. 15—Butt, J.]

Warrant—Negligent Representation—Estoppel.—[Goods were in 1875 stored by brokers with wharfingers, who issued a warrant for the same. In 1885 the servants of the defendant, who had taken over the wharf and business, delivered the goods by mistake to certain persons instead of goods to which they were entitled, and the defendant was not made aware of the mistake. The warrant had been negotiated, and was in January, 1886, in the possession of B. and E. In that month no rent having been paid for the goods since 1880, the defendant wrote two letters to the plaintiff, who had previously taken over the business of the brokers and carried it on under their name, informing him, as the supposed holder of the warrant, and as the person presumed interested in the goods, that the goods were in hand, that rent was due, and that, unless it was paid, the goods would be sold to cover the amount due. The plaintiff made no reply, but afterwards, and in consequence of receiving these letters, he bought the warrant from B. and E. and applied to the defendant for the goods, when the defendant first discovered that they were no longer in his possession. In an action to recover damages for a wrongful conversion of the goods:—Held, that the defendant was liable, being estopped from denying that he had the goods specified in the warrant, because he had by his negligent misrepresentation led the plaintiff to believe that the goods were in his possession, and such misrepresentation was the cause of the plaintiff's loss, the plaintiff having purchased the warrant in consequence of the same. *Seton v. Lafone*, 19 Q. B. D. 68; 56 L. J., Q. B. 415; 57 L. T. 547; 35 W. R. 749—C. A.]

WIFE.

See HUSBAND AND WIFE.

WILD BIRDS.

Preservation—Authority of Owner or Occupier of Land.—By the 3rd section of the Wild Birds Preservation Act, 1880, it is provided that any person who between the 1st day of March and the 1st day of August in any year after the passing of the act shall knowingly and wilfully shoot or attempt to shoot any wild bird, or shall use any lime, trap, snare, net, or other instrument for the purpose of taking any wild bird, shall forfeit, &c., but the section is not to apply to the owner or occupier of any land, or to any person authorised by the owner or occupier of any land, killing or taking any wild bird on such land. R. having, with the authority of the occupier of certain land, shot wild birds thereon, which were taken on other lands without the authority of the owners or occupiers thereof, was charged with an offence against the section:—Held, that R. did not come within the exemption contained in the section, and was rightly convicted. *Reg. or Warr v. Gilham*, 52 L. T. 326; 49 J. P. 357—D.

WILL.

I. TESTAMENTARY CAPACITY, 1991.

II. TESTAMENTARY INSTRUMENTS, WHAT ENTITLED TO PROBATE, ETC.

1. *Foreign Wills*, 1992.
2. *Disposing of Freeholds*, 1993.
3. *By Married Women*, 1993.
4. *Where there are Several Instruments*, 1994.
5. *Incorporation of Unattested Papers*, 1997.
6. *Conditional and Contingent*, 1997.
7. *Alterations, Additions, and Omissions*, 1998.
8. *Lost Wills*, 1998.

III. DONATIO MORTIS CAUSA, 1999.

IV. EXECUTION AND ATTESTATION.

1. *Generally*, 2000.
2. *Attestation by Parties Interested*, 2002.

V. REVOCATION, 2004.

VI. REPUBLICATION, 2006.

VII. PROBATE AND LETTERS OF ADMINISTRATION.

1. *Jurisdiction*, 2006.
2. *To whom granted*.
 - a. Probate, 2007.
 - b. Letters of Administration, 2008.
3. *Administration Bond*, 2011.
4. *Revocation of Grant*, 2012.
5. *Practice relating to*, 2013.
6. *Probate and Legacy Duty*—See REVENUE.

VIII. CONSTRUCTION.

1. *General Principles*, 2016.

2. *Inaccuracies—Parol Evidence to Explain*, 2017.
3. *Devises and Legatees*.
 - a. To what Persons.
 - i. Children.
 - a. Illegitimate Children, 2021.
 - β. In Ordinary Cases, 2025.
 - ii. Survivors, 2027.
 - iii. Executors, 2029.
 - iv. Next of Kin, 2030.
 - v. Representatives, 2031.
 - vi. Wife, 2032.
 - vii. Cousins, 2033.
 - viii. Heirs, 2033.
 - ix. In other Cases, 2034.
 - b. Gift to a Class, 2037.
 - c. Vested and Contingent Interests, 2039.
 - d. Death without Issue, 2047.
 - e. Death coupled with Contingency, 2048.
 - f. Acceleration of Interests, 2052.
4. *What Interest Passes*.
 - a. Absolute.
 - i. Lands, 2052.
 - ii. In other Cases, 2055.
 - b. Life Estate or Interest, 2058.
 - c. Estate Tail, 2062.
5. *Bequests and Devises*.
 - a. Particular Words, 2065.
 - b. Conditions.
 - i. Repugnancy, 2073.
 - ii. Forfeiture of Estate and Interest.
 - a. Non-Residence, 2074.
 - β. Name and Arms Clause, 2076.
 - γ. Bankruptcy, &c., 2077.
 - iii. Other Conditions, 2078.
 - c. Validity.
 - i. Remoteness, 2080.
 - ii. Uncertainty, 2082.
 - iii. Perpetuities, 2083.
 - iv. Thellusson Act, 2084.
 - v. To Charities—See CHARITY.
 - d. Specific Bequests and Devises, 2084.
 - e. Ademption and Satisfaction.
 - i. Ademption, 2087.
 - ii. Satisfaction, 2090.
 - f. Trusts.
 - i. Secret Trusts, 2091.
 - ii. Resulting Trusts, 2092.
 - iii. Precatory Trusts, 2093.
 - g. Annuity, 2094.
 - h. Powers of Appointment.
 - i. Instruments by which Exercised, 2095.
 - ii. Fraud on Power, 2099.
 - iii. To what Persons, 2101.
 - iv. Estate by Implication in Default, 2102.
 - v. Other Matters relating to, 2103.
 - i. Election, 2106.
 - j. Mortgages and Incumbrances, 2111.
 - k. Charge and Payment of.
 - i. Charge on Leaseholds and Real Estate, 2113.
 - ii. Exoneration of Personal Estate, 2115.
 - iii. Contribution, 2118.

- iv. Marshalling, 2120.
- v. Accumulations, 2121.
- vi. Apportionment of Gain and Loss, 2124.
- vii. Other Points as to Payment, 2126.
- l. Interest on Legacies—See ante, col. 791.
- m. Conversion—See CONVERSION.

I. TESTAMENTARY CAPACITY.

Testator subject to Delusions.]—In a case in which the question of testamentary incapacity arose, the court followed the decision of *Banks v. Goodfellow* (5 L. R., Q. B. 549). *Murfett v. Smith*, 12 P. D. 116; 57 L. T. 498; 51 J. P. 374—D.

Undue Influence—Coercion—Burden of Proof.]—To establish undue influence sufficient to invalidate a will, it must be shown that the will of the testator was coerced into doing that which he did not desire to do, and the mere fact that the testator in making his will was influenced by immoral considerations does not amount to such undue influence so long as the dispositions of the will express the wishes of the testator. *Wingrove v. Wingrove*, 11 P. D. 81; 55 L. J., P. 7; 34 W. R. 260; 50 J. P. 56—Hannen, P.

Married Woman—Future Separate Estate—Assent of Husband.]—The will of a married woman who had no personal estate belonging to her for her separate use at the date of the will, made without the assent of her husband, is effectual to dispose of personal estate to her separate use which she afterwards acquires and is entitled to at her death. *Charlemont (Earl) v. Spencer*, 11 L. R., 1r. 490—C. A.

— Realty—Renunciation by Husband.]— Mere renunciation by an intended husband of his marital rights in his wife's real property is not sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee. And upon the death of the wife without issue during her husband's lifetime, her heir-at-law, and not her devisee, will be entitled to the land of which she is seized in fee simple. *Rippon v. Dawding* (Ambl. 565) commented on. *Dye v. Dye*, 13 Q. B. D. 147; 53 L. J., Q. B. 442; 51 L. T. 145; 33 W. R. 2—C. A.

— Gift towards the erection of a Church, Invalid.]—Under the statute 43 Geo. 3, c. 108, which contained a power to all persons having an interest in any lands or in any goods or chattels, to give by deed enrolled, or will executed, three months before death, lands not exceeding five acres, or goods and chattels not exceeding in value 500*l.*, for or towards the erecting of any church, with a proviso that the act should not extend to any persons being within age, nor women covert without their husbands to make any such gift:—Held, that the proviso was not affected by the Married Women's Property Act, 1882, which by s. 1, sub-s. 1, gave power to married women to dispose by will of any real or personal property as her separate property in the same manner as if she were a feme sole. Consequently a gift by a married woman, by will executed three months

before death, to the vicar and churchwardens of a church of a sum of 300*l.* to be applied by them in the erection of a new church, and to be paid out of personal estate which was legally applicable for the purpose, was held to be invalid. *Smith's Estate, In re, Clements v. Ward*, 35 Ch. D. 589; 56 L. J., Ch. 726; 56 L. T. 850; 35 W. R. 514; 51 J. P. 692—Stirling, J.

— Republication when Discover—Subsequently acquired Property.]—Testatrix, a married woman, having under her marriage settlement a power of appointment over some 15,000*l.* worth of securities, and being entitled to jewels and furniture for her separate use, by her will in 1883, in exercise of this power and "of all other powers enabling her in this behalf," appointed, gave, and bequeathed "all the property of whatever nature comprised in the said settlement, and over which I have any power of appointment or disposition by will," to trustees upon certain trusts. In August, 1885, the husband of the testatrix died, and she thereupon became entitled to certain real estate, and had 7,500*l.* worth of personal estate; in December, 1885, she made a codicil by which she devised certain real estate therein referred to as having come to her from her late husband, but which did not otherwise refer to or confirm her will. Testatrix died in 1886:—Held, that the will as originally executed was only intended to deal with the property comprised in the settlement, that the codicil merely confirmed the will as it originally stood, and in no way enlarged its scope so as to make it include 7,500*l.* subsequently acquired from her husband, and that as to this amount there was an intestacy. *Taylor, In re, Whitby v. Highton*, 57 L. J., Ch. 430; 58 L. T. 842; 36 W. R. 683—Chitty, J.

Section 1, sub-s. 1, of the Married Women's Property Act, 1882, gives a married woman power to dispose by will only of property of which she is seized or possessed while she is under coverture. Consequently, notwithstanding s. 24 of the Wills Act, her will made during coverture is not, unless it is re-executed after she has become discover, effectual to dispose of property which she acquires after the coverture has come to an end. *Price, In re, Stafford v. Stafford*, or *Price v. Stafford*, 28 Ch. D. 709; 54 L. J., Ch. 509; 52 L. T. 430; 33 W. R. 20—Pearson, J.

Banking accounts were kept in the joint names of husband and wife, and investments in railway stock were made in their joint names. The wife survived her husband five days, having executed a will during coverture:—Held, that the balances of the joint accounts and the joint investments survived to the wife, but did not pass under her will. *Young, In re, Trye v. Sullivan*, 28 Ch. D. 705; 54 L. J., Ch. 1065; 52 L. T. 754; 33 W. R. 729—Pearson, J.

II. TESTAMENTARY INSTRUMENTS, WHAT ENTITLED TO PROBATE, ETC.

1. FOREIGN WILLS.

Execution by Alien Abroad.]—A will made by an alien, who was domiciled abroad at the time of making her will and of her death, and executed according to the forms required by English law, but not in manner required by the law of the

country of her domicile, is not entitled to probate, though her domicile of origin was English. *Blowam v. Fawcett*, 9 P. D. 130; 53 L. J., P. 26; 50 L. T. 766; 32 W. R. 673—C. A. Affirming 47 J. P. 377—Hannen, P.

Scotch Will—Invalid according to English Law—Leaseholds in England.]—An Englishman resident in Scotland bequeathed his whole means and estate to a trustee to pay certain pecuniary legacies and all the rest of his means and estate to be divided equally among certain of his god-children. The execution of the will was valid according to the law of Scotland, but invalid according to English law. The testator possessed leasehold property in England:—Held, that the English leaseholds passed under the will by virtue of the statute 24 & 25 Vict. c. 114, s. 2. *Watson, In re, Carlton v. Carlton*, 35 W. R. 711—North, J.

2. DISPOSING OF FREEHOLDS.

Equitable Conversion.]—Where freehold property is, by the doctrine of equitable conversion, to be considered as personality, it is liable to probate and legacy duty, and a will disposing of it is entitled to probate. *Gunn, In Goods of*, 9 P. D. 242; 53 L. J., P. 107; 33 W. R. 169; 49 J. P. 72—Hannen, P.

3. BY MARRIED WOMEN.

Testamentary Capacity.]—See *supra*.

General or Limited Grant.]—The limitation inserted before the Married Women's Property Act, 1882, in the probate of the will of a married woman, ought no longer to be required, and the court will henceforth make a general grant. *Price, In Goods of*, 12 P. D. 137; 56 L. J., P. 72; 57 L. T. 497; 35 W. R. 596; 51 J. P. 615—Butt, J.

The court refused to limit a grant of probate of a married woman's will, even where such will was made, and the person who made it had died before the Married Women's Property Act, 1882, and when the will and codicils were executed by virtue of a power of appointment. *Homfray, In Goods of*, 57 L. T. 498, n.; 51 J. P. 615—Butt, J.

Since the Married Women's Property Act, 1882, probate of the will of a married woman appointing executors, though the will is made in exercise of a power, and contains no disposition of property to which she was entitled outside the power, will be granted in the general form, and not, as heretofore, in a limited form. *Ievers, In Goods of*, 13 L. R., Ir. 1—Prob.

Will dealing with Realty only—Personalty.]—The will of a married woman dealing only with realty, but appointing executors, is entitled to probate where a portion of the estate consists of personality vested in her by virtue of the Married Women's Property Act, 1882. *Cubbon or Cubban, In Goods of*, 11 P. D. 169; 55 L. J., P. 77; 57 L. T. 87; 35 W. R. 200; 50 J. P. 744—Butt, J.

Assent of Husband—Power to Revoke.]—A

married woman made a will with the assent of her husband, and after her death he assented to the will:—Held, that he could not afterwards revoke his assent, and that the will was entitled to probate. The form of the judgment and probate determined. *Chappell v. Charlton*, 56 L. J., P. 73; 57 L. T. 496; 51 J. P. 215—Butt, J.

4. WHERE THERE ARE SEVERAL INSTRUMENTS.

Estate in England and Belgium—Two Wills—One in Belgian, other in English Form.]—A testator having an English domicile of origin died in Belgium possessed of property in England and in Belgium. He left two wills, one in the English form disposing of his property in this country, the other in the Belgian form disposing of his estate situate in Belgium. The court, on the renunciation of the Belgian executor and on an affidavit that according to the law of Belgium the Belgian will only applied to the property in that country, granted probate of both wills, as together constituting the last will of the deceased, to the English executor. *Bolton, In Goods of*, 12 P. D. 202; 57 L. J., P. 12; 36 W. R. 287—Hannen, P.

English and Spanish Wills—Probate of English Will only.]—A testator made a will in England, which disposed only of English property. Subsequently he made abroad another will, which disposed of property abroad and cancelled all previous dispositions. The court, with the consent of all the parties interested, ordered probate of the English will only, and allowed the foreign will to be delivered out of the registry for probate abroad. *Smart, In Goods of*, 9 P. D. 64; 53 L. J., P. 57; 32 W. R. 724; 48 J. P. 456—Hannen, P.

Two Documents separately Executed.]—A writing, comprising two parts, on different pages, separately signed and attested, but executed on the same day and occasion, the first part appointing executors, and commencing, "I further will," and disposing of further property, admitted to probate as one entire will. *Bonner, In Goods of*, 21 L. R., Ir. 339—Prob.

Codicil the only executed Paper forthcoming.]—At the death of a testatrix the sole testamentary papers forthcoming were a duly executed codicil and two drafts of wills, as to the execution or revocation of which there was no evidence:—Held, that though the codicil by its language was dependent on the will to which it belonged, and could not be construed without it, it ought to be admitted to probate, not having been revoked in any of the methods prescribed by the Wills Act. *Black v. Jobling* (1 L. R., P. 685) followed. *Gardiner v. Courthope*, 12 P. D. 14; 56 L. J., P. 55; 57 L. T. 280; 35 W. R. 352; 50 J. P. 791—Butt, J.

When First revoked by Second Will.]—A testatrix made a will on the 9th February, 1884, which she declared to be her last will, revoking all previous wills, and appointing a residuary legatee and an executor. On 19th February, 1884, she made another will, which commenced, "I declare this to be my last will,"

and bequeathing part of her property in legacies, and appointing another executor:—Held, that the latter will did not revoke the former, and both were admitted to probate. *O'Connor, In Goods of*, 13 L. R., Ir. 406—Prob.

A married woman, in exercise of a power to appoint real estate (subject to a trust for sale, but not sold), by will, made in 1870, appointed a life interest therein to her husband, and after his death as she should further appoint. By a subsequent will, made in 1880, also purporting to be made in exercise of the same power, she appointed three rent-charges—one to her husband, and the others to two of her children; and, subject to such rent-charges, she appointed the lands to her sons and daughters successively in tail with an ultimate remainder to her sisters (who were not objects of the power) in fee, thus purporting to deal with the entire estate; and she appointed her husband residuary legatee and devisee:—Held, that the first will was revoked by the second, and that the latter will should alone be admitted to probate. *Macfarlane, In Goods of*, 13 L. R., Ir. 264—Prob.

Evidence of Contents.—A testator made a will in 1864, appointing his wife sole executrix, and duly executed another document in 1877. There was no evidence of the contents of the second document except that after its execution the testator said, "I have made a will altering my affairs, and I have taken care of Ellen, and there will be something for Roby," and except a memorandum at the foot of the will as follows: "This will is now useless, a new will having been made in October, 1877, upon my wife telling me she was sorry she had ever seen me," &c.:—Held, that in the absence of proof of an alteration as to the executrix or of a revocatory clause of disposition wholly inconsistent with the first will, that will was not revoked, and was therefore entitled to probate. Quære, whether the memorandum was admissible in evidence to show an intention to revoke the first will. *Hellicr v. Hellicr*, 9 P. D. 237; 53 L. J., P. 105; 33 W. R. 324; 49 J. P. 8—Butt, J.

Will by Wife during Coverture.—A married woman, having in a settlement a special power of appointment by will over real estate, executed a will during coverture in 1866 appointing the same. After the death of her husband she made three other wills. In the first and second she said: "I revoke all other wills," and in the third: "I . . . hereby revoke all wills, codicils, and other testamentary dispositions heretofore made by me, and declare this to be my last will and testament," and then disposed of all her estate, "including as well real estate as personal estate over which I have or shall have a general power of appointment," but she did not in any way exercise or affect to exercise the power in the settlement, nor did she refer to it, or to the property the subject of the power:—Held, that the testamentary appointment of 1866 was revoked. *Kingdon, In re, Wilkins v. Pryer*, 32 Ch. D. 604; 55 L. J., Ch. 598; 54 L. T. 753; 34 W. R. 634—Kay, J.

Will by Codicil—Appointment in Will—Invalid Appointment by Codicil.—Testator by will, who said his estate would realise at least 10,000*l.*, wished 4,000*l.* to be invested on trust for his sister, A. P., for her life. At her death

the principal might be divided between her husband, if surviving, and children as she might by will determine. After giving other legacies, the testator bequeathed the remainder to the children of J. F. A sum of 4,000*l.* was invested in Consols and transferred into court. A. P. by will gave all the residue of her property, including the sum of 4,000*l.* left to her by the testator, and over which she had a disposing power, to her husband and children in equal terms. One son after the date of the will died, leaving two children, and by a codicil made afterwards, A. P. bequeathed the share which would have gone to him in trust for his children. On petition by the husband and surviving children for sale of the trust fund and payment of the proceeds to them:—Held, that the invalid appointment by the codicil did not operate as a revocation pro tanto of the gift by the will to the class, and that the husband and surviving children were entitled to the whole of the fund. *Duguid v. Fraser*, 31 Ch. D. 449; 55 L. J., Ch. 285; 54 L. T. 70; 34 W. R. 267—Kay, J.

Revocation of Gifts "in favour of" Donee of Power.—A testator by his will gave to his sister H. a life interest in a share of his residuary estate, and a special power of appointment by will over the capital of the share. By a codicil he revoked all devises and bequests whatsoever "in favour of" H.:—Held, that the power was revoked as well as the life interest. *Brough, In re, Currey v. Brough*, 38 Ch. D. 456; 57 L. J., Ch. 436; 58 L. T. 788; 36 W. R. 409—Kay, J.

Will to be read as if Name of Legatee omitted.—A testatrix by her will bequeathed her watch to her granddaughter M., and her brooch to her granddaughter J.; and, after giving certain pecuniary legacies, bequeathed to M. a legacy of 200*l.* A codicil made by the testatrix three years later, after reciting the legacies of the watch and brooch, continued as follows:—"Now I hereby revoke and make void the said legacies and bequests in my said will contained in favour of the said M. and J., and declare that my said will shall be read and construed in all respects as if the names of the said M. and J. had not been inserted therein, and in all other respects I confirm my said will":—Held, that the legacy of 200*l.* was not revoked by the codicil. *Percival, In re, Boote v. Dutton*, 59 L. T. 21—C. A.

A testatrix gave all her personal estate to her sisters Mary, Sarah, and Ann upon trust to invest and pay the income to her said sisters in equal shares during their lives, with benefit of survivorship, and after the death of the survivor, in case any of her nephews D. W. S. and R. O. S. and her niece M. A. S. should be then living, she gave her personal estate to T. R. and J. upon trust to transfer the sums invested as aforesaid, and all interest unto the said D. W. S., R. O. S., and M. A. S. in equal shares and proportions; and if but one of them should be then living, then the whole of such principal sums, &c., to be paid or assigned to such one, his or her executors, administrators, and assigns absolutely. But in case of the death of the testatrix's said nephews and niece, leaving either of her said sisters surviving, the testatrix gave and bequeathed all the said principal sums, &c., and all other her estate unto the survivor of her said sisters absolutely. The testatrix made a codicil,

whereby she requested "all names of T. R., J., and of D. W. S., R. O. S., and M. A. S., and any other of her friends except her three sisters, to be considered the same as if omitted from her will"—Held, that the omission of these names did not strike out the gift of the capital to the surviving sister, who took absolutely. *Stephenson v. Stephenson*, 56 L. T. 75—C. A. Affirming 54 L. J., Ch. 928—Pearson, J.

A testator bequeathed his residuary estate upon trusts for the benefit of his children, and as to the sons' shares he directed that one moiety should be held absolutely, and that the other moiety should be settled. By a codicil the testator revoked every devise and bequest to or in favour of his son S. :—Held, a revocation of the interest of the children of S. in the settled moiety. *Tabor v. Prentice*, or *Prentice v. Tabor*, 52 L. T. 85 ; 32 W. R. 872—Kay, J.

5. INCORPORATION OF UNATTESTED PAPERS.

Reference in Will to Papers.—To incorporate a document in the probate of a will, three things are necessary—(1) that the will should refer to the document as then in existence; (2) proof that the document propounded was in fact written before the will was made; and (3) proof of the identity of such document with that referred to in the will. A testator bequeathed all property he died possessed of to his executors, to be disposed of in charity in such manner as "I may direct them; and in case I may not leave directions or instructions, then they may dispose of it in such manner as they may think fit." The testator signed a paper, bearing the same date as the will, and in his own handwriting, containing directions for the management of his property for charitable purposes, and headed "Directions to the executors of my last will, executed the 13th February, 1879, how they are to manage my affairs :"—Held, that the will did not sufficiently describe the paper of directions as then existing, and that parol evidence was not admissible to identify it as the document referred to in the will. The court, therefore, refused to incorporate the directions with the probate. *Kehoe, In Goods of*, 13 L. R., Ir. 13—Prob.

A testatrix, the day before undergoing an operation which ended fatally, wrote two letters; the first, which was addressed to a personal friend, gave directions as to certain articles of plate to which the testatrix had affixed the names of various donees, and the second to her executor. In this letter, which was duly attested as a codicil, she mentioned having written the first letter :—Held, that the second letter, which constituted a valid codicil, incorporated the first letter and that the first letter incorporated the papers therein referred to. *Symes v. Appelle*, 57 L. T. 599 ; 51 J. P. 632—Hannen, P.

6. CONDITIONAL AND CONTINGENT.

A testator made his will as follows :—"As I am about to leave home for Bangor, should any accident, &c., take me out of this world, I will to E. M'D., of, &c., 200*l.* and also furniture to the

amount of 50*l.* at her selection," for her sole and separate use. "The remainder of all I am possessed of, or may be entitled to possess, I leave to my daughter S. C., for her sole and separate use, &c.; and should, in God's inscrutable providence, anything take her and her son away from this world before I again make my will—S. C. and her son—I will everything I may be possessed of to E. M'D., of, &c., for her sole and separate use," &c. The testator went to Bangor the same day, and returned home in a week without meeting with any accident, and did not again leave Ireland, or make any other will, until his death—more than six years afterwards :—Held, that the will was not conditional or contingent on any accident to him during his projected journey to Bangor. Principles of construction in determining whether a will is conditional or absolute. *Stuart, In Goods of*, 21 L. R., Ir. 105—Prob.

7. ALTERATIONS, ADDITIONS AND OMISSIONS.

Alteration—Duty of Court.—A testatrix duly executed a holograph will, which after her decease was found with the word "one" written in the place of another word. There was no evidence to show when the alteration was made. The original word was quite illegible :—Held, that it was the duty of the court to decide what the obliterated word was, if, from the evidence, it was able to do so with "reasonable certainty," and in that event to admit the will to probate with the word so decided upon in place of the word substituted for it by the testatrix. *Jeffery v. Cancer Hospital*, 57 L. T. 600 ; 51 J. P. 503—Butt, J.

Interlineation—Definition of.—The definition of the word "interlineation" in the Wills Act is not to be confined to something written between the lines. Something put into one of the lines, but written on the line, is equally an "interlineation" within the meaning of the act. *Bagshawe v. Canning*, 52 J. P. 583—Hannen, P.

Mistake in Copying—Will altered to correspond with Draft.—A testator in the draft of his will, which was duly executed and read over to him before execution, bequeathed a legacy to the Bristol Royal Infirmary. In the will, which was not read over to him, the bequest by a mistake in the engrossment was to the British Royal Infirmary. The Court, subject to an affidavit that there was no such institution as the British Royal Infirmary, granted probate of the will, with the word "Bristol" substituted for "British." *Bushell, In Goods of*, 13 P. D. 7 ; 57 L. J., P. 16 ; 58 L. T. 58 ; 36 W. R. 528 ; 51 J. P. 806—Butt, J.

8. LOST WILLS.

Evidence of Contents—Parol Evidence—Declaration by Testator.—If a lost will is propounded for probate upon parol evidence alone, with evidence of a residuary bequest, but no sufficient evidence as to the rest of the will :—Quære, whether probate ought to be granted of the residuary bequest alone, unless the court is

satisfied that it has before it substantially the testamentary intentions of the testator. Quære, also, whether post-testamentary declarations of the testator as to the contents are admissible in evidence. *Sugden v. Lord St. Leonards* (1 P. D. 154) commented on. *Woodward v. Goulstone*, 11 App. Cas. 469; 56 L. J., P. 1; 55 L. T. 790; 35 W. R. 337; 51 J. P. 307—H. L. (E.).

Advertisement.]—Before applying for probate of a lost will, an advertisement should be published offering a reward for production of the will. *Callaghan, In Goods of*, 13 L. R., Ir. 245—Prob.

III. DONATIO MORTIS CAUSÂ.

Banker's Deposit Receipt.]—A deposit receipt in the ordinary form used by banks may be the subject of a *donatio mortis causâ*; and this is so, although the receipt is expressed to be not transferable. *Cassidy v. Belfast Banking Company*, 22 L. R., Ir. 68—Ex. D.

Uncorroborated Evidence of Donee.]—A gift by a dying man of a banker's deposit receipt under such circumstances as to constitute it a good *donatio mortis causâ* will be upheld, even though the only evidence in support of the claim be that of the donee, if the court considers the evidence trustworthy. *Farman, In re, Farman v. Smith*, 57 L. J., Ch. 637; 58 L. T. 12—North, J.

Deposit-Note—Resumption of Possession.]—G. T. in his last illness showed a deposit-note to his daughter the plaintiff, and told her in effect that it was to belong to her in the event of his death. The plaintiff took the note, and by her father's directions placed it for safe custody in a cash-box which was kept in her father's bedroom, but of which she had the key, and to which she had resort for household purposes:—Held, that this was a good *donatio mortis causâ*. *Taylor, In re, Taylor v. Taylor*, 56 L. J., Ch. 597—Stirling, J.

Gift of Insurance Money.]—A., having made his will in 1880, by which he gave the income of his property to his wife B., fell ill in 1887, and, being in anticipation of death, signed the following document:—"1887, March 1.—I give all my insurance money that is coming to me to my wife B. for her own use, as well as 200l. in the bank. This is my wish.—A., witness, C." This document was, at A.'s request, placed with his will, and remained there till his death in April, 1887. Evidence having been admitted as to the circumstances attending the execution of the document:—Held, that effect could not be given to the document as a *donatio mortis causâ*. *Hughes, In re*, 59 L. T. 586; 36 W. R. 821—C. A.

Cheque payable to Donor or Order.]—A cheque payable to the donor or order, and, without having been indorsed by him, given by the donor during his last illness to his son, stands on the same footing as a promissory note or bill of exchange payable to the donor or order, and will pass to the son by way of *donatio*

mortis causâ. *Veal v. Veal* (27 Beav. 303) followed. *Clement v. Cheeseman*, 27 Ch. D. 631; 54 L. J., Ch. 158; 33 W. R. 40—Chitty, J.

IV. EXECUTION AND ATTESTATION.

1. GENERALLY.

Presumption of due Execution.]—The cases which have been decided in reference to the presumption of due execution of wills apply as well where the alleged testator's signature has been affixed by his direction as where he has himself actually written his name. *Clery v. Barry*, 21 L. R., Ir. 152—C. A.

Holograph Codicil—Attesting Witnesses unable to recollect the Execution.]—A testator left a codicil entirely in his own handwriting, written on the third side of the sheet of foolscap, the first side of which contained his will. There was an attestation clause in proper form, and the testator had signed his name at the foot of the codicil, but there being no more space on the sheet, the names of the attesting witnesses appeared at the bottom of the second page, opposite the attestation clause. The attesting witnesses acknowledged their signatures, but had no recollection of having signed the paper, nor of ever having seen it before:—Held, that the codicil was duly executed. *Woodhouse v. Balfour*, 13 P. D. 2; 57 L. J., P. 22; 58 L. T. 59; 36 W. R. 368; 52 J. P. 7—Hannen, P.

Rebutting by Parol Evidence.]—Where a will appeared on the face of it to have been duly executed as prescribed by the Wills Act, and the attestation clause was in full accordance with ss. 9 and 10 of the statute, the court, nevertheless, gave effect to the parol evidence of the attesting witnesses, varying the terms of the attestation clause they had subscribed to:—Held, that the presumption of law, *Omnia presumuntur rite et solenniter esse acta*, was rebutted by their evidence, and that the will had not been duly executed, and that it could not be admitted to probate. *Glover v. Smith*, 57 L. T. 60; 50 J. P. 456—Butt, J.

In 1878 the testator, who was a good man of business, but not a lawyer, wrote a holograph codicil upon the same paper as a will which he had made in 1868, and wrote at the end of it an attestation clause adapting that at the end of the will to the case of a codicil. He called the nurse into the schoolroom, and asked her and the nursery governess to "sign this paper." There was evidence that he took his own pen into the room. Both witnesses signed. At the trial, which took place between four and five years afterwards, the codicil was produced bearing the testator's signature, and both the attesting witnesses were examined. The governess deposed that she had designedly abstained from looking at any of the writing on the paper, and the nurse, it appeared, had been very nervous. Neither of them could say anything as to what writing was on the paper, nor as to whether the testator's signature was there when they signed, and both said that they did not see him sign. The President pronounced for the validity of the

codicil :—Held, by Earl Selborne, L. C., that the reasonable conclusion was that the codicil was signed by the testator in the presence of the witnesses. *Wright v. Sanderson, Sanderson, In re*, 9 P. D. 149; 53 L. J., P. 49; 50 L. T. 769; 32 W. R. 560; 48 J. P. 180—C. A.

Held, by Cotton, L.J., that on the evidence he should have come to the contrary conclusion, but that the finding of the President, who had seen and heard the witnesses, ought not to be reversed. *Ib.*

Held, by Fry, L.J., that as the codicil *ex facie* appeared to be properly executed, and the presumption *omnia rite esse acta* was strengthened by the conduct of the testator, which showed an anxious and intelligent desire to do everything regularly, that presumption was not rebutted by the evidence of the witnesses, who appeared to have been nervous and confused on the occasion of the attestation, and whose recollection of what took place was evidently imperfect. *Ib.*

Codicil executed on Margin of Will—Foot or End.—A testator duly executed a will prepared by a solicitor which was written on the first side of a sheet of foolscap paper. Desiring shortly before his death to make an alteration in the disposition of his property he called in the assistance of a neighbour, who wrote out a codicil on the third sheet of the foolscap, beginning, "The following alterations having been first made" and ending with an attestation clause in due form. The mark of the testator, however, and the signatures of the attesting witnesses, were written opposite the body of the will on the margin of the first page, the person who prepared the codicil being under the impression that as it was an alteration in the will it ought to be attested on the margin :—Held, that the codicil was not duly executed, and probate refused. *Hughes, In Goods of*, 12 P. D. 107; 56 L. J., P. 71; 57 L. T. 495; 35 W. R. 568—Hannen, P.

Mark—Foot or End.—A testator two days before his death, being paralysed on one side and partly speechless, intimated to the two medical men in attendance on him his desire to make a will. They interpreted his wishes by signs and wrote them down on a card. He executed the document by making his mark, which however appeared in the middle of the writing, and they then put their initials as witnesses at the back :—Held, that the card constituted a valid testamentary paper duly witnessed, expressing the intentions of the deceased; but that it was not signed at the "foot or end" within the meaning of the statute, and was therefore not duly executed and not entitled to probate. *Margary v. Robinson*, 12 P. D. 8; 56 L. J., P. 42; 57 L. T. 281; 35 W. R. 350; 51 J. P. 407—Hannen, P.

Acknowledgment of Testator's Signature.—A testatrix exhibited a codicil to her last will, which was entirely in her own handwriting, to one of the attesting witnesses, telling her she had something which required two witnesses. Subsequently, the second attesting witness having come into the room, was asked, either by the testatrix or by the other attesting witness in her presence, to sign it, and they both signed, but the testatrix did not tell them that it was a testamentary paper, nor did they know what sort of paper it was that they had attested. They did

not recollect seeing the testatrix sign, but one of them was clear that her signature was there at the time they signed :—Held, that this was a sufficient acknowledgment by the testatrix of her signature, and that the codicil was entitled to probate. *Daintree v. Pasulo*, 13 P. D. 102; 57 L. J., P. 76; 58 L. T. 661—C. A. Affirming 52 J. P. 87—Butt, J.

Attestation—Sufficiency of.—Where a witness in fact attested a testator's signature, but the form of attestation described him as only attesting the signatures of two other witnesses (the attestation of one of whom was irregular), probate of the will was granted. *Mason v. Bishop*, 1 C. & E. 21—Williams, J.

A., having made his will in 1880, by which he gave the income of his property to his wife B., fell ill in 1887, and, being in anticipation of death, signed the following document :—"1887, March 1.—I give all my insurance money that is coming to me to my wife B. for her own use, as well as 200*l.* in the bank. This is my wish.—A., witness, C." This document was, at A.'s request, placed with his will, and remained there till his death in April, 1887. Evidence having been admitted as to the circumstances attending the execution of the document :—Held, that it was intended as a testamentary instrument, and, not having been properly attested according to the Wills Act, could not take effect as a will. *Hughes, In re*, 59 L. T. 586; 36 W. R. 821—C. A.

Printed Form—Attestation on first Page—Second Page excluded.—A will was written on a printed form by a testator's directions, and was contained partly on a first page and partly on a second. The attestation was at the bottom of the first page, and there was no attestation on the second page. The court excluded the second page from probate. *Birt, In Goods of* (2 L. R., P. 214), distinguished. *Malen, In Goods of*, 54 L. J., P. 91; 33 W. R. 825; 50 J. P. 262—Butt, J.

Witness Signing Husband's Name.—A will was signed by the deceased in the presence of two persons, one of whom subscribed it with his own name and the other with the name of her husband :—Held, that the will was not properly attested. *Leccerington, In Goods of*, 11 P. D. 80; 55 L. J., P. 62—Butt, J.

Evidence—Attesting Witness not to be found—Affidavit.—In a suit for revocation of probate on the grounds of undue execution, and incapacity, where it appeared that every effort had been made to find one of the attesting witnesses, but without success—the court allowed the affidavit made by him eight years before, at the time of proving the will at the district registry, to be admitted as evidence of execution and capacity. *Gornall v. Mason*, 12 P. D. 142; 56 L. J., P. 86; 57 L. T. 601; 35 W. R. 672; 51 J. P. 663—Butt, J.

2. ATTESTATION BY PARTIES INTERESTED.

Solicitor—Professional Charges.—A declaration in a will that a solicitor, who is an executor or trustee of the will, may charge profit costs for

work done for the testator's estate, confers a beneficial gift or interest on him, within s. 15 of the Wills Act, 1837, and is therefore void where the solicitor trustee has been one of the attesting witnesses of the will. *Pooley, In re*, 40 Ch. D. 1; 58 L. J., Ch. 1; 60 L. T. 73; 37 W. R. 17—C. A.

—**Insolvent Estate.**—A., being entitled to a life interest in a fund over which she had a testamentary power of appointment, borrowed, in 1871, from B., 350*l.* on the security of a covenant that 1,250*l.* should be paid one month after her death. She died in 1884, having by her will appointed executors, and directed payment of her debts, and also that C., one of her executors (a solicitor), should be entitled to charge and receive payment for all professional business to be done by him under the will. C. was one of the attesting witnesses. In an administration action by B. on behalf of himself and all other creditors, the estate being insolvent:—Held, that C., as an attesting witness, was prohibited by the Wills Act, s. 15, from receiving that which was not a debt of which payment could be enforced at law, but a beneficial gift, which could only be claimed by virtue of the direction in the will; and (semble) that even if he had not attested the will, the direction authorising him to charge for his professional services operated by way of bounty only, and, the estate being insolvent, could not take effect as against the creditors. *Barber, In re, Burgess v. Finnicome*, 31 Ch. D. 665; 55 L. J., Ch. 373; 54 L. T. 375; 34 W. R. 395—Chitty, J.

Of Will and Codicils—Bequest under Will.—A testator by his will gave bequests to his employés; one of the employés had attested the will and also two codicils that confirmed the will; another employé had attested the codicils but not the will:—Held, that the former employé could not take the gift, but that the latter was not incapacitated from taking under the will. *Marcus, In re, Marcus v. Marcus*, 57 L. T. 399—North, J.

Acceleration of Interests.—A testator devised and bequeathed all his real and personal estate to his wife for life, and after her death to be equally divided between such of his children as should be living at her death; and in case of any of the above-mentioned children dying before his wife leaving children, such children were to take their parent's share. And in the event of any of his daughters being married at his wife's decease, it was his will that such proportion as they might be entitled to should be left to them and their children exclusively, and should in no way be controlled by their husbands. At the death of the testator's widow one of his daughters was living who had several children. Her husband was an attesting witness to the will, and consequently the gift to her was void under s. 15 of the Wills Act:—Held, that the daughter's children were not to be disappointed by her disability, but took an immediate interest in her share as tenants in common. *Clark, In re, Clark v. Randall*, 31 Ch. D. 72; 55 L. J., Ch. 89; 53 L. T. 591; 34 W. R. 70—V. C. B.

Gift by will of real and personal estate upon trust to convert and pay the income of the proceeds to A. for life, and after A.'s death to pay

the capital and income thereof unto the child or children of A. in equal shares, with gifts over in case A. should die without leaving issue living at his death. The will had been attested by A.'s wife, so that the gift of a life interest to him was void under s. 15 of the Wills Act. There were no children of A.'s marriage: The personal estate was exhausted and the trust funds represented real estate only:—Held, that until A. had a child the gifts upon the determination of A.'s life estate could not be accelerated, and that during the life of A. and so long as he had no children, the income of the trust funds was undisposed of, and belonged to the heir-at-law, and could not be accumulated for the benefit of the persons contingently entitled in remainder. *Jull v. Jacobs* (3 Ch. D. 703) distinguished. *Hodgson v. Earl of Beville* (1 H. & M. 376), and *Dumble, In re* (23 Ch. D. 360), explained. *Townsend, In re, Townsend v. Townsend*, 34 Ch. D. 357; 56 L. J., Ch. 227; 55 L. T. 674; 35 W. R. 153—Chitty, J.

V. REVOCATION.

Presumption—Duplicates—One in Testatrix's Possession Missing.—Where a will has been executed in duplicate, one only being retained by the testatrix, and such duplicate is not forthcoming after her decease, the presumption of law is that she destroyed it *animo revocandi*. The court, while doubting whether this presumption must necessarily arise on the bare fact of one of the duplicates having disappeared, and while suggesting that a stronger presumption was necessary in cases where a duplicate will was known to a testator or testatrix to be in existence, nevertheless felt bound by the authority of an unreported case of *Luzmoore v. Chambers*, and held, that the presumption of law must be upheld, that the will was duly revoked, and that the testatrix died intestate. *Jones v. Harding*, 58 L. T. 60; 52 J. P. 71—Butt, J.

—**Codicil—No Will.**—See *Gardiner v. Courthope*, ante, col. 1994.

Substitution—Two Wills.—A testatrix, having made a formal will, subsequently executed a holograph will, which did not contain residuary or revocation clauses, nor any powers for the administration of the estate, such as the first will did:—Held, that, as the second will disposed of all the property of the testatrix, it was to be taken to be in substitution for, and must be admitted to probate in exclusion of the first will. *Turnour, In Goods of*, 56 L. T. 671; 50 J. P. 344—Hannen, P. See also ante, cols. 1994–1997.

Destruction—Incorporated Document—Testamentary Intention.—Because part of the will of a testator fails by reason of some legal objection to it, it is not, therefore, to be regarded as struck out of the will for all purposes. Although, so far as the law intervenes, a clause may be inoperative, it may still be read with a view to ascertaining the general testamentary intention. A testator, who died in May, 1886, by his will, dated in Dec. 1871, disposed of all his property in favour of his children, and declared that whereas he had advanced, or might advance, for

the benefit of his children, certain sums towards their advancement in life or for their benefit, and all which sums respectively would appear and be mentioned in a book marked "A," and signed by him, every sum of money appearing or mentioned in such book to have been so advanced or paid on account of any child should be taken in or towards satisfaction of such child's share, and brought into hotchpot. In Jan. 1886 the testator tore from the book marked "A" several leaves, upon which entries of such advances had been written, and directed them to be burnt in his presence, and wrote on the book, the cover of which was preserved, a memorandum, stating that the book had been destroyed by him. It appeared that some of the sums advanced had been advanced before the date of the will, and others subsequently. An originating summons was taken out for the purpose of determining the effect of the above clause:—Held, that the book would probably have been admitted to probate if it had contained writing; and that if a document formed part of a will it was liable to revocation in the same manner as the will itself:—Held, therefore, that, as the book had been destroyed by the testator, no sum advanced by him, whether before or after the date of the will, could be brought into hotchpot. *Coyte, In re, Coyte v. Coyte*, 56 L. T. 510—Chitty, J.

Scratching out of Signatures.—A will which after execution had remained in the custody of deceased was found in her repositories after her death with her own signature and the signatures of the attesting witnesses scratched out as with a knife:—Held, that there was a revocation within the requirements of s. 20 of the Wills Act. *Morton, In Goods of*, 12 P. D. 141; 56 L. J., P. 96; 57 L. T. 501; 35 W. R. 735; 51 J. P. 680—Butt, J.

A testator two days before his death, being paralysed on one side and partly speechless, intimated to the two medical men in attendance on him his desire to make a will. They interpreted his wishes by signs and wrote them down on a card. He executed the document by making his mark, which however appeared in the middle of the writing, and they then put their initials as witnesses at the back. Subsequently, after a conversation with one of the testator's relatives, they returned to his room, and telling him that they had taken on themselves more responsibility than they ought to have taken, and that what they had written must be regarded as a memorandum, they erased their initials at the back. The testator seemed to acquiesce in this, but the card was found after his death in a handbag which he kept near his bed, and there was evidence that he had shown it to the lady whom he intended it to benefit, telling her it was for her, and wished her to take it:—Held, that what passed at the erasure of the witnesses' initials did not amount to a revocation. *Margary v. Robinson*, 12 P. D. 8; 56 L. J., P. 42; 57 L. T. 281; 35 W. R. 350; 51 J. P. 407—Hannen, P.

Mutilation — Revocation of Appointment of Executors.—A testator by his will appointed two executors, with the usual directions as to payment of debts, &c. He also appointed the same persons trustees, with directions to pay the income arising from his property to his wife and

his only son in equal shares during her life or widowhood, and after her death or remarriage the whole estate was bequeathed to the son absolutely. There were also alternative trusts in the case of the son dying in the wife's lifetime, either unmarried or married leaving children. After his death the will was found with the clause appointing executors cut out of it, and there was evidence of declarations by the testator that he had cut it out with a pair of scissors, with the intention of cutting out the name of one of the executors. The wife died in the lifetime of the testator, and in the events which had happened at his death the son was the only person entitled to the estate:—Held, that the appointment of executors was revoked by the mutilation of the will; that the trustees were not executors according to the tenor; and that the son was entitled to a grant of administration with the will annexed. *Maley, In Goods of*, 12 P. D. 134; 56 L. J., P. 112; 57 L. T. 500; 35 W. R. 764; 51 J. P. 423—Hannen, P.

Burning — Conditional — Revival of Earlier Will.—The destruction of a last will by burning or otherwise, does not revive an earlier will; and therefore where a testatrix caused her last will to be destroyed by burning it, at the same time expressing a wish that the provisions of an earlier will (which had been in terms revoked by a clause in the said last will) should thereupon again become operative:—Held to be only a conditional revocation of the last will, and that as the condition was inoperative the act of destruction was nugatory and the last will was still valid and subsisting and was entitled to probate. *Welch v. Gardner*, 51 J. P. 760—Hannen, P.

Obliteration—"Writing Declaring an Intention to Revoke."—The testator had obliterated the whole of a codicil, including his signature, by thick black marks, and at the foot of it had written the words, signed by himself and attested by two witnesses:—"We are witnesses of the erasure of the above":—Held, that the codicil was revoked, for the words above mentioned were "a writing declaring an intention to revoke" it within s. 20 of the Wills Act. *Gosling, In Goods of*, 11 P. D. 79; 55 L. J., P. 27; 34 W. R. 492; 50 J. P. 263—Butt, J.

VI. REPUBLICATION.

Of Married Woman's Will, when Discoverd.]
—See *Taylor, In re*, ante, col. 1992.

VII. PROBATE AND LETTERS OF ADMINISTRATION.

1. JURISDICTION.

Administration, Letters of — Proceeds of Realty.—The proceeds of real property sold under the Settled Estates Acts, and not yet converted into realty, have not become personal property in respect of which letters of administration can be granted. *Lloyd, In Goods of*,

9 P. D. 65; 53 L. J., P. 48; 32 W. R. 724; 48 J. P. 456—Butt, J.

Domicil of Testator.—See INTERNATIONAL LAW, III.

2. TO WHOM GRANTED.

a. PROBATE.

Executor according to the Tenor.—A testator by his will said, "I appoint R. H. P. and J. E. W.," but did not state in what capacity he appointed them. He also bequeathed legacies to "each of my executors," and gave to his "said executors" the residue of his property, with certain directions as to it. The court held, upon motion, that by the words of the will R. H. P. and J. E. W. were appointed executors, and granted probate to them accordingly. *Bradley, In Goods of*, 8 P. D. 215; 52 L. J., P. 101; 32 W. R. 324; 47 J. P. 825—Hannen, P.

Trustee.—Directions to get in the estate of the testator, and to distribute it in a certain manner after the payment of all funeral and other expenses:—Held, sufficient to constitute a trustee an executor according to the tenor. *Lush, In Goods of*, 13 P. D. 20; 57 L. J., P. 23; 58 L. T. 684; 36 W. R. 847; 52 J. P. 199—Hannen, P.

A testator bequeathed all he died possessed of "to my two children, subject to the following limitations:—I wish to appoint N., K., and C. my trustees for the objects of this my will, everything I have to be vested in them." The will then declared the trusts of the property to be so vested in the trustees. The trustees were not connected with the ascertainment or realization of the assets, but were, for the greater part, connected with property to be retained and held by the trustees for the use of the *cestui que trusts*. The will concluded by giving certain directions as to the testator's burial:—Held, that N., K., and C. were entitled to probate as executors according to the tenor. A direction to pay the testator's debts is not indispensable to the appointment of an executor according to the tenor. *McCane, In Goods of*, 21 L. R., Ir. 1—C. A.

A testator bequeathed a part of his household furniture to his wife, and all his personal property (and real, if any), consisting of books, &c., money in bank, together with all household furniture possessed by him before marriage, or purchased by him subsequently, to three trustees, upon trust as to the said furniture for his son A. (or if he should not be alive at the testator's death, for M.), to pay over to A. 1000*l.*, and to invest the remainder of the testator's money upon other specified trusts, and he gave directions as to his funeral not addressed to the trustees:—Held, that the trustees were not executors according to the tenor. *Gray, In Goods of*, 21 L. R., Ir. 249—C. A.

In a will there was a bequest of all property to three trustees upon trust, first to manage the same as they might think best for those interested, but to invest no part of the same except upon securities within the United Kingdom; secondly and thirdly, to pay the annual proceeds and capital of the property on specified trusts:—Held, that the trustees were executors accord-

ing to the tenor. *Hamilton, In Goods of*, 17 L. R., Ir. 277—Prob.

Where the court can gather from the words of a will that a person named therein is required to pay the debts, and generally to administer the estate, it will grant probate to such person, as executor according to the tenor. *Bluett, In Goods of*, 15 L. R., Ir. 140—Prob.

See also *Maley, In Goods of*, ante, col. 2006.

b. LETTERS OF ADMINISTRATION.

Next-of-Kin — Persons equally entitled — Selection.—In a contest among next-of-kin *primâ facie* equally entitled to administer to the estate of a deceased relative, the choice of the fittest person should be made on summons before one of the registrars, according to the practice in the Probate Division, and parties improperly brought into court on motion will be entitled to their costs. *John, In Goods of*, 58 L. T. 683; 52 J. P. 232—Butt, J.

Divorced Wife not cited.—Administration of the estate of a deceased intestate whose marriage had been dissolved by the High Court of Judicature in Bombay, granted to his next-of-kin without citing the divorced wife. *Nares, In Goods of*, 13 P. D. 35; 57 L. J., P. 19; 58 L. T. 529; 36 W. R. 528; 52 J. P. 231—Butt, J.

Guardian of Minor.—The next-of-kin of a minor, the universal legatee, were an uncle who was abroad, an aunt who was in poor circumstances, and another aunt who had renounced. The court granted letters of administration with will annexed for the use and benefit of the minor to a guardian elected by her. *Gardiner, In Goods of*, 9 P. D. 66; 53 L. J., P. 31; 32 W. R. 756; 48 J. P. 456—Hannen, P.

Where upon an application for administration with the will annexed it appeared that the testator's children were minors, the court granted administration to a stranger in blood elected by the children as their testamentary guardian, without notice to the next-of-kin entitled to the grant, on proof that one had renounced and that the remainder were at a distance, or that their place of residence was unknown. *Webb, In Goods of*, 13 P. D. 71; 57 L. J., P. 36; 58 L. T. 683; 36 W. R. 847; 52 J. P. 231—Butt, J.

Cum Testamento Annexo—Colonial Grant—Substitution of Executors — Administrator-General.—A testator domiciled in British Guiana by his will appointed two executors—one resident in the colony, the other in England—with power of substitution in the event of either or both being unable or unwilling to act. The executor resident in the colony administered the estate on his own behalf and on behalf of the other executor until he returned to this country to reside here permanently.—By the law of the colony an executor under such circumstances had the right to substitute as executor the Administrator-General of the Colony, who thereupon became possessed of all the powers necessary for the administration of the estate. This substitution had been effected by the executor before leaving the colony, and there being estate in this country which required a personal representative here, the court made a

grant of administration with the will annexed to persons nominated as his attorneys by the Administrator-General until such time as the Administrator-General or the executor resident in this country who had not renounced should apply, and without requiring justifying security. *Black, In Goods of*, 13 P. D. 5; 57 L. J., P. 20; 36 W. R. 400—Butt, J.

— **Attorney of Executor—Death of Executor—Administration de bonis non.**—A. obtained a grant of administration with a foreign will annexed as the attorney in England of B., the executor of C., the testatrix. After B.'s death a similar grant was made to D. as the attorney in England of A.'s executors:—Held, that the chain of representation was not broken by the grant of administration to the attorney of the original testatrix, and that D. was entitled to deal with the property of C. in this country without a grant of administration de bonis non. *Del Carmen Vea Murguia, In Goods of*, 9 P. D. 236; 53 L. J., P. 47; 32 W. R. 799; 48 J. P. 711—Butt, J.

— **Interest—Sister or Widow.**—In a contest for administration with the will annexed the court preferred the sister of the testator to the widow, as it appeared that the sister, as a legatee, had the larger interest in the property to be distributed. *Homan, In Goods of*, 9 P. D. 61; 52 L. J., P. 94; 31 W. R. 955—Hannen, P.

De Bonis non—No known Relations.—An intestate having died without known relations, his estate was administered by his widow, who, before having completed the administration, died, leaving a will. The court made a grant de bonis non to the residuary legatee of the widow, the nominee of the Duchy of Lancaster. *Avard, In Goods of*, 11 P. D. 75; 56 L. T. 673—Hannen, P.

— **No Residue—Specific Legatee, without Citation or Renunciation of Residuary Legatee.**—

Upon an application for a grant of administration de bonis non it appeared that the residuary legatee resident abroad had had notice by letter, and that he had no beneficial interest, there being actually no residue:—Held, that the grant might be made to a specific legatee, without requiring the residuary legatee to be cited, or to renounce. *Wilde, In Goods of*, 13 P. D. 1; 57 L. J., P. 7; 57 L. T. 815; 36 W. R. 400; 51 J. P. 775—Hannen, P.

Creditor—Insolvent Estate.—The assets being insufficient to pay an intestate's debts and being in the hands of an executor de son tort, who was sued by the creditors, the court granted administration to one creditor, with the consent of the others, he undertaking to administer the assets rateably. *Willett, In Goods of*, 21 L. R., 1r. 377—Prob.

— **Poor Law Guardians—Deceased Pauper Lunatic—Expense of Maintenance.**—The deceased had, for over six years prior to her death, been supported as a pauper lunatic at the county lunatic asylum. During the whole of this period she was, in fact, entitled to an annuity of 24l. 16s. 6d., payable by the Commissioners for the Reduction of the National Debt. This fact

only came to the knowledge of the guardians at the time of her death, or shortly thereafter:—Held, that the guardians were creditors of the deceased, within the provisions of 12 & 13 Vict. c. 103, ss. 16, 17, and, as such, entitled to administration of her estate. *Lambeth Guardians v. Bradshaw*, 57 L. T. 86; 50 J. P. 472—Butt, J.

— **To Nominee of Creditor.**—An intestate was the holder of shares in a company on which a call was made after his death:—The court made a grant of administration to the nominee of the company as a creditor of the estate of the deceased. *Tomlinson v. Gilby*, 54 L. J., P. 80; 33 W. R. 800; 49 J. P. 632—Butt, J.

The court, upon the application of a creditor who had obtained a grant of letters of administration with the will annexed to the personal estate and effects of his deceased mortgagor, being satisfied that there were special circumstances bringing the case within s. 73 of the Probate Act, and upon affidavit that the estate was insolvent, rescinded such grant and made a fresh grant in favour of a nominee of the creditor, such nominee to be approved by the registrar. *Brown, In Goods of*, 59 L. T. 523—Butt, J.

B., a pauper lunatic chargeable to the guardians of the Kingston Union, died, a spinster and without parents, leaving three brothers and one sister her surviving, all of whom renounced their right to administration. One other brother, who had gone to America in 1871, but who had not been heard of since 1883, was cited by advertisement, under order of the court. The court, upon the application of the guardians, made a grant of administration to the clerk to the board as their nominee. *Byrne, In Goods of*, 52 J. P. 281—Butt, J.

Nominee.—The court will, but under special circumstances only, make a grant of administration to a nominee of the parties interested in the estate. *Clayton, In Goods of*, 11 P. D. 76; 55 L. J., P. 26; 34 W. R. 444; 50 J. P. 263—Butt, J.

— **Duchy of Lancaster.**—Where an intestate had died leaving no known relatives, and his estate had been partly administered by his widow, who died leaving a will, the court made a grant de bonis non to the nominee of the Duchy of Lancaster, who was the residuary legatee of the widow. *Avard, In Goods of*, 11 P. D. 75; 56 L. T. 673—Hannen, P.

— **Of Creditor.**—See supra.

Specific Legatee—No Residue—Citation of Residuary Legatee.—A residuary legatee resident at a known address in Canada, and who was in regular communication with his relatives in England, was informally asked to renounce his right to administer to his father's estate, but made no reply to the letters of the solicitors. The estate was being administered in chancery, and the chief clerk had certified that the assets were insufficient for payment of the debts and specific legacies. The court upon affidavits of these facts ordered a grant of administration in favour of one of the specific legatees. *Wilde, In Goods of*, 13 P. D. 1; 57 L. J., P. 7; 57 L. T. 815; 36 W. R. 400; 51 J. P. 775—Hannen, P.

“Special Circumstances”—Married Woman

—**Bankruptcy of Husband—Grant to Trustee.**]—A married woman died intestate, the whole value of her separate estate being 20*l*. Her husband shortly afterwards absconded, and was adjudicated a bankrupt.—Held, that the husband's right to administration did not pass to the trustee in his bankruptcy under s. 44 of the Bankruptcy Act, 1883, but that there were "special circumstances" to justify a grant to the trustee in bankruptcy under s. 73 of the Probate Act, 1857, without citing the husband. *Turner, In Goods of*, 12 P. D. 18; 56 L. J., P. 41; 57 L. T. 372; 35 W. R. 384—Butt, J. See also *Brown, In Goods of*, supra.

Attorney—Limited Grant—Foreign Law—Evidence.]—By the law of Russia all testamentary instruments executed by members of the Imperial family are disregarded, and the disposition of the property of such persons after their death is within the exclusive power of the Emperor of Russia. *Oldenberg (Prince), In Goods of*, 9 P. D. 234; 53 L. J., P. 46; 32 W. R. 724; 49 J. P. 104—Butt, J.

A., a member of the Russian Imperial family, died in Russia, having executed a will by which he appointed B., his son, as his executor. After A.'s death a meeting of the members of his family was held, and an arrangement for the disposition of his property in accordance with the terms of his will was agreed to, and was embodied in a document termed an "Acte Définitif," which was subsequently confirmed by the Emperor of Russia; and by the terms of the "Acte Définitif" B. was constituted the sole and entire owner of certain shares held by the deceased in a railway company having its offices in England. The court upon a certificate from the Russian ambassador in England, with the seal of the Russian embassy, reciting that the law of Russia is as stated above, and that, under the "Acte Définitif," B. was the sole and entire owner of the railway shares, made a grant to the attorney of B. of letters of administration with the "Acte Définitif" annexed, limited to the property of the deceased in England. *Id.*

3. ADMINISTRATION BOND.

Reduced Penalty—Reduction of Estate—Grant to Attorney.]—A widow died intestate, leaving seven infant children, and a grant of administration was made to A., as guardian of the infants, for their use and benefit, till one of them should attain the age of twenty-one. A. absconded, after misappropriating part of the personal estate of the deceased. One of the daughters of the deceased, who had attained the age of twenty-one and was resident abroad, afterwards appointed B. as her attorney to obtain a grant of administration in England of her mother's estate, for her use and benefit, till she should apply for a grant of administration. The court allowed the attorney to give an administration bond for an amount representing the present value of the estate of the deceased. *Halliwell, In Goods of*, 10 P. D. 198; 54 L. J., P. 32; 33 W. R. 371; 49 J. P. 233—Hannen, P.

Sureties.]—The court will not by reason of the property being large and the risk small, dispense with sureties to an administration

bond, or lessen the amount to be secured. But it will allow the security to be made up of any number of bonds. *Earle, In Goods of*, 10 P. D. 196; 54 L. J., P. 95; 34 W. R. 48; 49 J. P. 761—Hannen, P. S. P., *McGowan, In Goods of*, 10 P. D. 197; 34 W. R. 48; 49 J. P. 761—Hannen, P.

Assignment of, to Creditor.]—Since the Probate Act, 1857, an unpaid creditor of a deceased intestate is entitled to an assignment of the administration bond. A motion for the assignment of an administration bond should be on notice. *Harding, In Goods of*, 15 L. R., Ir. 186—Prob.

4. REVOCATION OF GRANT.

Absconding Administrator—New Grant to Next of Kin.]—A grant of administration of the estate of an intestate was made to a creditor, who, after his debt had been fully satisfied, absconded, and could not be found.—A personal representative of the estate being required in an action in the Chancery Division, the court revoked the grant to the creditor without citing him, and made a new grant to the sole next-of-kin of the deceased. *Bradshaw, In Goods of*, 13 P. D. 18; 57 L. J., P. 12; 58 L. T. 58; 36 W. R. 848; 52 J. P. 56—Butt, J.

Married Woman intermeddling with Estate.]—Administration with the will annexed was granted to a woman who intermeddled with the estate, and subsequently married. Her husband deserted her and could not be found, and an application was accordingly made for a revocation of the grant, and a fresh grant to another person.—Held, that the administratrix having intermeddled with the estate the grant could not be revoked. *Reid, In Goods of*, 11 P. D. 70; 55 L. J., P. 75; 54 L. T. 590; 34 W. R. 577—C. A. Affirming 50 J. P. 263—Butt, J.

Jurisdiction of Chancery Division.]—Though the Chancery Division may have jurisdiction to recall the probate of a will, it ought not, as a general rule, to exercise that jurisdiction, even if the estate of the testator is in court in a proceeding in that division. *Pinney v. Hunt* (6 Ch. D. 98) followed. *Bradford v. Young*, 26 Ch. D. 656; 54 L. J., Ch. 96; 50 L. T. 707; 32 W. R. 901—Pearson, J.

Jurisdiction of Probate Division.]—Semble, the Probate Division has exclusive jurisdiction to revoke probate of a will. *Priestman v. Thomas*, 9 P. D. 210; 53 L. J., P. 109; 51 L. T. 843; 32 W. R. 842—C. A.

Forgery—Estoppel.]—In an action in the Probate Division, T. and G. propounded an earlier and P. a later will. The action was compromised, and by consent verdict and judgment were taken establishing the earlier will. Subsequently P. discovered that the earlier will was a forgery, and in an action in the Chancery Division, to which T. and G. were parties, obtained the verdict of a jury to that effect, and a decree that the compromise be set aside. In another action in the Probate Division for revocation of the probate of the earlier will.—Held,

that T. and G. were estopped from denying the forgery. *Id.*

Effect of—Sale of Leaseholds.]—A grant of letters of administration obtained by suppressing a will containing no appointment of executors is not void ab initio, and accordingly a sale of leaseholds by an administratrix who had obtained a grant of administration under such circumstances to a purchaser who was ignorant of the suppression of the will was upheld by the court, although the grant was revoked after the sale. *Abram v. Cunningham* (2 Lev. 182) distinguished. *Bozall v. Bozall*, 27 Ch. D. 220; 53 L. J., Ch. 338; 51 L. T. 771; 32 W. R. 896—Kay, J.

5. PRACTICE RELATING TO.

Citation—Service on Person of Unsound Mind.]

—Form of order for service of citation on a person of unsound mind, not so found by inquisition. *McCormick v. Heyden*, 17 L. R., Ir. 338—Prob.

—Executor possessing himself of Assets.]

—Where an executor possessed himself of part of the personal estate of the deceased without obtaining probate, and did not appear to a citation which had been issued by a legatee to bring in and prove the will, the court, on the application of the legatee, made a conditional order that the executor should, within a limited time, extract probate. *Clune, In Goods of*, 15 L. R., Ir. 470—Prob.

—Widow interested, a Lunatic—Heir-at-law represented.]

—In a probate suit the person interested in establishing an intestacy were the widow of the testator and his brother the heir-at-law. The widow was a lunatic confined in an asylum in Australia, and as the heir-at-law had already appeared as a party in the suit the court refused to order the widow to be cited to see proceedings. *Ward v. Huckle*, 12 P. D. 110; 56 L. J., P. 110; 57 L. T. 495; 35 W. R. 736—Hannen, P.

Presumption of Death—Notice to Insurance

Company.]—Where the estate of a person whose death the court were asked to presume consisted in part of a policy of assurance on his life, the court ordered that notice of the application should be given to the insurance company. *Barber, In Goods of*, 11 P. D. 78; 56 L. T. 894; 35 W. R. 80—Butt, J.

Amending Grant—Property Abroad—Foreign

Court.]—An intestate died leaving personal estate to the amount of 273*l.* in this country, and 6,100*l.* in the Italian rentes. The Italian court refused to grant the authority required to deal with the property within its jurisdiction, on the ground that the letters of administration granted by the Court of Probate here were on the face of them limited to the smaller amount in this country, and that this court, if it had been made aware of the full value of the estate, would have required greater security for its administration. The court allowed the letters of administration to be amended—the Board of Inland Revenue having signified its consent to accept the succession duty on the Italian rentes as probate duty—so as to state on the face of them that the larger

sum was also included. *Henley, In Goods of*, 11 P. D. 126; 55 L. J., P. 61; 56 L. T. 895; 35 W. R. 184; 50 J. P. 520—Hannen, P.

Subpoena to bring Scrip into Registry—Contempt of Court.]

—Where a writ of subpoena was issued in a non-contentious matter directing R., a solicitor, to bring into the Probate Registry a scrip which was stated to be, but which was not in fact, in his possession or control:—Held, that his non-compliance with the subpoena was not under the circumstances a contempt; that the fact that he had not followed the practice general in such a case (and compulsory in a contentious matter) of filing an affidavit explaining the reason for his non-compliance, with which practice he was acquainted, was not a contempt. *Emmerson, In re, Rawlings v. Emmerson*, 57 L. J., P. 1—C. A.

Interrogatories — Undue Influence.]

—The plaintiff sued to recall probate on the ground that the testator was not of sound mind, and that the will was obtained by the undue influence of the defendants, two of whom were the executors, and the third universal legatee. The plaintiff delivered interrogatories for the examination of the defendants, asking what sums they had received from the testator by way of payment for services, loan, or gift, and whether the universal legatee had since the death of testator made over any and what part of the property to the other defendants. The defendants declined to answer these interrogatories as irrelevant:—Held, that the interrogatories must be answered, the period in the first interrogatory being limited to three years. *Holloway, In re, Young v. Holloway*, 12 P. D. 167; 56 L. J., P. 81; 57 L. T. 515—C. A.

Particulars—Undue Influence.]

—The defendant in a probate action alleged that the will had been procured by the undue influence of the plaintiff "and others." The plaintiff applied for particulars of the names of the persons charged with undue influence and particulars of the acts of undue influence alleged, and the times when and places where each of the acts was alleged to have taken place. The President ordered the defendant to give the names of the persons charged with undue influence, but refused to order him to give particulars of the acts:—Held, that as it was admitted to have been the long-settled practice of the Probate Court, and subsequently of the Probate Division, not to require a party alleging undue influence to give particulars of the acts of undue influence, such practice ought not now to be disturbed; and semble (per Lindley and Fry, L.J.J.), that this rule of practice was founded on good reason. *Salisbury (Lord) v. Nugent*, 9 P. D. 23; 53 L. J., P. 23; 50 L. T. 160; 32 W. R. 221—C. A.

—**Incapacity.]**—In an action for probate the court will not order particulars to be given of incapacity. *Hankinson v. Birmingham*, 9 P. D. 62; 53 L. J., P. 16; 32 W. R. 324; 48 J. P. 24—Hannen, P.

Receiver — Injunction — Executor intermeddling with Estate.]

—An executor before obtaining probate, and without the consent of his co-executor, intermeddled with assets and made preparations to sell them. The court granted leave to the co-executor to issue a writ for an

injunction and for a receiver. *Moore, In Goods of*, 13 P. D. 36; 57 L. J., P. 37; 58 L. T. 386; 36 W. R. 576; 52 J. P. 200—Hannen, P.

— **Application before Probate—Chancery Division.**]—The Judicature Act, 1873, s. 25, sub-s. 8, enables any judge of the High Court to appoint a receiver of a deceased's estate (before grant of probate or administration), notwithstanding the absence of his pendens; but applications for any such order being on the way to probate proceedings are properly made in the Probate Division, and if made elsewhere will not be encouraged. *Parker, In re, Dearing v. Brooks*, 54 L. J., Ch. 694—Chitty, J.

Parties—Striking out.]—In a probate suit, out of nine defendants on the record eight had been cited and had not appeared. The remaining one, who was resident in New Zealand, had not been served. The court, at the hearing, allowed him to be struck off the record, and the case to proceed against the other eight defendants. *Drewitt v. Drewitt*, 58 L. T. 684; 52 J. P. 232—Butt, J.

Evidence—Affidavit.]—In a probate suit the court allowed an affidavit, used on a motion formerly made in the suit, and sworn by a witness who had been subpoenaed but was unable to attend, owing to his being, at the time of the hearing, engaged as a witness elsewhere, to be put in evidence, and treated the application as made before the trial under Ord. XXXVII., r. 1. *Ib.* See also *Gornall v. Mason*, ante, col. 2002.

— **Duchy of Cornwall.**]—On motion for grant of letters of administration of an intestate's effects to His Royal Highness the Prince of Wales, as Duke of Cornwall, it is not necessary, if the facts are sufficiently set forth in the warrant, that they should be verified by affidavit. *Griffith, In Goods of*, 9 P. D. 63; 53 L. J., P. 30; 32 W. R. 524; 48 J. P. 312—Hannen, P.

— **As to Birth or Death.**]—Upon an application for administration to the estate of a child, the court allowed the birth and death of the child to be proved by evidence of declarations by its deceased mother. *Thompson, In Goods of*, 12 P. D. 100; 56 L. J., P. 46; 57 L. T. 373; 35 W. R. 384—Hannen, P.

Pleading—Embarrassing Matter.]—The plaintiff propounded for probate a will of September, 1880. A defendant counter-claimed to prove a will of May, 1881. The plaintiff replied (inter alia) that the testatrix was not of sound mind when she executed the will of May, 1881; and (5) that if she did duly execute it when of sound mind, she duly revoked it by a will of June, 1881, executed when she was in a similar state of mind:—Held, that clause 5 of the reply ought not to be struck out as embarrassing. *Rigg v. Hughes, Smith, In re*, 9 P. D. 68; 53 L. J., P. 62; 50 L. T. 293; 32 W. R. 355—C. A.

Costs—Intervention—Two Sets.]—Where an intervenor in a probate suit had been cited to appear by the defendants, the unsuccessful parties, and had been charged by them with procuring the will by undue influence, the court, in pronouncing for the will, departed from the

usual practice of allowing only one set of costs, and condemned the defendants in the costs of the intervenor as well as of the executors. *Tennant v. Cross*, 12 P. D. 4; 56 L. J., P. 74; 57 L. T. 372—Butt, J.

New Trial—Misdirection—Grounds in Notice.]—Ord. XXXIX., r. 3, which requires that the grounds on which misdirection is alleged should be stated in the notice of motion for a new trial, applies to motions in the Probate Division as well as to the Queen's Bench Division. *Pfeiffer v. Midland Railway Company* (18 Q. B. D. 243) followed. *Murfett v. Smith*, 12 P. D. 116; 56 L. J., P. 87; 57 L. T. 498; 35 W. R. 460; 51 J. P. 374—D.

Appeal direct from Chambers.]—Appeals from orders made in chambers are to be subject to the same rules in the Probate Division as in the Chancery Division, and will not be entertained unless the judge gives leave to appeal direct, or certifies that he does not require to hear further argument. *Rigg v. Hughes, Smith, In re*, supra.

VIII. CONSTRUCTION.

1. GENERAL PRINCIPLES.

Inconsistent Clauses.]—Effect must be given to every part of a will if possible. But if two clauses are so irreconcilable as to be incapable of bearing a connected meaning, the earlier clause should be discarded, and effect given to the later one. *Biggar v. Eastwood*, 15 L. R., Ir. 219—M. R.

— **Printed Form.**]—Where a testator, using a common printed form of will, gave, devised, and bequeathed all his real and personal property and estate to Albert Twiddy Hart, with certain exceptions, and then, after a blank, came a full residuary clause in print unto Edmund Twiddy Hart, Amelia Collins, and Albert Dalby and John Collins, to and for their own use and benefit absolutely:—Held, that nothing remained upon which the second gift could operate, and that the first gift prevailed. *Spencer, In re, Hart v. Manston*, 54 L. T. 597; 34 W. R. 527—V.-C. B.

Foreign Will.]—If a domiciled Englishman makes a will expressed in the technical terms of the law of a foreign country, so as to manifest an intention that it should operate according to that law, the meaning of the will must be ascertained by the foreign law, and then an equivalent effect must be given to the will in England. *Strudd v. Cook* (8 App. Cas. 577) discussed. *Bradford v. Young*, 26 Ch. D. 656; 54 L. J., Ch. 96; 50 L. T. 707; 32 W. R. 901—Pearson, J.

An English will by a testator domiciled in Lower Canada must be interpreted with regard to the law of Lower Canada, and not that of England. *McGibbon v. Abbott*, 10 App. Cas. 653; 54 L. J., P. C. 39; 54 L. T. 138—P. C.

Rule of Construction—Rule of Law.]—A rule of construction is one which points out what a court shall do in the absence of express or implied intention. A rule of law is one which takes effect when certain conditions are found, although a testator may have indicated an in-

tention to the contrary. *Coward, In re, Coward, v. Larkman*, 57 L. T. 285—C. A.

Costs of obtaining Decision of Court.—Where a testator has used doubtful language, it may be right for those interested to have recourse to the court to ascertain the true construction of his will, and to throw the necessary costs upon the fund in dispute. When the decision of the court of first instance has been obtained at the expense of the fund, if either party is dissatisfied, he must, as a general rule, challenge that decision at his own peril. If, however, the appeal be successful, the costs of the appeal may be regarded as part of the unavoidable expense of obtaining a correct decision. *Dillon v. Arkins*, 17 L. R., Ir. 636—C. A.

2. INACCURACIES—PAROL EVIDENCE TO EXPLAIN.

Supplying Blank—Power to look at Original Will.—For the purpose of construing a will the court is entitled to look at the original will as well as at the probate copy. *Harrison, In re, Turner v. Hellard*, 30 Ch. D. 390 ; 55 L. J., Ch. 799 ; 53 L. T. 799 ; 34 W. R. 420—C. A.

Name of Legatee in blank.—A testatrix, in making her will, used a law stationer's form, which was partly in print, blanks being left in it which were to be filled up by the person who made use of it. After directing that her debts and funeral and testamentary expenses should be paid by her executrix thereafter named, the testatrix gave all her property, both real and personal, "unto to and for her own use and benefit absolutely, and I nominate, constitute, and appoint my niece, Catherine Hellard, to be executrix of this my last will and testament:"—Held, that there was an effectual gift of the residue to Catherine Hellard. *Harrison, In re, Turner v. Hellard*, supra.

Admissibility of Parol Evidence.—Testatrix, who made her will on a printed form, after giving certain legacies, gave all her estate real and personal "unto to and for her own use and benefit absolutely," and then appointed C. W. C. to pay all her debts, &c., and to be executor of her will. The Chief Clerk certified that the testatrix was illegitimate, and that she left no issue or next of kin. The Crown and the executor claimed the residue, and the executor tendered evidence to prove that the intention of the testatrix was that he should take the residue, if any, for his own benefit:—Held, that, under the peculiar circumstances, parol evidence was admissible to rebut the presumption against the executor arising from the blanks in the will, and that the executor, subject to the payment of costs, was entitled for his own benefit to what should remain. *Bacon's Will, In re, Camp v. Coe*, 31 Ch. D. 460 ; 55 L. J., Ch. 368 ; 54 L. T. 150 ; 34 W. R. 319—Kay, J.

A testator, after giving legacies to Mary Wyatt, Mathew Wyatt, Frederick Wyatt, Louisa Atwell (called Wyatt), Maria Weir, and Emily de Vere, proceeded "I give and bequeath to daughter of , holding some situation about the church , the sum of fifty pounds

annually during the continuance of her natural life, and I direct my trustees or trustee for the time being to pay to the said the said annuity of fifty pounds . . . and the receipt of the said shall be sufficient discharge to my trustees or trustee for the time being ; and from the decease of the said I direct," &c. And the testator directed that, "in case any one of my said legatees, Mary Wyatt, Frederick Wyatt, Mathew Wyatt, Louisa Atwell (called Wyatt), Maria Weir, Emily de Vere, or Marian Elliott," should become bankrupt, &c., her or his legacy should determine, and that the trustees or trustee should pay to her or him, "if in the case of Mary Wyatt, Mathew Wyatt, and Frederick Wyatt, the sum of forty shillings a week," and "if in the case of Maria Weir and Emily de Vere, the sum of thirty shillings a week," and "if in the case of Marian Elliott, the sum of fifteen shillings a week:"—Held, on an originating summons by Marian Furniss (formerly Marian Elliott), supported by an affidavit by her to the effect that she was the daughter of James Elliott, beadle of the parish church at Epsom, and that the testator was acquainted with her, that she was entitled to the annuity of fifty pounds given by the will. *Furniss v. Phear*, 36 W. R. 521—North, J.

Clerical Error in Description—Correction by Reference to Context.—A clerical error may be corrected where, if uncorrected, it makes the will absurd, and the proper correction can be gathered from the context. *Northen's Estate, In re, Salt v. Pym*, 28 Ch. D. 153 ; 54 L. J., Ch. 273 ; 52 L. T. 173 ; 33 W. R. 336—Chitty, J.

A testator devised an estate called Lea Knowl to trustees upon trusts for the benefit of his daughter W., her husband and children, and empowered his trustees, at the request of his daughter W., to sell the estate and stand possessed of the sale moneys upon the trusts thereinbefore declared "concerning the said Lea Knowl estate hereby devised, as to such and so many of them as shall at the time of sale have been existing undetermined and capable of taking effect." He then devised an estate called Croxton to trustees upon similar trusts for the benefit of his daughter C., her husband and children, and empowered his trustees, at the request of his daughter C., to sell the last-mentioned devised hereditaments and stand possessed of the sale moneys "in trust for such person and persons, and for such estates, ends, intents and purposes, powers, provisoes, and conditions as are hereinbefore limited, expressed, and declared of and concerning the said Lea Knowl estate hereby devised, as to such and so many of them as shall at the time of sale have been existing undetermined and capable of taking effect:"—Held, that the words "the said Lea Knowl estate," in the trusts of the moneys to arise from the sale of the Croxton estate had been inserted in the will through an obvious error ; that to read the words "the said Lea Knowl estate," literally and grammatically, would be making the will lead to a manifest absurdity or incongruity, and that the will must be read as if the words "the said Croxton estate" were inserted in the place of the words "the said Lea Knowl estate," in the trusts of the moneys to arise from the sale of the Croxton estate. *Id.*

Supplying Omission by Inference.—The prin-
3 T

ciples on which the court acts in supplying by inference an omission in a will discussed. An omission may be supplied in the case of independent gifts to strangers, as well as in the case of a series of gifts to children of a testator, or to members of a class. *Mellor v. Daintree*, 33 Ch. D. 198; 56 L. J., Ch. 33; 55 L. T. 175—North, J.

A testator devised and bequeathed his real and residuary personal estate to trustees, on trust as to one moiety of the personality and a specific part (being about half in value) of his realty to accumulate the income until B. should attain twenty-five or die, whichever should first happen, in case either of such events should happen within twenty-one years from his own death, but, in case that period should expire before either of such events should happen, upon trust to pay the income to B., if living, from the expiration of such period until he should attain twenty-five or die, whichever should first happen, and, subject as aforesaid, the testator directed that the moiety should be held in trust for B. absolutely in case he should attain twenty-five, and in case he should die under twenty-five, leaving a son or sons him surviving, who, or any one of them, should attain twenty-one, the moiety was, subject as aforesaid, to be held in trust for the only, or, if more than one, the first surviving son of B. who should attain twenty-one. And the testator directed that the second moiety of the personality and the rest of the realty should be held on trust to accumulate the income until D. should attain twenty-five or die, whichever should first happen within the period of twenty-one years from his own death, and in case that period should expire before either of such events should happen, then upon trust to pay the income to D. (if living) from the expiration of such period until he should attain twenty-five or die, whichever should first happen, and, subject as aforesaid, the testator directed that the moiety should be held in trust "for such only surviving son, or, if more than one surviving son, for the eldest of such surviving sons absolutely." But, in case D. should leave no son him surviving, the property was to be held in trust for R. absolutely. B. was a stranger in blood to the testator; D. was the testator's nephew. D. attained twenty-five:—Held, that, having regard to the whole scheme of the will, an absolute gift of the second moiety to D. at twenty-five must be implied. *Id.*

Erroneous Statement—Legatee adducing Evidence to contradict Will.—A testator gave the proceeds of sale of his real and personal estate to trustees, on trust to divide the same among his children living at his death, and the issue of deceased children, in equal shares per stirpes. The will stated that the testator had advanced to four of his sons respectively certain specified amounts, on account of their respective shares, and the testator directed that the "respective sums hereinbefore recited to have been advanced" should be brought into hotchpot by the four sons respectively for the purposes of the division of his estate:—Held, that the sons were bound by the statement in the will of the amounts of the advances made to them, and were not entitled to adduce evidence to show that the advances which had been made to them were in fact of less amount. *Aird's Estate, In re* (12 Ch. D. 291) followed. The decision in that case is not

overruled by *Taylor's Estate, In re* (22 Ch. D. 495). *Wood, In re, Ward v. Wood*, 32 Ch. D. 517; 55 L. J., Ch. 720; 54 L. T. 932; 34 W. R. 788—North, J.

Description of Devised Lands.—A testator devised "the townland of T., including the house, offices, and demesne, &c., of W." In addition to the demesne of W., which, in fact, formed part of T., the testator was entitled to adjoining lands, called M. and C.:—Held, that extrinsic evidence that the testator treated M. and C. as part of the demesne of W. was inadmissible for the purpose of showing that M. and C. passed under the devise. *King v. King*, 13 L. R., Ir. 531—V.-C.

"Acres"—Irish or Statute Acres.—A testator, by a will made in 1872, devised "forty-five acres of the lands of D." to A., and "fifty acres" of the same lands to B.:—Held, that extrinsic evidence was not admissible to show that the testator meant Irish and not statute acres. By the statutory definition contained in the 5 Geo. 4, c. 74, s. 2, the word "acre" has received a legal signification which must be attributed to that word, whether used in a contract, or in a will, or other voluntary instrument. *O'Donnell v. O'Donnell*, 13 L. R., Ir. 226—C. A.

Secret Trust—Evidence to show Existence of.—A testator who died in Jan., 1885, by his will dated in Dec., 1884, bequeathed to his friends A. and B. the sum of 500l. free of legacy duty to be raised and be paid out of his pure personality, "relying, but not by way of trust, upon their applying the said sum in or towards the object or objects privately communicated to them" by him. The executors objected to pay over the bequest, on the ground that there was a secret trust, and that such trust appeared to be an illegal one. The legatee accordingly applied to the court to order payment of the legacy. The executors tendered affidavits to show that the bequest was upon a trust. The legatees objected that the court could not go beyond the terms of the will:—Held, that the evidence was admissible. *Russell v. Jackson* (10 Hare, 204) followed. *Spencer's Will, In re*, 57 L. T. 519—C. A.

Latent Ambiguity—Description of Legatee—Parol Evidence.—A testatrix gave a share of her residue to her "cousin, Harriet Cloak." She had no cousin of that name, but she had a married cousin, Harriet Crane, whose maiden name was Cloak; and she had a cousin, T. Cloak, whose wife's name was Harriet:—Held, that extrinsic evidence was admissible to show the testatrix's knowledge of and intimacy with the members of the Cloak family. *Grant v. Grant* (5 L. R., C. P. 727) distinguished. *Taylor, In re, Cloak v. Hammond*, 34 Ch. D. 255; 56 L. J., Ch. 171; 56 L. T. 649; 35 W. R. 186—C. A.

A testator by his will left to his nephew his (the testator's) interest in the lands of L., subject to the payment of all charges on the said farm and lands, and, as to the said farm, subject to the payment by him (the testator's nephew) to each of his parents during their respective lives, of the sum of 5l. per year. At the time of his decease, and at the date of the will, the testator had several nephews, sons of the tes-

tator's brothers, who had emigrated to America many years before. He had also a nephew T. D., son of his sister M. D. For some years before his death the testator resided with M. D. and her husband, and T. D. had managed the testator's farm at L. The solicitor who drew the will proved that the testator intended T. D. as the object of his bounty:—Held, that T. D. was entitled to the farm, *Phelan v. Slattery*, 19 L. R., Ir. 177—V.-C.

A testator, in 1877, left to his trustees a sum of 10,000*l.* railway stock, in trust for the "children" living at his decease of his deceased niece "Margaret Kerr." Some years before the date of the will the niece mentioned had married a second time, under circumstances which very much displeased the testator, who had in consequence declined to hold any communication with her, and always refused to recognise her by any other surname than that of "Kerr," her first husband's. There were five children of the first marriage, and one of the second, who survived the testator. Within three weeks after the date of the will the testator wrote a letter to one of the five children of the first marriage, from which it appeared that he intended to confine the gift of the 10,000*l.* to them, as he stated therein that he had by his will left them 2,000*l.* each. He also caused a similar letter to be written and sent about four years later. The testator died in 1883:—Held, that the word "children" must bear its *primâ facie* meaning, so as to include the children of both marriages, and that, there being no latent ambiguity as to its signification in this instance, the letters were not admissible to show the testator's intention. *Andrews v. Andrews*, 15 L. R., Ir. 199—C. A.

Rebutting Presumption—Gift to Executor.]—Parol evidence is admissible to rebut the presumption that a legacy given to a person who is appointed executor is annexed to the office. *Appleton, In re, Barber v. Tebbit*, 29 Ch. D. 893; 54 L. J., Ch. 954; 52 L. T. 906; 49 J. P. 708—Per Cotton, L. J.

A testator's will contained the following clause:—"I give and bequeath to my brother E. whatsoever real estate I may die possessed of, whosoever situate, on trust nevertheless to pay thereout the sum of 800*l.* due from me to the trustees under the marriage settlement of S., and the sum of 300*l.* due from me to B., and also on trust to pay to each of my sisters M. and C. and to my brother A., as long as they respectively live, the sum of 50*l.* every year." The will contained a bequest of the personalty to E. and A. and certain of his sisters, and appointed E. executor thereof:—Held, that as E. was an express trustee, parol evidence was not admissible to show that there was an intention to give him a beneficial interest. *Croome v. Croome*, 59 L. T. 582—Stirling, J. And see *Bacon's Will, In re, ante*, col. 2017.

3. DEVISEES AND LEGATEES.

a. TO WHAT PERSONS.

i. Children.

ii. Illegitimate Children.

Child En ventre sa mère.]—G. B. went through the ceremony of marriage with J. A. C., whose

husband had deserted her and gone abroad many years before and was believed to be dead, but G. B. was aware that there was no certain information of his death. Shortly afterwards G. B. made his will, by which he gave "to my dear wife J. A. B., formerly J. A. C.," an interest in certain chattels during her widowhood, and also gave to her the income of his residuary personalty during widowhood, and after her decease or re-marriage he gave the corpus to "all and every my child and children," as therein mentioned, and in default of children to his nephews and nieces. G. B. and J. A. C. cohabited for more than a year and a half after the date of the will, when G. B. died leaving J. A. C. enceinte of her only-child. She enjoyed the income of the residue till her death, upon which event the nephews and nieces claimed the property under the gift over, and proved that J. A. C.'s child was illegitimate, her former husband having been alive at the time of her marriage to the testator:—Held, that the child could not take. *Occleston v. Fullalove* (9 L. R., Ch. 147), leaves untouched the rule that there cannot be a valid gift to a future illegitimate child described solely by reference to its paternity. *Goodwin's Trust, In re* (17 L. R., Eq. 345), observed upon. *Bolton, In re, Brown v. Bolton*, 31 Ch. D. 542; 55 L. J., Ch. 398; 54 L. T. 396; 34 W. R. 325; 50 J. P. 532—C. A.

Whether an illegitimate child en ventre sa mère at the testator's death, but not en ventre sa mère when the will was made, can take as the reputed child of the supposed father, *quære. Ib.*

Children to be in esse at Death of Testator.]—H. by his will gave a trust fund "in trust for my four natural children by M. E. M., viz., J. C., E., and J. H., and all and every other children and child which may be born of the said M. E. M. previous to and of which she may be pregnant at the time of my death, share and share alike." Besides the four children named in the will there were three other children born of M. E. M. after the date of the will and before the death of the testator, all of whom were known by his surname:—Held (1), that upon the construction of the will the word "children" must be taken to include illegitimate children, and was not void for uncertainty; and (2), that being a gift by will to illegitimate children of the testator to be in esse before the death of the testator, it was a good gift within the rule laid down in *Occleston v. Fullalove* (9 L. R., Ch. 147), and that the children who came into esse after the date of the will and before the death of the testator were entitled to share in the gift. *Hastie's Trusts, In re*, 35 Ch. D. 728; 56 L. J., Ch. 792; 57 L. T. 168; 35 W. R. 692—Stirling, J.

Gift to "Children"—Gift over.]—A testator by his will, made in 1847, gave to his eldest daughter, naming her, a freehold estate. The testator in the will twice called her his eldest daughter. He disposed of his furniture and continued, "I particularly direct that, should any of my children die without having any children of their own lawfully begotten, their share, whether land or money, shall be divided equally among my surviving children, and none of the land shall ever be sold." The testator died on the 14th December, 1854; his eldest daughter was illegitimate, and died intestate.

without having had any children. An action was brought for partition of the real estate, and the chief clerk found that the persons entitled to the interest of the eldest daughter in the freehold estate devised to her were the surviving children of the testator. On summons issued by the Attorney-General claiming the estate on behalf of the Crown:—Held, that the rule of law, that where there is a gift to children, an illegitimate child cannot take *pari passu* with legitimate children in the absence of special directions, does not apply to a gift over; and that on the death of the eldest daughter, the estate went to the other children of the testator. *Smith v. Jobson*, 59 L. T. 397—Kay, J.

— **Sufficiency of Description.**—A testator by his will, dated in 1868, directed his trustees to pay the income of a certain share in a trust fund “to my sister Charlotte, the wife of Thomas H.,” during her life, and after her death to pay and divide the share unto, between and amongst “all her children” who should be living at her death, and the “representatives” of such of them as should have died in her lifetime who should have attained twenty-one, equally share and share alike. Charlotte never was the wife of Thomas H., he having previously to 1845 married another woman who at the date of the will and down to his death in 1875 was his lawful wife. In 1845 Charlotte left her home, and thenceforth cohabited with Thomas H. until he died. At the date of the will she had had four illegitimate children by him, the two survivors of whom were then living, aged respectively twenty and eighteen; and she had not had a child for seventeen years, and was presumably past child-bearing. Charlotte died in 1885. These were the only children she ever had, and only one of them survived her. The testator was well aware of the connexion of his sister with Thomas H., visited at the house where they resided, and recognized the children of his sister by Thomas H. as his own nephews and nieces:—Held, that the testator in describing his sister Charlotte as the “wife” of Thomas H., when he knew she was not so, and in using correlatively with that the expression “children” to describe the offspring of a woman whom he knew not to be lawfully married, had shown that he did not use the term “children” in its strict legal sense; and that, applying the principles laid down in *Hill v. Crook* (6 L. R., H. L. 265), the illegitimate children of Charlotte were intended, and were entitled to take under the gift in the testator’s will. *Hill v. Crook* (6 L. R., H. L. 265), and *Dorin v. Dorin* (7 L. R., H. L. 568), explained. *Ayles’ Trusts*, *In re* (1 Ch. D. 282), *Ellis v. Houstoun* (10 Ch. D. 236), and *Megson v. Hindle* (15 Ch. D. 198), considered. *Horner, In re, Eagleton v. Horner*, 37 Ch. D. 695; 57 L. J., Ch. 211; 58 L. T. 103; 36 W. R. 348—Stirling, J.

A testator described R. W. and another person (who was a legitimate nephew of the testator) as “my two nephews.” He gave his residuary estate upon trust for the “children” of his brothers E. H. and T. H., and of his sister J. W. and of his late sister S. B., in equal shares, with a gift over if any one or more of his “nephews and nieces” should die before him leaving children. R. W. was an illegitimate child of J. W., who had four legitimate children, three sons and one daughter:—Held, that the circumstance

that R. W. was described by the testator as “nephew” was not sufficient to entitle him to share under the gift to the children of J. W. *Hall, In re, Branston v. Weightman*, 35 Ch. D. 551; 56 L. J., Ch. 780; 57 L. T. 42; 35 W. R. 797—Kay, J.

A testatrix bequeathed to A., “the eldest daughter of my deceased daughter, S., my gold watch.” And she bequeathed other property to trustees “in trust for such of the children of my said deceased daughter, S., who shall attain twenty-one, absolutely, equally share and share alike, the shares of such of them as shall be daughters to be for their sole and separate use.” S. had two legitimate children, a son and a daughter, and she had also an illegitimate daughter, who was the person spoken of in the will as “A., the eldest daughter of S.”:—Held, that there was a sufficient indication of an intention that A. should be included in the description of “the children of S.” *Humphries, In re, Smith v. Millidge*, 24 Ch. D. 691; 49 L. T. 594—North, J.

Testator by his will bequeathed to M. B. B., “daughter of my nephew, J. B.” 200*l.*; and to T. B., “son of the said J. B.” 100*l.* He directed his trustees to stand possessed of his residue upon trust for “all and every the children and child” of B. C. and J. B. respectively. By a codicil testator revoked the bequest of 200*l.* “to my great-niece” M. B. B., and the bequest of 100*l.* “to my great-nephew,” T. B., and instead thereof bequeathed to M. B. B. 100*l.*; to T. B. 100*l.*; and to A. B., “another daughter of my nephew J. B.” 100*l.* M. B. B. was illegitimate; T. B. and A. B. were legitimate:—Held, that M. B. B. was sufficiently indicated as one of the persons who was to participate in the residue. *Megson v. Hindle* (15 Ch. D. 198) distinguished. *Bryon, In re, Drummond v. Leigh*, 30 Ch. D. 110; 55 L. J., Ch. 30—V. C. B.

— **Illegitimate Children only in Existence.**—The testator, in 1860, was seized with paralysis at the house of his sister-in-law, M. A. L., and her husband, and remained there till his death. M. A. L. had been married seven years, and had by her husband three children, aged sixteen, thirteen, and eleven, born before her marriage with him, but treated as legitimate. The testator was intimate with them. Being worse, he was advised by his medical attendant to make his will, and made one dated the 7th of October, 1860, containing the following dispositions:—“I give and bequeath the following legacies to the following persons (that is to say),” after which followed gifts of legacies to persons named, “and to each of the children of M. A. L. the sum of 5*l.* for mourning, the same to be paid into the hands and on the receipt of the said M. A. L., their mother, for them, notwithstanding their coverture and their minority.” On the 5th of August, 1861, he made a codicil, by which he bequeathed 400*l.*, on the death of an annuitant, “unto and equally between all the children who shall be then living of M. A. L., share and share alike,” and confirmed his will except as varied by the codicil. He died two days afterwards. M. A. L., who was aged forty-four when the will was made, never had any legitimate child. On the death of the annuitant in 1884 the three children claimed the 400*l.*, and the executors, one of whom was the residuary legatee, took out an originating

summons to have the point decided. It was held that the children were not entitled, but gave the costs of all parties out of the 400*l*. The children appealed:—Held, by Cotton, L.J., that the appellants were not entitled, for that no repugnancy or inconsistency in the will would result from giving to the word "children" its proper sense of legitimate children; that the three children, therefore, were not entitled to the 5*l*. legacies, and whether, if they had been so entitled, the word "children" in the distinct gift in the codicil ought to be construed in the same way as in the will, *quære*. But held, by Bowen and Fry, L.J.J., that there was enough in the will, as explained by the surrounding circumstances, to show that the testator used the word "children" in a sense which would apply (whether exclusively or not) to the existing children, and that the word must have a similar interpretation in the codicil, and that the appellants, therefore, were entitled to the 400*l*.:—Held, that the costs of the proceedings must be borne by the residuary estate. *Haseldine, In re, Grange v. Sturdy*, 31 Ch. D. 511; 54 L. T. 322; 34 W. R. 327; 50 J. P. 390—C. A.

β. In Ordinary Cases.

Whether including Grandchildren.—It is a rule that in a will the word "children" must be construed in its literal sense, unless from the will itself and the context it appears that the word is intended to have a wider meaning; and for this purpose it is not right to take into consideration outside circumstances. A testator left residue to trustees upon trust to divide it into four parts, and pay one part "to the children of his late brother W. equally;" the other part "to the children of his late brother J. equally;" the other part "to the daughters of his late brother A. equally;" and the remaining part to a certain nephew. J. had had three children and no more, all of whom were dead at the date of the will. The testator knew this. J. left, however, both grandchildren, and great-grandchildren who survived the testator:—Held, on the above principle, that there was an intestacy as to the share given to J.'s "children," there being nothing in the context or within the four corners of the will to justify the meaning being extended; it being clear, on the contrary, that the word "children" was used in its literal sense in the gift to W.'s children. *Kirk, In re, Nicholson v. Kirk*, 52 L. T. 346—Pearson, J.

A testator gave his residuary real and personal estate to trustees in trust for sale, and to divide the proceeds into six shares, and to pay one of such shares to the "children" of his deceased sister; and he gave the other five-sixths in similar terms to the "children" of five deceased persons. At the date of the will there were no children of the sister living, but there were two grandchildren, and these facts were well known to the testator. Both the grandchildren survived the testator:—Held, that the two grandchildren took the one-sixth given to the "children" of the deceased sister. *Redcliffe v. Buckley* (10 Ves. 195) distinguished. *Smith, In re, Lord v. Hayward*, 35 Ch. D. 558; 56 L. J., Ch. 771; 56 L. T. 878; 35 W. R. 663—Kay, J.

Issue by Two Marriages.—A testator, in 1877, left to his trustees a sum of 10,000*l*. rail-

way stock, in trust for the "children" living at his decease of his deceased niece "Margaret Kerr." Some years before the date of the will the niece mentioned had married a second time, under circumstances which very much displeased the testator, who had in consequence declined to hold any communication with her, and always refused to recognise her by any other surname than that of "Kerr," her first husband's. There were five children of the first marriage, and one of the second, who survived the testator. Within three weeks after the date of the will the testator wrote a letter to one of the five children of the first marriage, from which it appeared that he intended to confine the gift of the 10,000*l*. to them, as he stated therein that he had by his will left them 2,000*l*. each. He also caused a similar letter to be written and sent about four years later. The testator died in 1883:—Held, that the word "children" must bear its *prima facie* meaning, so as to include the children of both marriages, and that there was no latent ambiguity as to its signification. *Andrews v. Andrews*, 15 L. R., Ir. 199—C. A.

C. for Life, and then amongst such Children as he should Appoint—Default of Appointment.]

—Leaseholds were assigned to trustees upon trust, after the decease of the survivor of A., and B., his wife, to assign the same unto and amongst such of the children of the said A., and B. his wife, then living, in such manner, shares, times, and proportions as the said A., and B. his wife, jointly, or the survivor of them separately, should by any writing appoint, and in case there should be no such child or children, then upon trust for C. for life, and after his decease upon trust to assign the same unto and amongst such of his children, and in such manner, shares, times, and proportions, as he should by any writing appoint. A. and B. died without issue, B. in 1876, A. in March, 1880. C. died in 1863, having had ten children, of whom some predeceased him, and some died between his death and the death of A., and the rest survived A.:—Held, that all the children of C. took, as tenants in common, in equal shares. *Wilson v. Duguid*, 24 Ch. D. 244; 53 L. J., Ch. 52; 49 L. T. 124; 31 W. R. 945—Chitty, J.

A power given by will to a tenant for life to appoint to his children, with an express limitation over "in default of such appointment," cannot be construed as conferring upon the children any estate or interest in default of the exercise of the power of appointment, at least in the absence of provisions extending the operation of the power. *Jefferys' Trusts, In re* (14 L. R., Eq. 136), dissented from as to this point, by Lord Esher, M.R. *Bradley v. Cartwright* (2 L. R., C. P. 511) explained and distinguished, by Cotton, L.J. *Richardson v. Harrison*, 16 Q. B. D. 85; 55 L. J., Q. B. 58; 54 L. T. 456—C. A.

Gift per Stirpes or per Capita.—A testator gave some houses to trustees upon trust to receive the rents and to pay the same in equal moieties to his son and daughter during their lives, and after the death of either of them without issue living, upon trust to pay the whole thereof to the survivor during the life of such survivor; but if there should be issue living of the first of them so dying, then upon trust to pay one moiety to the survivor and to divide the remaining moiety between the children of the one so first

dying; and after the decease of the survivor of the testator's children, on trust to sell the property and to divide the proceeds equally amongst all and every the child or children of each of them the testator's son and daughter who should attain twenty-one in equal shares and proportions:—Held, that the proceeds of sale were divisible among the grandchildren per stirpes and not per capita. *Campbell's Trusts, In re*, 33 Ch. D. 98; 55 L. J., Ch. 911; 55 L. T. 463; 34 W. R. 629—C. A.

“According to the Stocks.”]—A testator gave the income of a trust fund to his wife for her life, and subject thereto the fund was to be held in trust for such of his cousins (the children of four deceased aunts and two deceased uncles of the testator named in the will) living at the determination of the wife's life interest, and such issue then living (if any) of his said cousins then dead as, either before or after the determination of such life interest, should attain twenty-one, or should die under twenty-one leaving issue living at his, her, or their death, to take (if more than one) in a course of distribution according to the stocks, and not according to the number of individuals. At the time of the death of the tenant for life, there were living one cousin of the testator (a child of one of the uncles named in the will) and children and other issue of fifteen deceased cousins (children of the other uncle and of the four aunts named in the will):—Held, that the words, “according to the stocks,” applied to the descendants of cousins, and not to the cousins themselves, and that the fund was divisible into sixteen shares. *Robinson v. Shepherd* (4 D., J. & S. 129) preferred to *Gibson v. Fisher* (5 L. R., Eq. 1). *Wilson, In re, Parker v. Winder*, 24 Ch. D. 664; 53 L. J., Ch. 130—North, J.

ii. Survivors.

Indefinite Gift of Income.]—A will contained this clause: “With regard to the residue of my estate my executors shall pay the interest in equal parts half-yearly to my sons F., E. and A., the share of a predecessor to be equally divided to the survivors or survivor.” A. alone survived the testator:—Held, that A. was entitled to the capital of the residue. *Tandy, In re, Tandy v. Tandy*, 34 W. R. 748—C. A.

Bequest to Legatees for Life, and on Death of any without Child, Legacy to be divided amongst Survivors.]—A testator gave legacies to four named persons for their respective lives, and continued, “the interest on all these legacies is to be paid regularly to the respective parties as it becomes due; and in the event of either of the parties dying, and without child or children, then the legacy of the deceased is to be at once divided amongst the survivors.” The will contained a residuary gift. The last survivor of the four named persons having died without children:—Held, that his legacy fell into the residue. *Nevill v. Boddam* (28 Beav. 554), and *Cobbett's Trusts, In re* (Johns. 391), followed. *Maden v. Taylor* (45 L. J., Ch. 569) and *Davidson v. Kimpton* (18 Ch. D. 213) considered. *Mortimer, In re, Griffiths v. Mortimer*, 54 L. J., Ch. 414; 52 L. T. 383; 33 W. R. 441—Kay, J.

A testator devised to each of his children an

estate for the life of that child, with remainder to the children of that child, and in case any or either of the testator's children should die without leaving any child or children, him, her, or them surviving, then the testator devised the estates to which their child or children respectively would have been entitled under his will, if living, to his, the testator's, surviving children for their respective natural lives, and after their deceases respectively he gave their respective shares to their respective children, their heirs, executors, administrators, and assigns. There was no gift over on the death of all the testator's children without leaving children. C., one of the testator's children, died without leaving issue. Some of the other children were then living; others had died leaving children of theirs then living:—Held, that the word “surviving” was to be read in its proper sense, and that the children of those children of the testator who had predeceased C. took no interest in the estate of which C. was tenant for life. *Benn, In re, Benn v. Benn*, 29 Ch. D. 839; 53 L. T. 240; 34 W. R. 6—C. A.

The fact that the original shares are all settled by the will, and that the shares which the “survivors” take in the share of a child who dies without issue are settled in the same way as their original shares, is not by itself sufficient to show that “survivors” is used otherwise than in its proper sense. *Id.*

— **Cross-remainders—Estates tail.**]—A testatrix devised her real estate, after the death of her daughter, as to one fourth part thereof, to the use of Thomas (a son of the daughter) for his life; with remainder to the use of his children as tenants in common in tail; with cross-remainders in tail. The testatrix devised the other three-fourths of her real estate upon similar limitations in favour of the three other children of the daughters and their issue. By a codicil she directed that, in case any of her grandchildren named in her will should die without leaving any child or children, then the share or shares of them, him, or her so dying in the hereditaments devised by her will should go to and devolve on the “survivor or survivors” of her grandchildren, and the heirs of his, her, or their respective bodies. One grandchild died a spinster. Then two of the grandchildren died leaving children. Thomas was the last survivor, and he died without having had a child:—Held, that Thomas could not take his own share as “survivor,” that cross-remainders were to be implied between the four grandchildren, or else the words “survivor or survivors” were to be construed “other or others,” and that consequently Thomas's shares devolved, on his death without having had a child, upon the two grandchildren (who left children) equally as tenants in common in tail. *Askew v. Askew*, 57 L. J., Ch. 629; 58 L. T. 472; 36 W. R. 620—North, J.

To what Event Referable.]—A testator by his will gave all his real and personal estate remaining after payment of debts, &c., to J. S. for life, and at her decease he gave the same to M. A. and W. A. “if they are both living at the time of her decease, and in case of the death of either of them before J. S.,” he gave “the whole to the survivor of them for their own use and benefit absolutely.” The testator died seised of

real estate; after the testator's death W. A. died, then M. A., and J. S. last of all:—Held, that upon the true construction of the will the word "survivor" in the ultimate gift meant the survivor of M. A. and W. A. living at the death of J. S. the tenant for life; that since M. A., though she survived W. A., had pre-deceased J. S., she had not come within the terms of the ultimate gift, and that upon the death of J. S., there was an intestacy as to the property given by the will, and the real property consequently passed to his heir-at-law. *Hill to Chapman, In re*, 54 L. J., Ch. 595; 52 L. T. 290; 33 W. R. 570—C. A.

A testator devised copyholds; subject to life interests, to his cousins A. and B., their heirs and assigns, as tenants in common; but if either should die in the lifetime of the tenants for life, and without having lawful issue then living, he devised her share to the survivor of them, her heirs and assigns. A. died, leaving issue; then B. died without issue; afterwards the tenant for life died:—Held, that B.'s share went to A.'s representative, though A. did not survive B. *Johnson, In re, Hickman v. Williamson*, 53 L. J., Ch. 1116—V.-C. B.

After two successive life estates, a testator devised freehold houses (which were sub-demised) to "J. S., and W. S., or the survivor of them. The N. Street front to go to J. S., the H. Street front to W. S., and an equal portion of the back-ground to go to each tenement after the lapse of the present lease, whatever time the holding becomes the property of J. S., and W. S.; provided the lease now in existence has not terminated; the rent to be divided equally between them, after paying the chief rent, until the fall of said lease:—Held, that the survivorship was to be referred to the determination of the tenancies for life, and therefore, J. S., who had then survived W. S., was entitled to the houses. *Belfast Town Council, In re, Sayers, Ex parte*, 13 L. R., Ir. 169—M. R.

Younger Children—After-born Child.—A testator by his will directed that his four children should be made wards of court, and, having made provisions for maintenance, and bequeathed pecuniary legacies to his younger children, appointed his eldest son, W., residuary legatee and devisee, and directed as follows:—"In case of any of the younger children dying before they attain the age of twenty-one years or leaving legitimate issue, I direct their portion or portions to be divided among the survivors, share and share alike; and failing all my own children, I devise the whole of my property to the children of my sister," &c. The testator left four children, all minors, him surviving; namely, W., his eldest son, and J., R. and H. At the time of the death of the testator, his widow was enceinte of a child, C., who was born after the testator's death. R., one of the children, having died under twenty-one and unmarried:—Held, that W., the eldest son, and C. the posthumous child, were not entitled, upon the construction of the will, to any share of the legacy bequeathed to R. *Wallis v. Wallis*, 13 L. R., Ir. 258—V.-C.

iii. Executors.

Gift to A., and on his death to his Executors.]
—A gift in a will to A., and in case of his death

to his executors or administrators, passes to the legatee's personal representative as part of his personal estate. *Palin v. Hills* (1 Myl. & K. 470) overruled. *Clay, In re, Clay v. Clay*, 54 L. J., Ch. 648; 52 L. T. 641—C. A. Affirming 32 W. R. 516—Chitty, J.

—Residuary Gift by one of Legatees to Testator.—A testator made a general bequest to two persons, and in case of their decease to their executors and administrators. Both the legatees died in the testator's lifetime, one of them having bequeathed to the testator the residue of her property, which included the share of the testator's property which passed to her representative:—Held, that this share was not to be treated as forming part of the testator's estate, and so distributed again under his will, but went to his next-of-kin as undisposed of. *Valdez' Trusts, In re*, 40 Ch. D. 159; 60 L. T. 42; 37 W. R. 162—Kay, J.

Gift annexed to Office—Rebuttal of Presumption.—The mere fact that the gift of the legacy precedes the appointment of the legatee as executor—or that the legacies to several persons appointed executors differ either in their amount or subject-matter—is not enough by itself to rebut the presumption, that a legacy given to a person who is appointed executor is annexed to the office. *Jervis v. Lawrence* (8 L. R., Eq. 345) questioned. *Wildes v. Davies* (1 Sm. & Giff. 475) explained. *Appleton, In re, Barber v. Tebbitt*, 29 Ch. D. 893; 54 L. J., Ch. 954; 52 L. T. 906; 49 J. P. 708—C. A.

A testator bequeathed the lands of K. (building ground) to his son F. J. N., whom he appointed executor. He directed the land to be built on according to certain plans, with power to F. J. N. to alter them, and power to make building leases. He appropriated the rents of the lettings for building and of other property for carrying out his general trust, which he did not clearly define, and gave his executors duties to perform of a continuing character, to keep the furniture and the house in which he had resided for his daughters and sisters-in-law, and supply the latter with clothes and pocket-money; and to continue to carry on a certain business in which he had himself been engaged, &c.:—Held, that the lands of K. were bequeathed to F. J. N. as executor, and not beneficially. *Nugent v. Nugent*, 15 L. R., Ir. 321—M. R. See also *Bacon's Will, In re*, ante, col. 2017, and *Croome v. Croome*, ante, col. 2021.

iv. Next of Kin.

"Next Male Kin."—C. devised the rents of certain real estate to his wife for life, and after her death in certain proportions to H. and G. during their lives, and in the event of either dying, the deceased's share to revert to the next male kin:—Held, that next male kin must be taken to mean those of the testator's next of kin at his death who were males. *Chapman, In re, Ellick v. Cow*, 49 L. T. 673; 32 W. R. 424—North, J.

Next of Kin of Wife—Time for ascertaining.]

—A testator by his will directed that the shares of his daughters in his residuary estate should be settled, the ultimate limitation, in case a daughter should not leave any child or children

who should be living at the decease of the survivor of herself and her husband, being in trust for the person or persons who, under the Statutes of Distribution, "would on her decease have been entitled thereto in case she having survived her husband and had then died possessed thereof and intestate." A daughter having died without issue, leaving her husband surviving:—Held, that her next of kin to take under the ultimate limitation were to be ascertained at the time of her own death, and not at the time of the death of her husband. *Chalmers v. North* (28 Beav. 175) disapproved. *Druitt v. Seward*, 31 Ch. D. 234; 55 L. J., Ch. 239; 53 L. T. 954; 34 W. R. 180—Pearson, J.

v. Representatives.

Gift to Legatees or their respective "Legal Personal Representatives."—A testatrix, who died in 1885, by her will dated in 1884, after bequeathing certain specific legacies, gave all her real and residuary personal estate to her trustees upon trust to convert and to stand possessed of the proceeds to pay the legacies following, which she thereby bequeathed to the persons thereafter mentioned "or to their respective legal personal representatives." Then followed numerous legacies. The testatrix disposed of the residue of her property by giving it to each of several persons named "or the legal personal representatives" of such of them respectively as might then be dead or should die in her lifetime. In the commencement of the will the testatrix had made a specific bequest of certain portraits to a legatee there named, "or to his executors or administrators." One of the pecuniary legatees having died in the lifetime of the testatrix, the question was who was entitled to his legacy under the words "legal personal representatives":—Held, that the *primâ facie* meaning of "legal personal representatives" was executors or administrators; but that there was reason here for departing from the *primâ facie* meaning of the words, because the testatrix had, in one instance, used the words executors or administrators in a similar alternate gift, and it was legitimate to infer a change of meaning where different words were used:—Held, therefore, that the legacy belonged to the next of kin of the deceased legatee; and that such next of kin were to be those who would have been next of kin, according to the Statutes of Distribution, if the legatee had died at the time of the death of the testatrix. *Thompson, In re, Machell v. Newman*, 55 L. T. 85—Kay, J.

Gift to "Personal Representatives" of Children "per stirpes."—A testatrix, who died in 1827, by her will, dated in 1815, devised to her trustees therein named certain freehold hereditaments upon trust to apply the rents and profits thereof, in the first place, towards the discharge of certain debts and her funeral and testamentary expenses, and then to pay, apply, appropriate, and divide all and every such rents and profits unto and for the equal benefit and advantage of all her children and their respective families from time to time so long as any of her children should live; and from and after the death of the youngest liver of her children, upon further trusts, and she did thereby order and direct the heirs of her surviving trustee to sell and absolutely

dispose of all her said real estate, and the moneys arising from such sale or sales to pay and divide unto and equally amongst all and every the "personal representatives" of her several children per stirpes:—Held, that the words "personal representatives" here meant the descendants of the testatrix's children; and that the issue living at the testatrix's death, and born before the death of the last surviving child of the testatrix, were entitled to share per stirpes. *Knowles, In re, Rainford v. Knowles*, 59 L. T. 359—Kay, J.

"Representatives" of Children.—A testator by his will, dated in 1868, directed his trustees to pay the income of a certain share in a trust fund "to my sister Charlotte, the wife of Thomas H." during her life, and after her death to pay and divide the share unto, between and amongst "all her children" who should be living at her death, and the "representatives" of such of them as should have died in her lifetime who should have attained twenty-one, equally share and share alike:—Held, that the word "representatives" in the gift must be construed either as "next of kin" or as "descendants," and not as "executors or administrators." *Horner, In re, Eagleton v. Horner*, 37 Ch. D. 695; 57 L. J., Ch. 211; 58 L. T. 103; 36 W. R. 348—Stirling, J.

vi. Wife.

Divorce.—A testator left shares in his residuary estate in trust for his sons for life, and from and after the decease of each son, in trust to permit any wife of such son to receive the income of his share during her life. One of the sons married, was divorced from his wife and died:—Held, that the divorced wife was not entitled to the life interest in his share. *Bullmore v. Wynter* (22 Ch. D. 619) disapproved. *Hitchins v. Morrisson*, 40 Ch. D. 30; 58 L. J., Ch. 80; 59 L. T. 847; 37 W. R. 91—Kay, J.

"My Wife"—Former Wife alive.—A testator bequeathed the residue of his property to "my wife." He had separated from his wife by mutual consent, and in her lifetime went through the ceremony of marriage with another woman whom he always treated as his wife:—Held, that the second "wife" took under the words "my wife." *Howe, In goods of*, 33 W. R. 48; 48 J. P. 743—Butt, J.

"So long as she shall continue my Widow and Unmarried"—Nullity.—A testator, after giving a legacy of 200*l.* to his wife, directed his trustees "in addition thereto to pay to my said wife, so long as she shall continue my widow and unmarried, an annuity of 300*l.*, or otherwise in lieu and in substitution of the said annuity, at the option of my said wife, if she shall prefer it, a legacy of 2,000*l.*" After the date of the will the marriage was declared null by the Divorce Court in a suit brought by the wife against the testator. After this the testator died leaving the lady surviving. Fry, J., held that she was entitled to the legacy of 200*l.*, but she was not entitled either to the annuity or the 2,000*l.* She appealed from this decision so far as it was unfavourable to her:—Held, that although if the lady had been the testator's wife at his decease the words "shall continue my widow and unmarried," might have been in substance the same as "shall continue

unmarried," the reference to widowhood could not on that ground be treated as surplusage, but was the principal part of the condition, and that, as the lady did not at the testator's death fill the position of the testator's widow, she could not take the annuity. Held, further, that she could not take the 2,000*l.*, for that an option to take a legacy instead of an annuity could not exist if there was no right to take the annuity; and, moreover, that a gift by way of substitution for another is subject to the same conditions as the original gift. *Rishton v. Cobb* (5 My. & Cr. 145) doubted. *Boddington, In re, Boddington v. Clairat*, 25 Ch. D. 685; 53 L. J., Ch. 475; 50 L. T. 761; 32 W. R. 448—C. A.

vii. Cousins.

Who answer Description.—A testatrix gave a share of her residue to her "cousin, Harriet Cloak." She had no cousin of that name, but she had a cousin, T. Cloak, whose wife's name was Harriet.—Held (Bowen, L. J., dissenting), that "cousin" might be understood in a popular sense as the wife of a cousin; and that Harriet, the wife of T. Cloak, was entitled to the share of the residue. *Taylor, In re, Cloak v. Hammond*, 34 Ch. D. 255; 56 L. J., Ch. 171; 56 L. T. 648; 35 W. R. 186—C. A.

A testator gave the residue of the proceeds of the sale of his real and personal estate equally between all such of his first and second cousins, including his "reputed cousin" A. B., and his children, or reputed children, and the children of his "reputed cousin" S. G. as should be living at the time of the determination of two life interests given by the will, and directed that if the said A. B. should be then dead, the share to which he would have been entitled if then living should be divided amongst his then surviving children. By a codicil he gave a legacy "to each of my cousins" J. B. and G. C., in addition to any sum to which they might be entitled under his will. The testator had no second cousins either at the date of his will or his death. He had at his death first cousins, first cousins once removed, and first cousins twice removed. A. B. and S. G. would, if legitimate, have been his first cousins. J. B. and G. C. were his first cousins once removed.—Held, that the persons to take were the testator's first cousins, and first cousins once removed. *Wilks v. Bannister*, 30 Ch. D. 512; 54 L. J., Ch. 1139; 53 L. T. 247; 33 W. R. 922—Kay, J.

viii. Heirs.

Gift of Real and Personal Estate together.]

—A testator gave, devised and bequeathed to his wife all his property, real or personal, on trust for herself for her life, and after her death the whole of his property was to be equally divided among all his children, "or such of them as may be then surviving, or their heirs." The testator had five children, all of whom survived him. Of these children two daughters died before the wife, leaving children.—Held, that the word "heirs" had a twofold meaning, viz.: heir-at-law as regarded the real estate, and next of kin as regarded the personalty. Held, also, that the property was divisible in fifths—each surviving child of the testator taking one-fifth,

and the heir-at-law and next of kin of each deceased daughter taking between them (according to the nature of the estate) one-fifth share. *Wingfield v. Wingfield* (9 Ch. D. 658) followed. *Smith v. Butcher* (10 Ch. D. 113) distinguished. *Keay v. Boulton*, 25 Ch. D. 212; 54 L. J., Ch. 48; 49 L. T. 631; 32 W. R. 591—Pearson, J.

Personalty — Life Estate.—Testator bequeathed his residuary estate to his wife for life, his will continuing as follows: "And after the death of my said wife, I give unto my sister M. H., the wife of J. H., the sum of 1,000*l.* sterling, the same to become the property, at her death, of her heirs." J. H. survived M. H. (who died without issue), and by his will bequeathed the 1,000*l.* given to M. H. to X. and Z. on the subsequent death of the testator's widow.—Held, that the 1,000*l.* bequeathed to M. H. belonged to J. F., who was her heiress and next of kin, and not to X. and Z. *Russell, In re*, 52 L. T. 559—C. A. Reversing 53 L. J., Ch. 400—Kay, J.

ix. In Other Cases.

"Other Sons"—"To be Begotten"—Eldest Son excluded.—Testator devised his mansion-house successively to his second and third sons, F. L. and J. L., for life, with remainder to their sons in tail male, and then to the use of his fourth, fifth, and all and every other the son and sons of his body on the body of his wife to be begotten, born, or en ventre sa mère at the time of his decease, severally, successively, and in remainder one after another in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons and the heirs male of his body to be always preferred, and to take before the younger of such son and sons and the heirs male of his and their body and bodies issuing, and for default of such issue to the use of the testator's daughters, begotten or to be begotten, as tenants in common in tail. The will also provided for portions for the testator's children other than his three eldest sons, "who are otherwise provided for." The will contained no provision for the eldest son, but he was entitled to other family estates in remainder upon the death of the testator. The testator died leaving three sons and five daughters, all of whom were in esse at the date of the will. The limitations to the second and third sons and their issue having failed, the eldest son claimed an estate tail under the devise to the fourth, fifth, and other sons.—Held, that he was not entitled. *Locke v. Dunlop*, 39 Ch. D. 387; 57 L. J., Ch. 1010; 59 L. T. 683—C. A. Affirming 36 W. R. 41—Stirling, J.

"Relations hereafter named"—Names omitted.—A testator by his will, dated in 1861, devised and bequeathed all his property to his wife for life, and after her death he directed it to be divided amongst his "relations hereafter named." No relations were named in the will, and the testator's heir-at-law claimed on the ground that there was an intestacy.—Held, that the word "named" must be taken in its plain sense, indicating an intention to specify certain relations; and that as the testator had not done

so there was an intestacy, and the heir-at-law was entitled to the real estate. *Crampton v. Wise*, 58 L. T. 718—Chitty, J.

"Unmarried."—Although the word "unmarried" is one of flexible meaning, and may mean either "never having been married," or "not having a husband" at the time when a gift is to take effect, the former is the primary or natural meaning, and, in the absence of any context showing a different intention, the word will be so construed. *Sergeant, In re, Mertens v. Walley*, 26 Ch. D. 575; 54 L. J., Ch. 159; 32 W. R. 987—Pearson, J.

"Sole and Unmarried"—Divorce.—A testatrix, by her will made in 1860, bequeathed a fund to trustees, on trust to pay the income to her husband for his life, and on his death to divide the fund into four equal parts, and, as to one of the parts, "upon trust to pay the same to J. H., spinster, if she be then sole and unmarried, but, if she be then married," the testatrix directed her trustees to pay the income of the fourth part to J. H. for her life, for her separate use, and after her death to hold it on trust for her children. In June, 1878, the testatrix died, and her husband died in April, 1883. In April, 1861, J. H. married, and in November, 1878, a decree absolute was made for the dissolution of her marriage. There were three children of the marriage. J. H. did not marry again:—Held, that the words "then sole and unmarried" meant "not having a husband" at the time of the death of the tenant for life, and that in the events which had happened, J. H. was absolutely entitled to the one-fourth share. *Lesingham's Trusts, In re*, 24 Ch. D. 703; 53 L. J., Ch. 333; 49 L. T. 235; 32 W. R. 116—North, J.

"Died Intestate without having ever been Married."—A testator, by his will dated in 1883, after disposing of a sum of 20,000*l.* in favour of his son and others, made an ultimate gift of that sum to the persons who would be the next of kin of his (the testator's) late mother if she had "died intestate without having ever been married." The trustees of the will paid the 20,000*l.* into court under the Trustee Relief Acts. In the events which happened the whole of the fund was claimed by the first cousin once removed of the testator's mother. She had died, leaving one lineal descendant only, who opposed the claims of her first cousins once removed:—Held, that the words "died intestate without ever having been married" were clear and unambiguous; and that effect must be given to them by directing that the lineal descendant of the testator's late mother was, by the terms of the bequest, excluded in favour of her collateral next of kin. *Watson's Trusts, In re*, 55 L. T. 316—Chitty, J.

Testator's "Family."—A testator by his will appointed two trustees, and directed that all moneys due to him should be collected and placed to his trustees' account at a certain bank, in trust for his "family":—Held, that there was nothing in the context of the will to deprive the word "family" of its primary meaning, i.e., children of the testator; and that, therefore, such children alone were entitled to share in the money in the bank. *Muffett, In re, Jones v. Mason*, 55 L. T. 671—Chitty, J.

"Household Servants" confined to Domestic Servants.—A testator gave to each of his "household servants" who should have been in his service for one year previously to his death six months' wages, free of legacy duty in addition to the ordinary wages that might be due to him or her respectively. The servants who had been in the testator's service the requisite time, in addition to the maid servants resident in the house, were a coachman who lived in a cottage adjoining the pleasure grounds, a groom who occupied a room over stables in the park and close to the house, and another groom who also occupied a room over the stables:—Held, that household servants had the same meaning as domestic servants, and that the coachman and grooms were not entitled to the gift. *Ogle v. Morgan* (1 D. M. & G. 359) followed. *Dray, In re, Savile v. Yeatman*, 57 L. T. 475—Kay, J.

"To Servants in my Service and to my Gardener."—A testator, who died in 1883, by his will, dated in 1876, gave legacies to his servants, in the following terms: "To each of my servants, who shall at my death have been in my service twelve calendar months, or longer, one year's wages, in addition to anything owing by me, and to my gardener, Peter Grieve, 300*l.* in addition." In 1880 Peter Grieve, who had been in the testator's service for over thirty years, relinquished his situation, and when he did so the testator sent him 100*l.* The question was whether Peter Grieve was entitled to the legacy of 300*l.*:—Held, that the words "and to my gardener," &c., were governed by the condition that the servant should have been in the testator's service during twelve months preceding the testator's death, and as Peter Grieve had not fulfilled that condition he was not entitled to the legacy. *Benyon, In re, Benyon v. Grieve*, 53 L. J., Ch. 1165; 61 L. T. 116; 32 W. R. 871—Kay, J.

"Office and Warehouse Employés."—Testator, by his will, bequeathed as follows: "My office and warehouse employés, such as clerks and workmen, shall have to receive six months' full salary":—Held, that the persons to take were the employés in the service of the testator at the time of his death. *Marcus, In re, Marcus v. Marcus*, 56 L. J., Ch. 830; 57 L. T. 399—North, J.

Gift to a Peer.—A testator bequeathed a silver cup to Lord S. and his heirs for an heirloom. The person who was Lord S. at the date of the will died before the testator leaving a successor to the title:—Held, that the bequest lapsed. *Whorwood, In re, Ogle v. Sherborne (Lord)*, 34 Ch. D. 446; 56 L. J., Ch. 340; 56 L. T. 71; 35 W. R. 342—C. A.

Person entitled to Possession of M. House.—Testator bequeathed a collection of books, manuscripts and pictures to his executors to hold as heirlooms, and suffer the same to be used and enjoyed by the person who for the time being under the limitations of "a certain deed of entail bearing date day of shall be entitled to the possession of" M. House. At the testator's death there was no such deed of entail as described in the will in existence, and the testator was entitled to the house absolutely in fee simple:—Held, that the collection be-

longed to the heir-at-law of the testator, as the person entitled in possession to *M. House, Bute (Marquis), In re, Bute (Marquis) v. Ryder*, 27 Ch. D. 196; 53 L. J., Ch. 1090; 32 W. R. 996—V.-C. B.

Requests to Charities.]—See CHARITY.

Attesting Witness.]—See ante, col. 2003.

Solicitor—Direction to charge for work done.]—See ante, col. 2002.

b. GIFT TO A CLASS.

Artificial Class—Exclusion of Named Persons.]—Certain property was bequeathed by will to be held by trustees, in events which happened, "in trust for such person or persons as under the statutes for the distribution of the estates of intestates shall, exclusive of my said daughter C. L., and of my said grandchild C. G. and her issue (if any), then be my next of kin; such persons, if more than one, to take in equal shares as tenants in common." When the events happened, there were living the above-named daughter and grandchild, and a sister of the testator, and two nephews, sons of his deceased brother:—Held, that the effect of the will was to exclude the daughter and grandchild, and that the sister and nephews took in equal shares per capita. *Taylor, In re, Taylor v. Ley*, 52 L. T. 839—C. A.

Bequest to such Children as attain Twenty-one.]—Bequest of residue "in trust for my son George, my daughters Lydia, Mary Ann, Alice, and Frances, and such of my child or children, if any, hereafter to be born, as shall attain the age of twenty-one years or marry, in equal shares as tenants in common, but subject, as to the share of any daughter, whether now living, or a child hereafter to be born, to the trusts following: "the share of "such daughter" being settled. The testator had six children only, the five named and one other, all of whom had attained twenty-one at the date of the will. Of the named children, two died in the testator's lifetime without issue, and three survived him:—Held, that the five named children took as a class and not as individuals, and that the whole residue was divisible among the three who survived the testator. *Stanhope's Trusts, In re* (27 Beav. 201), followed. *Jackson, In re, Shiers v. Ashworth*, 25 Ch. D. 162; 53 L. J., Ch. 180; 50 L. T. 18; 32 W. R. 194—Chitty, J.

Surviving Children—Issue of Deceased Child to take Parent's Share—Issue of Children Dead at Date of Will.]—A testator, by a codicil to his will, bequeathed to the widow of his deceased son the interest accruing from a sum of money, the payment thereof to cease upon her death or second marriage. He directed his executors to divide the principal sum "amongst my surviving male and female children. Should a male or female child's death precede mine, his or her share to be divided equally between the male and female children of such son and daughter deceased." One son and two daughters of the testator were dead at the date of the codicil; the two daughters each left one child. Eight children of the testator survived him:—

Held, that the class of persons entitled under the gift were children of the testator living at his death, and, per stirpes, the children living at his death of any child of the testator who had predeceased him, whether before or after the date of the codicil; consequently the fund was divisible into tenths among the eight surviving children of the testator and the children of the two daughters who died in his lifetime. *Miles v. Tudway*, 49 L. T. 664—Kay, J.

Brothers and Sisters—Children of Objects Deceased at Date of Will.]—A testator, after bequeathing several pecuniary legacies, gave the residue of his real and personal estate to trustees, on trust to sell and invest the surplus after payment of his debts, and pay and divide the income unto and between all his brothers and sisters, share and share alike, during the terms of their natural lives respectively; and upon their deaths respectively the principal of such residuary property to which each should be entitled for his or her natural life, should go to the child or children of the person or persons respectively so dying, in equal shares and proportions, and the testator stated his wish to be, and he recommended such child or children to invest the amount of their respective shares in the purchase of farms. The testator had two brothers, J. and C., and one sister M., all of whom were married, and had families. C. and M. were both dead at the date of the will. J. was then alive, but predeceased the testator:—Held, that the residue was divisible equally between the families of the two brothers and the sister, so that each stirps took one-third share. *Walsh v. Blayney*, 21 L. R., Ir. 140—V.-C.

Gift of Residue to Children of Nephew to be vested at Twenty-five—Children born before and after Testatrix's Death.]—Testatrix directed that as to one moiety of the residue of her estate the trustees should hold it upon trust for the benefit of the children of her nephew, W. H., to be vested interests in them; as to sons on attaining the age of twenty-one years; and as to daughters on their attaining twenty-five years or being married before that age; and in case a daughter should marry under age, power was given to the trustees to settle her share. Power was also given to the trustees to apply the income of an expectant share of any child for maintenance, education, and bringing up; and also to apply half of an expectant share for advancement in life. In case all the children of W. H. should die without taking a vested interest, there was a gift over to testatrix's brothers and sisters, &c. W. H. had seven children, four born before the testatrix's death, all being now infants, and three afterwards. A daughter, one of the four, had married under age:—Held, that the four children and those only could take, and that the daughter took a vested interest which at present was one-fourth. *Elliot v. Elliott* (12 Sim. 276) followed. *Coppard, In re, Howlett v. Hodson*, 35 Ch. D. 350; 56 L. J., Ch. 606; 56 L. T. 359; 35 W. R. 473—Stirling, J.

Class described by Relationship—Half-blood.]—A gift in a will to a class of persons described by relationship will, in the absence of an overruling context, be construed as a

gift to all persons answering the relationship, whether of the whole blood or of the half-blood; therefore, a bequest simply to "the sisters of A." will extend to A.'s sisters of the half-blood. *Reed, In re*, 57 L. J., Ch. 790; 36 W. R. 682—Chitty, J.

Ascertainment of Class—Gift of Income—Period of Distribution.]—The "rule of convenience," by which in a bequest of an aggregate fund to children, as a class, payable on attaining a given age, the period of ascertaining the class is the time when the first of the class by attaining the given age becomes entitled to payment, and children coming into esse after that period are excluded, is not applicable to similar bequests of income. *Wenmoth's Estate, In re, Wenmoth v. Wenmoth*, 37 Ch. D. 266; 57 L. J., Ch. 649; 57 L. T. 709; 36 W. R. 409—Chitty, J.

—Life Estate determinable on Bankruptcy—Gift over to Children.]—A testator gave a fund to trustees upon trust to pay the income to his son during his life, and after his death to pay and divide the fund equally among all the children which the son might have, as and when they should respectively attain twenty-one, and if the son should leave no child who shall attain twenty-one, the fund was to sink into the residue of the testator's estate. There was a proviso that if the son should be adjudicated bankrupt the fund and the income thereof should thenceforth immediately go and be payable or applicable to or for the benefit of the said child or children of the son "in the same manner as if he was naturally dead" or in default of such child or children should sink into the residue. After the death of the testator, the son was adjudicated a bankrupt; at the date of the adjudication he had two children; other children were born to him afterwards.—Held, that the children born after the adjudication were entitled to share in the fund subject to the contingency of their attaining twenty-one. *Bedson's Trusts, In re*, 28 Ch. D. 523; 54 L. J., Ch. 644; 52 L. T. 554; 33 W. R. 386—C. A.

—Period of Accumulation.]—The testator directed that the rents of the trust premises should be accumulated for twenty-one years; and that the accumulated fund should be in trust for all the children of B. who should attain twenty-one, in equal shares. B. had six children who attained twenty-one. One of them, E., was born after the eldest had attained twenty-one, but during the period of accumulation.—Held, that E., having been born before the period of accumulation came to an end, was entitled to take as a member of the class; and that the fund was, therefore, divisible in sixths. *Watson v. Young*, 28 Ch. D. 436; 54 L. J., Ch. 502; 33 W. R. 637—Pearson, J.

c. VESTED AND CONTINGENT INTERESTS.

Discretionary Trust for Maintenance till youngest Child attains Twenty-one.]—A testator directed his trustees, after the death of his wife, to apply the income of his estate "in and towards the maintenance, education, and advancement of my children in such manner as they

shall deem most expedient until the youngest of my said children attains the age of twenty-one years," and on the happening of that event he directed them to divide his estate equally among all his children then living. The testator left four children, two of whom at the death of the widow in 1884 were of age, and the youngest was in his seventh year. After the decease of the widow the trustees paid each of the adult children one-fourth of the income, and applied the other two-fourths for the benefit of the minors equally till 1886, when J. S. C., the eldest son, made an absolute assignment for value of all his interest under the testator's will to H. The trustees declining to pay one-fourth of the income to H. he took out a summons to have the construction of the will determined.—Held, that no child of the testator was entitled, prior to the attainment of twenty-one by the youngest of the testator's children, to the payment of any part of the income. *Coleman, In re, Henry v. Strong*, 39 Ch. D. 443; 58 L. J., Ch. 226; 60 L. T. 127—C. A.

Gift of Income for Maintenance and Education—Direction to Pay at Twenty-one.]—A testatrix, who died in 1867, by her will dated in 1865, devised and bequeathed her real estate and the residue of her personal estate to trustees upon trust for sale and conversion, and after payment of her debts and certain legacies, upon trust to divide the residue of the income of her personal estate and the rents of her real estate until sold, into nine equal shares. The testatrix disposed of one of such shares in the following manner: As to one other equal ninth part or share of such dividends, rents and interest, upon trust to pay or apply the same for and towards the maintenance and education of A., B., and C.; and as and when they should respectively attain the ages of twenty-one years, upon trust to pay them in equal shares one equal ninth part or share of such principal moneys and the dividends and interest which might accrue due thereon. A. died in the lifetime of the testatrix. B. survived the testatrix, but died under twenty-one. C. survived the testatrix and attained twenty-one.—Held, that the gift was contingent and not vested, and that therefore B.'s share lapsed. *Martin, In re, Tuke v. Gilbert*, 57 L. T. 471—Kay, J.

Legacies were given by a testator "to each of my children, who, being sons, shall attain the age of twenty-one years, and being daughters shall attain that age or marry under that age with the consent of her guardian or guardians," of 1,000*l.*, with power to the trustees of the will if any of the sons should not have attained twenty-one, or any of the daughters should not have attained that age or married, to apply the whole or part of the interest and income of the legacies to which any of the children should be entitled in expectancy during the minority of the sons respectively and the minority and discovery of the daughters respectively, for his or her maintenance or education as they should think fit. The will contained a direction to accumulate the residue of the interest and income by investing the same for the benefit of those who should be entitled to the principal, and a proviso, if any of the sons or daughters should marry any person not a Protestant, revoking the bequests of the children so offending, and giving them over equally amongst all the others of the children,

sons at twenty-one and daughters at twenty-one or marriage with such consent. One of the daughters died under twenty-one and unmarried:—Held, that her legacy did not vest. *Wilson v. Know*, 13 L. R., Ir. 349—M. R. See *Bevan's Trusts*, *In re*, post, col. 2051.

Children attaining Twenty-one or Marrying—Condition applying to only Child.]—A testator gave the residue of his real and personal estate to trustees upon trusts for conversion, and to invest 4,000*l.* part thereof, and to pay the income to his daughter A. for life, and at her death to divide the same between her children in equal shares, "who being sons shall attain twenty-one, or being daughters attain that age or be married, and if only one child, then wholly to him or her, if no child who shall live to attain a vested interest," then the same fund was directed to be paid to other persons, and the testator gave the residue of his estate upon the same or like trusts. It was alleged that the testator's daughter died, having had only one child, a daughter, who survived her, and died under age unmarried:—Held, that the condition as to attaining twenty-one or marrying applied as well to an only child as to several children, and that therefore the testator's granddaughter, not having attained twenty-one or been married, did not become entitled to the funds in question. *Fletcher, In re, Doré v. Fletcher*, 53 L. T. 813; 34 W. R. 29—North, J.

Tenant in Fee Simple—Executory Limitation over.]—A testator devised realty to trustees on trust to pay the rents and income thereof to his wife for the maintenance, education, and benefit of his infant son until twenty-one, without liability to account for the same, and upon his said son attaining twenty-one, then upon trust for him absolutely; but if he should die under twenty-one without leaving issue, then upon trust for his said wife during life or widowhood, with remainder over:—Held, that the infant son was a tenant in fee simple in possession, with an executory limitation over. *Morgan's Estate, In re*, 24 Ch. D. 114; 53 L. J., Ch. 85; 48 L. T. 964; 31 W. R. 948—North, J.

Vesting subject to being Divested.]—A legacy was given to testator's son A., when he attained twenty-five, with a proviso that should any of the testator's sons or daughters die before attaining twenty-one, "the legacy hereby bequeathed, or share of the residue" of such sons or daughters should go to the survivors:—Held, that the legacy vested in A. at twenty-one. *Gunning's Estate, In re*, 13 L. R., Ir. 203—Land Judges.

Bequest of 1,000*l.* in trust to apply the income for the maintenance of E., a person of unsound mind, for life, and in case E. should recover sanity, in trust as to the principal as E. should by will appoint; and in default of such appointment, then, after the death of E., to pay the principal of the bequest to J. And the testator directed that in case of the death of any of his legatees before the legacy to such legatee should become vested or payable, the legacy which should so lapse by the death of the legatee should go to P. E. survived J., and died without recovering:—Held, that the 1,000*l.* vested in J. as a reversionary legacy, subject to be divested on an appointment by E., in the event of recovery which did not happen; that it was not subject

to the gift over by J.'s death in the lifetime of E.; and that the gift over applied only to legacies lapsing by the legatee predeceasing the testator. *Beddy v. Courtney*, 19 L. R., Ir. 245—V.-C.

A testator by his will devised all the residue of his real estate in trust for his six younger children, and directed that in case any one or more of his six younger children should happen to die in his lifetime leaving issue living at his decease, and which issue, being issue male, should live to attain the age of twenty-one years, or, dying under that age, should leave issue surviving, or being issue female, should live to attain that age or be previously married; then in such case the share to which such child so dying would, if he or she had survived the testator and had attained the age of twenty-one years, have become absolutely entitled, should be held upon trust for such issue:—Held, that the two infant children of one of the six younger children of the testator who had died in the testator's lifetime took a vested interest in the share of their deceased parent liable to be divested on their death under the age of twenty-one years. *James' Settled Estates, In re*, 51 L. T. 596; 32 W. R. 898—Pearson, J.

—Forfeiture on Alienation.]—A testatrix by will appointed two-fifths of certain property to trustees upon trust to pay the income to her son until he should attain the age of forty years, and then to hold the same in trust for her son, his executors and administrators; provided that in case her son should assign his share in the property, then the aforesaid bequests should be void, and the two-fifths should be held upon the trusts declared as to the other three-fifths. The son died before he attained the age of forty without having assigned:—Held, that the two-fifths vested in trust for the son absolutely so as to pass by his will. *Scotney v. Lomer*, 29 Ch. D. 535; 54 L. J., Ch. 558; 52 L. T. 747; 33 W. R. 633—North, J.

A. for Life or until Marriage—Gift over to Children living at A.'s death—Re-marriage.]—A testator bequeathed a fund upon trust for a widow for her life or until she should marry again, and directed his trustees from and immediately after her decease or marrying again to stand possessed of the fund upon trust to pay and divide the same equally between all her children "living at the time of their mother's decease," and the issue of any deceased child, such issue taking the parent's share. The widow married again:—Held, that thereupon her children took immediate vested interests. *Bainbridge v. Cream* (16 Beav. 24) followed, but doubted. *Tucker, In re, Bouchier v. Gordon*, 56 L. J., Ch. 449; 56 L. T. 118; 35 W. R. 344—Stirling, J.

Postponement of period of Distribution—Trust to Accumulate—Substitution of Issue.]—Testator gave and devised all the residue of his real and personal estate to trustees, upon trust to pay his wife an annuity during her life or widowhood, and from time to time during the lifetime of his wife, or during the time of twenty-one years after his decease, which should first happen, to invest and accumulate the rest of the annual produce in their names; and after the decease of his wife, or at the expiration of twenty-one years, whichever should first happen, he directed his trustees to sell his estate and to pay

and divide the balance of the moneys arising therefrom after providing for the annuity, if necessary, amongst all his children in equal shares, "the issue of any deceased child to take his, her, or their deceased parent's share." The testator died in 1877, leaving six children, who all survived him, and were now living; one only of the children had issue:—Held, that the six children took vested and indefeasible interests on the death of the testator. *Bragger, In re, Bragger v. Bragger*, 56 L. J., Ch. 490; 56 L. T. 521—Chitty, J.

Gift over of Child's Share on Death "during Continuance of Trusts" of Will.—A testator, who died in 1876, by his will gave a freehold house to trustees upon trust, as soon as conveniently might be after his death, to let the same upon certain terms; and until the granting of a lease the trustees were to permit the business at the house to be carried on by the testator's son R. and his daughter M. for the benefit of his estate. Subject thereto the testator gave the house and all his residuary real and personal estate to his trustees upon trust to sell and convert "as soon as conveniently might be after his death," and to hold the proceeds in trust for all his children equally: provided that if any child of his should die in his lifetime, "or during the continuance of the trust hereinbefore declared," leaving issue, such issue should take by substitution the parent's share; and if any son of his should die in his lifetime, "or during the continuance of the trusts hereinbefore declared," leaving a widow and no issue, such widow should take the share of her deceased husband for her life, and after her death the share should form part of the testator's residuary estate. The trustees had full powers as to mode, time, and place of sale, of any of the property directed to be sold. In 1878 the trustees let the freehold house. In 1881 one of the sons died intestate, and without issue, leaving a widow. The question was whether, on the death of the son, his interest in the residuary property was divested:—Held, that the absolute interests given to the testator's children became indefeasible at the latest when the lease of the house was completed, and the business was no longer carried on for the benefit of the estate; and that the share of the deceased son would devolve, subject to his funeral and testamentary expenses and debts, as to one moiety to his widow, and as to the other to his next of kin. *Teale, In re, Teale v. Teale*, 53 L. T. 936; 34 W. R. 248—Kay, J.

Gift to pay Debts and to convey Residue to Son absolutely—Death of Son leaving Children.

—Testatrix gave all her real and personal estate to trustees in trust to pay all her debts, &c., and certain annuities, and then as to the residue of her estate directed them to convey, assign, or otherwise assure the same unto and to the use of her son, his heirs, executors, &c., absolutely. And if her son should marry, and should die leaving children who should live to attain the age of twenty-one years, the trustees were to convey, &c., the residue to such children equally, as tenants in common absolutely, but if her son should die in her lifetime, without leaving children or a child surviving, then the trustees were to convey, &c., the residue to the persons named, for their absolute use and benefit. The son married after the date of the will in the

lifetime of the testatrix, survived the testatrix, and had children living:—Held, that death leaving children meant death in the lifetime of the testatrix, and that that not having happened, the son became, subject to the payment of debts and annuities, entitled absolutely to the residue. *Luddy, In re, Peard v. Morton*, 25 Ch. D. 394; 53 L. J., Ch. 21; 49 L. T. 706; 32 W. R. 272—Kay, J.

Income until Marriage—Corpus at Time of Marriage.—A testatrix by her will, after specific bequest of bonds, gave all the rest of her stocks and shares upon trust to pay the income to G. until his marriage, and at the time of his marriage to hand over the stocks and shares to him:—Held, that G. took a vested interest under the gift, and being of age, was entitled to have the stocks and shares comprised therein transferred to him, although he had not married. *Batsford v. Kebbell* (3 Ves. 363) distinguished; *Bunn, In re* (16 Ch. D. 47), and *Vize v. Stoney* (2 D. & Wal. 659; S. C. 1 D. & Wal. 337), observed upon. *Wrey, In re, Stuart v. Wrey*, 30 Ch. D. 507; 54 L. J., Ch. 1098; 53 L. T. 334—Kay, J.

Gift of Income—Ultimate Gift at Twenty-one.—A testatrix by her will devised and bequeathed all her real and personal estate to a trustee absolutely, upon trust to sell and convert into money, and thereout to pay her funeral and testamentary expenses and debts, and stand possessed of the residue upon trust to invest and apply the income "arising therefrom for or towards the maintenance and education of her two children" (naming them) "until they shall respectively attain the age of twenty-one years, and then to divide the trust funds equally between them as tenants in common." There were two children only, both illegitimate: one, a son, died a minor and unmarried, and if his share vested it went to the crown. On summons:—Held, that the gifts were separate, and the ultimate gift was contingent, and did not vest, but lapsed on the death of the son under twenty-one. *Morris, In re, Salter v. Att.-Gen.*, 52 L. T. 840; 33 W. R. 895—V.-C. B.

Gift over on Marriage—Taking effect on Death.—A testator bequeathed to his daughter M., so long as she should remain single, 120*l.* a year, and directed that on the day of her marriage the principal should be divided amongst his children, the shares of his daughter M. and of another daughter being given to trustees upon trust for the daughters for life, with certain remainders. The question was, whether the gift over on M.'s marriage took effect on her death:—Held, that the balance of authority being now strongly against *Pile v. Salter* (5 Sim. 411), the ordinary rule prevailed, and, although the gift over on marriage included a life tenancy in one-third of the original sum, it took effect on death. *Scarborough v. Scarborough*, 58 L. T. 851—Stirling, J.

Gift during Widowhood—Gift over on Death—Re-marriage.—A gift by will to testator's widow A. during her life, provided she remained a widow; and from and after her death or re-marriage to B. absolutely, with provisions for maintenance in case B. should not have attained twenty-one at the death or re-marriage of A. In the event (which happened) of B. dying during the lifetime of A., then at the death of A. the

property was given over to testator's brothers and sisters who should be living at A.'s death. B. died an infant, and afterwards A. married again :—Held, that upon such re-marriage the gift over in favour of testator's brothers and sisters took immediate effect, and was not postponed until A.'s death. *Stanford v. Stanford*, 34 Ch. D. 362; 56 L. J., Ch. 273; 55 L. T. 765; 35 W. R. 191—Chitty, J.

Heirlooms—Contingent future Interest—Tenant in Tail—Personal Estate.]—A testator by his will directed that his books and plate should be considered as heirlooms and should pass with his real estate, in the same manner as if they were an estate of inheritance at common law, and should so continue annexed to his real estate as long as the law would permit, to be inherited by the several persons who should succeed thereto; and he devised and bequeathed all his real and residuary personal estate to trustees upon trust for R. C. for life, and after the decease of R. C. for his first and other sons successively in tail male, and in default of such issue upon trust for Henry C., the eldest son of J. C., for life, and after his decease for his first and other sons successively in tail male, and in default of such issue upon trust for "the next eldest son of the said J. C. who shall survive the said Henry C." for life, and after his decease upon trust for "the first and other sons of the body of the said next eldest son of the said J. C. who shall survive the said Henry C." successively in tail male, and in default of such issue upon trust for his, the testator's, own right heirs. R. C. and Henry C. died without having married. J. C. died in testator's lifetime. George was the next eldest son of J. C., who survived Henry. F. J. C. was the eldest son of George, and the first tenant in tail under the settlement, and he died an infant in the lifetime of R. C. and of Henry C. :—Held, that notwithstanding the death of F. J. C. before it could be known whether his father would survive Henry C., or whether there would be any issue male either of R. C. or Henry C., the heirlooms and residuary personalty vested absolutely in the legal personal representative of F. J. C. *Hogg v. Jones* (32 Beav. 45) distinguished. *Cresswell, In re, Parkin v. Cresswell*, 24 Ch. D. 102; 52 L. J., Ch. 798; 49 L. T. 590—Kay, J.

Contingent Remainder—Accumulation of Rents and Profits until periods of Vesting.]—A testator, by his will dated in 1851, after making divers specific devises and bequests, and giving a life interest to his wife in his residuary real estate, devised such residuary real estate, after the death of his wife, to his trustees in trust for his grandson during his life, and from and after his decease in trust for "all and every his child and children who shall attain the age or respective ages of twenty-one years, and his, her, or their heirs and assigns for ever"; but in case there should be no child of his grandson who should attain the age of twenty-one years, then, as to the same residuary real estate, upon trusts over as in the will mentioned. The will contained a gift of the residuary personal estate, but it was distinct from the above devise, and upon different trusts from those declared concerning the real estate, although some of the trusts were the same. The will also contained powers for the trustees to grant leases, and apply

the rents and profits of the real estate in making repairs. The testator died in 1853, and his widow died in 1866. The grandson died in October, 1867, leaving an only child, who was born on the 11th February, 1864. The question arose whether the accumulated rents accruing between the date of the death of the testator's grandson and the time when the grandson's only child attained the age of twenty-one years, were undisposed of by the will, or passed to such child :—Held, that the gift to the grandson's child was a contingent remainder, and not a vested remainder, and subject to being divested. *Williams, In re, Spencer v. Brighthouse*, 54 L. T. 831—Chitty, J.

Contingent Remainder or Executory Devise—Maintenance of Infants.]—Testator, by will executed before the passing of the Contingent Remainders Act, 1877, devised freehold property to the use of E. for life, and after her death to the use of trustees, their heirs and assigns, during the life of S., upon trust for S., and after her death to the child or children of S., who being sons should attain twenty-one, or being daughters should attain that age or marry. The testator then directed that after the death of the survivor of E. and S., his trustees might, during the minority of any child of S. for the time being presumptively entitled, receive the rents of the premises or the share thereof to which any such minor should be actually or presumptively entitled, and apply the same for his or her maintenance, and directed that the unapplied income should follow the destination of the share from which the same should arise. On the death of the survivor of E. and S., there were five children, three of whom were infants and unmarried :—Held, that the children took the legal estate; but, looking to the maintenance clause, there was a sufficient intention expressed on the whole will that infants should share, and that therefore the gift must be construed as an executory devise and not as a contingent remainder. *Bourne, In re, Rymer v. Harpley*, 56 L. J., Ch. 566; 56 L. T. 388; 35 W. R. 359—Kay, J.

Contingent Remainder, or absolute Gift subject to Life Interests.]—The testatrix by her will gave certain real estate to trustees upon trust to pay to or otherwise permit E. S. to receive the rents and profits thereof for her life, and after her decease upon trust to pay to or otherwise permit A. B. to receive the rents and profits thereof for her life, if she should be living at the time of the decease of the said E. S., but if she should be then dead, upon trust for two nieces of the testatrix's late husband, whom she named, absolutely as tenants in common; and the testatrix gave all the residue of her estate to the said A. B. absolutely. E. S. survived the testatrix, and A. B. survived E. S., and consequently her life interest took effect. She was now dead, the two nieces being now living, and the question was raised whether the estate went to the two nieces, or whether, inasmuch as A. B. did not die in the lifetime of E. S., the gift to them failed, and the estate went to A. B.'s representatives, being given to her absolutely by the joint operation of the gift of the life interest and of the residue :—Held, that the property went to the two nieces, the gift to them not being a contingent remainder,

but an imperfect expression of the testatrix's intention that, subject to the two life interests, the nieces were to take absolutely. *Martin, In re, Smith v. Martin*, 54 L. J., Ch. 1071; 53 L. T. 34—Kay, J.

d. DEATH WITHOUT ISSUE.

Vesting — Provision for Family — Rule of Construction.]—The rule in *Howgrave v. Cartier* (3 V. & B. 79) in favour of putting on a settlement or will making a provision for a family such a construction as will give the children indefeasible interests on their attaining twenty-one, is only a rule of construction to be applied in construing ambiguous words, and not a positive rule which will modify the effect of plain words. *Hamlet, In re, Stephen v. Cunningham*, 39 Ch. D. 426; 58 L. J., Ch. 242; 59 L. T. 745; 37 W. R. 245—C. A.

"Die without leaving any Child."]—A testator gave his property to his daughter for life, and then to her children, who being sons should attain twenty-one, or being daughters attain that age or marry. "And in case my said daughter shall happen to die without leaving any child or children her surviving, or leaving such, they shall all die without having obtained a vested interest in the said trust-moneys, and without leaving any issue them, him or her surviving," then over to two cousins. The daughter had children, some of whom attained twenty-one, but all died in her lifetime.—Held, that the gift over took effect, its terms being unambiguous and the event to which it referred having happened. *Id.*

"Die without leaving Issue."]—A testator bequeathed personal estate on trust after the death of W. K. B. for W. R. B., and in case W. R. B. died without leaving issue male, for J. B. W. R. B. died in the lifetime of W. K. B., having had only one son, who died an infant in his father's lifetime.—Held, that the words "die without leaving issue male" must be construed as "die without leaving issue male living at the death," and not as "die without having had issue male," and therefore that the gift over to J. B. took effect. *White v. Hight* (12 Ch. D. 751) overruled. *Ball, In re, Slattery v. Ball*, 40 Ch. D. 11; 58 L. J., Ch. 232; 59 L. T. 800; 37 W. R. 37—C. A.

Testator gave all his property to his daughter, and if she "should die before the age of twenty-one, and at any time without issue" over. The daughter attained twenty-one, married, and had a child.—Held, that "without issue" meant "without leaving issue alive at the time of her death." *Clay v. Cules*, 57 L. T. 682—Stirling, J.

The words "without leaving" may be read "without having" had where the result of so doing is to make the whole instrument consistent, and where the contrary construction would have the effect of diverting a previously vested gift in a manner inconsistent with the expressed intention of the testator; but they will not be so read for the purpose of altering the event upon which the divesting of a gift previously vested is to take place. *Armstrong v. Armstrong*, 21 L. R., Ir. 114—C. A.

Testator devised real estate to "my son G. A. . . . Should my son G. and his wife E. die leaving no family, his share to revert to my two

daughters D. and S." G. A. had several children all of whom died in his lifetime without issue. By his will he devised and bequeathed all the real and personal estate to which he should be entitled at his decease to E. :—Held, that, upon G. A.'s death, E. took a life estate only in the property, and D. and S. the reversion in fee. *White v. Hight* (12 Ch. D. 751) not followed. *Id.*

"Die without leaving Children legally to inherit."]—Bequest of a share of testator's property to A. (not a child or issue of the testator), with a direction that if any legatee should die before the will took effect "without leaving any children legally to inherit," then his or her share should "lapse to the general fund." A. died in the testator's lifetime, leaving children who survived the testator :—Held, that A.'s children took by implication the share bequeathed to him. *McLean v. Simpson*, 19 L. R., Ir. 528—V. C.

"Die without leaving lawful Issue"—Period when ascertained.]—Where a testator, after making particular dispositions during the lifetime of his widow, and certain absolute dispositions in favour of his children to be effected by conveyance from the trustees of the will at her decease, directed that "if any of my said children shall die without leaving lawful issue them surviving the property hereby devised and bequeathed to each of my said children shall be equally divided amongst my surviving children" :—Held, that, according to the whole scope and intention of the will, the time of dying without lawful issue was confined to the time before the grant of the absolute interest, that is during the lifetime of the widow; and that after conveyance of the absolute interest, no defeasance was contemplated. *Lewin v. Killey*, 13 App. Cas. 783; 59 L. T. 675—P. C.

A testator devised real estate to his son and his heirs; and then declared that in case his said son should die without leaving lawful issue, then and in such case the estate should go to his son's next heir-at-law, to whom he gave and devised the same accordingly :—Held, that the contingency of death without leaving issue was not confined to death in the lifetime of the testator, but referred to death at any time; and that the gift over was repugnant and void; and that the devise took an absolute estate in fee simple. *Parry and Daggs, In re*, 31 Ch. D. 130; 55 L. J., Ch. 237; 54 L. T. 229; 34 W. R. 353—C. A.

e. DEATH COUPLED WITH CONTINGENCY.

To A. for Life, and after Her decease to Children—Death before Testator.]—A testator bequeathed the residue of his personal estate to trustees upon trust for a nephew and three nieces by name, equally between them; and he declared that his trustees should retain the share of each of his nieces, upon trust to pay the income to her during her life, for her separate use without power of anticipation, and after her decease, as to the capital thereof, upon trust as she should by will appoint, and in default of appointment, upon trust for her child or children, sons at twenty-one and daughters at twenty-one or marriage, equally between them if more than one. One of the nieces married, and died before

the testator, leaving an infant daughter her surviving:—Held, that the share of the deceased niece had lapsed, and that there was an intestacy in respect of it. *Stewart v. Jones* (3 De G. & J. 532) followed; *Unsworth v. Speakman* (4 Ch. D. 620) disapproved. *Roberts, In re, Tarleton v. Bruton*, 27 Ch. D. 346; 53 L. J., Ch. 1023; 51 L. T. 654; 32 W. R. 986—Pearson, J. Affirmed 30 Ch. D. 234; 53 L. T. 432—C. A.

Testator bequeathed the proceeds of his real estate upon trust for the equal benefit of his sisters, nephews, and nieces as follows: As to the shares of his nephews upon trust to pay the same to them absolutely, and as to the shares of his sisters and nieces upon trust to invest and pay the dividends unto each such sister and niece for life for her separate use, and after the death of each sister upon trust to apply her share for the benefit of his said nieces upon the trusts of the original shares of such nieces, and after the death of each niece upon trust to pay her share to such of her children as she should by will appoint, and in default of appointment to her children equally on attaining twenty-one, and if no such children then in trust for the survivors or survivor of his said nieces. And the will provided that if any niece should die in the testator's lifetime her share should be for the benefit of her child or children, but if no such children who should live to attain twenty-one then such share should be for the benefit of his surviving nieces equally and upon the same trusts:—Held, that the child of a niece who was dead at the date of the will was not entitled. *Smith's Trusts, In re* (5 Ch. D. 497 n.), not followed. *Chinery, In re, Chinery v. Hill*, 39 Ch. D. 614; 57 L. J., Ch. 804; 59 L. T. 303—Stirling, J.

To "all the Children of M.," "or, in event of Decease, to their Descendants."]—The testator, by will, bequeathed all his share in an estate in Barbadoes "to all the children of" his dear departed wife's sister, M., "or in event of decease, to their descendants, share and share alike." M. had six children, of whom five were living at the date of the will and at the death of the testator, and one had died prior to the date of the will, leaving issue an only daughter:—Held, following the decision in *Christopher v. Naylor* (1 Mer. 320), that the issue of the child of M., who was dead at the date of the will, was not entitled to a share of the property, but that it went to the five children of M. who survived the testator. *Webster's Estate, In re, Wigden v. Mello*, 23 Ch. D. 737; 52 L. J., Ch. 767; 49 L. T. 585—Kay, J.

Death before Payment—Gift over.]—Testator gave the residue of the proceeds of the sale of his real and personal estate between all such of his first and second cousins as should be living at the time of the determination of two life interests given by the will. The testator by a codicil directed that if any or either of his first or second cousins should die before the payment of any sum or share thereby, or by his will, directed to be paid to him or her, such sum or share should be equally divided amongst certain persons:—Held, that the gift over was meant to take effect in the event of death before the time of payment, i.e., the determination of the life interests. *Wilks v. Bannister*, 80 Ch. D. 512; 54 L. J., Ch. 1139; 53 L. T. 247; 33 W. R. 922—Kay, J.

A. for Life, and afterwards equally between Children of Testator's Brothers—"Issue of Deceased Child to take Parent's Share."]—

A testator, who died in 1871, by his will, dated in 1870, gave his residuary estate to trustees upon trust to pay the income thereof to his widow for her life, and after her death he gave the property unto and equally between all and every the children of his brothers and sisters, share and share alike, "the issue of any deceased child to take the parent's share." The testator's widow died in 1881. Some of the children of the brothers and sisters of the testator survived him, but died in the lifetime of the testator's widow, leaving issue. The question was, whether the issue of the deceased children of the brothers and sisters of the testator were respectively entitled to the shares of their deceased parents:—Held, that the substitutional gift took effect in the case of any child of a brother or sister of a testator who had died in the lifetime of the testator's widow. *Gilbert, In re, Daniel v. Matthews*, 54 L. T. 752; 34 W. R. 577—Kay, J.

Children of A. and lawful Issue of such as "then" Dead.]—Testator bequeathed his residuary personal estate upon trust for his aunt for life, and from and after her decease for all the children of his uncle, "and the lawful issue of such of them as may be then dead." The aunt and all the children of the testator's uncle died in the testator's lifetime, but one of such children died after the tenant for life, leaving issue who survived the testator:—Held, that the word "then" referred to the death of the tenant for life, and not to the period of distribution, and that consequently there was an intestacy. *Milne, In re, Grant v. Heysham*, 57 L. T. 828—C. A. Affirming 56 L. J., Ch. 543—Stirling, J.

"Die Unmarried and without Legal Issue"—"And" read "or."]—A testator made his will as follows:—"I leave to my son S. all my landed property in the county K., also the policy of assurance effected on the life of my sister C. for 1,500l. It is my desire that should the said S. die unmarried and without legal issue, that all my property bequeathed to him should go share and share alike between my daughters J. and E. I give power to my son S. to settle a jointure out of the said property not exceeding 100l. a year on the woman he may marry. . . . I do appoint my son S. as residuary legatee." The testator made a codicil to his will as follows: "I hereby give and bequeath to my daughter E. the sum of 400l., to be paid to her when the insurance on the life of my sister C. is paid in." S. died leaving a widow, and never had any issue:—Held, that in the executory gift to testator's daughters, "should the said S. die unmarried and without legal issue," the word "and" must be read "or," and that, therefore, upon S.'s death without issue, though leaving a widow, the testator's lands in the county K. passed under the executory gift to J. and E. subject to a jointure of 100l. a year which S. had charged thereon for his widow. *Long v. Lane*, 17 L. R., Ir. 11—C. A.

Gift at Twenty-five—Contingent Gift—Gift over.]—A testatrix by her will, dated in 1828, gave all her property to trustees upon trust, as

to the interest of a sum of 5,000*l.*; for her sister for life; and after the death of such sister the interest to be paid to the testatrix's daughter (she having first attained twenty-five); if the daughter married with the consent of the executors, and died "leaving children, the interest to be appropriated for the maintenance and education of such children," of whom the testatrix constituted the executors guardians as to the due application of the same according to their discretion; "and the principal to be divided amongst them as they shall severally attain the age of twenty-five years;" after the death of the sister, and in the event of the daughter marrying without consent, or marrying with consent "and dying without leaving issue," then over. The daughter survived the testatrix, attained twenty-five, and in 1842 married with the necessary consent. The sister died in 1854, and the daughter in 1866, having had two children, who survived her:—Held, that the gift was not void for remoteness, but that the fund vested in the children of the daughter living at her death. *Bevan's Trusts, In re*, 34 Ch. D. 716; 56 L. J., Ch. 652; 56 L. T. 277; 35 W. R. 400—Kay, J.

"Die before they are Entitled"—Death of Remainderman before Tenant for Life.]—By a testamentary appointment a testatrix gave three copyhold houses to E. for life, and after his death she directed the houses to be sold and the proceeds "to be equally divided amongst" her three nephews and niece, "but should either of my said nephews or niece die before they are entitled to the property, leaving issue, I give the share of him or her so dying to his or her child or children." All the remaindermen survived the testatrix, but three of them predeceased E., leaving children living at his death:—Held, that "entitled" meant entitled "in possession," and that therefore the shares of the three deceased remaindermen did not pass to their legal personal representatives, but to their children. *Commissioners of Charitable Donations v. Cotter* (1 D. & War. 498) distinguished. *Noyce, In re, Brown v. Rigg*, 31 Ch. D. 75; 55 L. J., Ch. 114; 53 L. T. 688; 34 W. R. 147—V.-C. B.

— Gift over on Death of Legatee.]—A testator by his will, dated in 1851, devised all his real estate to trustees upon trust to receive the rents and accumulate them until sufficient to pay his debts, and also to provide for the legacies next given. The testator then gave to J. C. the sum of 200*l.*; to S. W. the sum of 150*l.*; and to J. R. the sum of 19*l.* 19*s.* All of the three last-mentioned legacies the testator directed should be paid by his trustees at the end of seven years next after his decease; and he directed that, in case of the death of J. C. and S. W. respectively before they became entitled to the legacies above mentioned, leaving lawful issue him or her surviving, the legacy of him or her so dying should go and be equally divided between and amongst his or her issue at the end of seven years next after the testator's decease, in case such issue should then have attained the age of twenty-one years, but if they should not have attained the age of twenty-one years, then when and as they respectively attained that age. The testator died in September, 1861. J. C. died in February, 1864, within seven years after the testator's death. He left two children and a grandchild. The question arose between them

and his executors whether, in the events that had happened, the gift over of his legacy had taken effect:—Held, that the words "become entitled" did not mean "become entitled in possession;" that, therefore, notwithstanding that J. C. died within seven years after the testator's decease, the gift over of his legacy did not take effect; but that he became entitled thereto indefeasibly on the testator's death. *Crosland, In re, Craig v. Midgley*, 54 L. T. 238—Kay, J.

f. ACCELERATION OF INTERESTS.

Incapacity of Legatee—Substitutional Gift.]—

A testator devised and bequeathed all his real and personal estate to his wife for life, and after her death to be equally divided between such of his children as should be living at her death; and in case of any of the above-mentioned children dying before his wife leaving children, such children were to take their parent's share. And in the event of any of his daughters being married at his wife's decease, it was his will that such proportion as they might be entitled to should be left to them and their children exclusively, and should in no way be controlled by their husbands. At the death of the testator's widow one of his daughters was living who had several children. Her husband was an attesting witness to the will, and consequently the gift to her was void under s. 15 of the Wills Act:—Held, that the daughter's children were not to be disappointed by her disability, but took an immediate interest in her share as tenants in common. *Clark, In re, Clark v. Randall*, 31 Ch. D. 72; 55 L. J., Ch. 89; 53 L. T. 591; 34 W. R. 70—V.-C. B.

Gift by will of real, and personal estate upon trust to convert and pay the income of the proceeds to A. for life, and after A.'s death to pay the capital and income thereof unto the child or children of A. in equal shares, with gifts over in case A. should die without leaving issue living at his death. The will had been attested by A.'s wife, so that the gift of a life's interest to him was void under s. 15 of the Wills Act. There were no children of A.'s marriage. The personal estate was exhausted and the trust funds represented real estate only:—Held, that until A. had a child the gifts upon the determination of A.'s life estate could not be accelerated, and that during the life of A. and so long as he had no children, the income of the trust funds was undisposed of, and belonged to the heir-at-law, and could not be accumulated for the benefit of the persons contingently entitled in remainder. *Jull v. Jacobs* (3 Ch. D. 703) distinguished. *Hodgson v. Earl of Bective* (1 H. & M. 376) and *Dumble, In re* (23 Ch. D. 360) explained. *Townsend, In re, Townsend v. Townsend*, 34 Ch. D. 357; 56 L. J., Ch. 227; 55 L. T. 674; 35 W. R. 153—Chitty, J.

4. WHAT INTEREST PASSES.

a. ABSOLUTE.

i. Lands.

"All my Interest"—Will made before 1 Vict. c. 26.]—A testator in a will made before the Wills Act gave and bequeathed "all the interest

of my houses and cottages situated as follows." He then proceeded to dispose of this property, which was copyhold, and, after giving life interests, concluded with a gift to T. S.:—Held, that the words "all my interest" at the commencement of the will ran through the whole will, and were not in the nature of a recital merely, and that T. S. took the fee. *De la Hunt and Pennington, In re*, 57 L. T. 874—Chitty, J.

For sole use and benefit—Forfeiture on Alienation.]—A. was entitled under the will of his father, to an income amounting to 109*l.* 4*s.* 6*d.*, arising from houses in the city of Cork and certain shares vested in trustees, being a third share of the father's estate, upon trust "for the sole use and benefit" of the respondent, and "to be assigned, transferred, and handed over to him as soon as conveniently may be" after the decease of the father. The will directed that if any of the three sons of the testator should die unmarried and without issue his share should go to the survivors, and it was further provided that neither of the sons of the testator should have power to mortgage, sell, alien, charge or incur any part of the property assigned to them, and that in the event of either of them doing so the trustees should stand possessed of his share:—Held, that A. took an estate in fee simple under the will, and that the provision for forfeiture in case of alienation was therefore void. *Corbett v. Corbett*, 14 P. D. 7; 58 L. J., P. 17; 60 L. T. 74; 37 W. R. 114—C. A.

Absolute Devise in fee—Gift Over—Restraint on Alienation.]—A testator who died in 1871, after reciting in his will that he was seised of certain lands, devised the same to his son, T. M., without words of limitation, and directed that his said son should not have power to sell, assign, transfer, or make over the said therein-before mentioned lands, or part with the possession of any part thereof to any person or persons whomsoever, except by will to his wife, child, or children, lawfully begotten, or next-of-kin, in such shares and proportions as, by his last will and testament, he should direct or appoint. And in case the testator's said son should happen to die intestate and without lawful issue, then the testator declared that his executor should have power to dispose of the lands, but always to the testator's next heir, or heirs, or next-of-kin, it being the testator's will that said lands should not pass out of his family. And it was also the testator's will that any lawful issue of his said son, T. M., should not sell, assign, transfer, or make over the said lands or any part thereof, except in like manner as his (the testator's) said son, T., by will to his or their child or children, or next-of-kin. T. M. died without issue, but made a will, whereby he devised and bequeathed all his property to his wife, H. M. T. M. died seised and possessed of other property besides that devised and bequeathed to him by his father:—Held, that neither the restraint on alienation, nor the gift over, were indicative of an intention contrary to the devise to T. M. passing the fee-simple or absolute estate and interest of the testator in the lands devised. *Martin v. Martin*, 19 L. R., Ir. 72—V.-C.

Devise to Class—Gift over on Death leaving Issue.]—A testator had devised and bequeathed his real and personal estates to his wife during widowhood, and at her decease or marriage to his sons and daughters therein named in equal shares; and the will then proceeded as follows: "but if any of my children should die during my lifetime, or otherwise, leaving issue, such child or children, as the case may be, to have their father's or mother's share, to be equally divided between them absolutely." The testator's widow died in 1884, leaving all the sons and daughters named in the will her surviving, and all of them had attained twenty-one years. Such sons and daughters were the vendors of the property sold:—Held, that the children were entitled to their respective shares for an indefeasible estate in fee simple, and that they could therefore make a good title. *Thompson to Curzon, In re*, 52 L. T. 498—Kay, J.

Renewable Leaseholds—Purchase of Reversion.]—Testatrix devised leaseholds, renewable by custom, to J. P. for the residue of the term, and after the death of J. P., during the residue of the term, to the children of J. P. in equal shares. J. P. renewed the leaseholds more than once, and finally purchased the reversion:—Held, that the fee simple in the property passed by the devise in the will to the children of J. P., and became subject to the trusts of the will. *Phillips v. Phillips*, 29 Ch. D. 673; 54 L. J., Ch. 943; 53 L. T. 403; 33 W. R. 863—C. A.

Shelley's Case—Power to Appoint—Ultimate Limitation to Right Heirs of Tenant for life—In default of such Appointment.]—By a will made in the year 1833 a testatrix devised a freehold message unto trustees, their heirs and assigns, upon trust for her daughter during her life, and after her decease upon such trusts for the lawful child or children of the daughter as she should by deed or will appoint, and "in default of such appointment" in trust for the daughter's right heirs. The testatrix directed that the receipts of her daughter should be a discharge to the trustees, that the message should be enjoyed by her daughter free from the debts, control, or engagements of any husband, with whom she might intermarry, and that the trustees might reimburse themselves. The testatrix authorised the trustees, their heirs, or assigns, also to sell the message with the consent of her daughter, "or other the persons or person who shall be beneficially interested under the trusts." The daughter after her mother's death granted the message to the defendants in fee simple, and died without having been married. The plaintiff, her heir-at-law, having brought an action to recover the message:—Held, that the message was devised to the trustees in fee simple at law; that the limitation to the right heirs of the daughter in default of an appointment to her children was a remainder and not an executory devise; that both the estate for life devised to the daughter and the remainder to her right heirs were equitable estates; that consequently the estate for life and the remainder to the right heirs coalesced pursuant to the rule in *Shelley's Case* (1 Rep. 93 b), that the daughter could make a valid disposition of the fee simple, and that the defendants were entitled to the message. *Cunliffe v. Branohor* (3 Ch. D. 393);

Hart's Estate, In re (W. N. 1883, p. 164) distinguished, by Cotton, L.J. *Richardson v. Harrison*, 16 Q. B. D. 85; 55 L. J., Q. B. 58; 54 L. T. 456—C. A.

Legal Estate—Trustees.—By his will a testator devised a certain freehold messuage, mill, tenement, and closes of land, together with the millstones, mill machinery, threshing machine, &c., “and other fixtures” to two trustees, their heirs and assigns, upon trust for A. J. T. for life, upon the express condition that the premises should be kept in good repair, and insured in the names of the trustees, and after the death of A. J. T. in trust for the children of A. J. T. at twenty-one or marriage:—Held, that upon the construction of the will, the trustees had no legal estate vested in them. *Tudball v. Medlicott*, 59 L. T. 370; 36 W. R. 886; 52 J. P. 659—Kekewich, J.

A testator directed his executors to pay his debts and carry out the intentions of his will, and devised his real estate to his wife and daughters. The will contained a proviso limiting the wife's share to her for life, with remainder to his surviving daughters, or their children, and a direction to invest the shares of his daughters for their benefit and that of their children:—Held, that the executors took the legal estate in the testator's realty. *Davies to Jones*, 49 L. T. 624; 32 W. R. 460—Pearson, J.

ii. In other Cases.

Qualification of Absolute Gift.—Where in a will there is an absolute gift followed by a qualification of the mode of its enjoyment to secure certain objects for the benefit of the legatee, then, if the object fails, the absolute gift remains. But if there is an absolute gift, followed by a clause diminishing the estate so given to the first taker, the absolute gift has, in effect, been cut down, and the court can only give effect to it as so diminished. *Richards, In re, Williams v. Gorvin*, 50 L. T. 22—Pearson, J.

Under a gift by A. to his wife of 10,000*l.*, “afterwards to go to the understated residuary legatee E.”:—Held, that the legacy of 10,000*l.* was given to the wife absolutely, but that interest upon such legacy did not begin to run until after one year from the testator's death. *Percy v. Percy*, *Percy, In re*, 24 Ch. D. 616; 53 L. J., Ch. 143; 49 L. T. 554—V.-C. B.

Property to be enjoyed with and go with Title.—A testatrix by a codicil to her will bequeathed to C. A., sixth Earl of E., and to his successors, all her plate, and also gave, devised, and bequeathed a leasehold house to him and “to his successors, and to be enjoyed with and to go with the title”:—Held, that the plate and leasehold house passed to the sixth Earl absolutely; the words “to be enjoyed with and to go with the title” not being sufficient in themselves to create an executory trust or to cut down the interest to a life estate. *Montagu v. Inchiquin (Lord)*, (23 W. R. 592) discussed. *Johnston, In re, Cockerell v. Essex (Earl)*, 26 Ch. D. 538; 53 L. J., Ch. 645; 52 L. T. 44; 32 W. R. 634—Chitty, J.

M. for Life, and to Heirs after her — Gift over.—A testatrix bequeathed a sum of money

to “M. for the term of her life and to her heirs after her;” and in case M. should not survive her, the testatrix bequeathed the said sum to E. for her life, and at the death of E. to certain other persons:—Held, that the legacy did not upon the death of M., who survived the testatrix, pass to her heir-at-law as a persona designata, but that M. took the bequest absolutely. *Atkinson v. L'Estrange*, 15 L. R., Ir. 340—V.-C.

On Death of Legatees Shares should go to Next of Kin.—J. C. by his will, dated 19 March, 1877, gave and bequeathed his leasehold messuage in W.-road, and also all the plant, stock-in-trade, fixtures, and utensils of trade, and the goodwill of the trade or business of tyresmith carried on on the said premises, but not including the book-debts owing at the testator's decease, unto his three sons, J. C., W. C., and T. C. in equal shares, provided that upon the death of either of them the said J. C., W. C. and T. C. (whether in the testator's lifetime or after his decease) the share or shares of him or them so dying of and in the said leasehold messuage, plant, stock-in-trade, &c., should go to his or their next-of-kin according to the Statutes of Distribution. The testator died on the 21st of March, 1877. The three sons purchased the book-debts from the testator's estate, and carried on the business in partnership until the year 1886, during which time they had largely increased the value of the stock-in-trade, and had purchased additional leasehold premises for the business. In 1886 T. C. agreed to purchase the share of W. C. in the business for 4,500*l.*:—Held, that W. C. had a right to receive the whole of the purchase-money, and it was not necessary to set apart any part thereof for the persons who might be ultimately entitled under the gift to the next-of-kin. *Connolly v. Connolly*, 56 L. T. 304—North, J.

Gift of Rents and Income—Life or Absolute Interest—Contrary Intention.—Testator by his will gave a legacy of 100*l.* to his wife “for her present wants” and appointed her sole executrix. And he gave, devised, and bequeathed the rents and income of all his freehold, copyhold, and leasehold properties at B., and all the rents and profits of his leasehold houses in P., to his wife. He also directed that she should be entitled to all other the income of his estate and effects, real or personal, and that any moneys which might be in his house or in the hands of his said wife might be invested in her name in consols, and the interest to arise therefrom might be retained or received by his said wife as part of his said income. He desired that his wife “should be at liberty out of the proceeds of the surplus residuary estate to erect any monument to my memory which she may please, not exceeding the sum of 300*l.*” He also gave and bequeathed to his wife all his household furniture, goods, and effects in his house at E., and desired that she should “have the free use and occupation of his dwelling-house at E.” and directed that an inventory of such furniture and effects should be made. The court held, that there was no indication sufficiently clear to show that the widow took only a life interest, and therefore that she took an absolute interest in all the property:—Held, on appeal, (1) that there is a well-settled rule that a gift of income carries the corpus

unless there are in the will sufficient words to cut down the gift to a life interest only; (2) that the rule is merely one of construction, to be read only with reference to other parts of the will, and applicable only when the testator has himself given no rule for reading his will; (3) that there being nothing to cut down the gift of the property at B. and P. and the furniture, the widow was absolutely entitled to those properties; (4) that there was sufficient in the will to cut down the gift of the E. property and the residuary real and personal property to a life interest only. *Coward, In re, Coward v. Larkman*, 57 L. T. 285—C. A. Affirmed 60 L. T. 1—H. L. (E.).

Subject to Condition.]—A testator by his will, dated in 1885, appointed executors, and continued as follows: "I give to my two sons . . . all my real and personal property . . . for their natural life, subject to the condition of paying" the legacies therein mentioned. "If my sons marry and have issue, I give to each of their heirs their father's share, and to their heirs for ever; if there is no male issue with either of my two sons and there is female issue, then the father's share shall be divided between them share and share alike as tenants in common, and to their heirs for ever. Should either of my sons die without issue, then such son's share shall go to my other son and to his heirs for ever. Should both of my sons die without issue, then at the death of the last of them, I give all my real property to the whole of my grandchildren share and share alike as tenants in common, and to their heirs for ever." He then directed that his two sons should pay out of his real property any payment due and owing thereon:—Held, that the two sons took the personality absolutely subject to the conditions mentioned in the will. *Score, In re, Tolman v. Score*, 57 L. T. 40—Kay, J.

Devise to Trustees in Trust for A., subject to Charges still subsisting.]—In 1878 W. B. devised and bequeathed his real and residuary personal estate upon trust to permit his wife to carry on his business during widowhood, and to employ therein any capital so employed by the testator at his death. W. B. died in 1879, having since 1865 carried on the business of a licensed victualler on freehold premises, known as the W. hotel. The fee simple of the hotel belonged to A. B., W. B.'s father. In 1876 A. B. gave and devised his real and leasehold estates, including the hotel, to trustees upon trust to pay the expenses of repairs and insurance, and the expenses incidental to the management of the property and the collection of rents, and to pay out of the rents and profits certain annuities, and to permit his wife to occupy the house in which he died rent free, or in default any other house which he might die possessed of not exceeding in yearly rent 20*l.*, and he directed his trustees to stand possessed of his said real and leasehold estates in trust for his son W. B. absolutely. After the death of A. B. in 1876, W. B. continued in possession of the hotel as before, and on his death his widow continued to carry on business there. In 1886 the widow was adjudged bankrupt. The annual charges created by the will of A. B. were still subsisting:—Held, that W. B. was not entitled to possession under the will of A. B., and that the hotel was not capital employed by him in his business, and consequently

did not pass to the trustee in bankruptcy of the widow. *Brisley, In re, Fleming v. Brisley*, 56 L. T. 853—Stirling, J.

Postponement of Enjoyment of Principal—Interim Gift of Income.]—Property was assigned to trustees in trust for S. for life, and after her death to such of her issue as she should by will appoint. S. by her will appointed two-fifths of the property to two trustees of whom L. was the survivor in trust to pay the income to her son till he should attain the age of forty years, and then in trust for her son, his executors and administrators; provided that in case her son should assign his share in the property, then the appointment for his benefit should be void, and the two-fifths should be held in trust for the other objects of the power. The son died under the age of forty without having assigned his share, leaving a will of which B. was executor. After the death of S., L. and N. were appointed trustees of the original settlement. N. afterwards (with the consent of the son's executor) obtained possession of the son's share. Subsequently N. misappropriated the fund. The persons beneficially interested under the son's will recovered judgment against B. for wilful default in allowing the property to remain in N.'s hands; and B. being dead, his executor brought an action against D. to make him liable for the loss of the fund:—Held, on the construction of the will of S., that the beneficial interest in two-fifths of the property vested absolutely in her son and passed by his will. *Scotney v. Lomer*, 31 Ch. D. 380; 55 L. J., Ch. 443; 54 L. T. 194; 34 W. R. 407—C. A.

Precatory Trusts.]—See post, col. 2093.

b. LIFE ESTATE OR INTEREST.

By Implication.]—By a marriage settlement certain trust funds stood limited in trust for the wife for life, and after her death, in default of children, for such persons as A. (the wife) should by will appoint, and, in default of appointment, to her next of kin. The husband took no interest under the settlement. By her will A., after reciting the settlement, directed and appointed all such property so subject to her disposition as aforesaid, and from and after the decease of her said husband (but not to affect the income thereof during his life), in equal fifth parts unto and between her brother and four sisters therein named. At the date of the will the said brother and sisters were five out of six people who would have been entitled as the next of kin of A. if she had then died:—Held, that the husband of A. did not take any life estate by implication. *Woodhouse v. Spurgeon*, 52 L. J., Ch. 825; 49 L. T. 97; 32 W. R. 225—Denman, J.

A testator bequeathed the residue of his personal estate, which he directed to be converted into money by his executors, and to be divided into sixths. He bequeathed the interest of five-sixths to W. L. for life, and after his death the principal to his children, and if he should have no children, the interest to A. C. for life, and after her death the principal to her children; and if there should be no child of A. C., he bequeathed the five-sixths to the St. George family in different shares. He bequeathed the remaining one-sixth and the interest and divi-

dends thereof, &c., after the decease of W. L., to the children of A. C., and if there should be no child of A. C., to the St. Georges in equal shares. There was no child of A. C.:—Held (1) that W. L. did not take an interest for life in the one-sixth by implication; (2) that the interest of the one-sixth went, during the life of W. L. to the St. George family. *Greene v. Flood*, 15 L. R., Ir. 450—M. R.

To Sons for Life—"Heir"—Rule in Shelley's Case.—A testator devised certain land to his sons successively for life, beginning with the youngest, "and so on from son to son till it arrives to the oldest son, then the said estate to be for ever enjoyed by the oldest surviving heir of his oldest surviving son then living for their life or lives for ever"—Held, that upon the true construction of the will, the intention of the testator was to give a life estate to the "heir"; that the word "heir" was not to be regarded as a word of limitation, and therefore that the rule in Shelley's case (1 Rep. 93) did not apply, and that the testator's oldest surviving son took only a life estate. *Pedder v. Hunt*, 18 Q. B. D. 565; 56 L. J., Q. B. 212; 56 L. T. 687; 35 W. R. 371—C. A.

Absolute Power of Disposal—Enjoyment in Specie—Cash.—Testator directed his debts to be paid, and subject thereto gave his personal estate to his widow for her own use as long as she might live, and on her death directed the remainder of his personal estate and effects which might then exist to be made into money, and bequeathed the same to his brothers and sisters, and appointed his widow co-executrix of his will. The estate included a sum of cash at the bank:—Held, that the widow had no absolute power of disposal over the personal estate, but took only a life estate, with a right to enjoy the property in specie, and that the cash at the bank must be invested. *Holden, In re, Holden v. Smith*, 57 L. J., Ch. 648; 59 L. T. 358—Kay, J.

With power of Disposition—"Remain undisposed of."—A testator, by his will, gave his residue to his wife absolutely. By a codicil he revoked this gift, and after making a specific gift, gave his residue to his wife "for her own absolute use and benefit and disposal;" but, without prejudice to the absolute power of disposal by his wife of all the said residue, in case at her decease any part thereof should "remain undisposed of" by her, he gave the same to two other persons equally as tenants in common, subject to the payment by them of his wife's debts and funeral expenses:—Held, that the testator's wife took a life interest, with a power of disposition by act *inter vivos*, but not by will. *Pounder, In re, Williams v. Pounder*, 56 L. J., Ch. 113; 56 L. T. 104—Kay, J.

Life Estate with Power of Appointment or absolute Interest.—A testator left all his property to his wife, in trust for the uses there-after mentioned. He then bequeathed certain pecuniary legacies, and stated that it was his will that his youngest son P. should live and reside with his mother, and be attentive to her, and directed by her in order that she might by deed or by her last will and testament provide for him in such a manner as to her might seem

most expedient and proper; and he appointed and nominated his said wife his residuary legatee and trustee of his will, in order that she might direct and govern his said children and assist to arrange all matters between them; and previous to her death—provided that she did not marry again—that she might dispose of the residue of his property to and amongst his said children and provide for his son P. as she might think expedient; and he directed that if she married again she should cease to be trustee, and receive the sum of 100*l.* only; and that in such case his son E. should act as trustee in her stead. He nominated his son E. and his wife executor and executrix:—Held, that the testator's wife took the residue absolutely, and that there was not an estate for life merely in the wife, with power of appointment. *Morrin v. Morrin*, 19 L. R., Ir. 37—V. C.

Absolute Gift cut down.—By his will, dated in 1870, a testator gave all his household furniture, and all his real and personal estate, and sums of money in the house, and all sums of money in the savings bank, and all other his estate and effects with the exception of two 5*l.* shares in a certain company, unto his wife, and he gave to his sons the two 5*l.* shares; and he also desired that, at the decease of his wife, what might remain of his property should be equally divided amongst his surviving children. The question was whether this was an absolute gift of the property to the testator's widow, or whether there was a trust in favour of the testator's children:—Held, that the testator's widow took only a life interest in the property. *Sheldon and Kemble, In re*, 53 L. T. 527—Kay, J. See *Coward, In re*, ante, col. 2057.

Remainder to Female Issue.—A testator, after reciting that he wished to dispose of all his worldly substance, and to settle and assure his several estates in the counties of C. and L. to the several uses and purposes therein set forth, devised the same unto his sister A. L. for life; and, on her death, he declared it to be his will and intention to settle and assure his said estates amongst certain families named, in the following "parts or proportions;" and he then gave to six persons one-sixth "part" each, and declared that the several six parts should remain to each of the said devisees for life, with remainder to the first and every other son of each of the said devisees, severally and successively in tail male, and in default of such issue, then with remainder to the issue female of each or any of the said devisees, to take as tenants in common and not as joint tenants; and that, in case of the decease of any of the said six devisees without issue male or female, either in the testator's lifetime or after his decease, then the one-sixth part or parts of those who should happen to die without issue should go to and augment the shares of such survivors, "so long as the entail intended to be thereby created should continue to subsist," and, in case all his said estates should, under such limitations as aforesaid, vest in any one of his said devisees, or their heirs male, his will and intention was, that such person should take the name and arms of the testator:—Held, that under the above will, the six devisees took estates for life only, with remainder (after the express estates in tail male limited to their first and other sons) to.

their issue female in fee as purchasers. *Shannon (Earl) v. Good*, 15 L. R., Ir. 284—C. A.

Gift of Rents—Gift over on Death to Children.]

—A testator bequeathed leaseholds to a trustee upon trust to give yearly equal portions of the rents to the two brothers and three sisters of the testator; that was to say, each to receive one-fifth part of the net proceeds of rent; and he directed that, on the decease of any or all of his brothers and sisters, "the same should go to their children":—Held, that the brothers and sisters of the testator took life interests only. *Houghton, In re, Houghton v. Brown*, 53 L. J., Ch. 1018; 50 L. T. 529—Pearson, J.

Estate in quasi Tail — Issue taking as Purchasers.]—A testator who held under a lease for lives renewable for ever, by his will made before the Wills Act, 1837, devised all his estate in the lands to trustees upon trust for the maintenance of his son G. S. R. during his minority. He directed that the residue of the rents should accumulate for G. S. R. till he married or attained twenty-one, when the accumulations should be handed over to him. And as to the said lands, the testator declared that they were given to the trustees on trust for accumulation of the rents as aforesaid, and in the next place, to suffer G. S. R. to take the rents of the said lands for life, and after his death then to the issue of G. S. R. lawfully begotten, in such shares and proportions as G. S. R. should appoint, and for want of appointment, the said lands to go to and among all the lawful issue of G. S. R. living at the time of his death, share and share alike, and, if but one child living, then the whole of the lands to go to such only child, his or her heirs or assigns for ever. If G. S. R. should die without leaving issue, the testator devised the lands over to E. R. and T. R. in fee. G. S. R. attained twenty-one and obtained a fee-farm grant of the said lands in which it was recited that G. S. R. was tenant for life:—Held, that G. S. R. took an estate for life only in the lands, with remainder to his issue living at his death in quasi fee, and that on his death without issue E. R. and T. R. became entitled to the lands. *Rotherham v. Rotherham*, 13 L. R., Ir. 429—C. A.

Equitable Estate—Attaining Twenty-one.]

A testator devised freeholds and chattels together to trustees on trust to permit his wife to reside on the property, and have the use of the chattels until his youngest son attained twenty-one, when the whole was to be divided among his three children, they paying the wife an annuity if then living:—Held, that the interests of the children in the freehold after the youngest attained twenty-one were equitable. *Fowke v. Draycott*, 52 L. T. 890; 33 W. R. 701—North, J.

— Payment of Rents to Married Woman—

Direction to Trustees to Repair.]—A testatrix by her will directed her trustees to stand possessed of the net rents of her real estate, upon trust to pay the same to Mrs. W., a married woman, for life, for her separate use, her receipt alone to be a sufficient discharge to the trustees; and the testatrix directed her trustees, out of the rents of her real estate, to keep in repair all the buildings on the estate during the period of their trust, and also the chancel of P. Church. No

power of sale or leasing was contained in the will:—Held, that, notwithstanding the direction to the trustees with respect to repairs, Mrs. W. was equitable tenant for life of the settled land, and, as such, was entitled to be let into the possession and management of the estate, upon her undertaking to see to the repairs. *Bentley, In re, Wade v. Wilson*, 54 L. J., Ch. 782; 33 W. R. 610—Pearson, J.

c. ESTATE TAIL.

"Child or Children"—"Dying without Issue"

—Rule in Shelley's Case.]—A will made in 1820 contained the following clause, "I give and devise unto my eldest son Thomas all my real and freehold estate and all leases and leasehold premises now in my possession (subject to the payment of the rents and the performance of the covenants mentioned in the said indentures of leases) during the term of his natural life, and after his decease to his legitimate child or children (if there be any); but if he dies without issue, my will is it may go unto my other son William during the term of his natural life, and afterwards to his legitimate child or children (if any); but if he should likewise die without issue, my will is it may go to my daughter Mary and to her heirs and assigns for ever." The will then gave legacies to the second son and the daughters, with provisions for the daughters, to be paid in the first instance by Thomas, but to be repaid in part or in whole to him in certain events by his successor in the estate. Thomas died without issue:—Held, by Earl Cairns and Lords Blackburn and Fitzgerald, that reading the whole will together, Thomas took an estate tail in the realty. Contra, by the Earl of Selborne, L. C., and Lord Bramwell, that Thomas took an estate for life, with remainder to his children (if any) in fee as purchasers. *Bowen v. Lewis*, 9 App. Cas. 890; 54 L. J., Q. B. 55; 52 L. T. 189—H. L. (E.).

"Issue" with Words of Limitation super-

added.]—A testator by his will, dated 1860, disposed of all his real estate, subject to an interest therein to his wife for life, in favour of his six nephews, "and all my right, title, and interest to and in the same and every part thereof, to be equally divided amongst my six nephews, share and share alike, and their issue after them, to and for their heirs, executors, administrators, and assigns." The question arose whether the word "issue," with the words of limitation superadded, operated to give an estate tail, or whether the issue took as purchasers:—Held, that the words in question created an estate tail in the six nephews; that the addition of a limitation to the heirs general of the issue would not prevent the word "issue" from operating to give an estate tail as a word of limitation; that in this case the words "equally divided" made the estate divisible into six shares, and there were no words to subdivide those shares, and consequently that the subsequent words "heirs, executors, administrators, and assigns," must be rejected. *Williams v. Williams*, 51 L. T. 779; 33 W. R. 118—Chitty, J.

Implied Estate Tail—Rule in Shelley's Case.]

—G., who died in 1837, by will devised certain freehold hereditaments to W. B. for life, and if he should die without having a son, over. W. B.

entered into possession of the property and died in 1882, leaving a son, W. E. B., who entered into possession of the property, and contracted to sell it. The purchaser having objected to the title, a summons was taken out under the Vendor and Purchaser Act:—Held, that there was an implied gift to the son of W. B., and this implied gift following on the gift to W. B. for life, was equivalent to a word of limitation, and therefore, by the rule in *Shelley's case*, gave W. B. an estate in tail male, and as this had not been barred, W. E. B. was entitled to the property for an estate in tail male. *Bird and Barnard, In re*, 59 L. T. 166—North, J.

— **Contingent Estate Tail.**—Devise of the testator's Galway estate to the use of his daughter F. for life; remainder to the use of the second son of F., and the heirs male of the body of such second son; remainder to the use of the third, fourth, and all and every the son and sons of F., severally, successively, and in remainder, one after another, as they shall be in order of age and priority of birth, and the heirs male of the body and bodies of all and every such son and sons; remainder to the daughter and daughters of F., equally to be divided amongst them in such shares, &c., as F. should by deed or will appoint, as tenants in common, and the heirs of the body and bodies of all and every such daughter and daughters; "and in default of issue male or female of F.," to the use of testator's daughter Marion, and her issue male or female, in the same manner as other estates of the testator were by the same will devised to her and her issue; remainder to the testator's right heirs, on the express condition that none of his daughters should take the veil and become a nun. And in case any of them should do so, such daughter should forfeit all her right and title to such estate and lands, and her estate so forfeited should thenceforth be vested in and divided among her surviving sisters (excepting two) and their issue, share and share alike. And he left the residue of his property to his four daughters, M., L., F., and Marion. And in case all his children should die without issue, he devised all his estates to his wife for life, and after her decease to his right heirs for ever. In 1865 F., by a disentailing deed, recited the limitations of the Galway estate, and that she had been advised that she might be entitled under them to an estate tail by implication in remainder, expectant upon the determination of the express estates tail limited to the second and other succeeding sons, and to her daughters; and that she was desirous in the event of her being entitled to such estate tail in remainder by implication, of barring the same, and converting it into an estate in fee simple, granted all the lands in Galway so devised to her, and all other the hereditaments in which, under and by virtue of the said will, she was entitled to any estate tail, &c., and all her estate and interest therein, to a trustee, discharged from all remainders, &c., to such uses as she should appoint; and in default, and subject to such appointment, to the use of F. and her heirs. In 1866 Marion became a professed nun. In 1868 F. by her will devised the residue of her property, subject to some pecuniary legacies to Marion, and died without issue in 1880:—Held, 1. That F. did not take an estate tail by implication in the Galway lands. 2. That, on Marion becoming a professed nun, her vested remainder for life passed to M.,

L., and F., as tenants in common in quasi tail. 3. That F.'s quasi estate tail in one-third of Marion's life estate was not barred by the disentailing deed, and that on F.'s death one-third of Marion's life estate, which went over to F. on Marion becoming a professed nun, passed under the residuary clause in the original testator's will to M., L., F., and Marion absolutely. *Grattan v. Langdale*, 11 L. R., Ir. 473—M. R.

Limitation whether executory.—By his will a testator devised his W. property to J. F. L. and declared that he was to hold it with other property for his life, and after his decease to the use of his first and other sons successively, one after another, in tail male, with several remainders over. He afterwards purchased the lands of D., and by a codicil devised them to J. F. L., he paying any part of the purchase-money which remained unpaid, to hold it subject to the same entail as the W. property; and by another codicil, dated six years afterwards, devised it to J. F. L. and "entailed it in him and his issue male":—Held, that J. F. L. took an estate in tail mail in the lands of D. *Loury v. Loury*, 13 L. R., Ir. 317—M. R.

Charge on Lands.—By a will, coming into operation prior to the Wills Act, the testator devised all the freehold estate, right, title, and interest, in certain lands to his wife for life subject to legacies; remainder to his son J. for life; remainder, after the decease of J., "to his first and every other son lawfully to be begotten according to seniority of age and priority of birth;" remainder to T. for life; remainder to his first and every other son and their heirs. In a subsequent part of the will the testator bequeathed a sum of money, charged on the said lands to his daughter M., and desired that, in case she should die unmarried, it should go and enure to J., if then living, or the heirs male of his body. In action brought by J. B., who was J.'s younger son, to recover possession of the lands on the title:—Held, that the plaintiff was entitled to an immediate estate for his life, and accordingly to recover possession of the lands. *Palmer v. Palmer*, 18 L. R., Ir. 192—C. A.

Subject to Condition.—A testator by his will, dated in 1885, appointed executors, and continued as follows: "I give to my two sons . . . all my real and personal property . . . for their natural life, subject to the condition of paying" the legacies therein mentioned. "If my sons marry and have issue, I give to each of their heirs their father's share, and to their heirs for ever; if there is no male issue with either of my two sons, and there is female issue, then the father's share shall be divided between them share and share alike as tenants in common, and to their heirs for ever. Should either of my sons die without issue, then such son's share shall go to my other son and to his heirs for ever. Should both of my sons die without issue, then at the death of the last of them, I give all my real property to the whole of my grandchildren share and share alike as tenants in common, and to their heirs for ever." He then directed that his two sons should pay out of his real property any payment due and owing thereon:—Held, that the two sons took the real estate in tail male. *Score, In re, Tolman v. Score*, 57 L. T. 40—Kay, J.

5. REQUESTS AND DEVISES.

a. PARTICULAR WORDS.

General Words followed by Particular—Residue.]—A testator by his will having made a bequest of a sum of money secured by a mortgage proceeded in the following terms:—"I leave the remainder of my personal property in funds, royal bank, and other deposit docketts to my wife absolutely." He left pecuniary legacies to two individuals:—"Held, that the words "in funds, royal bank, and other deposit docketts," did not cut down the generality of the gift of "the remainder" of his personal estate, which passed to the testator's wife under the bequest. *Tighe v. Featherstonhaugh*, 13 L. R., Ir. 401—V.-C.

"All my property Leasehold and Freehold.]"—R. by will, after appointing executors and directing his debts and funeral expenses to be paid, gave his wife "all my property leasehold and freehold which I now possess:—"Held, that all the testator's real and personal estate passed under the gift to his widow, and not only his leaseholds and freeholds. *Roberts, In re, Kiff v. Roberts*, 55 L. T. 498; 35 W. R. 176—C. A. Affirming 55 L. J., Ch. 628—Pearson, J. See *Portal and Lamb, In re*, post, col. 2087.

"All my Interest"—Will made before 1 Vict. c. 26.]—A testator in a will made before the Wills Act gave and bequeathed "all the interest of my houses and cottages situated as follows." He then proceeded to dispose of this property, which was copyhold, and, after giving life interests, concluded with a gift to T. S.:—"Held, that the words "all my interest" at the commencement of the will ran through the whole will, and were not in the nature of a recital merely, and that T. S. took the fee. *De la Hunt and Pennington, In re*, 57 L. T. 874—Chitty, J.

"All my Personal Property"—Enumeration comprising Real Estate—After-acquired Freeholds.]—A testator, by his will, dated in 1875, gave and devised to the wife Rebecca "all my personal property, wherewith it has pleased God to bless me; that is, my freehold land, and my two cottages, Pennce Birr, situated at Clowstop . . . also my five leasehold houses . . . to have and to hold the same for her natural life." He then directed her to provide "out of the rents of the above property" for a granddaughter of hers, and concluded, "my wife Rebecca to be sole executor of the same." Subsequently to the date of his will the testator acquired other freehold property at Clowstop, of which, together with personal property, besides the leaseholds, he died possessed. The question was, what property passed by the will:—"Held, that the words "personal property" were not used in their technical sense; that the testator meant to give all the property of every kind belonging to him personally; that this general description was not cut down by the words of enumeration which followed; and that the widow was entitled, for her life, to all the real and personal estate of the testator which he possessed at the date of his death. *Smalley, In re, Smalley v. Smalley*, 49 L. T. 662—Kay, J.

"Real Estate"—Leaseholds for Years.]—A testator by his will, dated in 1870, declared that his trustees should stand possessed of and inter-

ested in the annual income and proceeds of his real and personal estate in trust to pay an annuity to his wife, and after her decease he declared and directed that his trustees should stand possessed of and interested in his real and personal estate upon the trusts and for the intents and purposes following, that is to say, "as to my real estates wheresoever situate (the Victoria Park Cemetery in the parish of St. Matthew, Bethnal Green, excepted)" in trust to pay the annual rents and proceeds thereof to two children as therein mentioned, "and as to my freehold estate called the Victoria Park Cemetery, and my personal estate wheresoever situated, upon trust to pay the dividends, interest, and annual proceeds thereof," to his five daughters in equal proportions. The personal estate comprised certain leaseholds for years:—"Held, that according to the true construction of the 26th section of the Wills Act (1 Vict. c. 26) the leaseholds for years did not pass under the gift of the real estates. *Wilson v. Eden* (16 Beav. 153), discussed; *Turner v. Turner* (21 L. J., Ch. 843), and *Gully v. Davis* (10 L. R., Eq. 562), discussed and distinguished. *Butler v. Butler*, 28 Ch. D. 66; 54 L. J., Ch. 197; 52 L. T. 90; 33 W. R. 192—Chitty, J.

B., by will, gave all his real estate in Kent to trustees upon trust for his sons, in strict settlement, and he gave all his real estate in the several counties of Durham and Middlesex, and elsewhere, and certain land at Stillington, in the county of Durham, held on lease from Merton College, Oxford, and all the residue of his personal estate, upon trust as to the personal estate for sale and conversion as therein mentioned, and as to the said real and leasehold estates in the counties of Durham and Middlesex, subject as to the said leasehold estate to the rents and covenants in the then present or any future lease thereof reserved or contained, upon the like trusts as were thereinbefore declared concerning the hereditaments in Kent. The testator at his death possessed in Kent a freehold mansion and estate; in Middlesex, a leasehold house only, and no real estate properly so called; in Durham, both freehold and leasehold lands in addition to the lands at Stillington mentioned in the will:—"Held, that s. 26 of the Wills Act applied, and all the leaseholds passed under the gift of real estate in the counties of Durham and Middlesex. *Davison, In re, Greenwell v. Davison*, 58 L. T. 304—North, J.

"My freehold farm and lands"—Copyholds.]—A testator devised a farm by the description of "my freehold farm and lands situate at Edgware, and now in the occupation of James Bray." The will contained no residuary devise. The farm comprised about seventy-six acres, of which twenty-six were copyhold:—"Held, that the copyhold parts of the farm passed under the devise. *Hall v. Fisher* (1 Coll. 47) and *Stone v. Greening* (13 Sim. 390) discussed and questioned. *Bright-Smith, In re, Bright-Smith v. Bright-Smith*, 31 Ch. D. 314; 55 L. J., Ch. 365; 54 L. T. 47; 34 W. R. 252—Chitty, J.

"Leasehold House"—Stables, whether included.]—A testator bequeathed to his wife his leasehold house, No. 32, Princes Gate. Together with this house he had at the time of his death occupied stables called No. 3, Princes-mews, which were originally held under a dif-

ferent lease from the house, though each lease was entered into on the same day, and they were for exactly similar terms, and between the same lessor and lessee. Upon the purchase of the house and stables by the testator from the original lessee, they were assigned to him by one deed, and afterwards the testator again assigned both house and stables by one deed by way of mortgage:—Held, that the stables passed with the house to the wife. *Mocatta, In re, Mocatta v. Mocatta*, 49 L. T. 629; 32 W. R. 477—Pearson, J.

“**Lease of House**”—**Freehold.**—A testator gave the lease of the house in which he should be living at the time of his decease to his wife. At the date of the will he was living in a house he held for a short term at a rack-rent; he subsequently bought and went to reside at a freehold house where he died:—Held, that the freehold house was not devised to the testator's widow. *Knight, In re, Knight v. Burgess*, 34 Ch. D. 518; 56 L. J., Ch. 770; 56 L. T. 630; 35 W. R. 536—North, J.

“**Temporal Effects.**”—“Temporal effects” in a will were held to include real estate. *Sheridan, In re*, 17 L. R., Ir. 179—Monroe, J.

“**Money.**”—In construing a will no absolute technical meaning should be giving to such a word as “money,” the meaning of which must depend upon the context, if any, and such surrounding circumstances as the court can take into consideration. A testatrix who was possessed of cash, securities, leaseholds, furniture, and effects, by her will, made in expectation of her death, which occurred two days after its date, gave “one half of the money of which I am possessed to H., and the remainder equally between O. and S., and after them to their children”:—Held, that the word “money” passed all the personal estate. *Cadogan, In re, Cadogan v. Palagi*, 25 Ch. D. 154; 53 L. J., Ch. 207; 49 L. T. 666; 32 W. R. 57—Kay, J.

L. by her will desired that all her debts, funeral and testamentary expenses should be paid, and if she should not leave enough money for that purpose, she desired that sufficient to pay her debts might be sold of the property she purchased from R. She gave the remainder of of that property to W. specifically; and, after making certain specific bequests of furniture and jewellery, gave her interest in certain real estate to A. and made him her residuary legatee. The property purchased from R. was leasehold, held for a very long term of years. The testatrix at her death possessed no actual cash. She had a small sum due to her for rents, and the half of a turnpike bond, besides furniture, the property purchased from R., one leasehold dwelling-house, and the real estate specifically devised to A.:—Held, that the word “money” must be taken to mean not the general personal estate, but the rents and money due on the bond, and those being exhausted, the residue of the debts must be paid out of the property purchased from R. in exoneration of the furniture and leaseholds. *Lloyd v. Lloyd*, 54 L. T. 841; 34 W. R. 608—North, J.

At the date of the will in August, 1881, the testatrix had over 600*l.* at her bankers. In February, 1883, she invested 600*l.* in the purchase of 586*l.* Consols. At the date of her death in May, 1884, she had the 586*l.* Consols, 555*l.* at

her bankers, and 8*l.* cash in her house:—Held, that the word “money” in the will ought not to be extended beyond its strict meaning. *Sutton, In re, Stone v. Att.-Gen.*, 28 Ch. D. 464; 33 W. R. 519—Pearson, J.

“**All my 'Moneys'**”—**Extent of Gift.**—A testatrix, by her will dated in 1874, appointed executors thereof, gave pecuniary legacies to servants, and directed her debts and expenses to be paid, and continued:—“I give in equal shares all my moneys to my brothers and sisters as shall be living at my decease.” Then she went minutely through her furniture and similar articles, bequeathing them to different members of her family, but some articles of furniture, &c., were omitted from the bequest, and the will contained no mention or express disposition of any stocks or investments, nor any residuary clause. By a codicil, dated in 1883, the testatrix bequeathed her furniture, &c., which might be in the house in which she and her sister X. should be living together at the time of her decease to X. for life, and, after her death, she directed that the same should belong to the persons to whom the same effects were bequeathed by her will, and in all other respects she confirmed her will. The testatrix died in September, 1883, possessed of New Three per Cents. standing in her name; bonds of a foreign government payable to bearer; consolidated and preference stock of a railway company, registered in her name in the company's books; sums due to her; cash in her house; and furniture, &c., some of which was not specifically mentioned in the will:—Held, that the intention of the testatrix appearing from her will and codicil was to dispose—first, of all her moneys; secondly, of all her furniture, &c.; and therefore that, though the gift of all her moneys could not be read as a residuary clause, it must be read as applying to all the property of which the testatrix died possessed, other than furniture, &c., and that the furniture, &c., not specifically disposed of was, therefore, the only property as to which the testatrix had died intestate. *Lowe v. Thomas* (5 De Gex. M. & G. 315), distinguished. *Townley, In re, Townley v. Townley*, 53 L. J., Ch. 516; 50 L. T. 394; 32 W. R. 549—Pearson, J.

“**Remainder of my Money.**”—The words “remainder of my money” pass all stocks and investments of money, but not the general residue other than such investments. *Hart v. Hernandez*, 52 L. T. 217—Pearson, J.

“**Securities for Money.**”—A testator, who died in 1878, bequeathed all his “moneys due on mortgage, securities for money, and ready money,” to trustees upon trust for his children. Part of the testator's property consisted of the following: (1) Consols; (2) Proportion of dividend on such Consols to the date of the testator's death; (3) Promissory notes; and (4) Railway debenture stocks. The question was, whether such property passed under the specific gift:—Held, that the Consols and promissory notes were “securities for money” within the meaning of the gift, and so also the railway debenture stocks, it being expressly provided by s. 23 of the Companies Clauses Act, 1863, that debenture stock and interest thereon should be a charge upon the undertaking of the company. But, held, that the proportion of dividend on the

Consols did not pass, as the Apportionment Act, 1870, applied, and the dividend must therefore be apportioned as at the date of the testator's death. *Beaven, In re, Beaven v. Beaven*, 53 L. T. 245—Kay, J.

"Stock Standing in my Name."—Where a testator made a specific bequest of "all my stock standing in my name in various companies, together with all bonds, &c." :—Held, that sums in Consols, and in New Three per Cent. Annuities, a thirty years' annuity, also sums of New Zealand Four per Cent. stock ; of Victoria, 1883, Four per Cent. stock ; of New South Wales Four per Cent. stock ; of Metropolitan Board of Works stock ; of Nottingham Corporation stock and dividends, passed under the bequest. *Parrott, In re, Parrott v. Parrott*, 53 L. T. 12—V.-C. B.

"Shares" in Company—Debentures.—A testator bequeathed all his stock, shares, and debentures in the M. bank, shares in four other companies (including the A. Gas Company), and all other shares in banks or public companies, not otherwise disposed of. At the time of his death the testator possessed one hundred and thirty-five shares in the A. Gas Company, and also 2,000l. debentures in that company :—Held, that the debentures did not pass under the bequest. *Luard v. Lane* (14 Ch. D. 856) questioned. *Dillon v. Arkins* 17 L. R., Ir. 636—C. A.

"My Property at R.'s Bank"—Cash Balance—Share Certificates.—Bequest of "half my property at R.'s bank." At the time of his will and of his death the testator had at R.'s bank in Paris a cash balance and certificates of French shares, some inscribed and some transferable by delivery, which were deposited with the bankers, who received the dividends and carried them to his credit. He had nothing else at the bank :—Held, by the court of first instance, that only half of the cash balance passed by the bequest :—But held, on appeal, that a moiety of the shares also passed. *Prater, In re, Desinge v. Beave*, 37 Ch. D. 481 ; 57 L. J., Ch. 342 ; 58 L. T. 784 ; 36 W. R. 561—C. A.

Bequest of Fund "to be Settled."—A testator bequeathed as follows : "To my daughter A., wife of M. W., I bequeath 10,000l. This amount to be settled upon her for her life, and to be invested for her in good securities in the names of two or more trustees. At her death 8,000l. of the above sum to be divided equally amongst her children, and the remaining 2,000l. to be given to her husband if living ; if deceased, then the whole amount is to be equally divided amongst her children." The daughter and her husband and child applied for the sanction of the court to a settlement of the legacy :—Held, that a settlement ought to be directed, treating the directions in the will as instructions for a settlement. *Parrott, In re, Walter v. Parrott*, 33 Ch. D. 274 ; 55 L. T. 132 ; 34 W. R. 553—C. A.

Bequest of 2,000l., for the benefit of a feme sole, "to be paid upon her marriage, and to be settled upon her by her settlement," the interest to be paid to her in the meantime ; and, in case she should not marry before attaining the age of thirty-five years, the principal sum to be paid to herself. The legatee married under the age of thirty-five years, and applied for payment of a sum of money in court, which represented the legacy :—Held, that a settlement should be made

of the legacy upon the legatee and her children. *Duckett v. Thompson*, 11 L. R., Ir. 424—V.-C.

— "To select and set aside Collection."—A testatrix bequeathed certain legacies to A. C., sixth Earl of E., and as to all her household furniture, paintings, books, china, and the whole contents of her house, she bequeathed the same to her trustees and executors upon trust that they should in the first place select and set aside a collection of the best paintings, statuary, and china for the said Earl of E., and his successors, to be held and settled as heirlooms, and to go with the title :—Held, that the gift was a clear direction to settle, and created an executory trust, and a settlement was directed (to be settled in chambers) giving a life interest to the sixth Earl, with remainder to the next heir to the earldom for his life. *Johnston, In re, Cocherell v. Essex (Earl)*, 26 Ch. D. 538 ; 53 L. J., Ch. 645 ; 52 L. T. 44 ; 32 W. R. 634—Chitty, J.

"Full Salary"—Legacy duty.—A gift of six months' full salary is not a gift free from legacy duty. *Marcus, In re, Marcus v. Marcus*, 56 L. J., Ch. 830 ; 57 L. T. 399—North, J.

Mortgages on Real Security.—Specific bequest of all moneys, stocks, funds, shares, and other securities, "except mortgages on real and leasehold security" :—Held, that mortgages of turnpike road tolls and mortgages of turnpike road tolls and toll-houses were not mortgages on real security, and did not come within the exception in the bequest. *Cavendish v. Cavendish*, 30 Ch. D. 227 ; 55 L. J., Ch. 144 ; 53 L. T. 652—C. A.

Business and Goodwill.—The testator directed his executors to assign and transfer to H. "my business and the goodwill thereof, with the premises in which the same shall be carried on" :—Held, that the capital of the testator employed in the business at his death and the stock-in-trade did not pass to H. under this bequest, and that the debts due to the business formed part of the capital, but the sacks, horses, and drays did pass to H. *Delany v. Delany*, 15 L. R., Ir. 55—V.-C.

"Share, Right and Interest" in Partnership.—B. bequeathed all his "share, right, and interest" in the goodwill of a partnership business, and in the partnership real and personal estate, to his son, upon trusts for the benefit of the testator's wife and children :—Held, that a debt due to B. from the partnership, and on which he was receiving interest, did not pass by the trust bequest, but formed part of the testator's residuary estate. *Beard, In re, Simpson v. Beard*, 57 L. J., Ch. 887 ; 58 L. T. 629 ; 36 W. R. 519—North, J.

"Fortune"—Words of complete Disposition—Foreign Real Property.—A testatrix, of French birth, made her will, dated 1868, in the French language. The will was, however, in English form, and the testatrix's domicile was English. The testatrix gave legacies and annuities to various persons, including her only daughter, and a specific legacy of articles of vertu to her only son. The testatrix then declared that, after the deduction of all the above bequests, together with the necessary sums to secure the payment of the annuities, the residue of her fortune (le

surplus de ma fortune) should belong to her grandson. The only real estate which the testatrix possessed was situate in France. Her personal property was not quite sufficient to pay all her debts and legacies. The question was, whether the testatrix's real estate in France, devolving to her French heirs, could be taken as intended by the testatrix to be comprised in her will, and to be subjected by her to the same obligation of contributing to the payment of debts and legacies, in which event the French heirs would be put to their election:—Held, that according to the authorities, the universality of a gift of property contained in a will was not sufficient to demonstrate or create a ground of inference that the testator meant it to extend to property which was incapable, although his own, of being given by the particular instrument; and that, therefore, the testatrix could not be said to have intended to affect her French real estate, there being nothing in the will from which the court could infer any such intention so as to take the case out of the rule above stated. *Baring v. Ashburton*, 54 L. T. 463—Chitty, J.

"Furniture, Goods, and Chattels."—A testator, after bequeathing pecuniary legacies, directed them to "be paid from such part of my personal estate as shall consist of money at my bankers or in the 3 per cent. Consols." And after directing that the whole of his income should be devoted to the comfort and maintenance of his wife, and that she should have the use of his residence, he desired "that the furniture, goods, and chattels be not sold during my wife's lifetime, but at her decease to be divided among the executors":—Held, applying the rule, ejusdem generis, that the gift of "furniture, goods and chattels," passed only such furniture, &c., as, on the house being let furnished, would go with the occupation of the house, and not such articles as jewellery, guns, pistols, tricycles, and scientific instruments, *Manton v. Tabois*, 30 Ch. D. 92; 54 L. J., Ch. 1008; 53 L. T. 289; 33 W. R. 832—V.-C. B.

"Other Household Effects" — Wine.]—A testator by his will, made on the 21st December, 1879, devised his property, known as Heathfield, with the offices, gardens, fields, and appurtenances belonging thereto, to the use of his wife, and then the will went on: "I bequeath all my furniture, pictures, plate, jewellery, horses, and carriages, and other household effects, to my said wife absolutely":—Held, that all the wine at Heathfield passed under the words "other household effects." *Bourne, In re, Bourne v. Brandreth*, 58 L. T. 537—Kay, J.

— Cash and Book Debt.]—Under a residuary gift of "all my household furniture, wines, carriages, horses and other effects, except my jewellery":—Held, that 750*l.* in cash and a book debt of 220*l.* passed. *Parrott, In re, Parrott*, 53 L. T. 12—V.-C. B.

"All Consumable Stores, Except Wines."]—By his will the testator bequeathed to B. certain other legacies, "also all consumable stores in my house, except wines, with respect to which she may have as much as she requires for consumption in the house, and with respect to the rest to which I have hereafter given specific directions in dealing with my house." In a subsequent part of the will the testator gave to his

trustees his house and all the furniture, plate, linen, china, wines, and other goods, chattels, and effects therein, at the time of his decease, and certain other premises occupied by him, in trust; to permit B. to use and occupy such house, furniture, plate, china, and other things, and to consume as much as she cared to do of his wines for and during her life, free of all rent or compensation of the same, and free of all obligation to repair or insure the premises or property (which he expressly directed his trustees to do), and free of all rates, taxes, tithes, and other outgoings (all of which he directed his trustees to discharge); and after the death of B., the house and property were to fall into and form part of his residuary estate:—Held, that B. was only entitled to the wines which she might require for consumption; that the rule with regard to gifts of all consumable articles could not be extended to a gift such as this; and that B. was not entitled to all the wines absolutely, though it might be that she and her friends would consume the whole during her occupation of the house. *Colyer, In re, Millikin v. Snelling*, 55 L. T. 344—Kay, J.

"Contents of House."]—A testatrix bequeathed certain legacies to A. C., sixth Earl of E., and as to all her household furniture, paintings, books, china, and the whole contents of her house, she bequeathed the same to her trustees and executors upon trust that they should in the first place select and set aside a collection of the best paintings, statuary, and china for the Earl of E., and his successors, to be held and settled as heirlooms, and to go with the title," and she authorised them to give to the said Earl or his successors, any articles of furniture which they should think fit, and as to all the rest and residue of the contents of her house upon trust for her trustees to select presents for her friends, and directed them to present any portion of the residue of the contents of her house to her cousins if they should think fit, or to sell the same, and the moneys so received to form part of her residuary personal estate. The testatrix died possessed of considerable personal estate, which comprised amongst other things, a number of articles of jewellery which were at her death in a box at her bankers, which jewellery had been bequeathed to her. It was proved that it had been the practice of the testatrix, and also of the former owner, to send such box for safe custody to the bankers, when they respectively were away from London:—Held, that the box of jewellery passed to the trustees as part of the contents of the house, that being the locality to which the property ought to be ascribed, although jewellery is merely for personal use, and is not appropriate to a house. *Johnston, In re, Cocherell v. Essex (Earl)*, 26 Ch. D. 538; 53 L. J., Ch. 645; 52 L. T. 44; 32 W. R. 634—Chitty, J.

Direction that Share "shall fall into Residue."]—A testator bequeathed the residue of his personal estate to his wife for life, and after her death to his sister and three brothers in equal shares; but directed that in the event of his sister dying unmarried in his wife's lifetime (which happened), "her one-fourth should fall into the residue":—Held, that there was no intestacy as to the sister's one-fourth, but that the whole residue was, on the widow's death, di-

visible in thirds between the three other legatees. *Humble v. Shore* (7 Hare, 247; 1 H. & M. 550, n.), *Lightfoot v. Burstall* (1 H. & M. 546), and *Crawshaw v. Crawshaw* (14 Ch. D. 817) considered. *Rhoades, In re, Lane v. Rhoades*, 29 Ch. D. 142; 54 L. J., Ch. 573; 53 L. T. 15; 33 W. R. 608—V.-C. B.

b. CONDITIONS.

i. Repugnancy.

Devise in Fee—Restraint on Alienation.]—A condition in absolute restraint of alienation annexed to a devise in fee, even though its operation is limited to a particular time, e.g., to the life of another living person, is void in law as being repugnant to the nature of an estate in fee. *Macleay, In re* (20 L. R., Eq. 186), commented on. *Large's case* (2 Leon. 82; 3 Leon. 182) explained. *Rosher, In re, Rosher v. Rosher*, 26 Ch. D. 801; 53 L. J., Ch. 722; 51 L. T. 785; 32 W. R. 820—Pearson, J.

A testator devised an estate to his son in fee, provided always that if the son, his heirs or devisees, or any person claiming through or under him or them, should desire to sell the estate, or any part or parts thereof, in the lifetime of the testator's wife, she should have the option to purchase the same at the price of 3,000*l.* for the whole, and at a proportionate price for any part or parts thereof, and the same should accordingly be first offered to her at such price or proportionate price or prices. The real selling value of the estate was, at the date of the will and at the time of the testator's death, 15,000*l.*:—Held, that the proviso amounted to an absolute restraint on alienation during the life of the testator's widow; that it was void in law; and that the son was entitled to sell the estate as he pleased, without first offering it to the widow at the price named in the will. *1b.*

A. was entitled under the will of his father, to an income amounting to 109*l.* 4*s.* 6*d.*, arising from houses in the city of Cork and certain shares vested in trustees, being a third share of the father's estate, upon trust "for the sole use and benefit" of the respondent, and "to be assigned, transferred, and handed over to him as soon as conveniently may be" after the decease of the father. The will directed that if any of the three sons of the testator should die unmarried and without issue his share should go to the survivors, and it was further provided that neither of the sons of the testator should have power to mortgage, sell, alien, charge or incur any part of the property assigned to them, and that in the event of either of them doing so the trustees should stand possessed of his share:—Held, that A. took an estate in fee simple under the will, and that the provision for forfeiture in case of alienation was therefore void. *Corbett v. Corbett*, 14 P. D. 7; 58 L. J., P. 17; 60 L. T. 74; 37 W. R. 114—C. A.

A testatrix gave certain real and personal estate "upon trust for my third son, J., his heirs and assigns; but if my said son should do, execute, commit, or suffer any act, deed, or thing whatsoever whereby or by reason or in consequence whereof, or if by operation of law, he would be deprived of the personal beneficial enjoyment of the said premises in his lifetime, then and in such case the trust hereinbefore

contained for the benefit of my said son shall absolutely cease and determine, and the estates and premises hereinbefore limited in trust for him" should go and be held in trust for his wife, or, if no wife then living, for his children equally. J. survived his mother, and was still living, a bachelor:—Held, that he took an absolute interest under the gift, and that the attempted executory gift over was void for repugnancy. Conditional gifts by way of restraint on alienation, discussed. *Dugdale, In re, Dugdale v. Dugdale*, 38 Ch. D. 176; 57 L. J., Ch. 634; 58 L. T. 581; 36 W. R. 462—Kay, J.

Executory Devise—Death of Devisee without leaving Issue.]—A testator devised real estate to his son and his heirs; and then declared that in case his said son should die without leaving lawful issue, then and in such case the estate should go to his son's next heir-at-law, to whom he gave and devised the same accordingly:—Held, that the contingency of death without leaving issue was not confined to death in the lifetime of the testator, but referred to death at any time; and that the gift over was repugnant and void; and that the devisee took an absolute estate in fee simple. *Parry and Daggs, In re*, 31 Ch. D. 130; 55 L. J., Ch. 237; 54 L. T. 229; 34 W. R. 353—C. A.

Fee Simple Estate—Name Clause.]—A testatrix, who died in 1832, settled her freehold estate upon her grandchildren, a share becoming vested in one of them, Lucy, in fee simple in possession; and the will contained a proviso that any person becoming entitled in possession to the estate should within one year thereafter, take and use the name of "Jones," and that in case any such person should refuse or neglect to use the name of Jones within one year, then the estate limited to him or her should be void, and should first go to her niece, Catherine Jones, since deceased, for her life, and after her decease to the person or persons next in remainder under the trusts of the will, in the same manner as if the person so refusing were dead. Lucy was twice married, and neither she nor either of her husbands ever took the name of Jones:—Held, that the gift being in fee simple, and there being necessarily no person entitled in remainder, the name clause was void, and that there had consequently been no forfeiture by Lucy. *Brooke, In re, Musgrave v. Brooke*, 26 Ch. D. 792; 54 L. J., Ch. 102; 33 W. R. 211—Pearson, J.

ii. Forfeiture of Estate and Interest.

a. Non-Residence.

What Amounts to Residence.]—Testator devised a message and hereditaments in the country to the use of his son G. for life, "provided as a sine qua non" that he "within six calendar months after my decease shall enter upon and take actual possession of" the message and hereditaments "as and for his residence and place of abode;" and "shall as such tenant for life thereafter during his life continue to reside in or upon the same capital message for at least six calendar months (but not necessarily consecutively) in every year." After G.'s death, "or his failing to take such possession as aforesaid and to reside in" the house, testator devised

the same to G.'s first and other sons in tail male. G. entered and took possession within six months after the testator's decease; but as to residence, during the year following the expiration of the six months, he was in the house for eighteen days only; and from the 1st of January to the 28th of December in the year following the date of such expiration, for no more than twenty-four days. He had, however, placed the house in charge of a staff of servants, he had paid the rates, he had kept horses and poultry in the stables and on the grounds, and his son, who was at a college near, had stayed at the house on an average on every alternate Saturday till Monday:—Held, that no forfeiture of G.'s life estate had taken place. *Moir, In re, Warner v. Moir*, 25 Ch. D. 605; 53 L. J., Ch. 474; 50 L. T. 10; 32 W. R. 377—V.-C. B.

Effect of Settled Land Act, 1882, s. 51.]—A condition in a will or settlement requiring a tenant for life to reside on settled land is not absolutely avoided by s. 51 of the Settled Land Act, 1882, but only when it interferes with the actual exercise by the tenant for life of his powers under the act. Where, therefore, such a condition had been broken by a tenant for life before any question of exercising the powers given by the act had arisen:—Held, that the interest of the tenant for life was forfeited. *Paget's Settled Estates, In re* (30 Ch. D. 161) explained. *Haynes, In re, Kemp v. Haynes*, 37 Ch. D. 306; 57 L. J., Ch. 519; 58 L. T. 14; 36 W. R. 321—North, J.

A principal mansion house was devised to A. for life and other limitations with a condition of forfeiture on non-residence in selling of, or letting the same:—Held, that the condition of forfeiture was void for the purposes of the Settled Land Act, 1882, and the court authorised a temporary letting to be made. *Thompson's Will, In re*, 21 L. R., Ir. 109—M. R.

P. devised an estate to the use of his son F. H. so long as he should continue to reside in the testator's present dwelling-house, or upon some part of the said estate for a period of not less than three calendar months in each year after he should become entitled to the actual possession thereof. And after the death of the said F. H., provided he should have complied with and fulfilled the above condition, to such uses for the benefit of all or any of his children as the said F. H. should by will appoint, and in default of such appointment, or if the said F. H. should fail in compliance with the above condition, then from the determination of F. H.'s estate to the use of trustees upon trust to sell and hold the proceeds upon trust for the children of F. H. as therein mentioned, and in default of children for other persons. F. H. took out a summons for the opinion of the court whether under this devise he had the powers of a tenant for life under the Settled Land Act; whether the condition of residence was void under s. 51 of the Settled Land Act, 1882; and for the sanction of the court to selling the mansion-house:—Held, that the condition of residence was one tending to induce the tenant for life not to exercise the powers under the act, and was therefore void under s. 51, and that the sale of the mansion-house ought to be sanctioned. *Paget's Settled Estate, In re*, 30 Ch. D. 161; 55 L. J., Ch. 42; 53 L. T. 90; 33 W. R. 898—Pearson, J.

B. Name and Arms Clause.

Validity—Disentailing Deed, Effect of.]—A testatrix devised her real estate in strict settlement, the will containing an ordinary name and arms clause. And she bequeathed personal estate to trustees, in trust for the person or persons who for the time being should by virtue of the will be beneficially entitled to the real estate, for such or the like estates or interests, to the intent that the personal estate should go along with the real estate, so far as the nature of the personal estate and the rules of law and equity would permit. And the testatrix directed that the name and arms clause relating to the real estate should not affect the personal estate, but in lieu thereof she directed (inter alia) that if any person, being a male, who should be entitled under any of the limitations of the will to any absolute beneficial interest in possession by purchase in the personal estate should refuse or neglect to assume, use, and bear the name and arms of C. within the period therein mentioned, provided such period should expire within twenty-one years next after the death of the survivor of three persons named, or should after having assumed the name and arms, discontinue to use and bear the same, or either of them, for six months at any time within the period of twenty-one years, then and in any of such cases, and from time to time, the estate and interest of the person so refusing, or neglecting, or discontinuing, in the personal estate should absolutely cease, and the personal estate should from time to time go over to the person or persons who would have been entitled to the real estate under the limitations of the will in case the party whose estate should so cease, being tenant for life of the real estate, were dead, or being tenant in tail of the real estate, were dead without issue, for such or the like estates or interests as such person or persons would have been entitled to in the real estate. Within the proper time after the death of the testatrix the first tenant for life under the will assumed the name and arms of C., and continued to use them until his death. The plaintiff was his first son and the first tenant in tail of the real estate under the will. After he had attained twenty-one he executed a disentailing deed of the real estate and limited it to himself in fee simple. He then claimed to be indefeasibly entitled in possession to the personal estate:—Held, that the forfeiture clause relating to the personal estate was valid, and that the effect of it was to make the interest of the tenant in tail, in case it should be forfeited, go over to the person who would have been entitled to the real estate under the limitations of the will in case the tenant in tail had been dead without issue, and no disentailing deed had been executed:—Held, therefore, that the plaintiff was not indefeasibly entitled to the personal estate; but that his interest was liable to forfeiture in case within the period of twenty-one years he should discontinue to use the name and arms of C. *Cornwallis, In re, Cornwallis v. Wykeham-Martin*, 32 Ch. D. 388; 55 L. J., Ch. 716; 54 L. T. 844—Pearson, J.

Compliance with—Licence of College of Arms.]—A name and arms clause contained a proviso that in case the devisee should "refuse or neglect within one year to take, use, and bear the sur-

name" of A., or should at any time afterwards "discontinue to use and bear such surname or arms," then, and in every such case immediately after the expiration of a year, or immediately after such discontinuance, the devise should determine and become void. The devisee assumed the surname, and also used his best endeavours to comply with the direction as to the arms, but failed to obtain a grant from the Herald's College of the right to use the identical arms used by A. :—Held, that the estate of the devisee had not been divested by the failure to obtain a grant of the identical arms used by A. Semble, that a name and arms clause requires a taking of arms by a proper grant from a proper authority (namely, the College of Arms), and is not satisfied by a mere voluntary assumption of a coat of arms. *Austen v. Collins*, 54 L. T. 903—Chitty, J.

γ. Bankruptcy, etc.

Future Event.]—The testator directed that if the annuitant should become bankrupt or insolvent he should forfeit the annuity :—Semble, such a direction applies only to future events, and no forfeiture would be incurred by an insolvency incurred during the testator's lifetime. *Draper's Trusts, In re*, 57 L. J., Ch. 942; 58 L. T. 942; 36 W. R. 783—Kekewich, J.

Annulment.]—A testator gave his residuary real and personal estate to trustees upon trust, to pay one-third of the rents and proceeds to his son until he should die or become bankrupt, or assign, charge, or incur, or attempt to assign, charge, or incur the same or any part thereof, or do something whereby the same or some part thereof would by operation of law or otherwise if belonging absolutely to him become vested in, or payable to, some other person or persons, with a gift over on the failure or determination of the trust. Shortly before the death of the testator insolvency proceedings were instituted against the son in Melbourne where he was living, and trustees of his estate were appointed, who gave notice to the trustees of the testator's will to pay over to them any sums in their hands to which the bankrupt was entitled. The insolvency proceedings were very shortly afterwards annulled, and it appeared that the insolvency trustees had not received anything from the trustees of the will :—Held, that, notwithstanding the annulment of the insolvency proceedings, the clause of forfeiture had taken effect. *Broughton, In re, Peat v. Broughton*, 57 L. T. 8—Chitty, J.

Effect of Words "do or suffer"—Registration of Judgment.]—Under a will, the rents and profits of certain lands were made payable to M. for life, or until he should become bankrupt, or assign, convey, charge, or incur the same, "or do or suffer something, whereby the same, or some part thereof would, by operation of law or otherwise, if belonging absolutely to him, become vested in or become payable to some other person or persons." A judgment creditor of M. registered his judgment as a mortgage against the lands :—Held, that, under the words "do or suffer something," a forfeiture had occurred of M.'s life interest in the lands. *Moore's Estate, In re*, 17 L. R., Ir. 549—Flanagan, J.

Felony—"Operation of Law"—Act to abolish Forfeitures.]—A testatrix, by her will, dated in July, 1869, devised and bequeathed all her real and personal estate to T. K. in trust for her sister M. C. for life, and after her decease upon trust to pay to or permit H. D. C. to receive the interest for his life, but if he should become bankrupt, or publicly insolvent, or should compound with his creditors, or should assign or incur his interest under the trust, or any part thereof, or should otherwise by his own act, or by operation of law, be deprived of the absolute personal enjoyment of the same interest, or any part thereof, then, and in either of such cases, the trust in favour of H. C. D. should be void, and T. K. should thenceforth apply the interest for the maintenance, education and support of the children of H. C. D. The testatrix died in 1871, and M. C. died in 1881. In July, 1878, H. C. D. was convicted of felony and sentenced to ten years' penal servitude. Before the expiration of his sentence he obtained a ticket of leave and commenced an action for the administration of the estate of the testatrix, and claimed the arrears of interest :—Held, that he had not been deprived of the actual enjoyment of the life interest by any operation of law, and that he was entitled to all arrears of interest. *Dash, In re, Darley v. King*, 57 L. T. 219—Chitty, J.

iii. Other Conditions,

Illegal Condition—Husband and Wife—Gift while living apart.]—A testator directed his trustee to pay to his sister M. "during such time as she may live apart from her husband, before my son attains the age of twenty-one years, the sum of 2l. 10s. per week for her maintenance whilst so living apart from her husband." M. and her husband were married some years before the date of the will, and never lived apart till some time after the death of the testator. The testator's son was living and an infant :—Held, that the bequest to M. was not to be construed as a gift to her during the joint lives of herself and her husband until the son attained twenty-one, upon a condition, which might have been rejected as against the policy of the law, that she and her husband should not live together, but as a limited gift of weekly payments to be made during a period the commencement and duration of which were fixed in a way which the law does not allow, and that the gift was void. *Brown v. Peck* (1 Eden. 140) and *Wren v. Bradley* (2 De G. & Sm. 49) considered. The distinction between gifts on condition and gifts by way of limitation, discussed. *Moore, In re, Trafford v. Maconochie*, 39 Ch. D. 116; 57 L. J., Ch. 936; 59 L. T. 681; 37 W. R. 83—C. A. Affirming 52 J. P. 596—Kay, J.

"For Services and collecting of Rents"—Collection of Rents by Agent.]—A testator gave to his trustees "for their services and collecting of rents, &c.," an annuity of 25l. each. The property principally consisted of eighty houses, some let at weekly tenancies, and the trustees employed a collector of the rents, and the chief clerk allowed the trustees in taking their accounts a sum of 80l. paid to the collector :—Held, that the trustees were not entitled to these annuities in addition to the sum allowed for the collection of rents, and that as that allowance exceeded

the aggregate of the two annuities, no apportionment of the annuities so as to cover the trustees' services other than the collection of rents, if otherwise possible, could be made. *Muffett, In re, Jones v. Mason*, 56 L. J., Ch. 600; 56 L. T. 685; 51 J. P. 660—C. A.

Persons who should Establish Right as Next of Kin within One Year.]—A testator bequeathed his residuary personal estate to such persons who should within one year from his death establish their right or title thereto as his next of kin, with a gift over in default. An order for limited administration, including an inquiry as to next of kin, was made on summons shortly after the testator's death. The persons who were next of kin did not bring in a claim within the year:—Held, that the gift over took effect. *Tollner v. Marriott* (4 Sim. 19) distinguished. *Hartley, In re, Stedman v. Dunster*, 34 Ch. D. 742; 56 L. J., Ch. 564; 56 L. T. 565; 35 W. R. 624—North, J.

Discretion of Executors as to Conduct of Legatee—Declaration of Dissatisfaction.]—A testator bequeathed to his son A. a sum of 2,000*l.*, if he should conduct himself to the satisfaction of the testator's executors. He also devised and bequeathed the residue of his property to his executors upon trust for the use and benefit of all his children, including his son A., in equal shares, and declared that if his son A. should not conduct himself to the satisfaction of his executors or the survivor of them, then that he should not be entitled to receive any portion of the residuary estate; and in that case a declaration in writing, signed by the said executors or the survivor of them, of their, her, or his dissatisfaction with him, should be conclusive evidence that he was not to receive any portion thereof:—Held, that a declaration of dissatisfaction signed by two of the executors who alone proved the will, leave having been reserved for the remaining three, was sufficient to disentitle A. to the legacy and to a share of the residue. *Delany v. Delany*, 15 L. R., Ir. 55—V.-C.

Provision as to Disputes on Construction of Will.]—A testator cannot, by constituting private individuals a forum domesticum to decide whatever questions may arise upon the construction of his will, oust the jurisdiction of the court to determine such questions. A will, after several dispositions of the testator's property, contained the following declaration: "I have now stated my will, to the best of my ability, clearly as to the disposal of my different properties; yet, in order to prevent disputes, I shall add this clause: And it is my will that all differences of opinion as to my intention shall be left to the decision of the executors, whose decision shall be final, if they agree; and if they do not, they shall appoint an umpire, from whose judgment there shall be no appeal. Anyone resorting to law, I here cancel and annul every benefit they would otherwise have derived from this my will, and whatever they have forfeited shall be divided by the executors among those who had acceded to their decision":—Held, that the jurisdiction of the court to decide any questions arising upon the will was not ousted by the clause attempting to confer upon the executors exclusive power to determine them. *Massy v. Rogers*, 11 L. R., Ir. 409—V.-C.

c. VALIDITY.

i. Remoteness.

Gift at Twenty-five—Contingent Gift—Gift over.]—A testatrix by her will, dated in 1828, gave all her property to trustees upon trust, as to the interest of a sum of 5,000*l.*, for her sister for life; and after the death of such sister the interest to be paid to the testatrix's daughter (she having first attained twenty-five); if the daughter married with the consent of the executors, and died "leaving children, the interest to be appropriated for the maintenance and education of such children," of whom the testatrix constituted the executors guardians as to the due application of the same according to their discretion, "and the principal to be divided amongst them as they shall severally attain the age of twenty-five years;" after the death of the sister, and in the event of the daughter marrying without consent, or marrying with consent "and dying without leaving issue," then over. The daughter survived the testatrix, attained twenty-five, and in 1842 married with the necessary consent. The sister died in 1854, and the daughter in 1866, having had two children, who survived her:—Held, that the gift was not void for remoteness, but that the fund vested in the children of the daughter living at her death. *Becan's Trusts, In re*, 34 Ch. D. 716; 56 L. J., Ch. 652; 56 L. T. 277; 35 W. R. 400—Kay, J.

Gift to Children of any Son of Tenant for Life—Tenant for Life past Child-bearing—Admissibility of Evidence.]—A testator by his will, dated September, 1866, gave all his estate to trustees upon trust to pay an annuity to his daughter (the plaintiff) for life, and on her decease he declared that they should stand possessed of the residue of the trust funds in trust for such child or children of the plaintiff as had attained or should live to attain the age of twenty-one years, or (being a daughter or daughters) should have attained or should live to attain that age, or have married or marry, and also for such child or children of any son of the plaintiff who should die under the age of twenty-one, as should live to attain the age of twenty-one years, or (being a daughter or daughters) should live to attain that age or marry, and, if more than one, in equal shares and proportions as between brothers and sisters. The testator died in January, 1875, and at his death the plaintiff, who was then over sixty years of age, had one son and five daughters living:—Held, that the trust in favour of the grandchildren of the plaintiff was void for remoteness, and that evidence was not admissible to show that at the testator's death the plaintiff was past the age of child-bearing. *See v. Audley* (1 Cox, 324) and *Sayer's Trusts, In re* (6 L. R., Eq. 319) followed. *Cooper v. Laroche* (17 Ch. D. 368) disregarded. *Dawson, In re, Johnston v. Hill*, 39 Ch. D. 155; 57 L. J., Ch. 1061; 59 L. T. 725; 37 W. R. 51—Chitty, J.

Divisible Gift.]—The will of a testatrix contained an ultimate limitation of her real estate to her right heirs in case both her daughters (for whom and their husbands and issue provision had been made by the will), should die without leaving any child or the issue of any child living at the decease of the survivor of them, or of the

survivor of their respective then present or any future husbands. The personal estate was bequeathed by reference on the trusts of the real estate. Neither of the daughters married again. Each died leaving her husband surviving her, but no issue:—Held, by the court below that the gift over was divisible into two distinct gifts, viz. (1) in case both the daughters should die without leaving issue living at their respective deaths; (2) in case the daughters or either of them should die leaving issue, and there should be no such issue living at the death of the survivor of the husbands of the daughters; and that, the first event having happened, the gift over was good, though it would have been void for remoteness if the daughters had left issue; but held, on appeal, that the gift over was not in the alternative on the happening of either of two distinct events, but a single gift over on one event involving two things; that as the testatrix had not separated the gift the court could not separate it, and that therefore the gift over was void for remoteness. *Harvey, In re, Peck v. Savory*, 39 Ch. D. 289; 60 L. T. 79—C. A.

Devise of real estate to trustees in fee, upon trust for J. for life, and after his death upon trust for his children who should attain twenty-one, and the issue of any child who should die under twenty-one leaving issue who should attain that age; but in case there should be no child, nor the issue of any child of J. who should attain twenty-one, the property was to be held on trust for the child or children of R. who should respectively attain twenty-one, if more than one, in equal shares. Provided always, that the rents of the trust premises should, during the term of twenty-one years from the day next before the day of the testator's death, be accumulated by way of compound interest, and the accumulated fund should be held in trust for the child, if only one, or all the children equally, if more than one, of R. who should attain twenty-one. J. died without ever having had a child. R. had six children who attained twenty-one. The youngest of them was born after the eldest had attained twenty-one, but before the end of the period of accumulation:—Held, that the gift over to the children of R. was divisible into two distinct alternative gifts, viz. (1) a gift over in the event of there never being any child of J.; (2) a gift over in the event of no child or issue of any child of J. attaining twenty-one; and that consequently the first alternative was not too remote, and the gift over was in the events which had happened good. *Evers v. Challis* (7 H. L. C. 531) explained. *Stuart v. Cockerell* (5 L. R., Ch. 713) distinguished. *Watson v. Young*, 28 Ch. D. 436; 54 L. J., Ch. 502; 33 W. R. 637—Pearson, J.

Investment of certain Moneys—Payment to Persons named—Further Limitations.—A testatrix directed that the interest of 3,000*l.*, which was a charge upon certain real estates belonging to C., should be each year invested, and when it amounted to 500*l.* should be divided equally between A. and B., and so continued until they should have received 1,000*l.* each. She further directed that if, at the time they should have received the last instalment, the estates held by C. should still be in the hands of a member of her family, and a Protestant, the interest of the 3,000*l.* was still to continue to be

invested, and, as it amounted to a sufficient sum, to be applied to buying up the tithe rent-charges on the estate one by one. When the tithe rent-charges were all bought up, the 3,000*l.* was to lapse to the owner of the estates. In the event of the said estates not being in the hands of a Protestant member of her family at the time A. and B. should have received the instalment, or if, during the time of buying up the rent-charges, they should cease to belong to a Protestant member of her family, the 3,000*l.* was to be divided equally between A., B., D. and E.:—Held, that the entire trust for accumulation was void for remoteness. *Smith v. Cuninghame*, 13 L. R., Ir. 480—V. C.

See also next case.

Powers of Appointment.—See post, cols. 2101, 2102.

ii. Uncertainty.

Gift to any Niece or Female Relative of A., provided she marries a Person named B.]—A testator left all his property upon trust for A. for life, and from and after his death, to pay the same to any niece or female relative of A., provided she marries a person of the name of B., residing in the county of T., and who has been born and reared a Roman Catholic; but the said bequest is not to vest in the niece or female relative of A. so marrying a B. until five years after the death of A.:—Held, to be void for remoteness, and, on appeal, to be void for uncertainty. *Smithwick v. Hayden*, 19 L. R., Ir. 490—C. A.

Gift for Hospital rendered Impossible.]—A testator, by deed-poll, duly enrolled in Chancery, conveyed to trustees a piece of land and cottages for the purpose of an hospital for ten aged or infirm poor persons, preference being given to particular parishes. By his will, made in 1882, he charged his copyhold and freehold estates with his debts and funeral expenses and legacies, and gave the residue of his personal property to the trustees of the deed-poll upon trust to build an hospital on the site of the premises conveyed by the deed-poll, and to employ the income of the remainder in insurance and repairs, and paying 18*l.* or more to each of the ten poor inmates, and the ultimate balance (if any) to aged and deserving poor of either sex as out-door pensioners. The testator died within twelve months from the execution of the deed-poll, which therefore became void under the Statute of Mortmain. Upon further consideration in an administration action:—Held, that the ultimate gift of the balance of the dividends failed for uncertainty, and that the legacies must be paid out of the proceeds of the real estate, and the debts and funeral expenses in the first instance, out of the personalty. *Taylor, In re, Martin v. Freeman*, 58 L. T. 538—Kay, J.

Gift of Shares in Unlimited Company subsequently converted into Limited Company—Change in Value of Shares.]—A testator bequeathed "fifty shares in the York Union Banking Company," to be held upon certain trusts. At the date of the will the company was registered and incorporated as an unlimited company under the Companies Acts, and the

testator held seventy shares therein of the nominal value of 100*l.* each. Between the dates of his will and his death, the company was registered as a limited company under the same style, except that the word "limited" was added, and each 100*l.* share was converted into two shares of the nominal value of 60*l.*, and 140 of these new shares were allotted to the testator in substitution for his seventy shares of 100*l.* each:—Held, that the bequest was not specific but general, that it was in effect a gift of such a sum as at the death of the testator should be the value of fifty shares of 100*l.* each in the unlimited company, and that as, by reason of events of which the testator was aware, it had become impossible to determine such value, the bequest failed. *Gray, In re, Dresser v. Gray*, 36 Ch. D. 205; 56 L. J., Ch. 975; 57 L. T. 132; 35 W. R. 795—Kay, J.

iii. Perpetuities.

Bequest to Individuals.—For the purposes of a Convent.—Bequest of 1,000*l.* to S., "Superioress of the Convent of Mercy at K., to and for the purposes solely of the said convent, or to such other person as may be superioress of the said convent at my" (the testator's) "decease":—Held, that the bequest was valid as a bequest to the person who should be superioress of the convent at the testator's death, and that it was not the less so by reason of the direction to apply it solely to the purposes of the convent. *Cocks v. Manners* (12 L. R., Eq. 574) approved and followed. *Wilkinson's Trusts, In re*, 19 L. R., Ir. 531—C. A.

A testatrix by her will gave a bequest of 100*l.* to the Marist Sisters of the Convent of C., a bequest to M., Superioress of the St. Anne's Convent of Mercy, in trust for the community of the said convent, and a bequest of the residue of real and personal estate to G., Superioress of the Convent of D., in trust for the support and maintenance of the said D. Convent. The communities consisted, at the death of the testatrix, of a superioress and a number of sisters, whose names were given. There was no evidence of the constitution or object of either of the convents:—Held, that the community of a convent means the persons at the time members of the convent, and that these legacies were valid bequests to the respective legatees as individuals, and, therefore, did not transgress the rule against perpetuities. *Bradshaw v. Jackman*, 21 L. R., Ir. 12—M. R.

— **For Masses.**—The testatrix also gave a bequest of bank stock to J., Provincial of the Franciscan Missionaries of Merchant's-quay, in the city of Dublin, or to the Provincial of the said missionaries at the time of the testatrix's death, for the offering of masses for the repose of the soul of the testatrix, &c.:—Held, that this legacy was not to or for the benefit of the Franciscan Missionaries, but to J. individually, for the offering up of masses, and as such was valid. *Id.*

Residuary bequest, the income thereof to be divided between the two priests officiating at the time of the testator's decease, and such others who should be from time to time officiating in the parish of K., in consideration of their

saying masses for the repose of the testator's soul:—Held, void. *Dorrian v. Gilmore*, 15 L. R., Ir. 69—V. C.

iv. Thellusson Act.

Accumulation of Income — Provision for Raising Portions.—A testator, who died in 1858, by his will, dated in that year, gave life annuities to his wife and two brothers, and directed that the income of his residuary personal estate, and the rents and profits of certain freehold and leasehold properties, should be accumulated during the life of his wife and brothers and the survivor; and after the decease of the survivor he bequeathed his residuary personal estate and the accumulation of the income thereof, and of the rents and profits of the freeholds, and leaseholds, to his nephews and nieces, children of his two brothers, "the same to be paid to them on their respectively attaining the age of twenty-one years." The testator gave the freeholds and leaseholds to other persons. The wife and brothers survived the testator, and lived for more than twenty-one years after his death. The questions were, whether the direction to accumulate was invalid as being contrary to the Thellusson Act, or whether it came within the exception contained in s. 2 of that statute. For the nephews and nieces, it was argued that, although, according to the authorities, the gift of the capital of the residuary personal estate, together with the accumulations thereof, was not a "provision for raising portions," within the exception to this act, yet the gift of the accumulations of the rents and profits of the freeholds and leaseholds, not being accompanied by a gift of the freeholds and leaseholds themselves, was such a provision; and that, therefore, as to such rents and profits, the direction for accumulation was effectual:—Held, that the rents and profits, could not be severed from the aggregate fund, as a part of which they were given; and that the direction for accumulating them was not a "provision for raising portions," within the exception, and was ineffectual beyond the twenty-one years allowed by the act. *Walker, In re, Walker v. Walker*, 54 L. T. 792—Kay, J.

v. To Charities—See CHARITY.

d. SPECIFIC BEQUESTS AND DEVISES.

Specific Bequests—What are.—A specific legacy is something which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed in the state and condition indicated by that description, separates in favour of a particular legatee, from the general mass of his personal estate. *Robertson v. Broadbent*, 8 App. Cas. 812; 53 L. J., Ch. 266; 50 L. T. 243; 32 W. R. 205—H. L. (E.).

By marriage settlement a wife had, in the event of her dying in her husband's lifetime, a power of appointment by will over the property therein comprised, which in the event of her surviving him became hers absolutely. At the date of the wife's death the property comprised in the marriage settlement included Consols and

Reduced and New Three per Cents.; her separate property comprised Consols. By her will the wife, after reciting the settlement, gave and appointed everything she had power to dispose of to trustees, and then gave a number of stock legacies in the form, "I direct my trustees to stand possessed of 1,000*l.* Consols upon trust to pay the dividends to A. for life, and after his death to transfer the same sum of Consols to his children;" and in the form, "I direct my trustees to transfer 1,500*l.* Consols to B." The New Three per Cents. so given amounted to exactly, and the Reduced Three per Cents. to very nearly, the amount of those stocks subject to the settlement. The amount of Consols so given was more than that subject to the settlement, but less than the amounts subject to the settlement and belonging to her separate estate taken together. The will contained a residuary gift:—Held, that all the legacies were specific, that those of New and Reduced Three per Cents. failed, and those of Consols could only be paid pro tanto out of the Consols belonging to the testatrix's separate estate. *Young, In re, Trye v. Sullivan*, 52 L. T. 754—Pearson, J.

A testator by his will directed his executor to transfer any money that he might have in bank stock at his death into the executor's name, and pay the income to his wife for life, or until she should marry again, and if she should marry again that she should thereupon forfeit her life interest in the fund, and that the whole of the bank stock should, upon his wife's second marriage, be distributed as follows:—1,000*l.* to be retained by his said executor, and applied by him in having masses offered for the repose of testator's soul, and the residue to be distributed among such Roman Catholic charities in Dublin as his executor, in his absolute discretion, might think fit; but if his wife did not marry again, the testator directed that at her death his executor should retain a sum of 2,000*l.* out of the bank stock, and apply the same as he saw fit in having such number of masses as he approved of offered up for the repose of testator's soul, and for the repose of the soul of his wife; and that the residue of the bank stock which should remain, after providing for such masses as aforesaid, should be divided in five equal parts, and paid to the treasurers of five different charitable institutions named in his will, and the testator appointed R., his executor, his residuary legatee. The testator died leaving his wife surviving. She never married again, and survived R. R. survived the testator, and died without having applied any portions of the bank stock in having masses said; and by his will he bequeathed all the property he derived in reversion or otherwise under the testator's will:—Held, that the gift of the residue of the bank stocks, after providing for such masses, was a specific gift of the portion of bank stock remaining after taking 2,000*l.* out of it; that the testator's widow not having married again, and having survived R., the gift of 2,000*l.* failed, the event upon which it was given never having arisen; and that the legacy of 2,000*l.* fell into the general residue, and therefore passed to R. under the residuary bequest in the testator's will. *Fee v. M'Manus*, 15 L. R., Ir. 31—C. A.

A testator bequeathed "fifty shares in the York Union Banking Company," to be held upon certain trusts. At the date of the will the company was registered and incorporated as an

unlimited company under the Companies Acts, and the testator held seventy shares therein of the nominal value of 100*l.* each. Between the dates of his will and his death, the company was registered as a limited company under the same style, except that the word "limited" was added, and each 100*l.* share was converted into two shares of the nominal value of 60*l.*, and 140 of these new shares were allotted to the testator in substitution for his seventy shares of 100*l.* each:—Held, that the bequest was not specific. *Gray, In re, Dresser v. Gray*, 36 Ch. D. 205; 56 L. J., Ch. 975; 57 L. T. 132; 35 W. R. 795—Kay, J.

— **Specific or Demonstrative Legacy.**]—M. S., by her will dated in 1865, directed the trustees thereof to stand possessed of the sum of 1,500*l.*, then invested in the Bombay, Baroda, and Central India Railway Company, upon trust for her brother, who had then disappeared, for life, if he should present himself to the trustees within five years after her death; and after the five years or the decease of her brother, whichever should first happen, she bequeathed the sum of 500*l.*, part of the Bombay, Baroda, and Central India Railway shares, to the trustees of a charity for the benefit thereof. M. S. was at the date of her will possessed of about 1,900*l.* in the railway, but at the date of her death in 1881 she was possessed of no property therein, and the brother had not appeared:—Held, that the legacy to the charity was a specific and not a demonstrative legacy, and that the investment out of which it was given having ceased to exist, the legacy was not payable to the charity out of the testatrix's general estate. *Sayer, In re, McClellan v. Clark*, 53 L. J., Ch. 832; 50 L. T. 616—Pearson, J.

— **Specific Legacy or Residuary Bequest.**]—A testator by his will, after directing his executors to pay all his just debts and funeral and testamentary expenses, and giving pecuniary legacies to individuals and to charities, gave all his personal estate and effects of which he should die possessed, and which should not consist of money or securities for money, to E. A. R. absolutely. And he gave and devised all the rest, residue, and remainder of his estate, both real and personal, to his executors upon certain trusts; all the legacies to be free of legacy duty; the legacies for charitable purposes to be paid exclusively out of such part of his personal estate as might lawfully be appropriated to such purposes and preferably to any other payment thereout:—Held, that the legacy to E. A. R. was not specific, and not exempt from the payment of the pecuniary legacies. *Robertson v. Broadbent*, supra.

Specific Devise—After-acquired Freeholds.]—A testator, by a codicil executed in 1867, devised to the defendant "all those three freehold cottages . . . and premises thereunto belonging which I have lately purchased." At that date he owned, as tenant in common with his brother, a share in a piece of garden-land adjoining one of the cottages, which he occupied as his residence from 1870 until his death in 1883. In 1875 the testator's brother devised to him his share in the garden-land, which the testator thenceforward occupied with his residence:—Held, that the garden-land did not pass under the devise in the codicil. *Cave v. Harris*, 57 L.

J., Ch. 62; 57 L. T. 768; 36 W. R. 182—Kekewich, J.

— **Subsequent Contract to Purchase.**—A. devised to G. for life, "my cottage and all my land at S.," subject to the stipulation (among others) that the plantations, heather, and furze be all preserved "in their present state," and devised "all other my freehold manor, messuages, lands, and real estate whatsoever and wheresoever" to trustees upon trust for sale. At the date of his will A. had a small cottage with twenty-two acres of rough land held with it, and he subsequently contracted to purchase from G. a house of considerable size with gardens and land comprising ten acres closely adjoining the cottage and land. The contract was not completed at his death:—Held, that a contrary intention within the meaning of the 24th section of the Wills Act was not shown with sufficient clearness, but that, construing the will as if it had been made on the day of the testator's death, having regard to the circumstances at that date, and to the residuary devise, the specific devise more aptly referred to the cottage and rough land, and did not carry the after-acquired property. *Portal and Lamb, In re*, 30 Ch. D. 50; 54 L. J., Ch. 1012; 53 L. T. 650; 33 W. R. 859—C. A.

The words "all my land at S." would, if used alone, have been sufficient to carry the after-acquired land with the house standing upon it; but upon the authority of *Ewer v. Hayden* (Cro. Eliz. 476, 658), by force of the context the word "land" must be taken as confined to lands in contradistinction from buildings. *Id.*

Effect of s. 24 of Wills Act.—Semble, per Lindley, L.J.:—S. 24 of the Wills Act, which provides that a will shall speak as to the real and personal estate comprised in it (i.e., the will) from the day of the testator's death, leaves open the question whether a particular property passes by the specific or the residuary devise. *Id.*

Ademption of.—*See infra.*

c. ADEPTION AND SATISFACTION.

i. Ademption.

Parol Evidence.—Parol evidence and declarations of the testator contemporaneous, or subsequent, are admissible to rebut or to confirm the legal presumption of ademption, but they must be directed to the very transaction relied on as an ademption. *Griffith v. Bourke*, 21 L. R., Ir. 92—M. R.

Stranger or Person in Parental Relation.—Difference of the legal presumption where the legacy and gift are by a stranger, and where they are by one standing in a parental relation. *Id.*

Moral Obligation other than Parental.—The doctrine of ademption of legacies founded on parental or quasi-parental relation applies also to cases where a moral obligation other than parental or quasi-parental is recognised in the will, though without reference to any special application of the money. *Pollock, In re*,

Pollock v. Worrall, 28 Ch. D. 552; 54 L. J., Ch. 489; 52 L. T. 718—C. A.

A testatrix by her will bequeathed to a niece of her deceased husband 500*l.* with these words, "according to the wish of my late beloved husband," and she afterwards in her lifetime paid 300*l.* to such legatee, with a contemporaneous entry in her diary that such payment was a "legacy from" the legatee's "uncle John":—Held, that the presumption was that such legacy was adeemed to the extent of 300*l.*, and that such presumption of ademption pro tanto only was not displaced by evidence that more than a year before the 300*l.* was given the testatrix had said that the legatee, when asked by the testatrix whether she would rather receive 300*l.* down than a larger sum after the testatrix's death, had replied that she would prefer 300*l.* down. *Id.*

Legacy to Priest—Gift to Archbishop for same Purpose.—Legacy to the parish priest of the parish K., for the erection of a new chapel in the town C.:—Held, adeemed by the gift of a like sum, for the same purpose, to the Roman Catholic Archbishop of the diocese by the testator in his lifetime. *Griffith v. Bourke*, supra.

Will speaking from the Date—Contrary Intention.—J. made his will, dated the 6th March, 1879, and thereby bequeathed all his real and personal estate to his executors, in trust to pay certain legacies which he set forth. The will then proceeds as follows:—"And inasmuch as my property almost exclusively consists of United States securities, which are to be redeemed by that Government at specified times, my will is that they be not disposed of or realised until they are redeemed by the said Government, I direct that in case I shall die before the time for such redemption shall arrive of the said securities, the interest to accrue due thereon shall be divided equally" between certain charities which the testator specified. At the date of the will the testator's property consisted of two United States 5-20 bonds of 1869 loan for 1,000 dollars each, four bonds of the same loan for 500 dollars each, and three bonds of the United States 6 per cent., 1861, loan for 1,000 dollars each. Shortly after the date of the will he sold these bonds, and purchased in lieu of them four United States bonds for 1,000 dollars each, and one bond of the Victoria Government for 500*l.* The testator died on the 11th May, 1883, the last-mentioned securities being then in his possession:—Held, that the bequest to the charities was adeemed. *Murphy v. Cheevers*, 17 L. R., Ir. 205—V. C.

Legacy of Share in Settled Fund—Specific Gift.—A testatrix by her will, after directing the payment of her debts, and giving certain legacies, gave a sum of 7,500*l.*, "which I believe is left under uncle Price's will to me," in various legacies to several persons. At the date of her will she was entitled in reversion to shares in two sums of 25,000*l.* and 20,000*l.*, which together amounted to 7,500*l.* under her uncle's will and a settlement which contained the usual power to change investments made by him. When the reversion fell into possession the testatrix received the money representing her share, which she invested and the investments could be

traced:—Held, that the gift of the 7,500*l.* was not adeemed, but was effectual so far as the funds representing the shares of the testatrix under her uncle's will and settlement could be traced. *Kenyon's Estate, In re, Mann v. Knapp*, 56 L. T. 626—Chitty, J.

Specific Bequest—Charge on Estate.]—A testator, by his will dated the 23rd June, 1869, after reciting that he was entitled as against the M. estates to the sum of 7,966*l.* 11*s.* 4*d.*, being the amount ascertained to be paid by him in his character of executor of the late R. H. E., in discharge of the residue of liabilities to which the inheritance in the M. estates was liable, bequeathed to his son W. the sum of 7,966*l.* 11*s.* 4*d.*, or such other sum as he might be entitled to raise off the M. estates. The testator was tenant for life of the M. estates, with remainder to W. in tail male. By deed, dated the 9th day of July, 1875, the M. estates, and also the B. estates, of which the testator was tenant for life, with remainder to W. in tail, were re-settled. This deed recited that, upon the winding-up of the testamentary estate of R. H. E. (under whose will the M. estates were limited), an account was settled between the several devisees of the respective estates of R. H. E., with a view to ascertain their liability, and that the testator had been ascertained to be entitled to stand against the M. estate for the sum of 8,329*l.* 0*s.* 2*d.*, and that it had been agreed that the said sum of 8,329*l.* 0*s.* 2*d.* should be charged on the inheritance of the said several estates; and by the said deed the M. estates and the B. estates were granted to trustees for five hundred years, in trust to raise the sum of 8,329*l.* 0*s.* 2*d.*, and pay the same as the testator should appoint:—Held, that there was no ademption of the bequest to W. of the charge on the estates. *Longfield v. Bantry*, 15 L. R., Ir. 101—V.-C.

"All my interest in C. Estate"—Sale before Testator's Death.]—Testator devised "all my interest in the C. estate" after the death of his wife, to M. Previously to his death the C. estate was sold and the proceeds of sale paid into court. The money was then paid out to the testator, and part of it was paid into a deposit account and part into his current account with other moneys:—Held, that there was an ademption of the C. estate, and that nothing passed to M. *Clark v. Brown* (2 Sm. & G. 524) not followed. *Moore v. Moore* (29 Beav. 496) distinguished. *Manton v. Tabois*, 30 Ch. D. 92; 54 L. J., Ch. 1008; 53 L. T. 289; 33 W. R. 832—V.-C. B.

Bequest of Business—Double Portions.]—A testator bequeathed the residue of his estate (including a business which he directed to be sold) for the benefit of his children equally. He had two sons and three daughters. Subsequently to the date of his will he assigned the business to his eldest son on trusts, which provided for the admission of the younger son as partner on equal terms with the elder on attaining full age, the repayment with interest to the father of a sum temporarily employed by him in the business, and the payment to the father of a weekly sum of 10*l.* for life:—Held, that the shares of the sons in the residue were adeemed to the extent of the value of the property assigned on trust for them at the time of the assignment, and must be brought

into account in the distribution of residue. *Vickers, In re, Vickers v. Vickers*, 37 Ch. D. 525; 57 L. J., Ch. 738; 58 L. T. 920; 36 W. R. 545—North, J.

ii. Satisfaction.

Contemporaneous Deed and Will.]—The circumstance that two documents are contemporaneous, so that both are present to the mind of the donor when he executes each of them, is a strong reason against holding a gift in one to be a satisfaction of an obligation under the other to pay a like sum. *Horlock v. Wiggins*, 39 Ch. D. 142; 58 L. J., Ch. 46; 59 L. T. 710—C. A.

By a separation deed, dated the 7th September, 1844, the husband covenanted that his executors or administrators should on his decease pay to his wife, if she survived him, 100*l.*; with a proviso that if 6*l.* per month was paid her for six months from his death, the balance should only be paid at the end of that period. By his will, dated the 5th day of September, 1844, but alleged to have been signed on the 9th, "after all my just debts, funeral and testamentary expenses are paid, I bequeath to my wife 100*l.* payable within six months after my decease, 6*l.* to be paid to her or her order until my estate is finally settled, and the same to be deducted from the said 100*l.* as per indenture stated in our mutual separation":—Held, that the legacy was not in satisfaction of the sum covenanted by the deed to be paid, but that the widow was entitled to both sums. *Id.*

Double Portions.]—A father on the marriage of his second son, by deed of settlement covenanted to pay him an annuity of 1,000*l.* a year for life, and to charge the annuity on a sufficient part of the real estate he might die seized of; provided that nothing in the settlement should prevent his dealing with his real estate during his life, or so only that sufficient real estate were left charged with the annuity, by will. The father subsequently made his will by which he devised his real estate (subject to the charges and incumbrances thereon) in strict settlement on his first and other sons in tail male; he bequeathed the greater part of his personal estate among his children, giving his second son legacies the income of which when invested would be considerably more than 1,000*l.* a year. He died leaving three sons:—Held (Fry, L.J., dissentiente), that the words "subject to the charges and incumbrances thereon," were too general to rebut the presumption against double portions, and that the second son was not entitled both to the annuity and to the bequests under the will. The doctrine of double portions discussed. *Montague v. Sandwich (Earl)*, 32 Ch. D. 525; 55 L. J., Ch. 925; 54 L. T. 502—C. A.

Legacy—Portion in Settlement.]—A., by marriage settlement, granted certain lands to trustees, to raise the sum of 3,000*l.* for the children of the marriage in such shares as A. should appoint, and in default of appointment equally among them. A. had three sons and six daughters. The power of appointment was never exercised. A. by will bequeathed his residuary estate, which realised a clear fund, exceeding what his daughters would have been entitled to under the settlement upon trust,

after the death of his wife (to whom he gave the interest thereon for life for the maintenance of his daughters), to pay each of his daughters one-sixth of the interest while unmarried, and a like share of the principal on marriage with consent, with a gift over to the survivors of the share of any daughter dying unmarried :—Held, that the provisions made by the will operated as a satisfaction of the portions given to the daughters by the settlement. *Battersby's Estate, In re*, 19 L. R., Ir. 359—Monroe, J.

Legacy—Debt.—A testator bequeathed his wife a legacy of 625*l.* He then owed her that exact amount. The debt was paid off in his lifetime :—Held, that the sum was not payable as a legacy. *Fletcher, In re, Gillings v. Fletcher*, 38 Ch. D. 373 ; 57 L. J., Ch. 1032 ; 59 L. T. 313 ; 36 W. R. 841—North, J.

A testator bequeathed 250*l.* to his son, and directed that his debts of every kind, including specialty debts, should be paid out of his personal estate :—Held, that the legacy was not a satisfaction of a debt of 92*l.* due by the testator to his son for business advances on a current account. *Buckley v. Buckley*, 19 L. R., Ir. 544—M. R.

Policy subject to Payment of Debts—Testator's Lunacy—Payment by Committee.—A testator bequeathed a policy on his own life on trust to pay two debts due from him, and to pay the balance of the money to be received on the policy if any, to his daughter J. The testator paid off one debt ; he became lunatic ; his committee paid off the other debt :—Held, that J. was entitled to the money received on the policy, less the debt paid by the committee. *Larking, In re, Larking v. Larking*, 37 Ch. D. 310 ; 57 L. J., Ch. 282—North, J.

f. TRUSTS.

i. Secret Trusts.

Communication of Object of Trust to Trustee.]

—A. B. instructed his solicitor to prepare for him a will leaving all his property to the solicitor himself absolutely, but to be held and disposed of by him according to written directions to be subsequently given, and a will was prepared and executed accordingly, under which the solicitor was universal legatee and sole executor. No such directions were, however, given to the solicitor by the testator in his lifetime, but after his death an unattested paper was found by which the testator stated his wish that X. Y. should have all his property except a small sum of money which he gave to the solicitor. The solicitor claimed no beneficial interest in the testator's property except to the extent of his legacy, and claimed to hold the rest of the property as trustee for X. Y. :—Held, that as the testator had not in his own lifetime communicated to the solicitor the object of the trust no valid trust in favour of X. Y. had been constituted, and accordingly that the solicitor held the property as trustee for the next of kin of the testator. *Boyes, In re, Boyes v. Carritt*, 26 Ch. D. 531 ; 53 L. J., Ch. 654 ; 50 L. T. 581 ; 32 W. R. 630—Kay, J.

Bequest of 200*l.* to A. and B. "to spend as I" (the testatrix) "shall, by word of mouth,

direct during my lifetime." The testatrix verbally informed A. that she wished to leave "something to J., and something to the Lord's work," and suggested C. and D. as persons to whom she proposed to give the last-mentioned bequest. After the testatrix's death A. found a letter in her handwriting, which, after reciting the bequest in the will of the 200*l.*, proceeded as follows :—"I would ask you to give or send 100*l.* to J. ; the second hundred I wish sent for the Lord's work, 50*l.* to C. and 50*l.* to D. ; I would ask them to lay it out :"—Held, that no valid trust was created affecting any portion of the 200*l.* *King's Estate, In re*, 21 L. R., Ir. 273—Monroe, J.

Admissibility of Evidence to show Existence.]—A testator who died in Jan., 1885, by his will dated in Dec., 1884, bequeathed to his friends A. and B. the sum of 500*l.* free of legacy duty to be raised and be paid out of his pure personality, "relying, but not by way of trust, upon their applying the said sum in or towards the object or objects privately communicated to them" by him. The executors objected to pay over the bequest, on the ground that there was a secret trust, and that such trust appeared to be an illegal one. The legatee accordingly applied to the court to order payment of the legacy. The executors tendered affidavits to show that the bequest was upon a trust. The legatees objected that the court could not go beyond the terms of the will :—Held, that the evidence was admissible. *Russell v. Jackson* (10 Hare, 204) followed. *Spencer's Will, In re*, 57 L. T. 519—C. A.

ii. Resulting Trusts.

In what Cases.]—By an agreement between H. and R. certain shares in a limited bank, which were the property of H., but standing in the names of H. and R., were to be held for H. for life, with remainder to R. for life, with remainder to such charities as H. should by will appoint. H. died in 1878, having appointed the shares among certain charities, subject to R.'s life interest. R. died in 1884. A winding-up order having been made against the bank, the executors of both H. and R. were informed that a call would be made against them on the shares. All the charities had disclaimed. The executor of R. brought an action against H.'s executors, one of whom was also H.'s residuary legatee, claiming indemnity in respect of the liability on the shares :—Held, that, on the disclaimer by the charities, there was a resulting trust of the shares in favour of H.'s estate, and that H.'s residuary legatee was bound to indemnify R.'s executor. *Hobbs v. Wayet*, 36 Ch. D. 256 ; 57 L. T. 225 ; 36 W. R. 273—Keke-wich, J.

A testator's will contained the following clause :—"I give and bequeath to my brother E. whatsoever real estate I may die possessed of, wheresoever situate, on trust nevertheless to pay thereout the sum of 800*l.* due from me to the trustees under the marriage settlement of S., and the sum of 300*l.* due from me to B., and also on trust to pay to each of my sisters M. and C. and to my brother A., as long as they respectively live, the sum of 50*l.* every year." The

will contained a bequest of the personality to E. and A. and certain of his sisters, and appointed E. executor thereof:—Held, that the word "thereout" and the words "and also on trust" were sufficient to show that the gift to E. was not for the purposes thereafter expressed, but only subject to such trusts as were expressed. *King v. Devision* (1 V. & B. 261) explained. *Croome v. Croome*, 59 L. T. 582—C. A. Affirmed 87 L. T. Jour. 201—H. L. (E.).

Acceleration of Interests.—See ante, col. 2052.

iii. Precatory Trusts.

General Rule of Construction.—The doctrine of precatory trusts is not to be extended, and, in considering whether precatory words create a trust, the court will not look only to particular expressions, but see whether on the whole will the testator's intention was to create a trust, and regard will be had to any embarrassment and difficulty which would arise from a trust. *Diggles, In re, Gregory v. Edmondson*, infra.

"In full confidence she will do what is right."—A testator gave and devised all his real and personal estate unto and to the absolute use of his wife, her heirs, executors, administrators, and assigns "in full confidence that she will do what is right as to the disposal thereof, between my children, either in her lifetime or by will after her decease":—Held, that under these words the widow took an absolute interest in the property unfettered by any trust in favour of the children. *Lambe v. Eames* (6 L. R., Ch. 597), *Hutchinson and Tenant, In re* (8 Ch. D. 540), *Curnick v. Tucker* (17 L. R., Eq. 320), and *Le Marchant v. Le Marchant* (18 L. R., Eq. 444) commented on. *Adams and Kensington Vestry, In re*, 27 Ch. D. 394; 54 L. J., Ch. 87; 51 L. T. 382; 32 W. R. 883—C. A.

"They are hereby enjoined."—Bequest as follows: "I give to my brother, in trust for my sisters, M., C., and H., 4,000l., . . . on condition that they will support M. M.; at the demise of either or any of the above, the survivors or survivor to receive the increased income produced thereby. They are hereby enjoined to take care of my nephew J., as may seem best in the future":—Held, that the sisters took absolutely as joint tenants; and that there was no precatory or other trust in favour of the nephew. *Moore, In re, Moore v. Roche*, 55 L. J., Ch. 418; 54 L. T. 231; 34 W. R. 343—Kay, J.

"It is my desire that she allows."—A testatrix gave all her property real and personal to her daughter, "her heirs and assigns; and it is my desire that she allows to A. G. an annuity of 25l. during her life, and that A. G. shall, if she desire it, have the use of such portions of my household furniture as may not be required by my daughter." The daughter and her husband were appointed executors:—Held, that no trust or obligation to pay the annuity was imposed upon the daughter, but that there was only a request to the daughter, not binding her in law, to make that provision for A. G. *Diggles, In re, Gregory v. Edmondson*, 39 Ch. D. 253; 59 L. T. 884—C. A.

"In order that she might provide for."—A testator left all his property to his wife, in trust for the uses thereafter mentioned. He then be-

queathed certain pecuniary legacies, and stated that it was his will that his youngest son P. should live and reside with his mother, and be attentive to her, and directed by her in order that she might by deed or by her last will and testament provide for him in such a manner as to her might seem most expedient and proper; and he appointed and nominated his said wife his residuary legatee and trustee of his will, in order that she might direct and govern his said children and assist to arrange all matters between them; and previous to her death—provided that she did not marry again—that she might dispose of the residue of his property to and amongst his said children and provide for his son P. as she might think expedient; and he directed that if she married again she should cease to be trustee, and receive the sum of 100l. only; and that in such case his son E. should act as trustee in her stead. He nominated his son E. and his wife executor and executrix:—Held, that the testator's wife took the residue absolutely, and that there was no precatory trust in favour of P. *Morrin v. Morrin*, 19 L. R., Ir. 37—V.-C.

g. ANNUITY.

Whether for Life or Perpetual.—A testator, being the lessor of the lands of B., which were held under him by a lease for lives, renewable for ever, at a yearly rent of 46l., made a will containing the following dispositions relating to these lands: "I hereby give and bequeath unto my three daughters" [naming them] "two years' profit rent to each out of B., that is to say, 60l. to each, to be paid as the rent becomes due after my decease; I order that, in case any of my daughters should die before they come to the age of twenty-one years, her part should be divided between the surviving daughters above mentioned. I also will and bequeath unto my six sons" [naming them] "all my interest in M. Farm and T. farm, and 5l. per annum to each out of B. after my daughters are paid off." Upon the argument of a demurrer, it not expressly appearing from the pleadings whether the lessor was liable to any or what head-rent in respect of B.:—Held, that the annuities of 5l. each to the testator's sons were not perpetual annuities, but were for the lives of the annuitants only. *Whitten v. Hanlon*, 15 L. R., Ir. 298—Ex. D.

Right of Annuitant to have Annuity secured.

—The testator gave all his real and personal estate to his son, upon trust to pay thereout weekly and every week to the testator's wife during her life the sum of 1l. 10s., and, subject thereto, upon trust for his said son absolutely. The testator had been dead four years, and the weekly payment had been regularly made during all that period. The widow now asked that its future payment should be secured by the sale of the property and the investment of the proceeds. The estate consisted substantially of a leasehold public-house, and the business carried on there, and the total amount of it, if realised, would not have been equal to the amount of the capitalised value of the annuity:—Held, that the property was given to the son absolutely, subject only to the payment of the annuity, and so long as he paid that, he was entitled to the quiet-

possession of his property, and the widow was not entitled to have it sold. *Potter, In re, Potter v. Potter*, 50 L. T. 8—V.-C. B.

Gift in Reversion—Direction to Purchase—Death of Annuitant—Failure of Gift.—A testator, having an absolute power of disposition over a fund subject to the interest of a tenant for life, directed that at the death of the tenant for life, 1,000*l.* of the fund should be invested in the purchase of a life annuity for the benefit of D., and that in the event of insolvency or alienation by D., the annuity fund should fall into residue, and he gave his residuary estate to the aforesaid tenant for life. The annuitant predeceased the tenant for life.—Held, that the gift of the annuity fund failed, and the fund fell into the residue. *Power v. Hayne* (8 L. R., Eq. 262) followed. *Day v. Day* (1 Drew. 569) not followed. *Draper's Trusts, In re*, 57 L. J., Ch. 942; 58 L. T. 942; 36 W. R. 783—Kekewich, J.

Charge on Leaseholds or Real Estate.—See post, col. 2114.

h. POWERS OF APPOINTMENT.

i. Instruments by which Exercised.

Intention to exercise Power—Residuary Gift.—A marriage settlement made in 1840 reserved to the husband a general power of appointment by will “expressly referring to this power or the subject thereof.” By his will (not referring to the power) he gave the residue of his property to trustees on certain trusts differing from those declared by the settlement in default of appointment.—Held, that the power was exercised by the will. In ascertaining whether a testator has shown an intention not to exercise by a residuary gift a general power of appointment reserved to him by a settlement made by himself the will only can be looked at. *Marsh, In re, Mason v. Thorne*, 38 Ch. D. 630; 57 L. J., Ch. 639; 59 L. T. 595; 37 W. R. 10—North, J.

A testator, who had under a settlement a power of appointment over leasehold and other personal estate among his children or grandchildren or other issue, by his will, which contained no reference to the power, gave “all the real and personal estate and effects whatsoever, and wheresoever, whether in possession, reversion, remainder, or expectancy, over which at the time of my decease I shall have any beneficial disposing power by this my will” to trustees, upon trusts partly for persons who were objects of the power, and partly in excess of the power.—Held, that the use of the word “beneficial” did not conclusively show that the testator could not have intended to exercise a power which he could not exercise for his own benefit or the benefit of his estate. *Ames v. Cadogan* (12 Ch. D. 868) discussed. *Von Brockdorff v. Malcolm*, 30 Ch. D. 172; 55 L. J., Ch. 121; 53 L. T. 263; 33 W. R. 934—Pearson, J.

There being, in the opinion of the court, upon the will taken as a whole, a sufficient indication of an intention to exercise the power.—Held, that the power was exercised by the will, the trusts, so far as they were in excess of the power, being inoperative. *Id.*

—Share and Interest in Colliery Company.]

—A testator having, under a settlement, a power of appointment over two freehold estates, B. and S., and over one-fourth share in a colliery company, by his will, which contained no reference to the power, devised to one son “all my freehold estates at B,” and to another son “my estate known as S,” and also bequeathed “all my shares and interest in the above-mentioned and two other colliery companies” to his three daughters. He had no estate of his own at B. and S. besides the settled estates, but he had a share in each of the three colliery companies, besides the share comprised in the settlement.—Held, that the bequest of all his shares and interest in the colliery companies operated as an appointment of the settled share, as the manner in which he had exercised his power over the estates of B. and S. showed that he intended to exercise his power over the settled share by the bequest of all his shares and interest in the colliery companies. *Wait, In re, Workman v. Petgrave*, 30 Ch. D. 617; 54 L. J., Ch. 1172; 53 L. T. 336; 33 W. R. 930—Pearson, J.

—Over Real Estate—Testator having no other Realty.—The question whether, since the Wills Act, a special power of appointing real estate is exercised by a general devise, where the testator had neither at the date of his will nor of his death any real estate of his own, is one of intention to be inferred from the words of the will and from the surrounding circumstances at the date of it, particularly the enlarged operation given by the act to a general devise. A testator making a mere general devise, though having no real estate of his own, does not thereby sufficiently indicate an intention of exercising a special power of appointing real estate, notwithstanding that the objects of the power happen to be included among the devisees. *Mills, In re, Mills v. Mills*, 34 Ch. D. 186; 56 L. J., Ch. 118; 55 L. T. 665; 35 W. R. 133—Kay, J.

—Exercise of Power up to Specified Amount.]

—A testator by his will, dated in 1884, after giving his residuary real and personal estate upon certain trusts for the benefit of his widow and his daughter and the daughter's children, empowered his widow by will to appoint that any sum or sums of money not exceeding 20,000*l.* should after her death be raised and applied as she should think fit. The widow by her will dated in 1885, devised and bequeathed all her estate and effects real and personal which she might die possessed of or entitled to unto her daughter absolutely.—Held, that by force of the 27th section of the Wills Act, the general devise and bequest in the widow's will operated as an exercise to the extent of 20,000*l.* of the power of appointment contained in the will of the testator. *Jones, In re, Greene v. Gordon*, 34 Ch. D. 65; 56 L. J., Ch. 58; 55 L. T. 597; 35 W. R. 74—Kay, J.

—Power created after Will.—A testatrix, who had a general power of appointment over the A. property, by her will in 1854 after specific devises and bequests devised and bequeathed the residue of her estate to X. By a deed-poll in 1855 she appointed the A. property upon such trusts as she by deed or her last will

"should from time to time or at any time thereafter direct or appoint," and in default of appointment upon trust for Y. The testatrix died in 1857:—Held, that reading together ss. 24 and 27 of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), the will operated as an exercise of the power given or reserved by the subsequent deed-poll and passed the property to X. *Boyes v. Cook* (14 Ch. D. 53) approved. Semble, that the case also fell within s. 23 of the Wills Act, and with the same result. *Airey v. Bower*, 12 App. Cas. 263; 56 L. J., Ch. 742; 56 L. T. 409; 35 W. R. 657—H. L. (E.). See also *Hernando, In re*, post, col. 2105.

P., a married woman, made a will the day after her marriage in the following terms: "In pursuance and exercise of the power of appointment, vested in me by the settlement executed previously to my marriage, and of every other power enabling me, I hereby appoint, give, and bequeath all the property settled by me on my marriage, and over which I have any disposing power, unto my dear husband." After the execution of the will, but in the lifetime of P., O. died, having by will bequeathed 100l. East Indian Railway Annuities in trust for P. for life, with remainder as she should by will appoint, with remainders over:—Held, that P.'s will was not confined to the property comprised in her marriage settlement, but operated to exercise the power given her by the will of O. *Old's Trusts, In re, Pengelly v. Herbert*, 54 L. T. 677—Pearson, J.

Revocation—Valid Appointment in Will—Invalid Appointment by Codicil.—Testator by will, who said his estate would realise at least 10,000l., wished 4,000l. to be invested on trust for his sister, A. P., for her life. At her death the principal might be divided between her husband, if surviving, and children as she might by will determine. After giving other legacies, the testator bequeathed the remainder to the children of J. F. A sum of 4,000l. was invested in Consols and transferred into court. A. P. by will gave all the residue of her property, including the sum of 4,000l. left to her by the testator, and over which she had a disposing power, to her husband and children in equal terms. One son after the date of the will died, leaving two children, and by a codicil made afterwards, A. P. bequeathed the share which would have gone to him in trust for his children. On petition by the husband and surviving children for sale of the trust fund and payment of the proceeds to them:—Held, that the invalid appointment by the codicil did not operate as a revocation pro tanto of the gift by the will to the class, and that the husband and surviving children were entitled to the whole of the fund. *Duguid v. Fraser*, 31 Ch. D. 449; 55 L. J., Ch. 285; 54 L. T. 70; 34 W. R. 267—Kay, J. See also *Kirwan's Trusts, In re, infra*.

Will of Wife during Coverture—General Disposition by Will, after Death of Husband.—A married woman, having in a settlement a special power of appointment by will over real estate, executed a will during coverture in 1866 appointing the same. After the death of her husband she made three other wills. In the first and second she said: "I revoke all other wills," and in the third: "I . . . hereby revoke all wills, codicils, and other testamentary disposi-

tions heretofore made by me, and declare this to be my last will and testament," and then disposed of all her estate, "including as well real estate as personal estate over which I have or shall have a general power of appointment," but she did not in any way exercise or affect to exercise the power in the settlement, nor did she refer to it, or to the property the subject of the power:—Held, that the testamentary appointment of 1866 was revoked. *Kingdon, In re, Wilkins v. Pryer*, 32 Ch. D. 604; 55 L. J., Ch. 598; 54 L. T. 753; 34 W. R. 634—Kay, J.

Testamentary Appointment—Residuary Bequest.—A testator executed a "testamentary appointment" under a general power. A month later he executed a will containing a residuary bequest, and not referring to the testamentary appointment:—Held, that the will operated as an execution of the power, and revocation of the testamentary appointment. *Gibbes' Settlement, In re, White v. Randolph*, 37 Ch. D. 143; 57 L. J., Ch. 757; 58 L. T. 11; 36 W. R. 429—North, J.

Residuary Gift—Appointment to Persons not Objects.—A testatrix having a testamentary power of appointment over a trust fund in favour of her children only, purported by her will to appoint to three of her children, including F. and B., one-fourth each, and the remaining fourth to a grandchild, not an object of the power; and "all the rest, residue, and remainder of my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, and over which I have any power of disposal by this my will, I give and bequeath the same unto and equally between my said sons F. and B. share and share alike":—Held, that the residuary gift operated as an appointment to F. and B. of the one-fourth badly appointed to the grandchild. *Hunt's Trusts, In re*, 31 Ch. D. 308; 55 L. J., Ch. 280; 54 L. T. 69; 34 W. R. 247—V.-C. B.

A testatrix had, under the will of a brother who had predeceased her, a power to appoint his property by will among his nephews and nieces, and the children or child of deceased nephews and nieces. She, by her will, gave all the real and personal estate of which she might be seised or possessed at the time of her death, or over which she might have any testamentary power of disposition, to trustees, upon trust for sale and conversion, and to stand possessed of the proceeds (which she described as "my said trust funds") upon trust to pay costs and expenses, and to pay her debts and funeral expenses and certain pecuniary legacies, and then upon trust as to two one-fourth parts of her trust funds respectively for persons who were objects of the power; and upon trust as to the other two one-fourth parts respectively for persons who were not objects of the power. And she declared that, in case of the failure of the trusts thereinbefore declared of any of the one-fourth parts of her trust funds, the one-fourth part, or so much thereof of which the trust should fail, should be held upon the trusts thereinbefore declared of the others or other of the fourth parts of which the trusts should not fail:—Held, that the testatrix had manifested an intention to exercise the power, and that as to one moiety of the brother's property the power was well exercised.

Held, also, that as to the other moiety of the brother's property the appointment was invalid, but that by virtue of the gift "in case of the failure of any of the trusts thereinbefore declared," that moiety went to the persons to whom the first moiety was well appointed, and that, consequently, no case of election arose. *Swinburne, In re, Swinburne v. Pitt*, 27 Ch. D. 696; 54 L. J., Ch. 229; 33 W. R. 394—Pearson, J.

By Will or Deed.—F., by his will, devised an estate at K. to his daughter H. for life, and directed that H. should not have any power to mortgage, sell, or give it away during the term of her natural life, but at her decease she might give it to whom she pleased. By a post-nuptial settlement H. and her husband settled the K. estate in trust for all their children equally. Afterwards H., by her will, appointed the K. estate to her only child for life, with remainder to his children:—Held, that H. had only a testamentary power of appointment over the K. estate, and that she could not dispose of the estate by deed during her life. *Flower, In re, Edmonds v. Edmonds*, 55 L. J., Ch. 200; 53 L. T. 717; 34 W. R. 149—North, J.

A testator gave by will the whole of his property to his three nieces during their joint and several lives, and added, "In leaving my property to my three nieces it is my wish that if my grandnephew J. conducts himself to their satisfaction, they shall leave him the property I now leave them":—Held, that the power could only be exercised by will. *Moore v. Ffolliott*, 19 L. R., Ir. 499—M. R.

Unattested Codicil—Deed.—A holograph codicil not duly attested was admitted to probate under 24 & 25 Vict. c. 114:—Held, that though admitted to probate, the codicil was invalid as a testamentary exercise of a power of appointment, sections 9 and 10 of the Wills Act not being repealed by 24 & 25 Vict. c. 114:—Held, also, that the codicil could not be treated as a defective attempt to execute a power by deed which the court would aid. *Kirwan's Trusts, In re, infra*.

ii. Fraud on Power.

Bargain to Settle the appointed Property.—Real estate was vested in trustees under a will, upon trust as to one moiety to pay the rents to A. for life, and after his death to convey it to and among his children who should attain twenty-one, and if he had no such child then on the trusts of the other moiety, and as to the other moiety on similar trusts for B. and his children. The will empowered the trustees if they should think fit, to convey the shares of A. and B., or either of them, to them in fee. In 1882, A. and B., the younger of whom was of the age of sixty-two, and neither of whom had any child, having incumbered their interests, and being pressed by their mortgagees, applied to the trustees to exercise their power of giving them their shares of the estate in fee. An arrangement was made between A. and B. and the trustees that the trustees should, in exercise of their power, convey the estate to A. and B., as tenants in common in fee, and that, subject to such mortgages as should be approved by

the trustees for raising money to pay off the existing mortgages, a part of the property should be settled upon trusts which gave A. and B. respectively powers of appointment in favour of their respective children and remoter issue, and powers of jointuring their wives. The trustees accordingly conveyed to A. and B., as tenants in common in fee, and the re-settlement, which vested the equity of redemption in new trustees, with a power of sale, upon the trusts which had been arranged, was made by a deed which recited that the trustees had exercised the power on condition that the settlement should be made:—Held, that looking at all the circumstances of the case, it was not shown that the bargain for the re-settlement induced the appointment, or that if the bargain had not been entered into the appointment would not have been made, and that the appointment and settlement were therefore valid, and that the trustees of the settlement could make a good title. *Turner's Settled Estates, In re*, 28 Ch. D. 205; 54 L. J., Ch. 690; 52 L. T. 70; 33 W. R. 265—C. A.

A tenant for life, having power to charge settled estates with a jointure of 200l. a year in favour of a wife, executed a deed appointing the full amount, but, as the court found upon the evidence, upon a bargain and with the sole purpose that 60l. should be paid each year out of the jointure to a third person, and the deed was executed as an escrow to be delivered to the jointress upon her securing the 60l. annuity, which condition she had not fulfilled:—Held, that the appointment was invalid as being a fraud upon the persons entitled to the settled property in remainder after the death of the tenant for life. *Whelan v. Palmer*, 39 Ch. D. 648; 57 L. J., Ch. 784; 58 L. T. 937; 36 W. R. 587—Kekewich, J.

The donee of a power of appointment amongst his children, exercisable by deed or will, having one son and one daughter, by will in 1862 made a valid appointment to the daughter of the whole fund subject to the power. By a French settlement; not under seal, made in 1866, upon the marriage of his daughter, he purported to appoint the whole fund to her, reserving to himself the power of disposing of a life interest in a portion of the fund in favour of his second wife; and by a holograph codicil, dated in 1871, made in France, and unattested, after reciting an arrangement made when his daughter was married between himself, his daughter and her intended husband, that such second wife should have such provision, he in effect appointed that if his daughter and her husband should carry out this arrangement they should have the whole of the fund. This codicil was admitted to probate under 24 & 25 Vict. c. 114:—Held, that though admitted to probate, the codicil was invalid as a testamentary exercise of the power, and did not revoke the appointment by will, that the appointments by the settlement and codicil were frauds upon the power, and that the arrangements made by the settlement and codicil involved a threat to revoke the will if they were not carried into effect, and that consequently the will, being an ambulatory instrument, was vitiated and became a fraud upon the power, although at the date of its execution it was not open to objection. *Kirwan's Trusts, In re*, 25 Ch. D. 373; 52 L. J., Ch. 952; 49 L. T. 292; 32 W. R. 581—Kay, J.

iii. To what Persons.

Remainder to Next-of-Kin.]—An appointment to an object of a power for life with remainder to his next-of-kin will take effect if at the death of the tenant for life his next-of-kin are objects of the power. *Coulman, In re, Munby v. Ross*, 30 Ch. D. 186; 55 L. J., Ch. 34; 53 L. T. 560—Pearson, J.

Trustees for Benefit of Son.]—Property was assigned to trustees on trust for S. for life, and after her death to such of her issue as she should by will appoint. S. by her will appointed the property to two trustees in trust to pay the income to her son:—Held, that S. had power to appoint the property to trustees for her son. *Scotney v. Lomer*, 29 Ch. D. 535; 54 L. J., Ch. 558; 52 L. T. 747; 33 W. R. 633—North, J.

Child leaving Issue—Lapse—Wills Act, s. 33.]—The 33rd section of the Wills Act, which enacts that a devise or bequest to a child of the testator who dies in the lifetime of the testator leaving issue shall not lapse, does not apply to an appointment under a special power. *Freme v. Clement* (18 Ch. D. 499) disapproved. *Holyland v. Levin*, 26 Ch. D. 266; 53 L. J., Ch. 530; 51 L. T. 14; 32 W. R. 443—C. A.

"Issue," Meaning of.]—The word "issue" may bear different interpretations in different parts of the same deed, and it is not an inflexible rule that, because the word evidently means "children," in the proper sense of the term, in one part of a settlement, it must be necessarily so construed in another part of the document. *Warren's Trusts, In re*, 26 Ch. D. 208; 53 L. J., Ch. 787; 50 L. T. 454; 32 W. R. 641—Pearson, J.

To Issue—Gift over in Default of Appointment to "such Issue."]—The testatrix gave all her property to trustees, upon trust to pay the income to such child or children of hers as should survive her during their lives, in equal shares if more than one, and in case of the death of any of her children in her lifetime or afterwards she directed that the issue of such child, or any one or more of them, should take his, her, or their parent's share in such shares and proportions as his, her, or their parent should by will appoint; "in default of such appointment such issue to take equally as tenants in common." The testatrix had several children, all of whom survived her, and two of whom afterwards died without exercising the power and having had children, some of whom predeceased their respective parents:—Held, that the words "such issue" meant all the issue of children of the testatrix to whom an appointment might have been made, and therefore that all the grandchildren of the testatrix were entitled to share whether they had survived their respective parents or not. *Hutchinson, In re, Alexander v. Jolley*, 55 L. J., Ch. 574; 54 L. T. 527—Kay, J.

Remoteness—Time how Calculated.]—A married woman exercised a general testamentary power:—Held, that time under the rule against perpetuities ran from her death, and not from

the date of the instrument creating the power. *Powell's Trusts, In re* (39 L. J., Ch. 188), discussed and not followed. *Rous v. Jackson*, 29 Ch. D. 521; 54 L. J., Ch. 732; 52 L. T. 733; 33 W. R. 773—Chitty, J.

A testator devised an estate to his daughter for life, with a power of appointment to be exercised by her by will; she appointed to her only child for life with remainder to the child's children:—Held, that time under the rule against perpetuities ran from the date of the daughter's death, and not from the date of the testator's will conferring the power. *Rous v. Jackson* (29 Ch. D. 521) followed. *Powell's Trusts, In re* (39 L. J., Ch. 188), disapproved. *Flower, In re, Edmonds v. Edmonds*, 55 L. J., Ch. 200; 53 L. T. 717; 34 W. R. 149—North, J.

A testator, who had under a settlement a power of appointment over leasehold and other personal estate among his children or grandchildren or other issue, by his will, gave a moiety of the property on trust for his daughters who should survive him, and attain twenty-four, in equal shares. The testator's youngest daughter was more than three years old at the time of his death:—Held, that the appointment was not void for remoteness. *Von Brockdorff v. Malcolm*, 30 Ch. D. 172; 55 L. J., Ch. 121; 53 L. T. 263; 33 W. R. 934—Pearson, J.

By an ante-nuptial settlement, dated 1834, to which the wife (an infant) was party, her parents agreed, and the husband covenanted, that the husband and wife would, on her attaining twenty-one, convey her real estate to the uses of the settlement. In 1836 the wife, having attained twenty-one, by deed duly acknowledged, in which the husband concurred, granted the real estate to the uses of the settlement:—Held, for the purpose of testing the validity of the exercise of a power, with reference to the rule against perpetuity, that the real estate was settled in 1834. *Cooke v. Cooke*, infra.

Severable Proviso.]—A marriage settlement gave the intended husband and wife power by deed or the survivor by deed or will, to appoint among children. The husband survived, and by will appointed the settled property among his three daughters equally, with a proviso that if at the time of his death any of them should be unmarried, her share should be held on trust for her for life, and after her decease, in case she should die leaving issue, as she should appoint, and in default of appointment, or in case she should not leave issue, on corresponding trusts in favour of his other children:—Held, that the trusts of the proviso were inseparable and totally void for remoteness, and that the absolute gift in favour of a daughter unmarried at the death of the testator prevailed. *Cooke v. Cooke*, 38 Ch. D. 202; 59 L. T. 693; 36 W. R. 756—North, J.

iv. Estate by Implication in Default.

A testator left to his three nieces, M., E., and R., the entirety of his property of every kind whatsoever during their joint and several lives, but subject to legacies, and added—"In leaving my property to my three nieces and co-heirs it is my wish that if my grand-nephew J. conducts himself to their satisfaction they shall leave him

the property I now leave to them." J. died in the lifetime of two of the nieces, M. and E., who both died intestate:—Held, that J., if he had survived all the tenants for life, would have taken an estate by implication in default of appointment, but not having survived them that there was an intestacy as to the real estate, which descended to the heir of the testator. The decisions on simple powers of appointment, powers coupled with a trust and gifts by implication in default of appointment distinguished and reviewed. *Moore v. Ffolliott*, 19 L. R., Ir. 499—M. R.

Leaseholds were assigned to trustees upon trust, after the decease of the survivor of A., and B. his wife, to assign the same unto and amongst such of the children of the said A., and B. his wife, then living, in such manner, shares, times, and proportions as the said A., and B. his wife, jointly, or the survivor of them separately, should by any writing appoint, and in case there should be no such child or children, then upon trust for C. for life, and after his decease upon trust to assign the same unto and amongst such of his children, and in such manner, shares, times, and proportions, as he should by any writing appoint. A. and B. died without issue, B. in 1876, A. in March, 1880. C. died in 1863, having had ten children, of whom some predeceased him, and some died between his death and the death of A., and the rest survived A.:—Held, that all the children of C. took, as tenants in common, in equal shares. *Wilson v. Duguid*, 24 Ch. D. 244; 53 L. J., Ch. 52; 49 L. T. 124; 31 W. R. 945—Chitty, J.

A power given by will to a tenant for life to appoint to his children, with an express limitation over "in default of such appointment," cannot be construed as conferring upon the children any estate or interest in default of the exercise of the power of appointment, at least in the absence of provisions extending the operation of the power. *Jefferys' Trusts, In re* (14 L. R., Eq. 136), dissented from as to this point, by Lord Esher, M.R. *Bradley v. Cartwright* (2 L. R., C. P. 511) explained and distinguished, by Cotton, L. J. *Richardson v. Harrison*, 16 Q. B. D. 85; 55 L. J., Q. B. 58; 54 L. T. 456—C. A.

v. Other Matters relating to.

Donee's Intention to make Property her Own.]

—A testatrix exercised a general power of appointment, and appointed an executor, who was the sole trustee of the property:—Held, upon the construction of the will, that she had not made the property the subject of the power her own for all purposes, and that the gift over in default of appointment took effect. The appointment of an executor is not sufficient evidence of intention to make the property the subject of the power assets for all purposes. *Thurston, In re, Thurston v. Evans*, 32 Ch. D. 508; 55 L. J., Ch. 564; 54 L. T. 833; 34 W. R. 528—Chitty, J.

—**Donee unaware of Power.**—A married woman being (although unaware of it) the donee of a general power of appointment by deed or will over policy moneys payable upon her own death, concurred with her husband in settling certain family estates by an indenture which treated the policy moneys as the husband's own

property, and settled them also. Her concurrence in the settlement was for a purpose entirely unconnected with the policy moneys, and under it she took a life interest in remainder, after her husband's death, in the estates, but no interest in the policy moneys. She survived her husband, received in respect of her life interest in the estates sums exceeding the amount of the policy moneys, and died, having by her will given all property over which she had any disposing power to certain beneficiaries:—Held, that by her will she had exercised her general power so as to make the policy moneys her own assets; and that, having taken under the settlement benefits exceeding the value of the policy moneys, she could not by the exercise of her power take the policy moneys out of the settlement, without making good to the settlement beneficiaries an equal amount from her own estate; and accordingly that the policy moneys must be paid to the settlement trustees. *Griffith-Boscawen v. Scott*, 26 Ch. D. 358; 53 L. J., Ch. 571; 50 L. T. 386; 32 W. R. 580—Kay, J.

Semble, the concurrence of the donee of the power in the deed of settlement, for purposes unconnected with the policy moneys subject to the power, and in ignorance of its existence, could not operate as an exercise of the power, although the deed purported to pass the policy moneys. *Ib.*

Subject to Charge.—R., having a testamentary power to appoint land to his male issue in such shares and proportions as he should direct, devised certain of the lands to his eldest son, J. (who survived him), "to be chargeable with 2,000*l.* borrowed for J.'s sole use," and which R. in a subsequent part of his will stated that he had paid. R. by his will gave benefits out of his own property to all the objects of the power, and directed that certain portions of his estates should be sold or charged as by his will provided, and the proceeds applied, together with the 2,000*l.* borrowed for his son J., and which he stated he had paid, to form a fund for payment of his debts and legacies:—Held, that the devise to J., subject to the 2,000*l.* was not the case of a gift absolute, with a superadded attempt to modify it, within the principle of *Carver v. Bowles* (2 Russ. & Myl. 301), but the gift of a certain portion only of the interest in the lands, the deduction of the 2,000*l.* charge being necessarily incorporated with the gift, and that, therefore, J. took the lands subject to the charge of 2,000*l.* *White v. White* (22 Ch. D. 555) followed. *King v. King*, 13 L. R., Ir. 531—V.-C.

By what Law governed.—On the 20th of December, 1881, prior to the marriage (solemnized in England) of a domiciled Englishwoman (a widow) with a domiciled Spaniard, real estate in England of the intended wife was vested by her in a trustee in fee, to such uses as the intended wife should by deed or will appoint, and subject thereto, to the use of the intended wife, for her separate use. The settlement was made with the approbation of the intended husband, and the deed contained a statement that this approbation was given in consideration of a renunciation the same day executed by the intended wife of any rights which she would otherwise have acquired by her marriage in respect of the property of the intended husband according to the law of Spain.

The deed also contained a declaration that it was to take effect and be construed according to the law of England. The marriage was solemnized on the next day. On the 23rd of February, 1882, the wife (being then domiciled in Spain) executed a deed-poll, in accordance with the provisions of the settlement, whereby she, in exercise of the power given to her by the settlement, appointed the real estate to the use of herself in fee for her separate use. By another deed executed the same day, to which the husband was a party, she, with the consent of the husband, appointed and conveyed, and the husband conveyed, the real estate to the use of a trustee in fee, upon trust for sale, and out of the proceeds of sale to pay certain specified debts, and, subject thereto, in trust for such person or persons as the wife "shall at any time or times hereafter by any writing or writings from time to time appoint," and in default of any appointment and subject thereto, in trust for the wife absolutely for her separate use. Under this deed the trustee sold the property, and out of the proceeds of sale paid the specified debts, and there then remained a surplus in his hands. The wife died in June, 1882, having by a will executed immediately after her marriage, and which purported to be made in exercise of the powers reserved to her by her marriage settlement, and of all other powers enabling her, directed, appointed and declared that the real and personal estate over which she had any disposing power at the time of her death should be held and applied in the payment of certain legacies and annuities, and, subject thereto, she gave four-fifths of her real and personal estate, in case she should leave no children, to her husband absolutely; and she gave the remaining one-fifth of her property, charged with the before-mentioned annuities and legacies, to her brothers and sisters, or to the children per stirpes of such of them as should die before her leaving children. The testatrix died without issue. The husband survived her. According to the law of Spain, under such circumstances, two-thirds of her property belonged to her father and mother, notwithstanding that she had left a will.—Held, that whether the will was or was not a good exercise of the power reserved by the deed of February, 1882, it was a valid testamentary disposition by virtue of the limitation in default of appointment to the separate use of the testatrix; that it took effect according to English law, and that the legatees named in it (including the husband) were entitled to the benefits given to them by it. *Hernando, In re, Hernando v. Sawtell*, 27 Ch. D. 284; 53 L. J., Ch. 865; 51 L. T. 117; 33 W. R. 252—Pearson, J.

Seemle, that on the authority of *Boyes v. Cook* (14 Ch. D. 53) the will was a valid exercise of the power of appointment given by the deed of February, 1882. *Id.*

Future Gift of Residue—Power to grant Jointure.—A testatrix, by her will, after reciting that she was entitled under the marriage settlement of her granddaughter to a fund, subject to the life interest of A., gave all her "reversionary interest" in the fund to trustees, upon trust, on the determination of the interest of A., to stand possessed thereof upon the like trusts, and with the same powers, so far as applicable, for any issue of A. by any future wife as were declared in the settlement

for any issue of A. by his late wife, the testatrix's said granddaughter. And the testatrix declared that A. might by will or codicil appoint that the income of the fund should be paid to any future wife of his during her life or for any less period, and that, in default of issue attaining a vested interest, the fund should be held upon trust for A. absolutely; and the testatrix gave the residue of her property in trust to A. absolutely. By a codicil, the testatrix, in lieu of the trusts in her will as to residuary estate, declared that the trustees should pay the income thereof to B. for life, and after his death should hold the same upon the like trusts in favour of A. and his issue, and with the same powers in all respects as were contained in her will with reference to her reversionary interest under the settlement, and as if the same were repeated in the codicil. A. married a second wife. B. subsequently died. A. then claimed the income of the testatrix's residuary estate accrued since the death of B. The court decided that, although there was no express disposition of the income after A.'s death during the remainder of his life, such income would nevertheless belong to the parties who might eventually become entitled to the corpus, since a future gift of residue carried with it previous income not expressly disposed of, and that it must therefore be accumulated for the possible children of A. by his then marriage, who might attain a vested interest therein. Shortly afterwards A. appointed the income of the testatrix's residuary estate to his wife for life:—Held, that the power given by the will to appoint to a wife was in the nature of a power to grant a jointure, that the power given by the codicil with regard to the residue was of the same nature; and that therefore the appointment would only take effect after A.'s death. *Lindo, In re, Askin v. Ferguson*, 59 L. T. 462—Kay, J.

Testamentary Expenses—Probate and Legacy Duty—Payment out of what Fund.—Testatrix, in exercise of a general power of appointment, made several appointments of (in each case) "so much and such part of" the said trust funds as should be of the "clear" value of a specified sum of money in each case, and lastly made an appointment of "all the residue" of the said trust funds. The will disposed of no other property except that subject to the power, and contained no direction for payment of testamentary expenses, probate or legacy duty:—Held, that the testamentary expenses and probate duty, and the legacy duty on the specified portions of the trust funds, must be paid out of that part of the trust funds which was lastly appointed as residue. *Currie, In re, Bjorkman v. Kimberley (Lord)*, 57 L. J., Ch. 743; 59 L. T. 200; 35 W. R. 752—Kay, J.

i. ELECTION.

Doctrine of Compensation.—The engrafted doctrine of compensation does not apply to the case of a person electing to take under the instrument which gives rise to the election. *Wilson v. Townshend (Lord)* (2 Ves. 693), discussed and not followed. *Chesham (Lord)*, *In re, Cavendish v. Dacre*, 31 Ch. D. 466; 55 L. J., Ch. 401; 54 L. T. 154; 34 W. R. 321—Chitty, J.

— **Bequest of Heirlooms in disregard of Settlement.**—A testator, who died in 1882, by his will dated in 1878, gave certain chattels upon trust for sale, for the benefit of his two younger sons, and the residue of his estate to his eldest son, C. The chattels so bequeathed by the will were, in fact, heirlooms settled by a deed dated in 1877, upon trust to go and be held with a certain mansion-house, of which C. was tenant for life:—Held, upon the questions whether C. having elected to take under the will, was or was not put to his election between the benefits given to him by the will and the chattels which were bequeathed by the same will, and whether he ought not to make compensation to his younger brothers, that he was not bound to make any compensation out of his legacy to his younger brothers, that he had no interest in the chattels apart from the mansion-house, which he could make over for their benefit, and that no case of election arose. *1b.*

— **Stock belonging to Wife in Joint Names—Bequest by Husband of Life Interest to Wife.**

—A testator after making certain bequests, and giving his wife a legacy of 3,000*l.*, gave all the residue of his estate and effects, "including therein the money in my banking account in the Bank of England, and money in the public funds, and whether standing in my name alone, or jointly with my said wife," and all his shares and interest in any public company, and other effects, to his wife for her life, and after her decease to other persons. At the date of the will, and at the time of the testator's death, there was only one sum (*viz.*, 7,110*l.* Consols) standing in the joint names of himself and his wife. This stock had by a previous will been bequeathed to the wife, subject to two executory gifts over, which did not take effect, one in favour of her children, if any, and the other of her husband, if he survived. The stock had been received by the testator, and by him transferred into their joint names. After the testator's death his wife received the income of all the residuary estate, including the 7,110*l.* Consols, but made no attempt to deal with the stock as her own property. There was, however, no evidence to show that she knew what her rights were. She subsequently died, and her representatives claimed the stock. The question was, whether they were bound, under the doctrine of election, to compensate the residuary legatees, who would be disappointed by their taking the stock, to any and what extent:—Held, that the testator intended the stock to pass, and was not dealing only with his right of survivorship; that he affected to give property belonging to his wife, and consequently the doctrine of election applied both to the wife and her representatives claiming under her; and that her representatives could only take the stock upon the terms of compensating the disappointed residuary legatees to the extent of the legacy of 3,000*l.*, and of the amount actually received by the wife in respect of her life interest in the testator's own property. *Carpenter, In re, Carpenter v. Disney, 51 L. T. 773—Kay, J.*

Revocation by Will of Settlement containing no Power of Revocation.—Where a testator, after making a voluntary settlement containing no power of revocation, by his will revoked, set

aside, and avoided all other wills, settlements, and agreements for settlements which he had at any time theretofore made and executed:—Held, that no case of election was raised. *Booker, In re, Booker v. Booker, 54 L. T. 239; 34 W. R. 346—Chitty, J.*

Bequest subject to Payment of Debts—Inadequacy of Estate.—A testator gave all his interest in certain leasehold farms mentioned in his will, and all the stock of every description thereon, and also all moneys due to him, to his son, subject nevertheless to the payment of all his debts, funeral and testamentary expenses. The testator's son continued in possession and receipt of the profits of the farms for about three years, when the leases of the farms and the stock thereon were disposed of. The testator's estate was very involved, and the liabilities to be discharged by the son, under the terms of the will, and as a condition of his accepting the bequest, greatly exceeded the value of the bequest:—Held, that the son must be deemed to have elected to accept the bequest contained in the will, subject to the payment of debts, funeral and testamentary expenses; but he was not personally liable to pay the same. *Cowley, In re, South v. Cowley, 53 L. T. 494—Kay, J.*

Conversion—Trust for Sale.—A testator devised and bequeathed real and personal estate to trustees in trust for his wife for life, and after her death, as to one freehold house, upon trust for one of his sons for life, as to another freehold house upon trust for his daughter for life, and as to a third freehold house upon trust for another son for life, and after their respective deaths to their issue respectively, and after the respective deaths of any without issue he directed his trustees to sell the house of such child and to pay the proceeds of sale to the survivors or the survivor of his three children, and until sale to pay the rents to the same persons or person, and he gave his residuary real and personal estate to such of his three children as should survive the widow. One of the sons predeceased the widow, a bachelor. The daughter survived her and died intestate in 1877, and all her property passed to her surviving brother as her sole next of kin. The houses were let to weekly tenants, and the surviving son, since 1877, received all the rents. He died in 1885, and shortly before his death he handed the title-deeds of the houses to a solicitor, directing that a gift of all his property should be made to a niece, but he died before a conveyance could be executed. The question then arose whether the will had effected a conversion of the realty, and, if so, whether the surviving son had elected to take the property as real estate:—Held, that there had been an out-and-out conversion, and that the son must be taken to have elected to take the houses as real estate. *Potter v. Dudeney, 56 L. T. 395—Chitty, J.*

— **Real and Personal Estate—Real Estate in Lease with Option to purchase Reversion.**

—A testator by his will gave his real estate and the residue of his personal estate to trustees, on trust to sell his real estate, and to convert and get in his residuary personal estate, and to stand possessed of the moneys arising from both, on trust to invest the same, and to pay the income to his wife, during her life or widowhood, and,

after her death or second marriage, upon trust to divide the trust funds equally between such of his children as should be living at his death, and the issue of such of them as might be then dead. The testator died in 1869. The wife and two infant children survived him. There was no issue of any deceased child. Both the children died before the wife unmarried and intestate, the one who died last dying in 1876. The wife did not marry again, and she died in 1885 intestate. The only real estate of the testator was a house, of which he had in 1869 agreed to grant a lease for twenty years, with an option to the tenant to purchase the reversion at any time during the term. At the death of the widow this option had not been exercised, and the house had not been sold by the trustees. After the deaths of the children the widow continued in receipt of the rent of the house.—Held, that, by reason of the tenant's option to purchase the house, the widow's continued receipt of the rent was no evidence of an election by her to take the property as real estate, and that on her death it descended as personality to her next of kin. *Gordon, In re* (6 Ch. D. 531), distinguished. *Lewis, In re, Foxwell v. Lewis*, 30 Ch. D. 654; 55 L. J., Ch. 232; 53 L. T. 387; 34 W. R. 150—Pearson, J.

Invalid Devise of Land—Bequest of Shares.]

—A married woman who was entitled to some shares in a colliery for life, for her separate use, with a power of appointment by will, and also to real estate in fee simple not for her separate use, by her will, made in February, 1880, appointed the shares in favour of her heir and other children, and purported to devise the real estate away from the heir. She died in June, 1880, leaving her husband surviving.—Held, that the will being void as to the real estate, the heir was not put to his election as between the real estate and his interest in the colliery. *De Burgh Lawson, In re, De Burgh Lawson v. De Burgh Lawson*, 55 L. J., Ch. 46; 53 L. T. 522; 34 W. R. 39—Kay, J.

Power of Appointment—Exercise of—Non-existent Power.]

—A testatrix entitled for life to property which in case of her death without issue (an event which happened) went over to her brothers and sisters, of whom J. was one, by her will, purporting to exercise a power, which she erroneously supposed herself to possess, appointed the property to a class consisting of certain named persons referred to in the will as objects of the power, of whom J. was not one, and by a codicil gave to J. certain property over which she had a free power of disposal.—Held, that J. was put to his election whether he would take under or against the will. *Brooksbank, In re, Beauclerk v. James*, 34 Ch. D. 160; 56 L. J., Ch. 82; 55 L. T. 593; 35 W. R. 101—Kay, J.

R., having a testamentary power to appoint land to his male issue in such shares and proportions as he should direct, devised certain of the lands to his eldest son, J. (who survived him), "to be chargeable with 2,000*l.* borrowed for J.'s sole use," and which R. in a subsequent part of his will stated that he had paid. R. by his will gave benefits out of his own property to all the objects of the power, and directed that certain portions of his estates should be sold or charged as by his will provided, and the proceeds applied, together with the 2,000*l.* borrowed for

his son J., and which he stated he had paid, to form a fund for payment of his debts and legacies:—Held, that the charge of 2,000*l.* not being well appointed, a case of election arose between the objects of the power and the persons entitled to the general fund of which R. intended that the 2,000*l.* should be part. *King v. King*, 13 L. R., Ir. 531—V.-C.

A testatrix had, under the will of a brother who had predeceased her, a power to appoint his property by will among his nephews and nieces, and the children or child of deceased nephews and nieces. She, by her will, gave all the real and personal estate of which she might be seised or possessed at the time of her death, or over which she might have any testamentary power of disposition, to trustees, upon trust for sale and conversion, and to stand possessed of the proceeds (which she described as "my said trust funds") upon trust to pay costs and expenses, and to pay her debts and funeral expenses and certain pecuniary legacies, and then upon trust as to two one-fourth parts of her trust funds respectively for persons who were objects of the power; and upon trust as to the other two one-fourth parts respectively for persons who were not objects of the power. And she declared that, in case of the failure of the trusts thereinbefore declared of any of the one-fourth parts of her trust funds, the one-fourth part, or so much thereof of which the trust should fail, should be held upon the trusts thereinbefore declared of the others or other of the fourth parts of which the trust should not fail:—Held, that the testatrix had manifested an intention to exercise the power, and that as to one moiety of the brother's property the power was well exercised. Held, also, that as to the other moiety of the brother's property the appointment was invalid, but that by virtue of the gift "in case of the failure of any of the trusts thereinbefore declared," that moiety went to the persons to whom the first moiety was well appointed, and that, consequently, no case of election arose. *Swinburne, In re, Swinburne v. Pitt*, 27 Ch. D. 696; 54 L. J., Ch. 229; 33 W. R. 394—Pearson, J.

Onerous Property—Power of Legatee to Refuse.]

—A testator devised and bequeathed a freehold house and the furniture and effects therein on trust for A. and B. for life. The house was subject to a mortgage for more than its value:—Held, that A. and B. were entitled to the use of the furniture without keeping down the interest on the mortgagee. *Syer v. Gladstone*, 30 Ch. D. 614; 34 W. R. 565—Pearson, J.

A testatrix gave "all my real and personal estate" to trustees "upon trust at their discretion to sell all such parts thereof as shall not consist of money," and out of the produce to pay her debts and funeral and testamentary expenses, and invest the residue, "and shall stand possessed of such real and personal estate, moneys, and securities" upon trust "to pay the rents, interest, and dividends and annual produce thereof" to T. during her life, with a clause of forfeiture on alienation, and after the decease of T. the testatrix devised and bequeathed the same to other persons. At her death she was entitled in fee to the P. estate, which was unincumbered. Some time after her death a remainder in fee to which she was

entitled in the B. estate, which was subject to mortgages made by prior owners and was out of repair, fell into possession, and its income was only sufficient to pay the interest on the mortgages. The trustees took out a summons for directions as to interest and repairs. The tenant for life contended that she could disclaim the B. estate:—Held, that as the P. and B. estates were not specifically mentioned, but only formed parts of one gift in general terms, T. could not accept one and refuse the other. *Guthrie v. Walrond* (22 Ch. D. 573), and *Syer v. Gladstone* (30 Ch. D. 614), distinguished. *Hotchkys, In re, Freke v. Calmady*, 32 Ch. D. 408; 55 L. J., Ch. 546; 55 L. T. 110; 34 W. R. 569—C. A.

j. MORTGAGES AND INCUMBRANCES.

Really contracted to be Purchased—Unpaid Purchase-money.—A testator who had contracted to purchase real estate, and paid the deposit money, by will made in 1881, specifically devised such real estate to his daughter for life, with remainder to her children, without showing any intention that the purchase-money should be paid out of his personal estate; and he died without having disposed of his personal estate, which was rather less in amount than the unpaid purchase-money, and without having completed the purchase or paid any further part of the purchase-money. After his death an action by the vendor against the executor and trustee of the will for specific performance of the contract was compromised by the defendant thereto, and the contract was put an end to upon the terms that the vendor should retain the deposit money and have his costs; and this compromise was confirmed by the court by an order made by consent in an administration action in the presence of the tenant for life of the real estate and the trustee, all the remaindermen being infants. Upon the further consideration of the administration action, the devisees contended that they were entitled to so much of the personal estate as was equivalent to the unpaid purchase-money, upon the ground that the purchase was a conversion by the testator of his personal estate to that extent, and that Locke King's Acts had not altered the law in that respect:—Held, that there was a vendor's lien, and that Locke King's Acts Amendment Act applied; that, accordingly, all the devisees were entitled to was the real estate charged with the unpaid purchase-money, and therefore on the facts to nothing; but held, moreover, that the order of compromise would be fatal to their claim, if otherwise good. *Cochcroft, In re, Broadbent v. Groves*, 24 Ch. D. 94; 52 L. J., Ch. 811; 49 L. T. 497; 32 W. R. 223—Kay, J.

Bequest of Leasehold—Contract to Purchase Reversion not Completed.—Locke King's Acts Amendment Act, 1877 (40 & 41 Vict. c. 34), s. 1, applies to leaseholds. A testator by his will, made in 1884, bequeathed to his wife the leasehold house "in which I now reside." At the date of the will he was residing in a leasehold house. In 1887 he entered into a contract with his lessor to purchase the reversionary ground lease, but died before the purchase was completed. His widow accepted the bequest:—Held, that all the testator's interest in the house passed to the widow, subject to her liability to

pay the purchase-money. *Kershaw, In re, Drake v. Kershaw*, 37 Ch. D. 674; 57 L. J., Ch. 599; 58 L. T. 512; 36 W. R. 413—North, J.

"Contrary or other Intention."—A testator directed his private debts to be paid out of the proceeds of certain life policies; he bequeathed his residue, subject to the payment of his trade debts; after the date of his will he deposited the title-deeds of real estate with his bankers to secure an overdrawn trade account:—Held, that this amounted to a declaration of intention contrary to Locke King's Act and that the devisee of the real estate was entitled to have it exonerated from the banker's lien. *Fleck, In re, Colston v. Roberts*, 37 Ch. D. 677; 57 L. J., Ch. 943; 58 L. T. 624; 36 W. R. 663—North, J.

A testator, after directing the payment of his debts, devised a freehold house to his wife "absolutely, to do with as she thinks proper;" and he requested his executors to sell and convert into money whatever freehold or other property he possessed, and to collect all debts due to him, and to apply the proceeds in the payment of certain legacies. The testator's real estate was all subject to one mortgage:—Held, that the will did not show any "contrary or other intention" within the meaning of Locke King's Act, and that consequently the widow took the house subject to its rateable proportion of the mortgage debt. *Brownson v. Lawrance* (6 L. R., Eq. 1) dissented from. *Sackville v. Smyth* (17 L. R., Eq. 153), and *Gibbins v. Eyden* (7 L. R., Eq. 371), followed. *Smith, In re, Hannington v. True*, 33 Ch. D. 195; 55 L. J., Ch. 914; 55 L. T. 549; 35 W. R. 103—North, J.

—Marshalling.—A testator, seised and possessed of real and personal estate, after bequeathing some pecuniary legacies (amongst others 250*l.* to his son C. E.), directed by his will that his trustees should, in the first place, pay out of his personal estate all debts of every kind, including specialty debts, in full exoneration of his real estate. He devised to his wife an annuity for life, and to his daughter and his five sons respectively perpetual annuities, which he directed to be 1st, 2nd, 3rd, and 4th charges on his real estate, and two small annuities to others. He appointed his son C. E. and another trustees and executors of his will. The testator's real estate produced 660*l.* a year. It was subject to two mortgages of 6,000*l.* and 1,500*l.* and was sufficient to pay the annuities charged thereon by the will if the mortgages were paid out of the personal estate (8,000*l.*), which was more than sufficient to pay the mortgages and other debts. But if the mortgages were primarily payable out of the real estate, and the personal estate applied in exonerating the real estate therefrom, it might not reach the legacy of 250*l.* to C. E.:—Held, on the construction of the will, that the mortgages were primarily payable out of the lands mortgaged; that the annuities were charged by the will on the real estate alone; and also, that the application of Locke King's Act and the acts amending it did not preclude the annuitants from their equity to marshal the assets. *Buckley v. Buckley*, 19 L. R., Ir. 544—M. R.

—Implied Exoneration.—A testator, who died in 1874, bequeathed three leaseholds, A., B. and C., to his wife, and directed that "should there be at the time of my death any incum-

brances on C., I desire the said incumbrances to be paid off." A. and B. were subject to mortgages at the time of his death, but C. was unincumbered:—Held, that the above direction did not raise an implication that A. and B. were not to be exonerated out of the general estate of the testator. *Bull, In re, Catty v. Bull*, 49 L. T. 592; 31 W. R. 854—Kay, J.

k. CHARGE AND PAYMENT OF.

i. Charge on Leaseholds and Real Estate.

What Words sufficient to Create.—A testatrix, whose personal estate was insufficient to pay her legacies, and who had a general power of appointing real estate by her will, in 1880 "devised, bequeathed, and appointed all her real and personal estate, any moneys and other chattel property" to her trustees as executors thereafter named, "subject as hereinafter." She then "gave, devised, and bequeathed" a number of pecuniary, and some specific, legacies, and "gave, devised, and bequeathed" her freehold and leasehold estate to her two nieces, and all the rest and residue of any property "she might have at her death, subject to the payment of the legacies aforesaid" and her debts. By a codicil she revoked some of the legacies on account of the depreciation of her property:—Held, that the legacies were charges on the real estate. *Wybrants v. Maffett*, 17 L. R., Ir. 229—M. R.

A father, on the marriage of his second son, by deed of settlement covenanted to pay him an annuity of 1,000*l.* a year for life, and to charge the annuity on a sufficient part of the real estate he might die seised of; provided that nothing in the settlement should prevent his dealing with his real estate during his life, or, so only that sufficient real estate were left charged with the annuity, by will. The father subsequently made his will, by which he devised his real estate (subject to the charges and incumbrances thereon) in strict settlement on his first and other sons in tail male:—Held (Cotton, L. J., dissentiente), that the settlement operated not only as a covenant by the father, but also as a charge upon all the real estate of which he should die seised. *Montague v. Sandwich (Earl)*, 32 Ch. D. 525; 55 L. J., Ch. 925; 54 L. T. 502—C. A.

A testator, by his will, made in 1882, charged his copyhold and freehold estates with his debts and funeral expenses and legacies, and gave the residue of his personal property to the trustees of the deed-poll upon trust to build an hospital on the site of premises conveyed by a deed-poll. The testator died within twelve months from the execution of the deed-poll, which therefore became void under the Statute of Mortmain. Upon further consideration in an administration action:—Held, that the legacies must be paid out of the proceeds of the real estate, and the debts and funeral expenses, in the first instance, out of the personality. *Taylor, In re, Martin v. Freeman*, 58 L. T. 538—Kay, J.

A testator, after giving legacies and annuities, proceeded to say: "My executors may realise such part of my estate as they think right in their judgment to pay the aforementioned legacies":—Held, that the legacies were not charged on the real estate, for that the direction to the executors to realise such parts of his estate as

they thought right to pay the legacies, was satisfied by holding it to apply to property which they took as executors. *Cameron, In re, Nixon v. Cameron*, 26 Ch. D. 19; 53 L. J., Ch. 1139; 50 L. T. 339; 32 W. R. 834—C. A. See also *Buckley v. Buckley*, ante, col. 2112; and *Biggar v. Eastwood*, post, col. 2119.

Gift of Annuity out of "Rents and Profits"—Bequest of Leaseholds "subject thereto."—Bequest of leaseholds "upon trust, out of the rents and profits of the said lands, to pay my just debts, and, subject thereto, upon trust to pay out of the rents and profits of the said lands, to my wife Jane Moore, during her life, an annuity or yearly rent-charge of 150*l.* per annum; and, subject thereto, I bequeath the said lands of S., upon trust to receive the rents and profits, and to apply the same for the maintenance, &c., of my son," and on his attaining twenty-one, to assign him the lands and accumulations (if any) of the said rents and profits, &c.:—Held, that the annuity was a charge upon the corpus of the leaseholds. *Moore's Estate, In re*, 19 L. R., Ir. 365—Monroe, J.

Devise of Lands in Trust to pay Annuity—Subsequent Specific Devise.—A testator devised and bequeathed all his estates, real, freehold, and leasehold, to trustees, on trust to pay an annuity of 120*l.* a year among three of his children, A., B., and C.; the said annuity to be charged on all his said estates; and after giving certain pecuniary legacies, he devised to his trustees a certain farm of land, held in fee simple, to be divided between his two sons, P. and M., and devised to his trustees certain other lands to the use that his daughter R. should receive an annuity of 50*l.*, to be charged on the said lands; and subject thereto, to the use of his son P.; and he devised certain other lands to his trustees, to the use that his daughter J. should receive an annuity of 50*l.*, to be charged on the said lands, and subject thereto to the use of his son M. After certain specific bequests, the testator bequeathed all the residue and remainder of his personality not otherwise disposed of—three-fourths to his sons P. and M., and one-fourth to be divided amongst three of his daughters:—Held, that the annuity of 120*l.* a year was charged upon, and payable out of, all the testator's real, freehold, and leasehold estates, including those specifically devised. *Sponge v. Sponge* (3 Bli., N. S. 84), and *Conron v. Conron* (7 H. L. C. 168) distinguished. *Cornwall v. Saurin*, 17 L. R., Ir. 595—C. A.

Additional Legacy given by Codicil.—The principle that where a will contains a gift of legacies and residue the legacies are (in the event of the personal estate proving insufficient for their payment) to be deemed to be charged upon the real estate applies in favour of an additional legacy given by a codicil to a legatee named in the will. *Hall, In re, Hall v. Hall*, 51 L. T. 86—Pearson, J.

Order of Application of Real and Personal Estate.—A testator, after directing his executors (whom he also appointed trustees) to pay his debts and funeral and testamentary expenses, and giving various pecuniary legacies, gave all his personal estate and effects, except money or securities for money, to R.; and he gave and

devised all the rest, residue, and remainder of his estate, both real and personal, to his trustees, upon trust thereout, in the first place, to pay two specified sums, and, as to the residue thereof, or such part or parts thereof as might lawfully be appropriated for the purpose, for such one or more, or any hospital of a charitable nature, and in such proportions as they in their uncontrolled discretion should think fit. It was held by the Court of Appeal that the gift to R. was not specific, but that all the pecuniary legacies were payable in full before she could be entitled to anything under the bequest to her. The personal estate (including that bequeathed to R.), was insufficient for the payment of the legacies, and the real estate had to be sold to make good the deficiency. After the legacies had been paid there remained a surplus of the proceeds of the sale of the real estate:—Held, that the real estate was charged with the payment of the legacies in aid of the personal estate, and that R. was not entitled to be recouped pro tanto out of the surplus the loss which she had suffered by the application of the personal estate bequeathed to her in the payment of legacies. *Owey, In re, Broadbent v. Barrow*, 31 Ch. D. 113; 55 L. J., Ch. 103; 53 L. T. 723; 34 W. R. 100—Pearson, J. See *Taylor, In re*, ante, col. 2082.

Right of Legatees to Back Rents.]—Where a devisee or his assigns have been in possession of real estate charged with the payment of legacies, and the estate proves insufficient to satisfy the legacies, the legatees are not entitled to back rents. *Garfitt v. Allen*, or *Allen v. Longstaffe*, 37 Ch. D. 48; 57 L. J., Ch. 420; 57 L. T. 848; 36 W. R. 413—North, J.

“Testamentary Expenses”—Costs of Litigation in Probate Division.]—A testatrix, by her will, after making various specific devises of her real estate, and giving certain legacies, charged her real estate, in exoneration of her personal estate, with the payment of her debts, funeral and testamentary expenses, and the legacies which she gave. The will was disputed in the Probate Division by, amongst other persons, her co-heiresses-at-law. The action in that Division was compromised, and the will proved in solemn form, it being provided in the agreement for the compromise that the costs of that action should be paid out of the estate in accordance with the rules and practice of the court. The question arose whether the costs incurred by the co-heiresses in that action were testamentary expenses, so as to be payable out of the real estate under the charge of those expenses upon the real estate made by the will:—Held, that such costs were testamentary expenses, inasmuch as they were incurred in establishing the will, and that they were therefore payable out of the real estate. *Brown v. Burdett*, 53 L. J., Ch. 56; 48 L. T. 753; 31 W. R. 854—V.-C. B.

ii. Exoneration of Personal Estate.

In what Cases.]—Testator gave to his wife an annuity of 60*l.*, issuing and payable out of his real estate thereafter devised to his three sons. He then gave to his daughter A. a legacy of 500*l.*, and to each of his sons H. and S., and to each of his daughters M. and E., a legacy of

1,600*l.*, to be paid, with interest, two years after his death. And he thereby charged and made chargeable his real estate, thereafter devised to his three sons J., T., and F., with the payment of the said legacies and the interest thereon. He gave his personal estate (charged with the payment of debts, funeral and testamentary expenses, and expenses of proving his will) unto his said sons J., T., and F., and gave all his residuary real estate (subject to mortgages, and subject to and charged with the payment of the annuity of 60*l.*, and the legacies to his sons H. and S. and his daughters M. and E., and also the legacy of 500*l.* to his daughter A., and subject also, in aid of his personal estate, to the payment of his debts, funeral and testamentary expenses, and the expenses of proving his will) equally between his said sons J., T., and F.:—Held, that the legacies were charged on the real estate exclusively in exoneration of the personal estate. *Needham, In re, Robinson v. Needham*, 54 L. J., Ch. 75—V.-C. B.

By his will a testator bequeathed a legacy of 16,000*l.* to trustees for his daughter A. during her life, and after her death directed that the legacy should revert to and be added to his general residuary personal estate and go as the same was bequeathed by his will. The testator then gave his general residuary personal estate to B. The testator devised his estates in certain places to other trustees as a fund for the discharge of his debts, funeral and testamentary expenses, and his pecuniary legacies in aid of his personal estate, with power to his trustees, if they thought it expedient or necessary, either before or after his residuary personal estate should be exhausted, to raise money for those purposes by sale or mortgage, and subject thereto, upon trust for B. in fee. The personal estate of the testator was insufficient for the payment of his debts and legacies, and B. supplied such deficiency, including the annual payments to A. in respect of her legacy. A. survived both the testator and B. On the death of B. the question arose whether, as the testator's personality was insufficient for the payments before mentioned, the testator intended that the corpus of the legacy should be raised out of the real estate devised to B. for the benefit of B., who was the testator's residuary legatee:—Held (following *Johnson v. Webster*, 4 De G. M. & G. 474), that the words “revert to and be added to my general residuary estate,” in the will, showed that the testator meant the legacy to be restored to the funds from which it was taken; and that it was not to be taken from the real estate merely for the purpose of augmenting the personal estate:—Held also, that B. had a vested interest in the charge on the real estate of which he was absolute owner; and that such interest was in immediate contact with his ownership of the inheritance in the land. Held further, that, inasmuch as the charge was not raised during the lifetime of B., and that now it was neither necessary nor expedient to raise it, the corpus of the legacy was not raisable out of the real estate for the benefit of B.'s personal estate at the instance of those who were entitled to his personal estate. *Somersett (Duke), In re, Thynne v. St. Maur*, 65 L. T. 753—Chitty, J. See *Lloyd v. Lloyd*, ante, col. 2067.

— **Lapsed Bequest.]**—A testatrix devised her real estate to trustees in trust for sale, and

directed them out of the proceeds to pay her funeral and testamentary expenses, debts, and legacies, and pay the residue to a class of persons. She then directed her trustees, who were also her executors, to sell her leaseholds, and if the sale moneys of the real estate were insufficient to pay her debts, funeral and testamentary expenses, and legacies, to apply so much of the proceeds of the sale of the leaseholds as should be sufficient for that purpose, and to pay the residue, or if no part was required for the above purpose, the whole of the proceeds to another class of persons. She then bequeathed to her trustees "all my personal estate," upon trust to call it in and convert it into money, and after payment of the expenses of such calling in and conversion, to pay the proceeds to the churchwardens of C. for charitable purposes. Part of the personal estate consisted of a mortgage debt, as to which the charitable bequest failed, and the Crown became entitled, there being no next of kin:—Held, that there was upon the will a sufficient indication of intention that the general personal estate should be exonerated from debts, funeral and testamentary expenses, and legacies out of the real estate; and if that was insufficient, out of the leaseholds; but that this right to exoneration failed as regarded the property which went to the Crown, and that there was no distinction in this respect between the freeholds and leaseholds. *Browne v. Groombridge* (4 Madd. 495), in which a direction to exonerate the general personal estate out of a specific fund of personality was held to enure for the benefit of persons who took by lapse, not followed:—Held, therefore, that the debts, funeral and testamentary expenses, and legacies, must be apportioned rateably between the pure and impure personality, including the leaseholds; that the real estate and then the leaseholds were to be applied in exonerating the pure personality from its proportion of debts, &c., and that the charity took the pure personality, subject to so much of that proportion as the freehold and leasehold estates were insufficient to satisfy, and that the Crown took the impure personality (other than leaseholds) subject to its proportion of debts, &c. *Meere, In re, Kilford v. Blaney*, 31 Ch. D. 56; 55 L. J., Ch. 185; 54 L. T. 287; 34 W. R. 109—C. A.

— **Deed—Specific Personal Estate.**—The rule that a charge of debts on real estate does not of itself exonerate the personal estate applies to a case where a charge for payment of debts after the grantor's death is created by deed. But no such rule applies to specific personal estate given on similar trusts; in such a case the specific personal estate will be the primary fund for the payment of the debts. *Trott v. Buchanan*, 28 Ch. D. 446; 54 L. J., Ch. 678; 52 L. T. 248; 33 W. R. 339—Pearson, J.

A testator by a deed executed in his lifetime conveyed and assigned real and personal estate to trustees, in trust for himself during his life, and after his death to sell and convert the property, and to stand possessed of the proceeds on trust, after payment of costs, to pay all the debts which should be due from him, and his funeral expenses, and, after such payment as aforesaid, upon trust for his sons and their children. By his will the testator, after reciting the deed, devised and bequeathed all and every the residue of his real and personal estate not comprised in

and subject to the trusts of the deed to his wife for her life, with remainders over, and he appointed his wife and one of the trustees of the deed executors of his will, which was proved by the widow and one of the trustees:—Held, that as regarded the real estate comprised in the deed, the testator's general personal estate was not exonerated from its primary liability to pay his debts. But held, that the personal estate comprised in the deed was the primary fund for the payment of the debts. *French v. Chichester* (2 Vern. 568) discussed and explained. *Ib.*

Specific and Residuary Gifts of Personality.]

—A testatrix bequeathed to her trustees certain specified moneys, upon trust, "after payment thereof, in the event of my predeceasing my husband, of my debts and funeral expenses as well as of my testamentary expenses for the time being," for her nephew; and after giving certain pecuniary legacies she devised and bequeathed all her real and personal estate not thereinbefore otherwise bequeathed, to trustees, upon trust after her husband's death, to sell and convert, and out of the proceeds, "subject nevertheless to the bequest of moneys to my said nephew hereinbefore contained," to pay her debts, pecuniary legacies, and funeral and testamentary expenses, and invest the residue and stand possessed thereof upon certain trusts. The testatrix predeceased her husband:—Held, that the moneys comprised in the specific gift were primarily applicable to the payment of the debts and funeral and testamentary expenses of the testatrix. *Hastings (Lady), In re, Hallett v. Hastings*, 55 L. J., Ch. 278; 54 L. T. 75; 34 W. R. 452—Kay, J.

iii. Contribution.

Charitable Bequest.—A testator, entitled to estates in two counties, L. and A., both subject to incumbrances, devised them to trustees in trust to apply the rents in payment of head-rents, fines for renewal, taxes, &c., and the interest upon charges affecting them, and to pay the residue of the rents to his wife for life; and after her death in trust to receive the rents, and employ them during the period of twenty-one years in payment of head-rents, fines, &c., and the interest on charges and two annuities to his nephews A. N. and C. N.; and next, so far as the rents would extend, in payment of the charges on his estates, his debts and legacies, at such time as the trustees should think most convenient. He devised portions of the L. estate to his nephews A. N. and C. N., free from incumbrances after the expiration of the period of twenty-one years; and as to the rest, residue and remainder of his estates not before devised, charged with the residue of the incumbrances, debts, and legacies then unpaid, to T. for life, remainder to T.'s first and other sons in tail male, remainder to B. for life, remainder to B.'s first and other sons in tail male, with other remainders over, and an ultimate remainder to his own right heirs. He bequeathed annuities for charitable purposes charged on the A. estate, and directed that charges which should affect his estates, and all his debts due at his death, and his legacies, should be borne by and be charges primarily affecting the "aforesaid residue" of his estates limited as aforesaid, and

be paid out of the rents and profits thereof in exoneration of his personal estate and other properties bequeathed and devised to his wife and nephews, and so that such personal estate and other property should be relieved therefrom. After the wife's death, estate A. was sold by the creditors, and the proceeds of the sale paid all the charges except a sum of 337*l.* :—Held, that during the period of twenty-one years from the death of the testator's wife the rents and profits of the estates devised to A. N. and C. N. and to B. respectively were both equally applicable to the payment of the charges on the testator's estates and his debts and legacies, and that the estates devised to B. were not bound to indemnify the estates devised to A. N. and C. N. against such charges, debts, and legacies until after the expiration of the term of twenty-one years :—Held, also, that the fact that the charges had been paid off by the sale of estate A. did not entitle A. N. and C. N. to go into possession of the estate devised to them before the expiration of the twenty-one years, and that the surplus rents of the unsold estates, after payment of the sum of 337*l.* so left unpaid and interest, and of the annuities payable to A. N. and C. N., and the legacies, were applicable, during the twenty-one years, to recoup the persons who would, but for the sale, have been entitled to the sold lands, so much of the charges paid out of the corpus of the estate sold as, but for the sale, would have been payable out of the rents during the term of twenty-one years :—Held, further, that the charitable annuities were not charged on the estates devised to A. N. and C. N., and that the legacies were only charged on the rents of these estates during the twenty-one years :—Held, further, that the charitable annuities charged on the A. estate were entitled to marshal and stand in the place of the incumbrances as against the unsold estates, but so that at the expiration of the twenty-one years' term, their right to marshal as against the estates devised to A. N. and C. N. should cease. *Biggar v. Eastwood*, 19 L. R., Ir. 49—C. A.

Deficiency of Personal Estate—Abatement—Portions charged on Real Estate.—A testator devised his real estate to the use of his wife during her life or widowhood, with remainder to the use of trustees for a term of 500 years, on trust to raise, by mortgage of the real estate or out of the rents and profits, portions of 5,000*l.* apiece for each of his younger children, with remainders in strict settlement, the testator's eldest son taking the first life estate. The testator's general personal estate was insufficient for the payment of his debts, and, consequently, the specifically bequeathed personal estate and the real estate had to contribute :—Held, that, as between the portioners and the persons entitled to the real estate on which they were charged, the former were not bound to contribute to make good the deficiency. *Raikes v. Boulton* (29 Beav. 41) followed; *Long v. Short* (1 P. Wms. 403) considered and explained :—Held, also, that, as between the real estate and the specifically bequeathed personal estate, the former must contribute in proportion to its full value, not in proportion to its value less the amount of the portions. *Saunders-Davies, In re, Saunders-Davies v. Saunders-Davies*, 34 Ch. D. 482; 56 L. J., Ch. 492; 56 L. T. 153; 35 W. R. 493—North, J.

Mixed Fund of Realty and Personalty—Payment out of Personal Estate.—A testator by his will declared in effect that his debts, legacies, funeral and testamentary expenses, and the costs, charges, and expenses incidental to the execution of the trusts of his will, should be paid rateably out of all his estate, real and personal. In the administration of his estate by the court, the debts, &c., were paid out of the personalty, but without prejudice to the liability of the realty. On the further consideration of the action :—Held, that the real estate must make good to the personal estate its rateable proportion of the amount paid out of the personal estate for debts, &c., with interest. *Ashworth v. Munn*, 34 Ch. D. 391; 56 L. J., Ch. 451; 56 L. T. 86; 35 W. R. 513—North, J.

Expenses of Probate—Married Woman, Will of—Costs of Proceedings.—A married woman who had a power of appointment over certain trust funds, and was also possessed of separate estate her title to which had accrued before the Married Women's Property Act, 1882, died in 1887, having in the same year made a will, by which she exercised her power of appointment over the trust fund and appointed executors, but made no disposition of her separate property. Probate of the will was granted to the executors according to the altered practice introduced by the Probate Rules of 1887, i.e., in the ordinary form without any exception or limitation. The court decided that on the death of the testatrix the title of her husband to her undisposed of separate estate accrued, and that the executors of her will became trustees of it for him, and not for the next of kin of the testatrix :—Held, that the expenses of proving the will, including the probate duty, must be apportioned rateably between the appointed and undisposed of property in the same manner in which they would have been apportioned under a grant *cæterorum* before the change in the form of the grant; but that the costs of the proceedings in which the questions were determined must fall upon the undisposed of property, as they were occasioned by a contest between the husband and the next of kin. *Lambert's Estate, In re, Stanton v. Lambert*, 39 Ch. D. 626; 57 L. J., Ch. 927; 59 L. T. 429—Stirling, J.

iv. Marshalling.

Residuary Gift to Charities with Direction for Payment exclusively out of pure Personalty.—A testatrix gave all her real and personal estate to trustees upon trust to convert, and out of the proceeds pay her debts, funeral and testamentary expenses, and certain legacies bequeathed to private individuals, and directed that all such legacies should in the first instance be payable out of the proceeds of sale of her "real and leasehold estate, if any." She directed her trustees to divide the residue of her estate into three parts and pay the same to certain charities. She then directed that "the foregoing charitable legacies" should be paid "exclusively" out of such part of her pure personal estate as was legally applicable for that purpose. The testatrix had no real or leasehold estate in this country, but was possessed of land in the colony of the Cape of Good Hope (the value of which was less than the amount of the general legacies)

and of pure and impure personalty:—Held, that the direction as to payment of the charitable legacies was in effect equivalent to a direction that the residue should consist exclusively of pure personalty, and therefore operated as a direction to marshal for the benefit of the charities; that the general legacies were primarily payable out of the proceeds of sale of the land in the colony; and that the debts and funeral and testamentary expenses and costs of action and the unpaid portion of the general legacies must be paid in the first instance out of the impure personalty so as to leave the pure personalty, so far as possible, to constitute the ultimate residue. *Arnold, In re, Ravenscroft v. Workman*, 37 Ch. D. 637; 57 L. J., Ch. 682; 58 L. T. 469; 36 W. R. 424—Kay, J.

Mortmain Act—Direction to Marshal.—A testator, by will dated in 1883, after giving certain pecuniary legacies, gave the residue of his estate and property to trustees upon trust to sell and convert, and out of the proceeds of sale and the money of which he should be possessed at the time of his death to pay his funeral expenses, and upon trust to pay and divide the net residue unto and equally between the treasurers for the time being of St. Thomas's Hospital, St. George's Hospital, Westminster Hospital, and Charing Cross Hospital, to be applied for the use and benefit of the said hospitals. The testator then declared that his pure personal estate should in the first place be applied in payment of the shares of St. Thomas's Hospital and Charing Cross Hospital. The Westminster Hospital and the St. George's Hospital were empowered to take land or impure personalty; the other two hospitals were not. The testator at the time of his death was entitled to both pure and impure personal estate:—Held, that there was in the will sufficient direction to marshal the estates so that the pure personalty was first to be applied in payment of the shares of the two hospitals which could not take land or impure personalty. *Pitt, In re, Lacy v. Stone*, 53 L. T. 113; 33 W. R. 653—Chitty, J.

See also *Biggar v. Eastwood*, supra.

Effect of Locke King's Act.—See *Buckley v. Buckley*, ante, col. 2112.

v. Accumulations.

Residue.—A testator bequeathed to his trustees and executors, the sum of 3,750*l.* Bank of Ireland stock, and directed them to retain it in their names for the purpose of securing the punctual payment of an annuity of 300*l.* to his wife; and after her death he directed the annuity to be paid to the governor and trustees of the Hospital for Incurables, Donnybrook Road, Dublin; and by a codicil he bequeathed the residue of his estate to the trustees for the time being of the Mater Misericordiae Hospital, Dublin. The dividends on the bank stock were more than sufficient to pay the annuity and a large surplus had been accumulated and invested by the trustees in Three per Cent. Stock:—Held, on a petition presented by them for the advice of the court, that they were at liberty to pay over accumulations of the surplus dividends to the trustees of the latter hospital as residuary

legatees. *Tharel's Trusts, In re*, 13 L. R., Ir. 337—M. R.

Directions to accumulate till Mortgage Paid off—Sale of Part by Mortgagees.—A testator who died in 1875 devised his estate to trustees, and directed that the rents should be accumulated until the amount of the accumulations was sufficient to discharge the principal-money due on mortgages on the estate, and that thereupon the trustees should pay off the same. And he declared that the tenants for life should not be entitled to any portion of the rents until the mortgages had been paid off. There were two mortgages on the estates. The trustees accumulated the rents and paid off one mortgage. The mortgagees of the other mortgage in 1884 sold the part of the estates subject to it for less than the amount of the mortgage debt, and the residue was paid off out of the accumulations of which a surplus still remained:—Held, that the tenant for life was entitled to be let into possession of the rest of the estates, and to payment of the remainder of the accumulations. *Norton v. Johnstone*, 30 Ch. D. 649; 55 L. J., Ch. 222; 34 W. R. 13—Pearson, J.

Contingent Remainder—Rents and Profits—Doctrine of Attraction.—A testator, by his will dated in 1851, after making divers specific devises and bequests, and giving a life interest to his wife in his residuary real estate, devised such residuary real estate, after the death of his wife, to his trustees in trust for his grandson during his life, and from and after his decease in trust for "all and every his child and children who shall attain the age or respective ages of twenty-one years, and his, her, or their heirs and assigns for ever"; but in case there should be no child of his grandson who should attain the age of twenty-one years, then, as to the same residuary real estate, upon trusts over as in the will mentioned. The will contained a gift of the residuary personal estate, but it was distinct from the above devise, and upon different trusts from those declared concerning the real estate, although some of the trusts were the same. The will also contained powers for the trustees to grant leases, and apply the rents and profits of the real estate in making repairs. The testator died in 1853, and his widow died in 1866. The grandson died in October, 1867, leaving an only child, who was born on the 11th February, 1864. The question arose whether the accumulated rents accruing between the date of the death of the testator's grandson and the time when the grandson's only child attained the age of twenty-one years, were undisposed of by the will, or passed to such child:—Held, that the accumulated rents belonged to the testator's heir-at-law:—Held, further, that the doctrine of attraction, as established by *Genery v. Fitzgerald* (Jac. 468) and *Dumble, In re, Williams v. Murrell* (23 Ch. D. 360), did not apply. *Williams, In re, Spencer v. Brighthouse*, 54 L. T. 831—Chitty, J.

Contingent Legacy—Direction to Set Apart—Intermediate Income.—A testator appointed executors and trustees, and bequeathed to his trustees the sum of 750*l.* upon trust to pay and divide the same amongst certain persons contingently upon their surviving him and attaining twenty-one; and in default of any such person attaining a vested interest he directed

that the 750*l.* and the investments representing the same should fall into his residuary personal estate; and he gave his residue not thereinbefore otherwise disposed of to his trustees upon trust to convert the same, and out of the moneys thereby arising pay his debts and legacies, and invest the residue of the same moneys, and pay the income to his wife for life. The persons contingently interested in the 750*l.* were infants:—Held, that as the 750*l.* was by the terms of the will directed to be set apart for the benefit of the contingent legatees, there was a gift to them of the intermediate income, which was therefore applicable for their maintenance. *Medlock, In re, Ruffie v. Medlock*, 55 L. J., Ch. 738; 54 L. T. 828—Kay, J.

A testator by will, after giving his real and personal estate to trustees upon trust for sale and conversion and payment of debts and legacies, directed the trustees to stand possessed of the residue of the trust moneys upon trust, in the first place, to pay thereout 1,500*l.* to be equally divided between such of six legatees whom he named as should be alive at the death of A. B.; such shares to be paid to them respectively on attaining twenty-one or marriage. And as to the rest of his residuary estate upon trust for X. Y. A. B. and the six legatees all survived the testator and were still living. The trustees having set apart and invested 1,500*l.* to meet the legacy, X. Y., the six legatees, and the next of kin of the testator, all claimed to be entitled to the income thereof during the life of A. B.:—Held, that such income passed under the gift of the rest of the testator's residuary estate, and that X. Y. was entitled thereto during the life of A. B. *Judkin's Trusts, In re*, 25 Ch. D. 743; 53 L. J., Ch. 496; 50 L. T. 200; 32 W. R. 407—Kay, J.

Where a contingent deferred legacy has been severed from the general estate of the testator, such severance will not entitle the legatee to interim interest thereon unless the severance has been necessitated by something connected with the legacy itself. *Id.*

Jurisdiction of Court to allow Maintenance—Tenant for Life.—A testator directed the income of his real and personal estate to be accumulated for twenty-one years, and gave the accumulated estates to his sister J. C. for life, then to her son W. for life, and after his decease to his children in tail male, and then to her son J. for life, and then to her son A. in tail male. The court directed an annual sum to be paid to J. C. out of the income of the personal estate for the maintenance and education of her three sons. *Havelock v. Havelock* (17 Ch. D. 807) followed. *Collins, In re, Collins v. Collins*, 32 Ch. D. 229; 55 L. J., Ch. 672; 55 L. T. 21; 34 W. R. 650; 50 J. P. 821—Pearson, J.

Where a testator has by his will made a settlement of his estate, subject to a prior trust for the accumulation of the whole income during a term of years not exceeding the legal limit, the court has, in the absence of special circumstances, no jurisdiction to order an allowance to be paid out of the income for the maintenance and education of the person who will, if he is living at the end of the term, be a tenant for life, even if there is no other way in which a provision can be made for his maintenance and education. *Havelock v. Havelock* (17 Ch. D. 807) distinguished. *Alford, In re, Hunt, or Hurst v.*

Parry, 32 Ch. D. 383; 55 L. J., Ch. 659; 54 L. T. 674; 34 W. R. 773—Pearson, J.

A testator devised his real estate to trustees for a term of twenty years after his death, and, after the expiration of the term, and in the meantime subject thereto, to the use of the plaintiff for life, with remainder to the use of his first and other sons successively in tail, with remainders over. Under the trusts of the term the rents were to be accumulated for a period of twenty years after the testator's death. The income of the testator's residuary personalty was subject to a similar trust. At the end of the twenty years the residuary personalty and the accumulations of the income and of the rents were to be laid out in the purchase of real estate, which was limited to the same uses. The will contained no provision for the maintenance of the plaintiff during the term. He was not the heir-at-law of the testator, but he was the eldest son of a favourite niece of the testator, who had before her marriage lived a good deal with him and had been educated at his expense. The testator was a tenant-farmer. The rental of his real estate was about 440*l.* per annum; his personal estate was about 10,000*l.* An order had been made in the action allowing 300*l.* a year for the maintenance and education of the plaintiff during his minority. After he had attained twenty-one the plaintiff applied for the continuance of the allowance until further order:—Held, that, there being no special circumstances, there was no jurisdiction to interfere any further with the trust for accumulation. *Id.*

A testator devised to trustees real estate, producing an estimated income of 1,300*l.* a year, in trust to accumulate the rents and profits at compound interest for a term of twenty-one years, and at the end of the said term, or as soon as circumstances would permit, to lay out the accumulations in the purchase of lands, to be settled subject to the said trust term to the use of A. for life; remainder to B., the eldest son of A., for life; remainder to B.'s first and other sons in tail male; remainder to A.'s younger sons (then in being) successively for life; with like remainders to their first and other sons in tail male respectively; with several remainders over. The testator also bequeathed his residuary personal estate (which was above the value of 58,000*l.*) in trust to be invested in the purchase of lands, to be settled to the like uses as were thereinbefore directed in relation to the accumulations of the rents and profits of the lands comprised in the term. The directions as to accumulation contained in the will were repeated in the codicils. A.'s sons were minors. An application was made on behalf of the eldest for an allowance to A. out of the rent, profits, and income for the maintenance of the sons, on the ground that A.'s own means were not sufficient to enable him to educate and maintain them suitably to their prospective position:—Held, that as there was an imperative trust to accumulate, the court could not make an allowance for maintenance. *Havelock v. Havelock* (17 Ch. D. 807) not followed. *Kemmis v. Kemmis*, 15 L. R., Ir. 90—C. A.

vi. Apportionment of Gain and Loss.

Trust for Conversion—Power to Postpone—Property falling in after Testator's Death.—

Where a testator has bequeathed his residuary personal estate to trustees upon trust for conversion, with power to postpone such conversion at their discretion, and to hold the proceeds upon trust for a person for life with remainders over, and such residue includes outstanding personal estate, the conversion of which the trustees, in the exercise of their discretion, postpone for the benefit of the estate, and which eventually falls in some years after the testator's death—as, for instance, a mortgage debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a life policy—such outstanding personal estate should, on falling in, be apportioned as between capital and income, by ascertaining the sum which, put out at interest at 4 per cent. per annum, on the day of the testator's death, and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received; and the sum so ascertained should be treated as capital, and the residue as income. *Chesterfield's (Earl) Trusts, In re*, 24 Ch. D. 643; 52 L. J., Ch. 958; 49 L. T. 261; 32 W. R. 361—Chitty, J. S. P., *Beavan v. Beavan*, 24 Ch. D. 649, n.; 52 L. J., Ch. 961, n.; 49 L. T. 263, n.; 32 W. R. 363, n.—Romilly, M. R.

Contingent Reversionary Interest—Capital and Income.—A testator by his will bequeathed his residuary personal estate upon trust, after payment of debts and legacies, to lay out and invest the residue as therein mentioned, and to pay the income to the plaintiff for life, with remainders over. Part of the residuary estate consisted of a contingent reversionary interest in some settled funds. The testator died in 1832, and the reversion first became saleable in 1846, but it had never been sold. Since 1846 the reversion had enormously increased in value. Upon an application in effect to have the value of the reversion apportioned as between tenant for life and remainderman:—Held, that the principle of *Chesterfield's Trusts, In re* (24 Ch. D. 643), applied, and that assuming the reversion to have been sold at an agreed price, it must be ascertained what principal sum would, with compound interest from the date of the testator's death, make up the agreed price, and such principal sum alone must be attributed to corpus, and the whole of the rest to income. *Hobson, In re, Walker v. Appach*, 55 L. J., Ch. 422; 53 L. T. 627; 34 W. R. 70—Kay, J.

Apportionment Act.—See APPORTIONMENT.

Incidence of Loss—Power to continue Business.—A. gave all his real and personal estate to trustees upon trust for sale, conversion and investment, and to pay the income of one-fifth part to his wife for life, and subject thereto, to divide the whole into four parts, and pay the income of one such part to each of his four daughters for life, and after her death to hold such part in trust for her children equally. And he empowered his trustees to carry on any business carried on by him, and directed that the net profits of any business so carried on should, except such parts thereof as the trustees should in their discretion reserve for the purpose of increasing the capital in such business, be treated as income of his said trust estate. And

he directed that, should any losses (not being the result of neglect) fall on his trustees in consequence of their carrying on such business, the same should be defrayed out of his estate. The testator left property employed in business, and other property. The trustees carried on the business, and duly invested the other property. For some years the business was successful, and the profits were duly divided among the tenants for life. In a subsequent year losses were incurred, and the trustees claimed that they should be recouped out of the income of the trust estate generally:—Held, that the losses must be borne by the capital of the testator's estate, and not by the tenants for life. *Millicham, Goodale and Bullock, In re*, 52 L. T. 758—Pearson, J.

— **Bequest of Share of Business.**—A trader devised and bequeathed to trustees all his real and personal estate, including his share in the business in which he was a partner, on trust as to one moiety thereof, to pay the annual proceeds (including the net profits of the business) to his daughter for her life, for her separate use without power of anticipation, and after her death the moiety was to be held in trust for her children or remoter issue. He directed his trustees to carry on the business after his death until the expiration of the partnership term, and authorised them to use, not only such capital as he should have in the business at the time of his death, but also such other part of the trust premises as they should think fit. The partnership deed authorised the partners to dispose of their shares by will; it did not provide how any loss in carrying on the business should be borne. The will contained no provision as to the mode in which any loss should be borne as between the persons interested in the testator's estate. It had been the practice of the firm in prosperous years to divide the whole profit among the partners, and in years in which there was a loss to write off each partner's proportion of the loss from his share of the capital. The testator died in 1879. After his death the business was carried on by his trustees in partnership with the other partners. Up to the end of 1880 it was carried on at a profit, and half the testator's share of that profit was paid by the trustees to the daughter. For the year 1881 there was a loss, and the testator's share of the loss was written off from his share of the capital in the books of the firm. For the year 1882 there was a profit:—Held, that the daughter was entitled to receive half that share of the profits which the testator, according to the practice of the firm, would have received if he had been alive, and that, consequently, she was entitled to receive half his share of the profits for the year 1882, without any deduction for the purpose of making good the corpus of the settled share in the interest of the remaindermen. *Gow v. Foster*, 26 Ch. D. 672; 51 L. T. 394; 32 W. R. 1019—Pearson, J.

vii. Other Points as to Payment.

Advance by Parent to Child—Interest on Payment of Income to Widow—Hotchpot Clause.—A testator had advanced by way of loan to the defendant, one of his children, a sum of 2,000l., upon which sum interest was paid during the testator's lifetime. The testator by his will, devised and be-

queathed his property, both real and personal, to trustees on trust to permit his widow to receive the income actually produced by such property, however constituted or invested, during widowhood, and subject thereto on trust for his child, if only one, or all his children equally if more than one, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry. The will contained a proviso that any advances made by the testator to any child or to the husband of any child in his lifetime, together with interest on such advances, as charged against such child or her husband in his private memorandum book in his own handwriting, should, according to the amount thereof, be taken in full or in part satisfaction of his or her share in the testator's property, unless the testator should otherwise declare by writing under his hand. The sum advanced to the defendant was charged against him in the testator's memorandum book, and such book contained an entry as follows:—"This is the memorandum book named in my will as containing the advances made by me to my children or their husbands to be taken in satisfaction of their respective shares in my estate":—Held (Cotton, L.J., dissenting), that the testator's widow was entitled to receive from the defendant during her life, as part of the annual income given to her by the will, interest on the said sum of 2,000*l.* *Limpus v. Arnold*, 15 Q. B. D. 300; 54 L. J., Q. B. 85; 33 W. R. 537—C. A.

Deferred Payment—Substitutional Legacy.—By his will a testator bequeathed 10,000*l.* upon trust for A. for life, and after her decease for eight persons named, in certain proportions, among whom was B., who was to receive 1,000*l.*; by a codicil to his will the testator gave to B. "2,000*l.* instead of 1,000*l.* as bequeathed by my said will":—Held, that, following the general rule, the legacy by the codicil being given instead of that by the will, was subject to the same incidents, and the payment must be deferred until after the death of A. *Colyer, In re, Millikin v. Snelling*, 55 L. T. 344—Kay, J.

Direction to appropriate Fund—Deficiency in Income—Resort to Capital.—A testator, after giving various pecuniary legacies, bequeathed to various persons annuities of 1*l.* a week, and he directed sufficient funds to be appropriated in the name of his trustee out of his personal estate to answer by means of the income the payment of the annuities, and he directed that on the dropping of the annuities the appropriated funds should follow the distribution of his residuary personal estate. The income of the personal estate, after payment of the pecuniary legacies, was insufficient to pay the annuities:—Held, that the annuities were payable, so far as necessary, out of the capital of the estate. *Taylor, In re, Illsley v. Randall*, 53 L. J., Ch. 1161; 50 L. T. 717; 33 W. R. 13—Pearson, J.

Annuity free of Legacy Duty—Deficient Estate—Abatement of Annuities.—When a testator's estate is insufficient (after payment of his debts) to pay in full annuities given by his will, the fund must (after payment of costs) be apportioned between the annuitants in the proportion

which the sum composed of the arrears of the annuity in each case plus the present value of the future payments bear to each other, and this rule applies in a case in which the annuitants are all living at the time of distribution. A testator gave an annuity of 150*l.* to his widow, and an annuity of 100*l.* to a stranger in blood, and he directed that the second annuity should be paid free of legacy duty, which should be paid out of his estate. After payment of his debts, the estate was insufficient to pay the annuities in full:—Held, that (after payment of costs) the fund must be apportioned as above between the two annuitants; that the legacy duty payable on the sum apportioned to the second annuitant must be deducted from the whole fund, and the balance then divided in the same proportion between the two annuitants. *Heath v. Nugent* (29 Beav. 266) followed. *Wilkins, In re, Wilkins v. Rotherham*, 27 Ch. D. 703; 54 L. J., Ch. 188; 33 W. R. 42—Pearson, J.

Bequest subject to Payment of Debts—Inadequacy of Estate—Legatee not personally Liable.—A testator gave all his interest in certain leasehold farms mentioned in his will, and all the stock of every description thereon, and also all moneys due to him, to his son, subject nevertheless to the payment of all his debts, funeral and testamentary expenses. The testator's son continued in possession and receipt of the profits of the farms for about three years, when the leases of the farms and the stock thereon were disposed of. The testator's estate was very involved, and the liabilities to be discharged by the son, under the terms of the will, and as a condition of his accepting the bequest, greatly exceeded the value of the bequest:—Held, that the son must be deemed to have elected to accept the bequest contained in the will, subject to the payment of debts, funeral and testamentary expenses; but he was not personally liable to pay the same. *Cowley, In re, South v. Cowley*, 53 L. T. 494—Kay, J.

Bequests "free of Legacy Duty."] — See REVENUE, III. 7.

WINDFALLS.

See TIMBER.

WINDING UP.

See COMPANY.

WINDOWS.

See EASEMENT.

WINE.

See INTOXICATING LIQUORS.

WITNESS.

In Bankruptcy Cases.]—See BANKRUPTCY.

In Criminal Cases.]—See CRIMINAL CASES.

In Other Cases.]—See EVIDENCE.

WOMEN.

Criminal Law Relating to.]—See CRIMINAL LAW.

Other Matters Relating to.]—See HUSBAND AND WIFE.

WORDS.

In Testamentary Instruments.]—See WILL.

"About."]—See *Alcock v. Leeuw*, ante, col. 1664.

"Acting under the Public Health Act."]—See *Lea v. Facey*, ante, col. 878.

"Action."]—See *Collis v. Lewis*, ante, col. 558.

"Actually Enjoyed."]—See *Cooper v. Straker*, ante, col. 677.

"Allowances."]—See *Whiteley v. Barley*, ante, col. 876.

"And" "Or."]—See *Mersey Docks v. Henderson*, ante, col. 1717.

"Annual Profits or Gains."]—See ante, cols. 1567-1570.

"Annual Value."]—See *Stevens v. Bishop*, ante, col. 1571, and cases ante, cols. 1965, 1966.

"Appurtenances."]—See *Thomas v. Owen*, ante, col. 672.

"As far as is Reasonably Practicable."]—See *Wales v. Thomas*, ante, col. 1229.

"Assignee."]—See *Ward*, In re, ante, col. 1754, and *Ingle v. McCutchan*, ante, col. 1782.

"At and from Port."]—See *Colonial Insurance Company v. Adelaide Marine Insurance Company*, ante, col. 1011.

"At or before."]—See *Tunnel Mining Company*, In re, ante, col. 446.

"At Ship's Risk."]—See *Nottebohm v. Richter*, ante, col. 1664.

"At Merchant's Risk."]—See *Burton v. English*, ante, col. 1664.

"At the Wreck."]—See *Difiori v. Adams*, ante, col. 1011.

"At Risk of Craft until Safely Landed."]—See *Houlder v. Merchants' Marine Insurance Company*, ante, col. 1011.

"Beer."]—See *Howorth v. Minns*, ante, col. 1047.

"Beneficial Owner."]—See *Stanford*, Ex parte, *Barber*, In re, ante, col. 238.

"Building."]—See *Harris v. De Pinna*, ante, col. 678.

"Case or Canister."]—See *Foster v. Diphwys Casson Slate Company*, ante, col. 1229.

"Carry on Business."]—See *Lewis v. Graham*, ante, col. 1202.

"Cause of Action."]—See *Read v. Brown*, ante, col. 5.

"Cause then Pending."]—See *Boswell v. Coaks*, ante, col. 1395.

"Cause or Matter relating to Real Estate."]—See ante, col. 1488.

"Cause Shown."]—See *Newitt*, Ex parte, *Mansel*, In re, ante, col. 92.

"Causing or Permitting."]—See *Midland Railway v. Freeman*, ante, col. 17.

"Charge or Control."]—See *Gibbs v. Great Western Railway*, ante, col. 1193.

"Colonial Wines."]—See *Commissioners for Railways v. Hyland*, ante, col. 319.

"Common to the Trade."]—See ante, col. 1846.

"Continuing Trustees."]—See ante, col. 1913.

"Co-Partnership."]—See *Reg. v. Robson*, ante, col. 567.

"Costs of Execution."]—See *Ludford*, In re, and *Conder*, Ex parte, ante, col. 1644.

"Concerned or interested in Contract."]—See ante, col. 876.

"Criminal cause or matter."]—See cases, ante, col. 22 et seq.

"Damage by Collision."]—See *Robson v. Owner of the Kate*, ante, col. 1720.

"Dangers and Accidents of the Sea or Navigation."]—See *Garston Sailing Ship Company*

v. Hickie, ante, col. 1668; *Wilson v. The Xantho*, ante, col. 1661; *Hamilton v. Pandorf*, ante, col. 1668, and *The Glenfruin*, ante, col. 1661.

"Debenture."—See ante, col. 368.

"Debt or Liability."—See *Linton, Ex parte*, ante, col. 143.

"Defeasance."—See *Consolidated Credit Co. v. Gosney*, ante, col. 250.

"Defect in Condition of Ways or Machinery."—See ante, cols. 1194 et seq.

"Dilution."—See *Crofts v. Taylor*, ante, col. 1661.

"Divisible Assets."—See *Mysore Rrefs Gold Mining Company*, ante, col. 420.

"Distinctive Device."—See cases ante, cols. 1840 et seq.

"Domestic Animals."—See *Colam v. Pagett*, ante, col. 15.

"Drain."—See *Bateman v. Poplar Board of Works*, ante, col. 1216, and *Croft v. Rickmansworth Highway Board*, ante, col. 1978.

"Drunken Person."—See *Cundy v. Le Cocq*, ante, col. 1054.

"Due Cause."—See *Adam Eyton, In re*, ante, col. 421.

"Dwelling-house."—See *Wright v. Wallasey Local Board*, ante, col. 697, and *Cooke v. New River Company*, ante, col. 1964.

"Due Regard."—See *Hemsworth Grammar School, In re*, ante, col. 314.

"Dumb Barge."—See *Gapp v. Bond*, ante, col. 1658, and *Hedges v. London Dock Company*, ante, col. 1717.

"Event."—See ante, cols. 520, 530.

"F. O. B."—See *Stock v. Inglis*, ante, col. 1581.

"Fair Criticism."—See *Merivale v. Carson*, ante, col. 634.

"Fancy Word."—See cases ante, cols. 1838 et seq.

"Final Judgment."—See ante, col. 105.

"Finally Sailed from her Last Port."—See *Price v. Livingstone*, ante, col. 1673.

"For and on Behalf of."—See *West London Commercial Bank v. Kitson*, ante, col. 1519.

"For the Purposes of the Act."—See *Grand Junction Canal Company v. Petty*, ante, col. 1974.

"Formal Defect."—See *Johnson, Ex parte*, *Johnson, In re*, ante, col. 102.

"Forthwith."—See *Furber v. Cobb*, ante, col. 251, and *Lowe v. Fox*, ante, col. 1825.

"Free of Legacy Duty."—See ante, col. 1578.

"Free from all Deductions."—See *Higgins, In re, Day v. Turnell*, ante, col. 1576.

"Free from Particular Average under Three per Cent."—See *Stewart v. Merchants' Marine Insurance Company*, ante, col. 1015.

"Future Debt or Liability."—See *Linton, Ex parte, Jinton, In re*, ante, col. 143.

"Frequenting."—See *Clark v. Reg.*, ante, col. 1925.

"Frost Preventing the Loading."—See *Grant v. Coverdale*, ante, col. 1678.

"General Line of Building."—See *Spackman v. Plumstead Board of Works*, ante, col. 1210.

"Good Cause."—See ante, col. 521.

"Goods."—See *Reg. v. Slade*, ante, col. 18.

"Heirs or Assigns."—See *Dynevor (Lord) v. Tennant*, ante, col. 674.

"House."—See *Kerford v. Seacombe, &c., Railway and Barnes v. Southsea Railway*, ante, col. 1116, and *Wright v. Ingle*, ante, col. 1218.

"If he shall think fit."—See *Abergavenny (Marquis) v. Llandaff (Bishop)*, ante, col. 690.

"In Port."—See *Hunter v. Northern Marine Insurance Company*, ante, col. 1010.

"In lieu of."—See *Reg. v. Sussex County Court Judge*, ante, col. 110.

"Incendiarism."—See *Walker v. London and Provincial Insurance Company*, ante, col. 1007.

"Incidental to."—See *Llewellyn, In re*, ante, col. 1634.

"Improper Navigation of Ships."—See *Car-michael v. Liverpool Sailing Ship Owners' Association*, ante, col. 1012.

"In or Near."—See *Att.-Gen. v. Horner*, ante, col. 1179.

"In or At."—See *Downshire (Marquis) v. O'Brien*, ante, col. 1179.

"Income."—See *Benwell, Ex parte, Hutton, In re*, and *Webber, Ex parte*, ante, col. 133.

"Injurious affecting."—See ante, col. 1118.

"Innocent Shippers."—See *Brooking v. Maudslay*, ante, col. 1019.

"Interest in Land."—See *Lavery v. Purssell*, ante, col. 472; *Thomas, In re, Thomas v. Howell*, ante, col. 919.

"Interested in Contract."—See ante, col. 876.

"Interval of not less than Fourteen Days."]
—See *The Railway Sleepers Supply Company*,
In re, ante, col. 1825.

"Intimidation."]
—See *Judge v. Bennett*, ante,
col. 567.

"Judgment or Order."]
—See *Haslam Engineering Company v. Hall*, ante, 27.

"Issue any Note."]
—See *Att.-Gen. v. Birkbeck*, ante, col. 81.

"Land."]
—See *Wright v. Ingle*, ante, col. 1218.

"Last Place of Abode."]
—See cases ante,
col. 212.

"Lease."]
—See *Swain v. Ayres*, ante, col. 1103.

"Legal Notice to Quit."]
—See *Friend v. Shaw*,
ante, col. 547.

"Lodger."]
—See *Heawood v. Bone*, ante, col. 1097.

"Lower Rates."]
—See *Glasgow and South-Western Railway v. Mackinnon*, ante, col. 292.

"Maliciously."]
—See *Reg. v. Latimer*, ante,
col. 582.

"Means to Pay."]
—See *Koster, Ex parte*,
Park, In re, ante, col. 608.

"Minerals."]
—See *Midland Railway v. Robinson*, ante, col. 1546; *Glasgow (Lord Provost) v. Farie*, ante, col. 1226; and *Att.-Gen. v. Welsh Granite Company*, ante, col. 1225.

"Moderate Speed."]
—See cases ante, col. 1686.

"Molestation."]
—See *Fearon v. Aylesford (Earl)*, ante, col. 912.

"Nominee."]
—See *Urquhart v. Butterfield*,
ante, col. 599.

"Obtaining Credit."]
—See *Reg. v. Peters*,
ante, col. 187.

"Open Court."]
—See *Kenyon v. Eastwood*,
ante, col. 549.

"Or Otherwise."]
—See *Landergan v. Feast*,
ante, col. 1426, and *Driffield Linsced Cake Company v. Waterloo Mills Cake Company*,
ante, col. 1353.

"Order."]
—See *Reg. v. Edwards*, ante, col. 1122.

"Or" "And."]
—See *Mersey Docks v. Henderson*, ante, col. 1717.

"Ordinary course of Post."]
—See *Childs v. Cow*, ante, col. 713.

"Ornaments and Reparations."]
—See *Palatine Estate Charity, In re*, ante, col. 310.

"Owing."]
—See *Faure Electric Accumulator Company v. Phillipart*, ante, col. 393.

"Owner."]
—See *Reg. v. St. Marylebone Vestry*, ante, col. 60; *Williams v. Wandsworth Board of Works*, ante, col. 1219; *Wright v. Ingle*, ante, col. 1218, and *St. Helen's (Mayor) v. Kirkham*, ante, col. 866.

"Passenger Trains."]
—See *Burnett v. Great North of Scotland Railway*, ante, col. 1543.

"Pending Action."]
—See *Cropper v. Smith*,
ante, col. 1342.

"Perils of the Sea, and all other Perils."]
—See *Thames and Mersey Marine Insurance Company v. Hamilton*, ante, col. 1012.

"Person."]
—See *Union Steamship Co. v. Melbourne Harbour Commissioners*, ante, col. 321.

"Person aggrieved."]
—See cases, ante, col. 201; *Ralph's Trade Mark, In re*, and *Rivière's Trade Mark, In re*, ante, col. 1853; *Poulton, Ex parte*, ante, col. 505; *Garrett v. Middlesex JJ.*, ante, col. 1052; and *Reg. v. Andover*, ante, col. 1057.

"Personal Earnings."]
—See *Ebbs, In re*,
ante, col. 133.

"Place of Dramatic Entertainment."]
—See *Duck v. Bates*, ante, col. 500.

"Plant."]
—See *Yarmouth v. France*, ante,
col. 1195.

"Policy."]
—See *Norwich Equitable Fire Assurance Society, In re*, ante, col. 1008.

"Port."]
—See ante, cols. 1673, 1674.

"Promoter."]
—See *Great Wheal Polgooth Company, In re*, ante, col. 422.

"Public Charity."]
—See *Hall v. Derby Sanitary Authority*, ante, col. 871.

"Railway Company."]
—See *Brentford and Isleworth Tramways Company, In re*, ante, col. 1863.

"Rash and Hazardous Speculations."]
—See
ante, cols. 172, 181.

"Rates, Assessments, Impositions, and Outgoings."]
—See ante, col. 1086.

"Ready Quay Berth."]
—See *Harris v. Jacobs*,
ante, col. 1667.

"Realized Profits."]
—See *Oxford Benefit Building Society, In re*, ante, col. 362.

"Recovered or Preserved."]
—See ante, col. 1788 et seq.

"Risk of Craft."]
—See *Houlder v. Merchants' Marine Insurance Company*, ante, col. 1011.

"Road Authority."]
—See *Wolverhampton Tramways Company v. Great Western Railway*,
ante, col. 1861.

"Royal Courts of Justice."—*See Petty v. Daniel*, ante, col. 1482.

"Salary."—*See Brindle, Ex parte*, ante, col. 132.

"Separate Court of Quarter Sessions."—*See St. Lawrence (Overseers) v. Kent JJ.*, ante, col. 1072.

"Settlement."—*See Todd, Ex parte*, ante, col. 161.

"Sewer."—*See Bateman v. Poplar Board of Works*, ante, col. 1216, and *Acton Local Board v. Batten*, ante, col. 859.

"Shipped for Sale."—*See Witham v. Vane*, ante, col. 618.

"Special and Distinctive Word."—*See* ante, col. 1841.

"Street."—*See* ante, cols. 852, 1212; and *St. John's, Hampstead, v. Cotton*, ante, col. 1220.

"Stationary Vessels."—*See The Dunelm*, ante, col. 1684.

"Striking Work."—*See Stephens v. Harris*, ante, col. 1678.

"Surveyor."—*See Lewis v. Weston-super-Mare Local Board*, ante, col. 865.

"Taking Lands."—*See Charlston v. Rolleston*, ante, col. 1115.

"Tolls."—*See Manchester, Sheffield, and Lincolnshire Railway v. North Central Wagon Company*, ante, col. 293.

"Town."—*See Killmister v. Fitton*, ante, col. 1180.

"Trade or Business."—*See Sully, Ex parte, Wallis, In re*, ante, col. 124.

"Trading Inwards"—"Trading Outwards."—*See Mersey Docks v. Henderson*, ante, col. 1717.

"Turnpike Road."—*See Midland Railway v. Watton*, ante, col. 853.

"Undertaking."—*See Mersey Railway, In re*, ante, col. 1548.

"Vested Interest."—*See* cases ante, cols. 313 and 2039 et seq.

"Vessel."—*See Hedges v. London Dock Co.*, ante, col. 1717.

"Visible Means."—*See Lea v. Parker*, ante, col. 552.

"Vocation."—*See Partridge v. Mallandaine*, ante, col. 1567.

"Wilfully Obstruct."—*See* cases ante, col. 1976.

"Within or at the end of the Year."—*See Reg. v. Income Tax Commissioners*, ante, col. 1573.

"Within the United Kingdom."—*See Stoneham v. Ocean, Railway, and Accident Insurance Company*, ante, col. 996.

"Within Three Months."—*See Foster, Ex parte, Hanson, In re*, ante, col. 101.

"Without Prejudice."—*See Kurtz v. Spence*, ante, col. 750.

"Workman."—*See Hollyoak, Ex parte*, ante, col. 139, and cases ante, col. 1190.

"Works."—*See Howe v. Finch*, ante, col. 1194.

"Works for Sewage Purposes."—*See Wimbledon Local Board v. Croydon Sanitary Authority*, ante, col. 861.

WORK AND LABOUR.

See BUILDING CONTRACTS.

WORKHOUSE.

See POOR LAW.

WORKMAN.

Trade Unions.]—*See* TRADE.

Rights and Duties.]—*See* MASTER AND SERVANT.

Lien—Charge during Detention.]—A workman detaining a chattel in respect of a lien for work done thereon, has no claim for warehouse charges during such detention. *Bruce v. Everson*, 1 C. & E. 18—Stephen, J.

WRECK.

See SHIPPING.

WRIT.

Of Attachment.]—*See* ATTACHMENT.

Of Fi. Fa.]—*See* EXECUTION—SHERIFF.

Of Summons.]—*See* PRACTICE.

Of Elegit.]—*See* EXECUTION—SHERIFF.

Ne Exeat Regno.—*See* NE EXEAT REGNO.

Of Injunction.—*See* INJUNCTION.

De Contumace Capiendo.—*See* ECCLESIASTICAL LAW.

Writ of Assistance—Delivery of Chattels.—Although for the purpose of recovering land the old writ of assistance has been superseded by the writ of possession (Ord. XLVII.) the writ may still be issued for the purpose of recovering possession of and preserving chattels which have been ordered to be delivered to a receiver. *Wyman v. Knight*, 39 Ch. D. 165; 57 L. J., Ch. 886; 59 L. T. 164; 37 W. R. 76—Chitty, J.

Writ of Possession—When Plaintiff's Title expired.—Where a landlord has recovered judgment in an action against his tenant for

the possession of premises which had been held over after the expiration of the tenancy, he will be allowed to issue the writ of possession notwithstanding that his estate in the premises terminated after the commencement of the action and before the trial, unless it be unjust and futile to issue such writ, and it is for the defendant to show affirmatively that this will be the result of issuing such writ. *Knight v. Clarke*, 15 Q. B. D. 294; 54 L. J., Q. B. 509; 50 J. P. 84—C. A.

YORK.

Chancery, Court of.—*See* ECCLESIASTICAL LAW.

TABLE OF CASES.

A.

A.'s Divorce Bill	904, 905	Agar-Ellis, <i>In re</i> , Agar-Ellis v. Lascelles	978
A. v. A. (falsely called B.)	885	Ager v. Blacklock	529
A. (falsely called M.) v. M.	888	— v. Peninsular and Oriental Steam	
A. v. M.	479, 886	Navigation Co.	502
A. B., <i>In re</i>	687	Agg-Gardner, <i>In re</i>	498
Abd-Ul-Messih v. Farra	1026, 1031	Aglaia, The	1703
Aberavon Tin Plate Co., <i>In re</i>	420	Agnes Otto, The	1680
Abergavenny (Marquis) v. Llandaff (Bishop)	690	Agnew v. McDowell	1454
Abram v. Aldridge, Aldridge, <i>In re</i>	10	— v. Usher	1417
Abrams, <i>Ex parte</i> , Johnstone, <i>In re</i>	138	Ahier v. Ahier	897
Abrath v. North Eastern Ry.	516, 1171	Ahrbecker or Ahrbecket v. Frost ...	55, 531, 539
Acason v. Greenwood, Grey's Settlements,		Ainslie, <i>In re</i> , Ainslie v. Ainslie	1610
<i>In re</i>	923	— Swinburn v. Ainslie ...	790, 1824
Accident Insurance Co. v. Accident, Dis-		Airey v. Bower	615, 2097
ease, and General Insurance Corpora-		Akankoo Mining Co., <i>In re</i>	438
tion	1827	Albion Mutual Permanent Building Society,	
Ackers v. Howard	718	<i>In re</i>	441
Ackroyd v. Smithies	2, 222, 1358	Alcock v. Leeuw	1664
Acton v. Crawley, Crawley, <i>In re</i> ...	1221, 1818	Alderson v. Elgey	1280
Acton Local Board v. Batten	859	Alderton v. Archer	1203
— v. Lewsey	868	Aldridge's case	507
Adam, Eyton, <i>In re</i> , Charlesworth, <i>Ex parte</i>		Aldridge, <i>In re</i> , Abram v. Aldridge	10
28, 421, 1395		— v. Aldridge	479, 886
— v. Townend	1330	— v. Ferne	1086
Adames' Trusts, <i>In re</i>	925	Alexander, The	1695
Adams' Trusts, <i>In re</i>	1910	— v. Burke	706
Adams v. Batley	657	— v. Calder, Wilson, <i>In re</i> ...	763, 802
— v. Buchanan	712	— v. Cross, Cousins, <i>In re</i>	797
— v. Ford	707	— v. Jolley, Hutchinson, <i>In re</i> ...	2101
— v. Fox	707	Alford, <i>In re</i> , Hunt or Hurst v. Parry	2123
— v. Morgan	63, 1558	Alison v. Charlesworth	1070
— v. Newbigging	823, 1332	Alfred, The	1712
Adams and Kensington Vestry, <i>In re</i>	1091, 2093	Allam, <i>Ex parte</i> , Munday, <i>In re</i>	246, 257
Adamson, <i>Ex parte</i> , Hagan, <i>In re</i>	197	Allan v. Hamilton Waterworks Commis-	
Addington, <i>Ex parte</i> , Ives, <i>In re</i> ...	85, 550, 609	sioners	1568
Addlestone Linoleum Co., <i>In re</i> , Benson's		— v. Pratt	339
case	448	— v. Regent's Canal, City and Docks	
Addy v. Blake	1056, 1987	Ry.	402, 1749
Adelaide Corporation v. White	340	Allcard v. Skinner	1922
Adnitt v. Hands	1041	Allen's case	383
Agamemnon, The	1703	Allen, <i>In re</i>	1764, 1765
		— <i>In re</i> , Simes v. Simes	1487, 1918
		— v. Allen	768, 889
		— v. Coltart	1663, 1667

Allen v. Longstaffe	2115	Apollinaris Co. v. Wilson.....	1441
— v. Norris, Norris, <i>In re</i> ... 1740, 1914, 1918		Appleby v. Franklin	5, 573
— v. Quebec Warehouse Co.....	339	Appleton, <i>In re</i> , Barber v. Tebbit ...	2021, 2030
— v. Taylor, Gyhon, <i>In re</i>	1450	Apthorpe v. Apthorpe.....	58, 70
Allestree, <i>Ex parte</i> , Clarkson, <i>In re</i>	182	Arabin's Trusts, <i>In re</i>	937, 1627
Allgood v. Merrybent and Darlington Ry.		Arbenz, <i>In re</i>	1838, 1849
	1541, 1950	Arcedeckne, <i>In re</i> , Atkins v. Arcedeckne...	1535
Allhusen v. Brooking	833, 1807	Arch v. Bentinck	720
Alliance Society, <i>In re</i>	432	Archer v. Prall, Smeed, <i>In re</i>	972
Allingham, <i>In re</i>	1754	Ardanhu, The	1696
Almada and Tiritto Co., <i>In re</i> , Allen's case	383	Arden, <i>Ex parte</i> , Arden, <i>In re</i> ...	150, 204, 207
"Alpine" Trade-mark, <i>In re</i>	1840, 1849	— v. Arden	628, 1255, 1309
Altrincham Union v. Cheshire Lines Com-		— v. Deacon	150, 204, 207
mittee	1373, 1803	Argentino, The	1700
Ambler's Trusts, <i>In re</i>	1913	Argus Life Assurance Co., <i>In re</i>	1004
Amersham Union v. City of London Union	1383	Argyle Coal and Cannell Co., <i>In re</i> , Wat-	
Ames, <i>In re</i> , Ames v. Taylor	1780	son, <i>Ex parte</i>	450
Amos v. Herne Bay Pavilion Co.	1408	Arina, The	1654
Amstell v. Lesser	1492, 1539	Arklow, The	1682
Andalina, The	1656	Armfield v. London and Westminster Bank	79
Anderson's Trade-mark, <i>In re</i>	1843	Armour v. Walker	757
Anderson, <i>Ex parte</i> , Tollemache, <i>In re</i> ...	149,	Armstrong, <i>Ex parte</i> , Armstrong, <i>In re</i> 134,	922
	747	— <i>In re</i> , Boyd, <i>Ex parte</i>	134
— v. Commercial Union Assurance		— <i>In re</i> , Gilchrist, <i>Ex parte</i> ... 41, 134,	922
Co.	1006	— v. Armstrong.....	2047
— v. Dublin Corporation	529, 854	— v. Milburn	1142
— v. Ocean Steamship Co.	1716	Army and Navy Hotel, <i>In re</i>	414
Andrew v. Williames, Williames, <i>In re</i> ...	787,	Arnall, <i>Ex parte</i> , Witton, <i>In re</i>	120, 121
	1894	Arnaud, <i>Ex parte</i> , Bullen, <i>In re</i>	182
Andrews, <i>Ex parte</i> , Andrews, <i>In re</i>	113	Arnison v. Smith	345, 350
— <i>Ex parte</i> , Wilcoxon, <i>In re</i>	145	Arnold, <i>In re</i> , Ravenscroft v. Workman	307,
— <i>In re</i> , Edwards v. Dewar	928		2121
— v. Andrews	2021, 2026	Arnot's case.....	449
— v. Barnes	538	Arnott v. Hayes	750
— v. Cox	835	Arrowsmith v. Dickenson.....	1386
— v. McGuffog	312, 1598, 1599	Ashburnham's Trust, <i>In re</i>	1901
— v. Patriotic Assurance Co. 1007, 1478		Ashbury v. Watson	398, 1956
Angell, <i>In re</i> , Shoolbred, <i>Ex parte</i>	199	Ashby v. Costin	832, 998
— v. Tratt	1782	— v. Day	738, 1527
Angier, <i>Ex parte</i> , Johnstone, <i>In re</i>	200	— v. Hincks	1824
— v. Stewart	1674	Ashcroft, <i>In re</i> , Todd, <i>Ex parte</i> 160, 1807, 1808	
Anglo-African Steamship Co., <i>In re</i>	441	Asher v. Calcraft	694
Anglo-American Brush Electric Light Cor-		Ashworth v. Lord	1281
poration v. Crompton	1347	— v. Munn	2120
Anglo-French Co-operative Society, <i>In re</i> ,		Askew v. Askew.....	2028
Pelly, <i>Ex parte</i>	431	— v. Lewis	234
Anglo-Indian Industrial Institution, <i>In re</i> ,		Askin v. Ferguson, Lindo, <i>In re</i>	2106
Montagu's case; Grey's case	392	Aspey v. Jones	547
Anglo-Maltese Hydraulic Dock Co., <i>In re</i> 1784		Asphaltic Paving Co., <i>In re</i> , Lee and Chap-	
Anglo-Swiss Condensed Milk Co. v. Met-		man, <i>Ex parte</i>	427, 491
calf	1846	Asquith v. Griffin	1561
Anlaby v. Prætorius	28, 1409, 1479, 1499	Aste v. Stumore.....	654, 754, 1669
Anna Helena, The.....	1704	Atherley v. Barnett	1253
Annie, The	1704	— v. Burnett	1253
Annot Lyls, The	20, 1696, 1730	Atkins v. Arcedeckne, Arcedeckne, <i>In re</i> ...	1535
Anson, <i>Ex parte</i> , Mutual Aid Permanent		Atkinson, <i>In re</i> , Atkinson v. Bruce	1622
Benefit Building Society, <i>In re</i>	267	— v. Collard	596, 708
Anstice, <i>In re</i> , Anstice v. Hibell	1439	— v. L'Estrange	2056
Anstis, <i>In re</i> , Chetwynd v. Morgan.....	962, 1201		

Atkinson v. Powell, York, <i>In re</i>	210	Bagley v. Searle.....	1507
Attenborough's case, Cunningham & Co., <i>In re</i>	226	Bagshawe v. Canning	1998
Att.-Gen. v. Ailesbury (Marquis)	1577	Bagster, <i>Ex parte</i> , Bagster, <i>In re</i>	175
— v. Anderson	696	Bahin v. Hughes	914, 1529
— v. Barry Dock and Ry.	1545	Bailes v. Sunderland Equitable Industrial Society.....	965
— v. Birkbeck	81	Bailey v. Badham	702
— v. Blackburn (Corporation)	514	— v. Bailey.....	901, 1422, 1811
— v. Bradlaugh ... 25, 27, 743, 751, 985, 1316, 1474, 1806		Baillie v. Goodwin.....	1410
— v. Heywood	1560	Baines v. Geary	485
— v. Horner ... 621, 1178, 1179, 1180, 1804		— v. Toye	966
— v. Hubbuck	1576	— v. Wright	176
— v. Leonard.....	595	Baird v. Thompson.....	1402
— v. Llewellyn	42, 1492	Baker, <i>Ex parte</i> , Baker, <i>In re</i>	104
— v. Maule.....	1573	— <i>Ex parte</i> , Stogdon, <i>In re</i>	1757
— v. Montefiore.....	1575	— <i>In re</i> , Baker, <i>Ex parte</i>	104
— v. Murray	1577	— <i>In re</i> , Connell v. Baker	765
— v. Welsh Granite Co.	1225	— v. Baker	457, 797
— (Duchy of Lancaster) v. Devon- shire (Duke).....	984, 1074	— v. Hedgecock	481, 485
— (Nova Scotia) v. Gregory	338	— v. Monmouth Town Council.....	711
— (Quebec) v. Read.....	325	— v. The Theodore H. Rand.....	1682
— (Queensland) v. Gibbon.....	320	Bala and Festiniog Railway, <i>In re</i>	1129
— (Straits Settlements) v. Wemyss	337, 1608	Baldry v. Bates	1514
Augusta, The	1680	Balgooley Distillery Co., <i>In re</i> , Weekes's case, 401	
Auld v. Glasgow Working Men's Building Society.....	273	Balkis Consolidated Co., <i>In re</i>	388, 619
Austen v. Collins.....	1488, 2077	Ball, <i>Ex parte</i> , Hutchinson, <i>In re</i>	163
Austerberry v. Oldham Corporation ... 623, 853, 1080, 1974		— <i>In re</i> , Slattery v. Ball.....	2047
Autothreptic Steam Boiler Co., <i>In re</i> ... 55, 535		Ballard v. Tomlinson.....	1312
Avard, In goods of	561, 2009, 2010	Banbury and Cheltenham Direct Ry. v. Daniel.....	264, 1542
Avenir, The.....	1723	Bank of Africa v. Colonial Government ... 329	
Avery's Patent, <i>In re</i>	1350	— of Ireland, <i>Ex parte</i> , S., <i>In re</i> ... 142, 1001	
Aylesford Peerage, The	743, 744, 884	— v. Brookfield Linen Co.... 1307	
Aylesford's (Earl) Settled Estates, <i>In re</i> ... 1634		— of Montreal v. Sweeny.....	76, 327
Aylmer, <i>In re</i> , Bischoffsheim, <i>Ex parte</i> 171, 1061		— of New South Wales v. Campbell ... 319	
Ayres, <i>Ex parte</i> , Finsbury School Board Election, <i>In re</i>	41, 1592	— of Toronto v. Lambe	324
Ayshford, <i>In re</i> , Lovering, <i>Ex parte</i>	166	Bankes v. Small.....	816, 1797, 1822
B.		Banks v. Mansell.....	709, 1923
Babington v. O'Connor.....	1092	Bann Navigation Act, <i>In re</i> , Olpherts, <i>Ex</i> <i>parte</i>	1770
Back v. Holmes	1215, 1977	Bannatyne v. Direct Spanish Telegraph Co., 375, 376	
Backhouse v. Alcock	764	Banque Jacques Cartier v. Banque d'Epargne	476, 1955
Bacmeister v. Fenton	1521	Bansha Woollen Mills Co., <i>In re</i>	238, 366
Bacon's Will, <i>In re</i> , Camp v. Coe	2017	Banshee, The.....	1686, 1688, 1729
Bacon v. Camphausen	1878	Barangah Oil Refining Co., <i>In re</i> , Arnot's case	449
— v. Ford, Kensington (Lord) <i>In re</i> ... 1061		Barber's Mortgage Trusts, <i>In re</i>	1904
Badcock, <i>Ex parte</i> , Badcock, <i>In re</i>	180	Barber, <i>In re</i>	1917
Baddeley v. Granville (Earl).....	1198, 1811	— <i>In re</i> , Burgess v. Vinicome	807, 813, 1779, 2003
Badeley v. Consolidated Bank	70, 774, 1243, 1325, 1534	— <i>In re</i> , Stanford, <i>Ex parte</i> ... 237, 238, 240	
Badische Anilin und Soda Fabrik v. Levin- stein	1340, 1348, 1349	— In goods of	1003, 2013
		— v. Houston.....	1143
		— v. Tebbit, Appleton, <i>In re</i>	2021, 2030
		Barham v. Ipswich Dock Commissioners ... 1977	
		Baring v. Ashburton.....	2071
		Barker's Trade-mark, <i>In re</i>	1851

TABLE OF CASES.

Barker v. Lavery	19	Batthyany v. Walford	803, 1033, 1401
— v. Purvis	1481	— — Batthyany, <i>In re</i> ...	1464
— v. Vogan	1429	Baudains v. Jersey Banking Co.....	338, 339
Barlow, <i>In re</i> , Barton v. Spencer ...	40, 319, 1161	Bax v. Palmer, Knott, <i>In re</i>	1897
— <i>In re</i> , Thornber, <i>Ex parte</i>	173	Baxendale v. De Valmer	748
— v. St. Mary Abbott's Vestry... 1210, 1211		Bayley and Hanbury's case	449, 1200
— v. Teal	1107, 1805	— v. Great Western Ry.....	620, 672, 1117
Barnacott v. Passmore	818	Bayly v. Went	1263
Barnard, <i>In re</i> , Barnard v. White	1035	Baynes, <i>Ex parte</i> , Clarke, <i>In re</i>	207
— <i>In re</i> , Edwards v. Barnard 217, 804, 1326		Baynton v. Collins	924
— v. White, Barnard, <i>In re</i>	1035	— v. Morgan	1105, 1529
Barne, <i>Ex parte</i> , Barne, <i>In re</i>	96	Beal v. Exeter (Town Clerk)	706
Barnes v. Southsea Ry.	1116	Beale, <i>In re</i> , Durrant, <i>Ex parte</i>	1521, 1588
— v. Toye	966	Beamish v. Cox	1099
Barnett, <i>In re</i> , Reynolds, <i>Ex parte</i> 86, 193, 196		Bean v. Wade	1141
— v. South London Tramways Co. ...	1515	Bear, <i>In re</i> , Official Receiver, <i>Ex parte</i> ...	164
Barney v. United Telephone Co.	1354	Beard, <i>In re</i> , Simpson v. Beard	2070
Barnstaple Second Annuitant Society, <i>In re</i>	481, 752	Beatty v. Leacy	1499
Baron Aberdare, The	1024, 1444, 1725	Beaty v. Glenister	1067
— Liebig's Cocoa and Chocolate Works,		Beaucklerk v. James, Brooksbank, <i>In re</i> ...	2109
— <i>In re</i>	441	Beaumont's Settled Estates, <i>In re</i>	1631
Barr v. Harding	1276, 1455, 1486	Beaupré's Trusts, <i>In re</i>	924
— v. Kingsford	247	Beavan v. Beavan	1819, 2125
Barracrough v. Shillito	1617	Beaven, <i>In re</i> , Beaven v. Beaven	44, 2069
Barrington, <i>In re</i> , Gamlen v. Lyon 1228, 1615		Beckett v. Manchester Corporation	1191
Barron v. Ehlers	158	— v. Ramsdale, Hodgson, <i>In re</i>	728,
Barrow v. Dyster	753, 1520	— — — — —	754, 805, 807, 1329
— v. Myers	1416	— v. Tasker	927
— v. Smith	1273	Bedborough v. Army and Navy Hotel Co. 57	
— Hæmatite Steel Co., <i>In re</i>	377	Beddington v. Atlee	676
— Mutual Ship Insurance Co. v. Ash-		Beddy v. Courtney	2042
burner	393, 737, 1021	Bedingfield, <i>In re</i> , Bedingfield v. D'Eye 1781, 1892	
Barrs-Haden's Settled Estate, <i>In re</i>	1626	Bedson's Trusts, <i>In re</i>	2039
Barry v. Quinlan	811	Beesty, <i>Ex parte</i> , Lowenthal, <i>In re</i>	84
Barter, <i>Ex parte</i> , Walker, <i>In re</i>	134, 263	Beeswing, The	39, 1653, 1654
Bartlett v. Northumberland Avenue Hotel		Beetham, <i>In re</i> , Broderick, <i>Ex parte</i> 475, 1242	
Co.	422	Belfast Town Council, <i>In re</i> , Sayers, <i>Ex</i>	
Barton v. London and North-Western Ry. 1462		parte	2029
— v. North Staffordshire Ry. ...	389, 733,	Belfort, The	751, 1557, 1663
— — — — —	760, 778, 1144	Bell's Estate, <i>In re</i>	828, 983
— v. Spencer, Barlow, <i>In re</i> 40, 319, 1161		Bell, <i>In re</i> , Carter v. Stadden	773, 1255
— v. Taylor	318	— <i>In re</i> , Lake v. Bell	1139
— Regis Guardians v. St. Pancras.....	1384	— v. Denvir	1801
Basan, <i>Ex parte</i> , Foster, <i>In re</i>	114	— v. Stockton Tramways Co.....	1862, 1978
Batchelder v. Yates, Yates, <i>In re</i>	227, 1258	— v. Sunderland Building Society 1249, 1280	
Batchelor v. Fortescue	1298	Bellairs v. Tucker	346
— v. Yates, Yates, <i>In re</i>	227, 1258	Bellamy, <i>In re</i> , Elder v. Pearson	913
Bateman v. Ball	408	Bellcairn, The	1479, 1480, 1697
— v. Poplar Board of Works ...	8, 1210,	Belt v. Lawes	1475
— — — — —	1216	Benares, The	1687
Bates, <i>In re</i> , Lindsey, <i>Ex parte</i>	106, 112	Bendelow v. Wortley Union	1311
— v. Moore	1430	Beninfield v. Baxter	330, 779
Bath, <i>Ex parte</i> , Phillips, <i>In re</i>	141, 272	Benington v. Metropolitan Board of Works 1117	
Batho, <i>In re</i>	1903	Benn, <i>In re</i> , Benn v. Benn	2028
Batten v. Wedgwood Coal and Iron Co.		Benson's case	448
— — — — —	431, 1746, 1786	Bent v. Lister	1055
Battersby's Estate, <i>In re</i>	2091	Benthall v. Kilmorey (Earl)	315
Batthyany, <i>In re</i> , Batthyany v. Walford ...	1464	Bentinck, <i>Ex parte</i> , Branksea Island Co.,	
		<i>In re</i>	387, 436, 447

Bentinck Steamship Co. v. Potter.....	1691	Birkbeck v. Bullard	720, 721, 722
Bentley, <i>In re</i> , Wade v. Wilson	1621, 2062	Birkenhead (Mayor) v. London and North-	
— v. Vilmont	572, 577, 1185	Western Ry.	861, 1120
Benwell, <i>Ex parte</i> , Hutton, <i>In re</i>	133	Birmingham and Lichfield Junction Ry.,	
Benyon, <i>In re</i> , Benyon v. Grieve	2036	<i>In re</i>	1320
Beren's Settlement Trusts, <i>In re</i>	948	— Banking Co. v. Ross.....	676, 1200
Berens v. Fellowes	1618, 1821	— Land Co. v. London and North-	
Bergin, <i>Ex parte</i> , South City Market Co.,		Western Ry. ...	38, 1113, 1124,
<i>In re</i>	1126		1396, 1458, 1461
Beridge, <i>In re</i>	1165	Birrell v. Dryer	742, 1014
Berkley v. Thompson	212	Bischoffsheim, <i>Ex parte</i> , Aylmer, <i>In re</i> ...	171,
Berner, <i>Ex parte</i> , Laine, <i>In re</i>	147		1061
Berners v. Bullen-Smith, Bullen-Smith, <i>In</i>		Biscoe v. Jackson	308
<i>re</i>	1027, 1484	Bissell v. Fox	219
Bernina, The	1287, 1647, 1671, 1697, 1698	Bissett v. Jones	1270, 1420
Berridge v. Man On Insurance Co. ...	482, 1010	Bjorkman v. Kimberley (Lord), Currie, <i>In</i>	
Bertie, The.....	1705	<i>re</i>	1579, 2106
Beryl, The.....	1687, 1688, 1724	Bjorn, The	1444, 1723
Besley v. Besley.....	1404	Blachford, <i>In re</i> , Blachford v. Worsley ...	791
Best v. Applegate	1273	Black, <i>In goods of</i>	2009
Beswick, <i>In re</i> , Hazlehurst, <i>Ex parte</i>	86	— v. Ballymena Commissioners	682
Beta, The	1686	Blackburn v. Haslam	1014, 1512
Bethell, <i>In re</i> , Bethell v. Bethell 222, 1142, 1146		— v. Vigors	1013, 1511
— <i>In re</i> , Bethell v. Hildyard.....	882, 1036	— Corporation v. Micklethwait ...	867
— v. Bethell, Bethell, <i>In re</i> ...	222, 1142,	— District Benefit Building Society	
	1146	<i>v. Brooks</i>	269
— v. Clark	1585	Blackett v. Blackett	526, 907
— v. Hildyard, Bethell, <i>In re</i> ...	882, 1036	Blackhall v. Blackhall	900
Bethlehem and Bridewell Hospitals, <i>In re</i> 1128		Blackie v. Osmaston	1436
Bettesworth and Richer, <i>In re</i>	866	Blaiberg v. Beckett.....	249, 251
— v. Allingham.....	511, 1069	— v. Parsons	249, 252
Betts v. Armstead.....	848	Blair v. Cordner	1022, 1435, 1753
— v. Betts, Symons, <i>In re</i>	1400	— v. Deakin	1313
Bevan's Trusts, <i>In re</i>	2051, 2080	— v. Eisler	538, 1733
Bevan v. Bevan	1620	— v. Stock.....	1840
— v. Carr	473	Blake, <i>In re</i> , Jones v. Blake	802, 811, 1881
Bew, <i>In re</i> , Bull, <i>Ex parte</i>	1108	— v. Gale	794, 1155, 1279, 1957
Beyfus, <i>Ex parte</i> , Saville, <i>In re</i>	111	— v. Gale, Gale, <i>In re</i>	1141
— and Masters, <i>In re</i>	1928	— v. Harvey	1491
Bianchi v. Offord	243	— v. Hummell	1752
Bice v. Jarvis	70, 594, 1365	— v. Kelly	864
Bickers v. Speight.....	1409	— v. London (Mayor)	1564
Bickerton v. Walker	1245	Blakeway, <i>In re</i> , Rankart, <i>Ex parte</i> ...	132, 201
Bidder v. Bridges	3, 660, 747, 759	Blakey v. Hall	536, 989, 1490
Biegel's Trade-mark, <i>In re</i>	1851	Blanche, The	1657
Biggar v. Eastwood.....	782, 811, 2016, 2119	Blanchett, <i>Ex parte</i> , Keeling, <i>In re</i>	105
Bigwood v. Bigwood.....	892	Blank v. Footman	1858
Billing v. Brogden, Brogden, <i>In re</i> ...	794, 1891	Blantyre (Lord) v. Babbie	1960
Billington v. Cyples	214	Blashill v. Chambers	1211
Binney v. Mutrie	1336	Blease, <i>Ex parte</i> , Blinkhorn, <i>In re</i>	208
Birch, <i>In re</i> , Roe v. Birch.....	788, 1073	Blenheim, The	1675, 1693, 1700
Birch's Trustees, <i>In re</i>	972	Blenkarn v. Longstaffe, Longstaffe, <i>In re</i> 762	
Bird and Barnard, <i>In re</i>	2063	Blinkhorn, <i>In re</i> , Blease, <i>Ex parte</i>	208
— v. Andrew	38	Blockley, <i>In re</i> , Blockley v. Blockley ...	10, 945
— v. Eggleton	1133	Blosse v. Wheatley	717
— v. Gibb	1709, 1711	Blount v. O'Connor	775, 776, 800
— v. Greville (Lord).....	488, 1110	Blower v. Ellis	819
— v. Ponsford	1133	Bloxam v. Favre	1029, 1993
— v. Wenn	1282	Bluck, <i>Ex parte</i> , Bluck, <i>In re</i>	151

Bluck v. Lovering.....	1786	Bouch v. Sproule	399
Bluett, In Goods of	2008	Bourgoise, <i>In re</i>	1025
Blundell, <i>In re</i> , Blundell v. Blundell 1749, 1781,	1877	Bourke v. Donoghue.....	1278
— v. De Falbe	955	— v. Nichol	1500
Boaler v. Holder	1171, 1465	Bourne, <i>In re</i> , Bourne v. Brandreth	2071
— v. Reg.	594, 641	— <i>In re</i> , Rymer v. Harpley	2046
Board of Trade, <i>Ex parte</i> , Brunner, <i>In re</i>	198	— v. Coulter.....	1446
— <i>Ex parte</i> , Chudley, <i>In re</i>	92	— v. Netherseal Colliery Co.....	1230
— <i>Ex parte</i> , Games, <i>In re</i>	91	Bournemouth Commissioners v. Watts.....	869
— <i>Ex parte</i> , Gyll, <i>In re</i> ...	118	Bouron, <i>In re</i> , Brandon, <i>Ex parte</i>	1484,
— <i>Ex parte</i> , Heap, <i>In re</i> ...	180	1754
— <i>Ex parte</i> , Margetts, <i>In re</i>	93	Bousfield v. Dove, Dove, <i>In re</i>	185, 1493
— <i>Ex parte</i> , Martin, <i>In re</i>	91	Bovill v. Gibbs	1212
— <i>Ex parte</i> , Mutton, <i>In re</i>	182,	Bowchier v. Gordon, Tucker, <i>In re</i>	2042
.....	205	Bowden v. Besley	508
— <i>Ex parte</i> , Pearce, <i>In re</i> 92, 194		— v. Layland, Marsden, <i>In re</i> ... 789, 1140,	1955
— <i>Ex parte</i> , Pryor, <i>In re</i> ...	199	Bowen v. Lewis.....	2062
— <i>Ex parte</i> , Rogers, <i>In re</i>	92	Bowes, <i>In re</i> , Strathmore (Earl) v. Vane... 78,	787
— <i>Ex parte</i> , Rowlands, <i>In re</i>	94	Bowesfield, The	1722
— <i>Ex parte</i> , Strand, <i>In re</i>	200	Bowie v. Ailsa (Marquis).....	20
— <i>Ex parte</i> , Stainton, <i>In re</i>	202	Bowker v. Evans	45, 1401
— <i>Ex parte</i> , Taylor, <i>In re</i>	89	Bowles v. Hyatt, Hyatt, <i>In re</i>	789, 1140
— v. Block.....	184, 189	Bown, <i>In re</i> , O'Halloran v. King	937
Boarder v. Lindsay	654	Boxall v. Boxall	778, 918, 2013
Boddington, <i>In re</i> , Boddington v. Clairat	2033	Boycott, <i>In re</i>	1758
— v. Rees	1465	Boyd, <i>Ex parte</i> , Armstrong, <i>In re</i>	134
Bolingbroke v. Hinde	1269	— <i>In re</i>	163
Bollard v. Spring	732	— v. Allen	1322
Bollen v. Southall	714	— v. Farrar	1346
Bolton, <i>In re</i> , Brown v. Bolton	2022	Boyes, <i>In re</i> , Boyes v. Carritt	1869, 2091
— In goods of	1994	Boyle's case	453
— Estates Act, <i>In re</i>	1639	Boyle v. Sacker.....	1396, 1414, 1494
— v. O'Brien	636, 1475	Boyse, <i>In re</i> , Crofton v. Crofton	215, 216,
Bombay Civil Fund Act, <i>In re</i> , Pringle,		221, 223, 1142, 1557
<i>Ex parte</i>	964	Bradbrook, <i>In re</i> , Lock v. Willis	1818
Bompas v. King	1264	Bradbury v. Cooper	636, 1438
Bond, <i>In re</i> , Official Receiver, <i>Ex parte</i> ...	104	Bradford (Mayor), <i>Ex parte</i> , Hargreave's	
— v. Evans	1054	Trust, <i>In re</i>	1128
— v. Walford	626, 963	— <i>In re</i>	541, 1744
Bonella v. Twickenham Local Board.....	860	— v. Young	1027, 2012, 2016
Bongiovanni v. Société Générale	1813	— v. Young, Falconar's Trust, <i>In</i>	
Bonham, <i>Ex parte</i> , Tollemache, <i>In re</i> ...	149	re.....	36
Bonner, In goods of	1994	— Banking Co. v. Briggs	385, 1257
Bonnie Kate, The	1648, 1649	— Banking Co. v. Cure, Clough, <i>In</i>	
Booker, <i>In re</i> , Booker v. Booker	791, 2108	re	34, 1236, 1326
Boote v. Dutton, Percival, <i>In re</i>	1996	Bradlaugh v. Gossett.....	1315
Booth v. Smith	1555, 1556	Bradley, <i>In re</i> , Brown v. Cottrell	954
— v. Trail, Hayson, <i>In re</i>	70	— In goods of	2007
Borlick v. Head.....	1198	— v. Price	819
Borneman v. Wilson	94, 1403	Bradley's Settled Estate, <i>In re</i>	1907
Borthwick v. Ransford	1485, 1828	Bradshaw, In goods of	2012
Bortick v. Head.....	1198	— v. Jackman	2083
Boston Deep Sea Fishing Co. v. Ansell ...	1187,	— v. Warlow	562, 1473
.....	1188, 1189, 1525	Bradwell, <i>Ex parte</i> , Norman, <i>In re</i>	1760
Bosville v. Att.-Gen.	742, 884	Brady, <i>In re</i>	112, 1168
— v. Bosville	909	— v. M'Argle	15
Boswell v. Coaks	529, 533, 540, 765, 1395	Bragger, <i>In re</i> , Bragger v. Bragger	2043

Braine, <i>Ex parte</i> , Dublin Grains Co., <i>In re</i>	415	British Empire Mutual Life Assurance Co. v. Southwark and Vauxhall Water Co.	1967
Braintree Local Board v. Boyton	862	— Land and Mortgage Co. of America, <i>In re</i>	378
Bramlett v. Tees Conservancy Commissioners	1972	— Mutual Banking Co. v. Charnwood Forest Ry.	1515
Brandon, <i>Ex parte</i> , Bouron, <i>In re</i> ... 1484,	1754	Briton Life Association, <i>In re</i>	1004
— <i>Ex parte</i> , Trench, <i>In re</i>	97	— Medical and General Life Assurance Association, <i>In re</i>	354, 419, 1005
Brandon's Patent, <i>In re</i>	1351	Brittain v. Overton	315
Brandram, <i>In re</i>	1129	Brittlebank v. Smith	761
Branksea Island Co., <i>In re</i> , Bentinck, <i>Ex parte</i>	387, 436, 447	Broad, <i>Ex parte</i> , Neck, <i>In re</i>	127
Branston v. Weightman, Hall, <i>In re</i>	2024	— <i>In re</i>	1778
Brasnett's case	42, 427	— v. Perkins	1538
Bray v. Gardiner	1342	Broadbent v. Barrow, Ovey, <i>In re</i>	304, 309, 2115
— v. Lancashire JJ.	1566	— v. Groves, Cockcroft, <i>In re</i>	2111
Brennan v. Dorney	1058	Broadwater Estate, <i>In re</i>	1636, 1637
Brentford and Isleworth Tramways Co., <i>In re</i>	411, 1863	Broadwood's Trusts, <i>In re</i>	1430
Brereton v. Edwards	772, 1496	Brocklehurst v. Manchester Steam Tramways Co.	1861
Brewer v. Brown	1936	Broderick, <i>Ex parte</i> , Beetham, <i>In re</i> ... 475, 1242	
Brewster v. Prior	791, 1868	Brodribb v. Brodribb	13, 461, 896
Briant, <i>In re</i> , Poulter v. Shackel.	786, 918	Brogden, <i>In re</i> , Billing v. Brogden ... 794, 1891	
Bridewell Hospital and Metropolitan Board of Works, <i>In re</i>	1764	Bromley, <i>In re</i> , Sanders v. Bromley	398
Bridge, <i>In re</i> , Franks v. Worth	1485	Brook v. Brook	894
Bridgend Gas and Water Co. v. Dunraven	1111	Brooke, <i>In re</i>	120
Bridger v. Savage	835, 1525	— <i>In re</i> , Musgrave v. Brooke	2074
Bridges v. Dyas	1445	Brooking v. Maudslay	992, 1019, 1505
— v. Miller	713	— v. Skewis	1277
Bridgetown Waterworks Co. v. Barbados Water Supply Co.	1447	Brooks, <i>Ex parte</i> , Speight, <i>In re</i>	208
Bridgewater Navigation Co., <i>In re</i>	383, 429	— <i>In re</i>	87
Brien v. Sullivan	1476	— v. Blackburn Building Society.	268
Brier, <i>In re</i> , Brier v. Evison	788, 1890	— v. Hassell	1515
— v. Evison, Brier, <i>In re</i>	788, 1890	— v. London and North-Western Ry.	1293
Brierley Hill Local Board v. Pearsall	873	Brooksbank, <i>In re</i> , Beauclerk v. James ... 2109	
Brigg v. Brigg	950	Brosnan, <i>Ex parte</i>	24
Bright v. Campbell	1265	Brough, <i>In re</i> , Currey v. Brough	1996
Bright-Smith, <i>In re</i> , Bright-Smith v. Bright-Smith	2066	Broughton, <i>In re</i> , Peat v. Broughton ... 191, 2077	
Brightmore, <i>In re</i> , May, <i>Ex parte</i>	110	— Coal Co. v. Kirkpatrick	1570
Brighton Livery Stables Co., <i>In re</i>	37, 527	Brown, <i>Ex parte</i> , Evans, <i>In re</i>	1756
Brindle, <i>Ex parte</i> , Brindle, <i>In re</i>	132	— <i>Ex parte</i> , Landau, <i>In re</i>	204
Brindley, <i>Ex parte</i> , Brindley, <i>In re</i>	132	— <i>Ex parte</i> , Smith, <i>In re</i> ... 71, 94, 152, 613	
— v. Cilgwyn Slate Co.	1587	— <i>Ex parte</i> , Sheffield and Watts, <i>In re</i>	85, 1396, 1790
Brinton v. Lulham, Lulham, <i>In re</i> ... 827, 952, 1867		— <i>Ex parte</i> , Wise, <i>In re</i>	88, 208, 209
— v. Maddison	178	— <i>In re</i>	978, 1159
Brisley, <i>In re</i> , Fleming v. Brisley	2058	— <i>In re</i> , Brown v. Brown	1877
Bristol (Guardians) v. Bristol (Mayor) ... 1380		— <i>In re</i> , Dixon v. Brown	1232, 1888
— (Mayor) v. Cox	650	— In goods of	2010
— Steam Navigation Co. v. Indemnity Mutual Marine Insurance Co.	1018	— v. Alabaster	670
— Waterworks Co. v. Uren	1966	— v. Bolton, Bolton, <i>In re</i>	2022
British and Foreign Contract Co. v. Wright	645	— v. Brown, Brown, <i>In re</i>	1877
— Burmah Lead Co., <i>In re</i> , Vickers, <i>Ex parte</i>	344	— v. Burdett	524, 811, 2115
British Commerce, The	1699	— v. Butterley Coal Co.	1191
British Empire Match Co., <i>In re</i> , Ross, <i>Ex parte</i>	382	— v. Collins	977
		— v. Cottrell, Bradley, <i>In re</i>	954
		— v. Great Western Ry.	1288, 1291

Brown v. Inskip	1952
— v. Kough	131
— v. Liell	654
— v. Rigg, Noyce, <i>In re</i>	2051
— v. Watkins	644
— v. Watt	1571
Brown's Will, <i>In re</i>	1627, 1631
Browne v. La Trinidad	402, 404
— v. Netherseal Colliery Co.	1230
Browne's Estate, <i>In re</i>	1456, 1736
Brownscombe v. Fair	195
Bruce v. Everson	1136, 2136
Brunner, <i>In re</i> , Board of Trade, <i>Ex parte</i> . .	198
Bruno, <i>In re</i> , Francis, <i>Ex parte</i>	1586
Brunsden v. Beresford	265
— v. Humphrey	728, 1864
— v. Staines Local Board	49, 265
Bryans v. Hughes	1411
Bryant, <i>In re</i>	1744
— v. Reading	25, 43, 1044
Bryden v. Niebuhr	1665, 1677
Bryon, <i>In re</i> , Drummond v. Leigh	2024
Bryson v. Russell	7, 17, 1366, 1466
Buccleuch's (Duke) Estate, <i>In re</i>	1624
Buchanan v. Hardy	583, 1169
Buckingham v. Whitehaven Trustees	1317
Buckle v. Lordonny	275
Buckley, <i>In re</i> , Ferguson, <i>Ex parte</i>	1769
— v. Buckley	2091, 2112
Bucknill v. Morris, Morris, <i>In re</i>	1877
Budd v. London and North-Western Ry....	298
Budden, <i>Ex parte</i> , Underhill, <i>In re</i>	198
Bull, <i>Ex parte</i> , Bew, <i>In re</i>	1108
— <i>In re</i> , Catty v. Bull	2113
Bullen, <i>In re</i> , Arnaud, <i>Ex parte</i>	182
Bullen-Smith, <i>In re</i> , Berners v. Bullen- Smith	1027, 1484
Bullers v. Dickinson	680
Bullock, <i>Ex parte</i> , Garnett, <i>In re</i>	189
— <i>In re</i>	1163
— v. Bullock	1889
Bulman v. Young	652
Bulmer v. Bulmer	1303
Bulwer-Lytton's Will, <i>In re</i>	1636
Burden, <i>In re</i> , Wood, <i>Ex parte</i>	85
Burdett, <i>In re</i> , Byrne, <i>Ex parte</i> 237, 418,	1806
Burford v. Unwin	1085
Burge, <i>In re</i> , Gillard v. Lawrenson	1140
Burges v. Bristol Sanitary Authority	879
Burgess, <i>Ex parte</i> , Burgess, <i>In re</i>	190
— <i>In re</i> , Burgess v. Bottomley	981
— v. Clark	876
— v. Gillespie.....	178
— v. Vinnicome, Barber, <i>In re</i> ...	807, 813, 1779, 2003
Burke, <i>In re</i>	127
— v. Gore	1629
Burlinson v. Hall	62
Burn v. Herlofson	1658
Burnaby v. Equitable Reversionary Inte- rest Society	967, 1820, 1936
Burnett v. Great North of Scotland Ry. ...	1543
Burns v. Bryan or Martin	1603
Burr v. Wimbledon Local Board	63, 1404
Burra v. Ricardo	1812
Burrows v. Holley.....	627
Burry Port and Gwendreath Valley Ry. <i>In re</i>	371
Bursill v. Tanner	756, 930, 1423, 1734
Burstall v. Beyfus... 644, 1408, 1424, 1463, 1744 — v. Bryant.....	1045, 1474
— v. Fearon.....	1402
Burton v. Acton.....	859
— v. Bradley.....	852
— v. English.....	1664, 1717
Bury (Mayor) v. Lancashire and Yorkshire Ry.	1545
Busfield, <i>In re</i> , Whaley v. Busfield 1484, 1809	
Bush v. Whitehaven Trustees.....	467
Bushell, <i>In goods of</i>	1998
— v. Pocock.....	464
Bushire, The	1671
Butcher v. Pooler	527, 543
Butchers' Company, <i>In re</i>	1133
Bute (Marquis), <i>In re</i> , Bute (Marquis) v. Ryder	1612, 2037
— (Marquis) v. James.....	760
Butler's Trusts, <i>In re</i> , Hughes v. Anderson	9, 883, 1820
Butler v. Butler	13, 460, 896, 915, 2066
— v. Manchester, Sheffield and Lin- colnshire Ry.	283
— v. Wearing.....	71, 156
Buxton and High Peak Co. v. Mitchell ...	480
Bygrave v. Metropolitan Board of Works... 1117	1800
Byrne, <i>Ex parte</i> , Burdett, <i>In re</i> ... 237, 481, 1806 — <i>In re</i> , Hawes, <i>Ex parte</i>	1156
— <i>In goods of</i>	1166, 1387, 2010
Byron's Charity, <i>In re</i>	1124, 1638
C.	
C.'s Settlement, <i>In re</i>	933
Cadman v. Cadman	975
Cadogan, <i>In re</i> , Cadogan v. Palagi	2067
Cahill v. Cahill	915
— v. Fitzgibbon	1172
Caird v. Moss	624, 726, 1231
— v. Sime	502
Caldicott, <i>Ex parte</i> , Hart, <i>In re</i>	147, 153
Caldwell v. McLaren	327
Callaghan, <i>In re</i> , Elliott v. Lambert	977
— <i>In goods of</i>	1999
— v. Society for Prevention of Cruelty to Animals	16

Callan, <i>Ex parte</i> , Whitley & Co., <i>In re</i> ...	350,	Carson v. Pickersgill	527, 1398
.....	451, 1512	— v. Sloane	1887
Callendar v. Wallingford	1462	Carshore v. North Eastern Ry.	1460, 1461
Callow, <i>Ex parte</i> , Jensen, <i>In re</i>	125, 198	Carter's case	421
— v. Callow	918	Carter, <i>In re</i> , Carter v. Carter	1783, 1786
— v. Young	66, 67	— v. Carter, Carter, <i>In re</i>	1783, 1786
Caloric Engine and Siren Fog Signals Co.,		— v. Drysdale	1191
<i>In re</i>	407	— v. Molson	325
Calton's Will or Trusts, <i>In re</i>	1128	— v. Stadden, Bell, <i>In re</i>	773, 1255
Calver v. Laxton, Jones, <i>In re</i>	785	— v. White	221, 1533
Calvert v. Thomas	249, 252	Carthew, <i>In re</i>	1761
Cambefort v. Chapman	728, 1331	Carus-Wilson, <i>In re</i>	52
Camellia, The	1704, 1712	Carvill, <i>In re</i>	93
Cameron, <i>In re</i> , Nixon v. Cameron ...	777, 2114	Casey v. Hellyer	1409
— and Wells, <i>In re</i>	829	Cassidy v. Belfast Banking Co.	1445, 1999
Camp v. Coe, Bacon's Will, <i>In re</i>	2017	Casson v. Churchley	236, 617
Campbell, <i>Ex parte</i> , Campbell, <i>In re</i>	97	Castel v. Trechman	1667, 1673
— <i>Ex parte</i> , Wallace, <i>In re</i> ...	169, 173	Castle, <i>In re</i>	1762
— <i>In re</i> , Campbell, <i>Ex parte</i>	97	Castle Mail Packets Co., <i>Ex parte</i> , Payne,	
— <i>In re</i> , Wolverhampton Banking		<i>In re</i>	183, 188, 201
Co., <i>Ex parte</i>	167, 168, 206, 484	Cattley v. Loundes	578
— Lord Colin, <i>In re</i>	190	Catton v. Bennett	1362, 1459, 1951
— v. Chambers	705, 714	Catty v. Bull, Bull, <i>In re</i>	2113
Campbell's Trusts, <i>In re</i>	2027	Cave v. Harris	2086
Cann, <i>In re</i> , Hunt, <i>Ex parte</i>	256	— v. Torre	1437
— v. Cann	1891	Cavendish v. Cavendish	2070
— v. Willson	825, 1300	— v. Dacre, Chesham (Lord), <i>In re</i> ..	2106
Canning v. Farquhar	995	Cavendish-Bentinck v. Fenn	359, 1524
Cannock and Rugeley Colliery Co., <i>In re</i> ,		Cawley v. National Employers' Assurance	
Harrison, <i>Ex parte</i>	387	Association	996
Capel v. Sim's Ships Compositions Co.	347	Caygill v. Thwaite	818
Capital Fire Insurance Association, <i>In re</i> ..	420,	Cayley v. Sandycroft Brick, Tile, and	
.....	1784, 1905	Colliery Co.	660
Carden v. Albert Palace Association	436	Cayzer v. Carron Co.	1692
Cardiff Steamship Co. v. Barwick ...	538, 1708,	Cecil v. Langdon	1632, 1914
.....	1728	Cella, The	1652
Cardigan (Lady) v. Curzon-Howe	1625	Central News Co. v. Eastern News Tele-	
Cardinal v. Cardinal	57, 1469	graph Co.	644, 754
Cardwell (Lord) v. Tomlinson ...	653, 1167, 1406	Chadwick v. Ball	563, 1538
Cargo ex Laertes	1662, 1705	— v. Bowman	648
— Ulysses	1706	Chaffers, <i>In re</i> , Incorporated Law Society,	
Carling v. London and Leeds Bank ...	344, 348	<i>Ex parte</i>	1733
Carlisle Banking Co. v. Thompson ...	271, 1248	Chalk & Co. v. Tennent	6, 443
Carlton v. Bowcock	737, 1105	Challender v. Royle	1355, 1356
— v. Carlton, Watson, <i>In re</i>	1993	Chalmers v. Wingfield, Marrett, <i>In re</i>	1027
Carlyon, <i>In re</i> , Carlyon v. Carlyon	1485	Chamber Colliery Co. v. Hopwood	682
Carmichael v. Liverpool Sailing Ship		Chancellor, <i>In re</i> , Chancellor v. Brown ...	776
Owners' Association	1012	Chandler, <i>Ex parte</i> , Davison, <i>In re</i> ...	146, 1060
Carnac, <i>In re</i> , Simmonds, <i>Ex parte</i> ...	95, 1232	Chapel House Colliery Co., <i>In re</i>	413
Carnegie v. Carnegie	730, 899	Chapell v. Emson	850
Carnelly, <i>Ex parte</i> , Lancashire Cotton		Chaplin, <i>Ex parte</i> , Sinclair, <i>In re</i> 100, 144, 166,	
Spinning Co., <i>In re</i>	423	826
Carpenter, <i>In re</i> , Carpenter v. Disney	2107	Chapman, <i>In re</i> , Edwards, <i>Ex parte</i>	169
Carpenter's Patent Davit Co., <i>In re</i>	354	— <i>In re</i> , Ellick v. Cox	2030
Carr, <i>Ex parte</i> , Carr, <i>In re</i>	115	— <i>In re</i> , Fardell v. Chapman	1487
— <i>In re</i> , Carr v. Carr	1892	— <i>In re</i> , Johnson, <i>Ex parte</i> 100, 236, 255,	
— <i>In re</i> , Carr, <i>Ex parte</i>	115	260, 762
Carriage Co-operative Supply Association,		— <i>In re</i> , Parker, <i>Ex parte</i>	143
<i>In re</i>	427, 446	— and Hobbs, <i>In re</i>	1944

Chapman v. Withers	559, 1584	City of Chester, The	615, 1709, 1710
— v. Wood, Smith, <i>In re</i>	938	— Delhi, The	1692
Chappell, <i>In re</i> , Ford, <i>Ex parte</i>	141, 465, 1529	— Lucknow, The	533, 535, 1728
— v. Charlton	1994	Civil Service and General Store, <i>In re</i>	436
— v. Griffith	846, 1336	Clagett, <i>In re</i> , Lewis, <i>Ex parte</i>	1022, 1060
Chapple, <i>In re</i> , Izard, <i>Ex parte</i>	125, 258	Clan Grant, The	1681
— <i>In re</i> , Newton v. Chapman	1780	— Macdonald, The	1669
Charlemont (Earl) v. Spencer	939, 1991	Clapham v. Andrews	1276
Charles, <i>Ex parte</i> , Tricks, <i>In re</i>	205	— v. Draper	44, 1093
— v. Jones	541, 1260	Clarapede v. Commercial Union Association	1440
Charles Jackson, The	1650	Clark, <i>Ex parte</i> , Clark, <i>In re</i>	172
Charleston v. London Tramways Co.	1173, 1199, 1863	— <i>Ex parte</i> , Huntingdon Election, <i>In re</i>	510
Charlesworth, <i>Ex parte</i> , Adam Eyton, <i>In re</i>	28, 421, 1395	— <i>Ex parte</i> , Townsend, <i>In re</i>	225, 237
Charlton v. Rolleston	1115	— <i>In re</i> , Clark, <i>Ex parte</i>	172
Charman v. South Eastern Ry.	1293	— <i>In re</i> , Clark v. Randall	2003, 2052
Charrington, <i>Ex parte</i> , Dickinson, <i>In re</i> ..	155	— <i>In re</i> , Husband v. Martin	305
Chase, <i>In re</i> , Cooper, <i>Ex parte</i>	182	— v. Clark	780, 889, 1886
Chatteris v. Isaacson	845	— v. Randall, Clark, <i>In re</i>	2052
Chaytor's Settled Estate Act, <i>In re</i> 537, 1626, 1634		— v. Reg.	1925
Cheerful, The	1703	— v. South Metropolitan Gas Co.	778
Chelsea Waterworks Co., <i>In re</i>	1127	— v. Wray	1503
— v. Paulet	1964	Clarke, <i>In re</i> , Baynes, <i>Ex parte</i>	207
Chepstow Bobbin Mills Co., <i>In re</i>	412, 416	— <i>In re</i> , Combe v. Carter	1240
Cherry v. Endean	299, 1204	— v. Bennett	659
Chesham (Lord), <i>In re</i> , Cavendish v. Dacre, 2106		— v. Berger	1409
Cheshire Banking Co., <i>In re</i> , Duff's Executors' case	381, 787	— v. Buchanan	705, 710
Chester v. Powell	1109	— v. Millwall Dock Co.	1098
Chesterfield Corporation and Brampton Local Board, <i>In re</i>	56, 874	— v. Somersetshire Drainage Commissioners	683, 1312
Chesterfield's (Earl) Trusts, <i>In re</i>	1819, 2125	— v. Thornton	1638
Chetwynd v. Morgan, Anstis, <i>In re</i>	962	— v. Torish	710, 717
Chichester v. Chichester	888	Clarkson, <i>In re</i> , Allestree, <i>Ex parte</i>	182
Chifferiel, <i>In re</i> , Chifferiel v. Watson, ...	763, 1935	Class v. Marshall	1337
Childs v. Cox	713	Claxton v. Lucas	554
Chillington Iron Co., <i>In re</i> , Mansell, <i>Ex parte</i>	407	Clay, <i>In re</i> , Clay v. Clay	2030
Chinery, <i>Ex parte</i> , Chinery, <i>In re</i>	109	— v. Coles	2047
— <i>In re</i> , Chinery v. Hill	2049	Clayton, <i>In goods of</i>	2010
Cholmondeley's (Marquis) Settled Estate, <i>In re</i>	1636	— Mills Manufacturing Co., <i>In re</i> ...	31
Chorlton's Trade-mark, <i>In re</i>	1837	Cleather v. Twisden	39, 1327, 1750
Chowne, <i>In re</i>	1757	Cleaver, <i>In re</i> , Rawlings, <i>Ex parte</i> ...	239, 249, 251
Christchurch Inclosure Act, <i>In re</i>	311, 341	— v. Cleaver	19, 897
— Gas Co. v. Kelly	393, 738	Clegg v. Baretta	548
Christian v. Whitaker, Whitaker, <i>In re</i> ...	946	— v. Clegg	806, 983
Christiansborg, The	1431, 1723	Clement, <i>In re</i> , Goas, <i>Ex parte</i>	179, 620
Christie v. Barker	6, 466, 702, 1556, 1812	— v. Cheeseman	2000
Christison v. Bolam, Gregson, <i>In re</i>	1284	Clements v. Richardson	1095
Christmas, <i>In re</i> , Martin v. Lacon	302	— v. Ward, Smith, <i>In re</i> , 303, 940, 1808, 1992	
Christopher v. Croll	31	Clemson v. Townsend	240
Chudley, <i>In re</i> , Board of Trade, <i>Ex parte</i> ..	92	Clench v. D'Arenberg	1110
Churchill (Lord), <i>In re</i> , Manisty v. Churchill	597, 1534	— v. Dooley	43, 1043, 1044
Chusan, The	1682	Clerical, Medical, and General Life Assurance Society v. Carter	1004, 1568
City Bank v. Sovereign Life Assurance Co.	999	Clerk v. British Linen Co.	1565
		Clery v. Barry	1741, 2000
		Cleverton v. St. Germain's Union	865, 1317, 1782
		Clifford v. Clifford	910
		Clitheroe, <i>Ex parte</i> , National Building and Land Investment Co., <i>In re</i>	431

Clitheroe Estate, <i>In re</i>	1624	Colonial Bank v. Whinney	8, 124, 397
Cloak v. Hammond, Taylor, <i>In re</i> ...	2020, 2033	— Building and Investment Association v. Att.-Gen. of Quebec.....	324
Cloghessy, <i>In re</i> , McDonald v. Cloghessy...	809	— Insurance Society of New Zealand v. Adelaide Marine Insurance Co.	339, 1010, 1011
Close, <i>Ex parte</i> , Hall, <i>In re</i>	226	Colonsay, The	1726
Clothworkers' Co., <i>Ex parte</i> , Finley, <i>In re</i> ..	121	Colquhoun v. Brooks.....	1200, 1477, 1569, 1803
Clough, <i>In re</i> , Bradford Commercial Banking Co. v. Cure	34, 1236, 1326	Colston v. Roberts, Fleck, <i>In re</i>	2112
Clover v. Wilts and Western Benefit Building Society.....	1280, 1451	Colverson v. Bloomfield	612, 1287
Clune, <i>In goods of</i>	2013	Colyer, <i>In re</i> , Millikin v. Snelling ...	1893, 2072, 2127
Clydach, The	1689	Combs, <i>In re</i>	1916
Coaks v. Boswell	1489, 1740	Comité des Assureurs Maritimes v. Standard Bank of South Africa	1866, 1920
Coates to Parsons, <i>In re</i>	1913, 1914	Commercial Bank of South Australia, <i>In re</i> ..	410, 417
— v. Mackillop, Holburne, <i>In re</i>	303	— — of South Australia, <i>In re</i> , Commercial Banking Co. of Sydney, <i>Ex parte</i>	223
Coatsworth v. Johnson.....	1076, 1103, 1795	— Banking Co. of Sydney, <i>Ex parte</i> , Commercial Bank of South Australia, <i>In re</i>	223
Cobeldick, <i>Ex parte</i>	1746	Commissioner for Railways v. Brown	339
Coburn v. Collins	230, 1504	— — v. Hyland	319
Coch v. Allcock	757	— — v. Toohey	320
Cock, <i>In re</i> , Shilson, <i>Ex parte</i>	121	Commissioners of Woods and Forests, <i>Ex parte</i> , Thomas, <i>In re</i> ..	119, 595
Cockcroft, <i>In re</i> , Broadbent v. Groves.....	2111	— of Works, <i>Ex parte</i> , Wood's Estate, <i>In re</i> ..	596, 1130, 1802
Cockerell v. Essex (Earl), Johnston, <i>In re</i> ..	1578, 2055, 2070, 2072	Compagnie du Senegal v. Woods or Smith ..	51
Coffin v. Dyke	546	Compton, <i>In re</i> , Norton v. Compton ..	30, 38, 785
Cohen, <i>Ex parte</i> , Cohen, <i>In re</i>	184	Comptroller, <i>Ex parte</i> , Thomas, <i>In re</i>	93
— <i>In re</i> , Schmitz, <i>Ex parte</i>	108	Concha v. Concha	726, 763
Colam v. Pagett.....	15	Conder, <i>Ex parte</i> , Woodham, <i>In re</i> ..	158, 1644
Colbeck, <i>In re</i> , Hall v. Colbeck.....	1406	Condon v. Vollum.....	979
Cole v. Great Yarmouth Steam Tug Co. ...	464, 1713	Condy v. Taylor.....	1856
— v. Miles	1064, 1551	Coney, <i>In re</i> , Coney v. Bennett.....	769, 1453
— v. Saqui	22, 1348	Connan, <i>In re</i> , Hyde, <i>Ex parte</i>	106
Coles v. Civil Service Supply Association...	1462	Connell v. Baker, Baker, <i>In re</i>	765
— v. Courtier, Courtier, <i>In re</i> ...	1818, 1881	Connery v. Best.....	464
— v. Fibbens	864	Connolly v. Connolly	2056
Coleman, <i>In re</i> , Henry v. Strong ...	974, 1880, 2040	— v. Munster Bank	781
— v. Llewellyn	1274	Conolan v. Leyland	927
— v. West Middlesex Waterworks Co.	1967	Consolidated Credit Corporation v. Gosney ..	250
Colledge v. Pike.....	1444	— Telephone Co., <i>In re</i>	379
Collett v. Young	1091	Constable v. Constable.....	979, 1628
Colling, <i>In re</i>	1906, 1926	Contract and Agency Corporation, <i>In re</i> ...	415
Collinge's Settled Estates, <i>In re</i>	1622	Conway v. Fenton.....	1611
Collingridge v. Emmott	503	Coode v. Johns	1109
Collingrove, The	1728	Cook, <i>In re</i> , Dudgeon, <i>Ex parte</i>	124
Collins, <i>In re</i> , Collins v. Collins.....	2123	— v. North Metropolitan Tramways Co.	1190
— v. Castle	266, 987, 1952	Cooke's Trusts, <i>In re</i>	1029
— v. Collins	892, 894, 1601	Cooke v. Cooke	2102
— v. —, Collins, <i>In re</i>	2123	— v. Eshelby	735, 1511
Collinson, <i>Ex parte</i> , Collinson, <i>In re</i>	112	— v. New River Co.	1964
Collis v. Lewis	558, 1043	— v. Wilby	761
Colls v. Robins	1487	Cookes v. Cookes	1638
Colne Valley Water Co. v. Treharne ..	1963, 1967		
Colombia Chemical Factory Manure and Phosphate Works, <i>In re</i> , Hewitt's and Brett's case	445		
Colonial Bank v. Exchange Bank of Yarmouth	1233		
— v. Hepworth	396, 732		

Cookson v. Swire.....	234, 258	Cox, <i>Ex parte</i> , Dublin Drapery Co., <i>In re</i>	366, 367, 368, 371
Coombe v. Carter, Clarke, <i>In re</i>	1240	— <i>In re</i> , Trustee, <i>Ex parte</i>	139
— v. Vincent, Stedman, <i>In re</i>	1322	— v. Andrews.....	835
Coomber v. Berks JJ.	1566	— v. Bruce	1663
Coombs v. Cook.....	1932	Coyle v. Great Northern Ry.....	1288, 1289
Cooper, <i>Ex parte</i> , Chase, <i>In re</i>	182	Coyte, <i>In re</i> , Coyte v. Coyte	2005
— <i>Ex parte</i> , Knight, <i>In re</i>	143	Crabtree v. Robinson	1095
— <i>Ex parte</i> , Morris, <i>In re</i>	140, 1186	Craddock v. Rogers	1738
— <i>Ex parte</i> , Pennington, <i>In re</i>	826	Craig v. Elliott	471
— <i>In re</i> , Cooper v. Slight	10	— v. Midgley, Crossland, <i>In re</i>	2052
— v. Cooper	21, 1036, 1602	Cramer v. Giles	467
— v. Davis.....	235	— v. Murphy.....	1641
— v. Metropolitan Board of Works	749, 844, 1125, 1241	Crampton v. Ridley	52
— v. Slight, Cooper, <i>In re</i>	10	— v. Swete	1833
— v. Straker.....	677	— v. Wise	2035
— v. Zeffert.....	236, 258	Crane v. Lewis	218, 1328
Coote v. Ingram.....	1469	Craven, <i>Ex parte</i> , Ingham, <i>In re</i>	148
— v. Judd	503, 504	— v. Ingham	1493
Cope v. Cope.....	48, 1333	Crawford v. Crawford.....	898, 899
Coppard, <i>In re</i> , Howlett v. Hodson	2038	— v. Newton	1081
Coppinger v. Shekleton	1897	— v. Peel	1298
Corbett v. Corbett	2053, 2073	Crawley, <i>In re</i> , Acton v. Crawley ..	1221, 1818
— v. Plowden	1262	Crawshay, <i>In re</i> , Dennis v. Crawshay	1493
Corbold, <i>Ex parte</i> , Progressive Investment and Building Society, <i>In re</i>	279, 433	Crawshay's case	440
Corke v. Brims	1565	Creadon, The	1701
Cormick v. Ronayne	71, 1784	Crears v. Hunter or Burnyeat.....	479
Cornford v. Elliott, Watts, <i>In re</i> ..	301, 302, 616	Credit Co., <i>Ex parte</i> , McHenry, <i>In re</i>	91
Cornwall, <i>In re</i>	1441, 1754	— v. Webster	439
— v. Saurin	40, 2114	Credits Gerundeuse v. Van Weede... ..	1041, 1484
Cornwallis, <i>In re</i> , Cornwallis v. Wykeham-Martin	2075	Creed v. Henderson, Hudson, <i>In re</i>	474, 478
Corsellis, <i>In re</i> , Lawton v. Elwes	981, 1779	Cresswell, <i>In re</i> , Parkin v. Cresswell	2045
Cory v. Burr	1014	Creswell v. Davidson	1102
Cosby v. Shaw	1082	Crew v. Cummings	233
Cosmopolitan, The	1444, 1723	Crick v. Hewlett	1448, 1472
Cossman v. West	1016	Cripps, <i>In re</i> , Ross, <i>Ex parte</i>	113, 158
Coton, <i>In re</i> , Payne, <i>Ex parte</i>	239	— v. Judge	1195
Cottrell v. Cottrell	1639	— v. Tappin	1328
Coulman, <i>In re</i> , Munby v. Ross.....	2101	Crisford v. Dodd	1507
Coulson, <i>Ex parte</i> , Gardiner, <i>In re</i>	95, 944	Croft v. London and County Banking Co.	1104
Coulton, <i>In re</i> , Hamling v. Elliott	1482	— v. Rickmansworth Highway Board	742, 1978
Counsell v. London and Westminster Loan and Discount Co.	254	Crofton v. Crofton, Boyse, <i>In re</i> 215, 216, 221,	223, 1142, 1557
Courtier, <i>In re</i> , Coles v. Courtier	1818, 1881	Crofts v. Taylor	1047, 1561
Courtney, <i>In re</i> , Dear, <i>Ex parte</i>	204	Crompton v. Anglo-American Brush Electric Light Corporation	1347
— v. Cole	1679	— v. Jarrett	619, 692
Cousins, <i>In re</i> , Alexander v. Cross	797	Cronin v. Rogers	1081, 1103
Cousins' Trusts, <i>In re</i>	1256, 1310	Crooke's Mining and Smelting Co., <i>In re</i> , Gilman's case	450
Coventry v. Great Eastern Ry.....	290, 739	Groome v. Croome.....	2021, 2093
Cowan v. Carlill.....	73, 773	Cropper v. Smith	36, 1342, 1501
— v. O'Connor	465, 1202, 1817	— v. Warner.....	1042, 1098
Coward, <i>In re</i> , Coward v. Larkman... ..	2017, 2057	Crosby, <i>In re</i> , Munns v. Burn	33
Cowell v. Taylor	93, 1442	Crossland, <i>In re</i> , Craig v. Midgley	2052
Cowin, <i>In re</i> , Cowin v. Gravett	630, 1899	Crosley, <i>In re</i> , Munns v. Burn ..	33, 187, 1143
Cowley, <i>In re</i> , Souch v. Cowley	2108, 2128	Crossfield v. Shurmur	828
Cowper v. Harmer.....	1907		
Cox, <i>Ex parte</i>	27, 616, 687		

Crossman v. Gent-Davis	720, 721
— v. Reg.	1560
Crosthwaite, <i>Ex parte</i> , Pearce, <i>In re</i> 157, 1641	
Crowley v. Fenry	1058
Crown, The, <i>Ex parte</i> , Oriental Bank Corporation, <i>In re</i>	321, 430, 595
Crowther, <i>In re</i> , Duff, <i>Ex parte</i>	121
— <i>In re</i> , Ellis, <i>Ex parte</i>	209
— v. Boulton	526
— v. Elgood	611
— v. Thorley.....	352
Croydon County Court (Registrar), <i>Ex parte</i> , Wise, <i>In re</i>	88, 208, 209
— Union v. Reigate Union	1384
Crozier v. Dowsett.....	540, 1275
Crump v. Leicester, Sinclair's Settlement, <i>In re</i>	492
Cubbon or Cubban, <i>In goods of</i>	1993
Cuddeford, <i>Ex parte</i> , Long, <i>In re</i>	106
Cumbrian, The	1707
Cundy v. Le Cocq	565, 1054
Cunningham, <i>Ex parte</i> , Mitchell, <i>In re</i>	96, 1026
— <i>In re</i>	67
— & Co., <i>In re</i>	28, 415
— & Co., <i>In re</i> , Attenborough's case	226
— & Co., <i>In re</i> , Simpson's Claim	1513
Cunnington v. Great Northern Ry.	291
Currey, <i>In re</i> , Gibson v. Way	933, 944
— v. Brough, Brough, <i>In re</i>	1996
Currie, <i>In re</i> , Bjorkman v. Kimberley (Lord)	1579, 2106
Curtin v. Great Southern and Western Ry.	1293
Curtis, <i>In re</i> , Hawes v. Curtis	917
— v. Wainbrook Iron Co.	157
Cusack v. Farrell	1099
Cutler v. North London Ry.	294

D.

D., <i>In re</i>	179
D'Amico v. Trigona	334
D'Arcy v. D'Arcy	890
Dadswell v. Jacobs	1464, 1525
Dagnino v. Bellotti	340
Daintree v. Fasulo.....	2002
Daking v. Fraser	714
Dale, <i>Ex parte</i> , Dale, <i>In re</i>	203
— <i>In re</i> , Leicestershire Banking Co., <i>Ex parte</i>	207
Dallas v. Ledger	460
Dallow v. Garrold	71, 1791
Daly v. Daly	607, 902
— & Co., <i>In re</i>	435
Damant v. Hennell	982
Dames and Wood, <i>In re</i>	1940
Danby, <i>In re</i>	1166
— v. Coutts	623, 1307, 1391

Daniel, <i>Ex parte</i> , Roberts, <i>In re</i>	164
— v. Matthews, Gilbert, <i>In re</i>	2050
— v. Whitfield	75, 1987
Daniels v. Allard	711
Darbyshire, <i>In re</i> , Hill, <i>Ex parte</i>	204
Darent. Main Valley Sewerage Board v. Dartford Union	872
Darley v. King, Dash, <i>In re</i>	4, 574, 2078
— v. Tennant.....	1153
— Main Colliery Co. v. Mitchell	1144, 1227
Darling, <i>In re</i>	1164
Darlington Forge Co., <i>In re</i>	391
Darracott v. Harrison.....	606, 943
Dartmouth Harbour Commissioners v. Dartmouth Mayor	1443
Dash, <i>In re</i> , Darley v. King	4, 574, 2078
Dashwood, <i>In re</i> , Kirk, <i>Ex parte</i>	138
— v. Ayles	715
Daubuz v. Lavington	1278, 1421
Davenport v. Charsley	1934
Davey v. London and South Western Ry.	1291
— v. Thompson	1562
David v. Howe	553
Davidson v. Allen	1094, 1642
— v. Illidge, Illidge, <i>In re</i>	792
— v. Young	1492
Davies, <i>In re</i>	463
— <i>In re</i> , Davies v. Davies	1485
— to Jones.....	2055
— v. Davies	485, 488, 537, 1076, 1632
— v. Davies, Davies, <i>In re</i>	1485
— v. Hodgson	1909
— v. Makuna	481, 1206
— v. Rees	238
— v. Smith	1268, 1451
— v. White	749, 750
— v. Williams, Williams, <i>In re</i>	1154
— v. Wright	1270
Davis, <i>In re</i> , Muckalt v. Davis	783
— <i>In re</i> , Pollen Trustees, <i>Ex parte</i> ...	159, 1094
— <i>In re</i> , Rawlings, <i>Ex parte</i>	127, 232
— v. Burton	243, 253
— v. Comitti	501
— v. Galmoye	66
— v. James	1499
— v. Loach	1069
— v. Shepstone	634
— v. Simmonds	607
— v. Usher	255
Davison, <i>In re</i> , Chandler, <i>Ex parte</i>	146, 1060
— <i>In re</i> , Greenwell v. Davison	2066
Davys and Saurin, <i>In re</i>	1935
— v. Richardson	1427, 1745, 1823
Dawdy, <i>In re</i>	48
Dawes, <i>Ex parte</i> , Moon, <i>In re</i>	26, 180, 192, 202
— v. Creyke.....	906, 944
Dawson, <i>In re</i> , Johnston v. Hill.....	2080

Dawson v. Fox.....	25, 1045	Dever, <i>Ex parte</i> , Suse, <i>In re</i> , 128, 130, 135, 467, 921, 995, 1003, 1035	
Day, <i>In re</i> , Steed, <i>Ex parte</i>	208	Devine v. Keeling	1049
— v. Bonaini, Smith, <i>In re</i>	1949	Devitt v. Kearney	782
— v. Sykes	375	Devonport (Mayor) v. Plymouth Tramways Co.	5, 989, 1811
— v. Turnell, Higgins, <i>In re</i>	1576, 1618	Devonshire (Duke) v. Pattinson	597, 621, 818, 1970
— v. Ward.....	1203, 1733	Dewar, <i>In re</i> , Dewar v. Brooke	1890
D'Estampes, <i>In re</i> , D'Estampes v. Hankey	945	Dewhurst's Trusts, <i>In re</i>	1907
D'Etchegoyen v. D'Etchegoyen	1029	Dewsbury Waterworks Board v. Penistone Union Assessment Committee	1377
De Bay, The.....	1709, 1711	— Union v. West Ham Union	6, 1073
De Burgh Lawson, <i>In re</i> , De Burgh Law- son v. De Burgh Lawson	2109	Dickinson, <i>In re</i> , Charrington or Moore, <i>Ex parte</i>	155
De Carteret v. Baudains	333	Dickson, <i>In re</i> , Hill v. Grant	971
De Caux v. Skipper	1275	— v. Great Northern Ry.	296
De Jager v. De Jager	331	— v. Lough	1362
De Jongh v. Newman	1507	— v. Murray, Murray, <i>In re</i>	823, 1920
De Mattos v. Great Eastern Steamship Co.	603	Difiori v. Adams	1011
De Montfort v. Broers	329	Digby, <i>Ex parte</i> , Jackson v. Smith	1791
De Mora v. Concha	28, 747	Diggles, <i>In re</i> , Gregory v. Edmondson ...	2093
De Portugal, <i>In re</i>	569, 814	Dillett, <i>In re</i>	338
De Rechberg v. Beeton.....	1574	Dillon's claim, Munster Bank, <i>In re</i>	455
De Ros' Trust, <i>In re</i> , Hardwicke v. Wilmot	945	Dillon v. Arkins	2017, 2069
De Rosaz, <i>In re</i> , Rymer v. De Rosaz.....	535	— v. Balfour	633, 1502
De Stacpoole v. De Stacpoole	969	— v. O'Brien	594, 1366
De Waal v. Adler	331	Dimmock, <i>In re</i> , Dimmock v. Dimmock	804, 1883
Del Carmen Vea Murguia, <i>In goods of</i>	2009	Dinning v. South Shields Union	1387
De la Chevroitière v. Montreal	324	Dione, The	1702
De la Hunt and Pennington, <i>In re</i>	2053, 2065	Direct Spanish Telegraph Co. <i>In re</i>	375
De la Pole (Lady) v. Dick	33, 1736	— v. Shepherd,	1086 1967
Des Vignes, <i>Ex parte</i> , Des Vignes, <i>In re</i>	152	District Bank of London, <i>Ex parte</i> , Genese, <i>In re</i>	144
Deacon v. Arden	90, 1457	— <i>In re</i>	416
Deakin v. Lakin, Shakespear, <i>In re</i>	926	Dix v. Great Western Ry.	1406
Dean, <i>In re</i> , Ward v. Holmes	1769	Dixon, <i>Ex parte</i> , Dixon, <i>In re</i>	110, 115, 174, 207
Dear, <i>Ex parte</i> , Courtenay, <i>In re</i>	204	— <i>In re</i> , Dixon v. Smith	929
Dearing v. Brooks, Parker, <i>In re</i>	1454, 2015	— v. Brown, Brown, <i>In re</i>	1232, 1888
Dearle, <i>Ex parte</i> , Hastings, <i>In re</i>	103	— v. Farrer	597, 1731
— v. Petersfield Union	877, 1368	— v. Pyner	960
Dearmer, <i>In re</i> , James v. Dearmer	922	— v. Smith, Dixon, <i>In re</i>	929
Debenham v. King's College, Cambridge	58	Dobbin's Settlement, <i>In re</i>	233
Deering v. Bank of Ireland	148	Dobbs v. Grand Junction Waterworks Co.	1965
Deignan v. Deignan	937	Doble v. Manley	1266, 1272
Delaney v. Wallis	577, 1184, 1865	Docwra, <i>In re</i> , Docwra v. Faith	936, 1945
Delany v. Delany	2070, 2079	Dod, Longstaffe and Co., <i>In re</i> , Lamond, <i>Ex parte</i>	557, 1776
Delaroque v. Oxenholme Steamship Co.	1656	Dodds v. Tuke	743, 808, 1896
Delta Syndicate, <i>In re</i> , Forde, <i>Ex parte</i>	446	Doggett v. Revett, Youngs, <i>In re</i>	29, 804, 1434, 1480
Delves v. Newington	18	Doherty's Contract, <i>In re</i>	1946
Dempsey v. Keegan	716	Dominion of Canada Freehold Estate and Timber Co., <i>In re</i>	437
Denaby Main Colliery Co. v. Manchester, Sheffield, and Lincolnshire Ry.	297	— Plumbago Co., <i>In re</i>	420
Denham, <i>In re</i>	360, 442, 1308		431
Denne and Secretary of State for War, <i>In re</i>	1767	Domville v. Winnington	1617
Dennis v. Crawshay, Crawshay, <i>In re</i>	1493		
Derbon, <i>In re</i> , Derbon v. Collis	1424		
Derby Union v. Sharratt, Webster, <i>In re</i>	1165, 1387		
Desinge v. Beare, Prater, <i>In re</i>	2069		
Dessau v. Lewin, Michael, <i>In re</i>	762		
Deutsche Springstoff Actien Gesellschaft v. Briscoe	49		

15

Donaldson, <i>In re</i>	528, 1279, 1778	Dublin Corporation v. M'Adam	1568
Donoghue v. Brook	708	— and Wicklow Manure Co., <i>In re</i> ,	
Donohoe v. Donohoe	551, 969, 1034	O'Brien, <i>Ex parte</i>	447
— v. Mullarkey	772	— Drapery Co., <i>In re</i> , Cox, <i>Ex</i>	
Dooby v. Watson	1141, 1747	parte	366, 367, 368, 371
Dora Tully, The	1653	— Grains Co., <i>In re</i> , Braine, <i>Ex parte</i>	415
Doran v. Moore	1093	Duck v. Bates	500
Dorchester Union v. Poplar Union	1383	Duckett v. Thompson	2070
— v. Weymouth Union	1385	Ducondu v. Dupuy	328
Dordogne, The	1685, 1686	Dudgeon, <i>Ex parte</i> . Cook, <i>In re</i>	12
Doré v. Fletcher, Fletcher, <i>In re</i>	2041	Dudley, <i>Ex parte</i> , Solicitor, <i>In re</i>	1493
Dormont v. Furness Ry.	517, 1718	— <i>In re</i> , Monet, <i>Ex parte</i>	611, 1742
Dorrian v. Gilmore	2084	— (Countess) and London and North	
Dougherty v. Teaz	619, 1491	Western Railway, <i>In re</i>	1626
Doughty v. Firbank	1194	Duff's Executors' Case	381, 787
Douglas, <i>In re</i> , Douglas v. Wood	1207	Duff, <i>Ex parte</i> , Crowther, <i>In re</i>	121
— — Obert v. Barrow	305	— v. Duff	895
— — Wood v. Douglas	724	Duffett v. McEvoy	321, 1752
— v. Wood, Douglas, <i>In re</i>	1207	Dufourcet v. Bishop	1672
Doulon v. Halse	704	Dugdale, <i>In re</i> , Dugdale v. Dugdale	2074
Dove, <i>In re</i> , Bousfield v. Dove	185, 1493	Duguid v. Fraser	1996, 2097
Dowden v. Lewis	1532	Dumoulin v. Langtry	332
Dower v. Dower	1153	Duncan v. Toms	1068
Down v. Steele	710	Dundee Suburban Railway, <i>In re</i>	1491
Downe v. Fletcher	930, 1423	Dunelm, The	1684, 1805
Downes v. Somerville, Somerville, <i>In re</i>	42	Dunkley v. Harrison	831
Downing v. Falmouth United Sewerage		Dunn v. Dunn	901
Board	645	— v. Flood	1796, 1883, 1884
Downs v. Salmon	235	— v. Lareau	322
Downshire (Marquis) v. O'Brien	1178, 1179, 1181	— v. Newton	1521
Dowson, <i>Ex parte</i> , Dowson, <i>In re</i>	183	Dunning, <i>In re</i> , Hatherley v. Dunning	783
— <i>In re</i> , Jaynes, <i>Ex parte</i>	198	— v. Gainsborough (Earl)	1306
Doyle v. City of Glasgow Life Assurance Co.	1003	Durham (Earl), <i>In re</i> , Grey (Earl) v.	
— v. Maguire	796, 1497	Durham (Earl)	622
Drage v. Hartopp	798, 1407	— v. Durham	884
Drake v. Francke, Francke, <i>In re</i>	807, 1455, 1486	— (Mayor) v. Fowler	1532
— v. Greaves	1133	Durrant, <i>Ex parte</i> , Beale, <i>In re</i>	1521, 1588
— v. Kershaw, Kershaw, <i>In re</i>	2112	Dwyer v. Meehan	632
Draper's Trusts, <i>In re</i>	2077, 2095	Dyas, <i>Ex parte</i> , Navan & Kingscourt Ry.,	
Draycott v. Harrison	606, 943	<i>In re</i>	1634, 1635
Dresser v. Gray, Gray, <i>In re</i>	2083, 2086	Dye v. Dye	921, 939, 1870, 1991
Drew v. Drew	891	Dyer, <i>Ex parte</i> , Taylor, <i>In re</i>	126
— v. Josolyne	64, 165, 263	— <i>In re</i> , Dyer v. Paynter	1321
— v. Metropolitan Board of Works	1209, 1314	Dyke v. Stephens	644, 981
Drewitt v. Drewitt	2015	Dynevor (Lord) v. Tennant	674, 1078
Driffield Linseed Cake Co. v. Waterloo		Dyson v. Godfray	333
Mills Co.	1353	— v. Greetland Local Board	1979
Discol v. King	552		
Druitt v. Christchurch Overseers	712		
— v. Seaward	2031		
Drum Slate Quarry Co., <i>In re</i>	364, 445		
Drummond v. Leigh, Bryon, <i>In re</i>	2024		
— v. Van Ingen	1584		
Drury v. Orsmond, Orsmond, <i>In re</i>	792		
Drury Lowe's Marriage Settlement, <i>In re</i> ,			
Sitwell, <i>Ex parte</i>	1574		
Drax, <i>In re</i> , Savile v. Yeatman	2036		
Dry Docks Corporation, <i>In re</i>	424		
Duane v. Lee	799		

East and West India Dock Co. v. Shaw, Savill & Co.	1552	Elderton, <i>In re</i>	977
East London Waterworks Co. v. St. Matthew, Bethnal Green	1962	— <i>In re</i> , Russell, <i>Ex parte</i>	208
Easton v. London Joint Stock Bank	534	Eley, <i>In re</i>	1768, 1774
— Estate Co. v. Western Waggon Co.	1097, 1548	— v. Lytle	584
Easy, <i>In re</i> , Hill, <i>Ex parte</i>	84, 112	Elin, The	1656
Eaton v. Lake	501	Ellick v. Cox, Chapman, <i>In re</i>	2080
Ebbs, <i>In re</i>	133	Ellington v. Clark	37, 536, 1340
Eberle's Hotel Co. v. Jonas	153, 426	Elliott v. Dean	469
Ebor, The	1685, 1686	— v. Elliott	969, 1429
Ebrard v. Gassier	562, 1441	— v. Hall	1295
Eccles v. Wirral Sanitary Authority	867	— v. Harris	1478, 1509
Edell v. Cave	1419	— v. Lambert, Callaghan, <i>In re</i>	977
Edelston v. Russell	645	— v. Nailstone Colliery Co.	1295
Eden v. Weardale Iron and Coal Co.	655, 1463	Ellis, <i>Ex parte</i> , Crowther, <i>In re</i>	209
Eder v. Levy	1205	— <i>In re</i> , Hinshelwood, <i>Ex parte</i>	103
Edge v. Boileau	1083	— v. Johnson, Glanvill, <i>In re</i>	928, 942
Edgington v. Fitzmaurice	344, 345, 536, 822	— v. Rogers	1797, 1932
Eddie and Brown, <i>In re</i>	1943	— v. Stewart	34
Edinburgh Magistrates v. Blackie ...	1183, 1603	Ellis' Trusts, <i>In re</i> , Kelson v. Ellis	1486
Edison Electric Light Co. v. Holland	1461	Elmore v. Pirrie	1797
— v. Woodhouse ...	1340	Elphinstone v. Monkland Iron and Coal Co.	428, 1082, 1085, 1362
Edmonds v. Blaina Furnaces Co.	368, 369	Elsas v. Williams	1490
— v. Edmonds, Flower, <i>In re</i> ...	2099,	Elwell v. Jackson	72, 222, 1358
— v. Robinson	1337, 1481	Elwes and Turner, <i>In re</i>	1762
Edmonton Guardians v. St. Mary, Isling- ton, Guardians	1382	— v. Brigg Gas Co.	1077
Edmunds, <i>Ex parte</i> , Green, <i>In re</i>	200	Elworthy v. Harvey	1487
— v. Wallingford	466, 1234, 1528	Emanuel, <i>In re</i>	1773
Edward v. Cheyne	917, 1601, 1602	— v. Parfitt, Tucker, <i>In re</i>	925
Edwards, <i>Ex parte</i> , Chapman, <i>In re</i>	169	Emery v. Sandes	522, 553
— <i>Ex parte</i> , Home, <i>In re</i>	87	Emery, <i>In re</i> , Official Receiver, <i>Ex parte</i> ...	234
— <i>Ex parte</i> , Smith, <i>In re</i> ...	49, 142, 193	— v. Cichero	1682
— <i>Ex parte</i> , Tollemache, <i>In re</i>	149, 745	— v. Sandes	522, 553
— <i>In re</i> , Owen v. Edwards	619, 1491	Emery's Trust, <i>In re</i>	935
— and Green, <i>In re</i>	1938	Emmens v. Pottle	636
— v. Barnard, Barnard, <i>In re</i> ...	217, 804,	Emmerson, <i>In re</i> , Rawlings v. Emmerson	462, 543, 2014
—	1326	— v. Ind	20
— v. Chancellor	216	Emmett v. Heyes	539
— v. Dennis	1836, 1850	Emmy Haase, The	1689, 1693
— v. Dewar, Andrews, <i>In re</i>	928	Emperor Life Assurance Society, <i>In re</i> , Holliday, <i>Ex parte</i>	440
— v. Edwards	925	Empire Theatre, <i>In re</i> , Reg. v. Inland Revenue Commissioners	1046
— v. Falmouth Harbour Commis- sioners	517, 1718	England, The	1651
— v. Hope	540, 1787	— v. Shearburn	1100
— v. Lloyd	711	English's Trusts, <i>In re</i>	1132
— v. Lloyd, Lloyd, <i>In re</i>	1640	English and Scottish Trust Co. v. Flatau ..	1463
— v. Salmon	877	Ennis v. Rochford	728, 789
Edwards' Trade-mark, <i>In re</i>	1836, 1850	— and West Clare Ry., <i>In re</i>	1320
Egg v. Blayney	1220	Enniskillen Guardians v. Hilliard ...	850, 1810
Eggleton v. Newbegin, Newbegin, <i>In re</i> ...	1165,	Eppos, The	1722
.....	1387	Erato, The	1711
Ehlers v. Kauffman	155	Ermen & Roby's Trade-mark, <i>In re</i>	1852
Ehrlich v. Ihlee	1347	Erskine v. Armstrong	469
Eilean Dubh, The	1729	Escallier v. Escallier	337
Elder v. Pearson, Bellamy, <i>In re</i>	913	Esdaille, <i>In re</i> , Esdaille v. Esdaille	1635
		— v. City of London Union	700, 1376
		Espir v. Todd	1091

Essequibo, The	1683	Faust, The	1658
Essery v. Cowland	626, 963	Fawcus, In goods of	761
Essex Election (South-Eastern Division), <i>In re</i>	719	Fawsitt, <i>In re</i> , Galland v. Burton	30
Etheridge v. Womersley, Womersley, <i>In re</i>	806	Featone v. Aylesford (Earl)	483, 564, 912
European, The	1292, 1696	Feast, <i>Ex parte</i> , Feast, <i>In re</i>	107
Euston v. Smith	656, 886	Fee v. M'Manus	2085
Evans, <i>Ex parte</i> , Evans, <i>In re</i>	101, 102	Fellows v. Thornton	72
— <i>In re</i>	1430	— v. Wood	966
— <i>In re</i> , Brown, <i>Ex parte</i>	1756	Fendall v. O'Connell	653, 943, 1501
— <i>In re</i> , Evans, <i>Ex parte</i>	101, 102	Fennessy v. Clark	646
— <i>In re</i> , Evans v. Evans	777	— v. Day	520, 1858
— <i>In re</i> , Welch v. Channell ...	975, 1893	— v. Rabbits	1469
— v. Benyon	37, 1886	Fenton, <i>Ex parte</i> , Sissling, <i>In re</i>	151
— v. Evans, Evans, <i>In re</i>	777	Ferens v. O'Brien	574
— v. Hemingway	1055, 1071	Ferguson, <i>Ex parte</i> , Buckley, <i>In re</i>	1769
— v. Manchester, Sheffield and Lin- colnshire Ry.	992, 1296, 1973	Ferns v. Carr	1733
— v. Maxwell, Orme, <i>In re</i>	12, 785	Ferret, The	1721
— v. O'Donnell	1145	Fewings, <i>Ex parte</i> , Sneyd, <i>In re</i>	188, 1023, 1061, 1279
— v. Roberts, Roberts, <i>In re</i> ..	229, 472, 1588	Field, <i>In re</i>	1765, 1767, 1774
Evatt, <i>Ex parte</i> , Old Swan Benefit Build- ing Society, <i>In re</i>	278	— <i>In re</i> , Hollyoak, <i>Ex parte</i>	139
Ewing v. Orr-Ewing	614, 801, 1032, 1033, 1597	— v. Bennett	1410
Exchange Bank of Canada v. Reg.	323	— v. Field	888, 900
— Drapery Co., <i>In re</i>	429	— v. Lydall, Tillet, <i>In re</i>	806, 1493
— and Hop Warehouses v. Land Financiers' Association	1450	— v. White, Rownson, <i>In re</i>	783, 788
F.		Fielding v. Cronin	787
Fabian, <i>Ex parte</i> , Landrock, <i>In re</i>	131	Findlater v. Tuohy	799, 1422
Fagan v. Monks	552	Findlay, <i>In re</i>	970, 1906
Fairburn v. Household	1467	Fine Art Society v. Union Bank ..	77, 1304, 1389
Fairport, The	1654	Finlay v. Chirney	883, 1400
Faithfull, <i>In re</i> , Hardwick v. Sutton	784	Finley, <i>In re</i> , Clothworkers' Co. or Han- bury, <i>Ex parte</i>	122
— <i>In re</i> , Moore, <i>Ex parte</i>	108	Finnis to Forbes, Finnis, <i>Ex parte</i>	313
Falcke v. Scottish Imperial Insurance Co.	1000, 1396	— — Tower Ward Schools Trus- tees, <i>Ex parte</i>	314
Falconar's Trusts, <i>In re</i> , Bradford v. Young ..	36	Finsbury School Board Election, <i>In re</i> , Ayres, <i>Ex parte</i>	41, 1592
Fanny M. Carvill, The	1682	Firbank, <i>In re</i> , Knight, <i>Ex parte</i>	88
Fanshawe v. London and Provincial Dairy- Co.	1468	— v. Humphreys	373, 1518
Fardell v. Chapman, Chapman, <i>In re</i>	1487	Fire Queen, The	1684, 1691
Farman, <i>In re</i> , Farman v. Smith	1999	Firmin, <i>In re</i> , London and County Banking Co. v. Firmin	612
Farmer v. Farmer	890	Firth v. North Eastern Ry.	286
— v. London and North Western Ry.	1380	— v. Slingsby	1147
Farnell's Settled Estates, <i>In re</i>	1632, 1911	Fisher's Case	452
Farnell v. Bowman	318	Fisher and Haslett, <i>In re</i>	778
Farnworth Local Board v. Compton	868	Fitt v. Bryant	72
Farrar v. Farrars	536, 1259	Fitzgerald's Settlement, <i>In re</i>	1266, 1614, 1871
Farrer v. Lacy	35, 1261, 1271, 1276, 1590	Fitzpatrick, <i>In re</i>	235
— v. Nelson	833, 1091	— v. Waring	72
Farrington v. Farrington	907, 908	Fitzroy Bessemer Steel Co., <i>In re</i> ..	363, 1143, 1308
Faulkner, <i>In re</i>	1772	Flatau, <i>In re</i> , Scotch Whiskey Distillers, <i>Ex parte</i>	111, 113
Faure Electric Accumulator Co., <i>In re</i> ..	363, 422	Flavell, <i>In re</i> , Murray v. Flavell	1334, 1872
— — — v. Philli- part 393, 737		Fleck, <i>In re</i> , Colston v. Roberts	2112
		Fleming v. Brisley, Brisley, <i>In re</i>	2058
		— v. Hardcastle	1764, 1769
		— v. Hislop	1600

Fleming v. Yeamen	1597	Fox v. Railway Passengers Assurance Co. 50, 997	
Fleming's Trusts, <i>In re</i>	956	— v. Smith	25, 1045
Fletcher, <i>Ex parte</i> , Fletcher, <i>In re</i>	116	Foxwell v. Lewis, Lewis, <i>In re</i>	495, 2109
— <i>In re</i> , Doré v. Fletcher	2041	France v. Clark	387
— <i>In re</i> , Gillings v. Fletcher	2091	Francis, <i>Ex parte</i> , Bruno, <i>In re</i>	1586
— v. Bealey	1313	Francke, <i>In re</i> , Drake v. Francke ...	807, 1455, 1486
Flewitt v. Walker	1930	Franke v. Chappell	1830
Flint, <i>Ex parte</i>	58	Franks v. Worth, Bridge, <i>In re</i>	1485
— Coal and Cannel Co., <i>In re</i>	419	Fraser, <i>In re</i>	49
Flintham v. Roxburgh	507	— v. Brescia Steam Tramways Co. ...	420, 537
Florence Land and Public Works Co., <i>In re</i> , Nicol's case, Tufnell & Ponsonby's case	391	— v. Denison	688
Flower, <i>In re</i> , Edmonds v. Edmonds	2099, 2102	— v. Ehrensperger	49, 616
— v. Metropolitan Board of Works, <i>In re</i>	1885, 1947	— v. Mason	496
Flynn, <i>In re</i> , Guy v. McCarthy	809	Frechette v. La Compagnie Manufacturière de St. Hyacinthe	327, 683
Foakes v. Beer	2, 478	Free Fishermen of Faversham, <i>In re</i>	411
— v. Webb	663	Freeman's Settlement Trusts, <i>In re</i>	1918
Fobbing Commissioners v. Reg.	669, 1607	Freeman v. Newman	714
Foot v. Leslie	1161	Freke v. Calmady, Hotchkys, <i>In re</i> ...	1894, 2111
Foot v. Bean	1448, 1472	French, <i>In re</i> , Love v. Hills	1396, 1752
Ford, <i>Ex parte</i> , Chappell, <i>In re</i> ...	141, 465, 1529	— v. Hope	1249
— <i>Ex parte</i> , Ford, <i>In re</i>	106	— v. Municipal Permanent Building Society	275
— v. Barnes	709	French Hoek Commissioners v. Hugo ..	331, 683
— v. Hoar	716	Frewen, <i>In re</i> , Frewen v. James	1634
— v. Metropolitan and Metropolitan District Rys.	1119	Friedeberg, The	543, 1729
— v. Miescke	1413	Friedlander, <i>In re</i> , Oastler, <i>Ex parte</i> ...	98, 201
— v. Shephard	1410	Friend v. Shaw	547, 1111
— v. Smerdon	718	Frith v. Cooke	1272
Forde, <i>Ex parte</i> , Delta Syndicate, <i>In re</i> ...	446	— v. Simpson	1550
Fore Street Warehouse Co., <i>In re</i>	377	Frowde v. Williams	1324
Foreman, <i>Ex parte</i> , Hann, <i>In re</i>	206	Fry v. Lane	1000, 1923
— <i>Ex parte</i> , Price, <i>In re</i>	119	— v. Tapson	1875, 1889
Forrest v. Shore	1273	Fryer, <i>Ex parte</i> , Fryer, <i>In re</i>	105, 608, 895
Forster, <i>In re</i> , Rawlings, <i>Ex parte</i>	166	Fryman's Estate, <i>In re</i> , Fryman v. Fry- man	210, 1094
— & Co., <i>In re</i> , Schumann, <i>Ex parte</i> ..	441, 1188	Fulham Board of Works v. Smith	1215
— v. Davies, McRae, <i>In re</i> ...	33, 803, 1329	— Union v. Wells	1223
— v. Schlesinger	1495, 1900	Fullagsen v. Walford	1674
Foscolino, The	1701	Furber v. Abrey	251
Foskett v. Kaufman	715	— v. Cobb	246, 250, 251, 253
Foster's Trusts, <i>In re</i>	1916	Furlong v. South London Tramways Co. ...	1173, 1199, 1863
Foster, <i>Ex parte</i> , Hanson, <i>In re</i>	101	Furness v. Davis	524
— <i>Ex parte</i> , Webster, <i>In re</i>	87, 174	— Railway v. Cumberland Building Society	671, 1119
— <i>Ex parte</i> , Woolstenholme, <i>In re</i> ...	98	Furniss v. Phear	2018
— <i>In re</i> , Basan, <i>Ex parte</i>	114	Fusee Vesta Co. v. Bryant and May ..	1342, 1354
— v. Diphwys Casson Slate Co.	1229	Fussell v. Dowding	1403
— v. Ward	220, 1325	— v. O'Boyle	1509
— v. Wheeler	479, 601, 1075	Futcher v. Saunders	507
Foulkes v. Quartz Hill Consolidated Gold Mining Co.	349		
Fowke v. Draycott	936, 2061		
Fowler's Trusts, <i>In re</i>	1909		
Fox's Claim, Northumberland Avenue Hotel Co., <i>In re</i>	478		
Fox, <i>Ex parte</i> , Smith, <i>In re</i>	95, 140		
— <i>In re</i>	1159		

G.

G. v. M.	20, 885, 1600
Gabriel v. Blankenstein	122

Gainsborough (Earl) v. Watcombe Terra Cotta Co.	1306, 1879, 1891
Gale, <i>In re</i> , Blake v. Gale	1141
Galland, <i>In re</i>	1747, 1783, 1787
— v. Burton, Fawsitt, <i>In re</i>	30
Gallard, <i>In re</i> , Harris, <i>Ex parte</i>	199, 1770
— v. Hawkins	497
Games, <i>In re</i> , Board of Trade, <i>Ex parte</i> ...	91
— v. Bonnor	40, 541, 1801, 1937
Gamlen, <i>In re</i> , Ward, <i>Ex parte</i>	117
— v. Lyon, Barrington, <i>In re</i> ...	1228, 1615
Gandy v. Gandy	4, 475, 629, 725, 911, 1399
— v. Macaulay, Garnett, <i>In re</i> ...	623, 625, 754, 805, 1486
Gapp v. Bond	224, 1658
Garcia v. Garcia	891
Gard v. Commissioners of Sewers ...	616, 1213, 1214
Gardner v. Jay	1471
— v. Mansbridge	585
— v. Smart	235
— v. Tapling	982, 1478
— v. Trechmann	1675
Gardiner, <i>In re</i> , Coulson, <i>Ex parte</i>	95, 944
— In goods of	2008
— v. Courthorpe	1994
Gardiner's Trusts, <i>In re</i>	1908
Gare's Patent, <i>In re</i>	1341
Garfitt v. Allen	2115
Garnes, <i>In re</i> , Garnes v. Applin	984, 1899
Garnett, <i>In re</i> , Bullock, <i>Ex parte</i>	189
— <i>In re</i> , Gandy v. Macaulay ...	623, 625, 754, 805, 1486
— <i>In re</i> , Robinson v. Gandy	949
Garnett-Orme to Hargreaves	1628
Garnham v. Skipper	1254, 1450
Garrett v. Middlesex JJ.	1052
Garrod, <i>In re</i>	1160, 1916
"Garston" Sailing Ship Co. v. Hickie	1668, 1674
Gascoyne v. Risley	1049
Gaslight and Coke Co. v. Hardy	842
— v. Holloway	1107
— v. St. Mary Abbott's Vestry	842, 1209
— v. South Metropolitan Gas Co.	838
— v. Towse	1088
Gason v. Rich	8, 844
Gateshead (Mayor) v. Hudspeth, Hewitt's Estate, <i>In re</i>	304
Gaulard and Gibbs' Patent, <i>In re</i> ...	1343, 1351
— v. Lindsay	1343
Gayner v. Sunderland Joint Stock Premium Association	1018
Gedling Rectory, <i>In re</i>	1132
Gee v. Bell	1420, 1455, 1485
Geisel, <i>Ex parte</i> , Stanger, <i>In re</i>	98, 118
"Gem" Trade-mark, <i>In re</i>	1838
General Horticultural Co., <i>In re</i> , Whitehouse, <i>Ex parte</i>	70
General Horticultural Co., <i>In re</i> , Whitehouse's Claim	368
Genese, <i>In re</i> , District Bank of London, <i>Ex parte</i>	144
— <i>In re</i> , Gilbert, <i>Ex parte</i>	755
— <i>In re</i> , Kearsley, <i>Ex parte</i> ...	139, 170, 173, 197
— <i>Ex parte</i> , Lascelles, <i>In re</i>	27, 609
Gent, <i>In re</i> , Gent-Davis v. Harris	610, 1315
George Gordon, The	1729
George Roper, The	1691
Gera v. Ciantar	333
Gerard (Lord), <i>In re</i> , Oliphant v. Gerard ..	948
Germ Milling Co. v. Robinson	1345, 1348
Gertrude, The	1024, 1444, 1725
Gettysburg, The	1697, 1726
Ghost's Trusts, <i>In re</i>	734, 792
Gibbes' Settlement, <i>In re</i> , White v. Randolph	2098
Gibbings v. Strong	1508
Gibbons, <i>In re</i> ...	796
— v. Chambers	483, 1806
— v. Hickson	225
Gibbs v. Great Western Ry.	1193
— v. Lamport	1716
— v. Layland, Marsden, <i>In re</i> ...	1140, 1955
Gibert v. Gonard	132, 1920
Gibson, <i>Ex parte</i> , Lamb, <i>In re</i>	99, 168
— <i>Ex parte</i> , Stockton, <i>In re</i>	203
— v. Way, Currey, <i>In re</i>	933, 944
— v. Wise	1150
Gifford's Divorce Bill	904, 905
Gifford and Bury Town Council, <i>In re</i>	873
Gilbert, <i>Ex parte</i> , Genese, <i>In re</i>	755
— <i>In re</i> , Daniel v. Matthews	2050
— <i>In re</i> , Gilbert v. Huddleston	544
— v. Aviolet, Heathcote, <i>In re</i>	494
— v. Huddleston, Gilbert, <i>In re</i>	544
— v. North London Ry.	282
— v. Trinity House Corporation	517, 1299, 1718
Gilchrist, <i>Ex parte</i> , Armstrong, <i>In re</i> ...	41, 134, 922
Giles, <i>In re</i>	796, 1901
Gill, <i>Ex parte</i> , Reg. v. Yorkshire JJ.	1176
— <i>In re</i> , Smith v. Gill	1487, 1910, 1918
— v. Woodfin	39, 1482, 1509
Gillard v. Cheshire Lines Committee	1118
— v. Lawrenson, Burge, <i>In re</i>	1140
Gillatt v. Colquhoun	1571
Gillespie, <i>In re</i> , Morrison, <i>Ex parte</i> ...	151, 204
— <i>In re</i> , Reid, <i>Ex parte</i>	152, 200
— <i>In re</i> , Roberts, <i>Ex parte</i>	143, 223
Gillings v. Fletcher, Fletcher, <i>In re</i>	2091
Gilman's case	450
Gilmer, <i>In re</i>	767, 1058
Gilroy v. Bowey	246

Ginnett v. Whittingham	1923	Gornall v. Mason	762, 2002
Glamorganshire, The	1682, 1694	Gorringe v. Irwell India Rubber and Gutta Percha Works.....	61, 433
— Banking Co., <i>In re</i> , Mor- gan's case	438	Gort (Viscount) v. Rowney.....	529
Glanvill, <i>In re</i> , Ellis v. Johnson	928, 942	Gosling, <i>In goods of</i>	2006
Glanville, <i>In re</i> , Jenkins, <i>Ex parte</i> ... 90, 99, 164		Gosnell v. Bishop	536
Glascodine and Carlyle, <i>In re</i>	1759, 1769	Gough v. Heatley	1478
Glasgow Corporation v. Miller	1567	— v. Murdoch	848
— (Lord Provost) v. Farie.....	1226, 1961	Gough's Trusts, <i>In re</i> , Great Western Ry., <i>Ex parte</i>	1132
— — v. Hillhead Police Commissioners	1598	Goulard v. Lindsay	1353
— and South Western Ry. v. Mac- kinnon	292	Gould, <i>Ex parte</i> , Richardson, <i>In re</i>	88, 140
— and South Western Ry. and Lon- don and North Western Ry., <i>In re</i>	53	— <i>Ex parte</i> , Salmon, <i>In re</i>	1658
Glen v. Fulham Overseers	1221	— <i>Ex parte</i> , Walker, <i>In re</i> ... 123, 192, 193, 1083, 1101, 1103	
Glenfruin, The.....	1661, 1705	— <i>In re</i> , Official Receiver, <i>Ex parte</i>	210
Glenister v. Harding, Turner, <i>In re</i>	744, 748	Gouraud v. Edison Gower Bell Telephone Co.	650
Glenny and Hartley, <i>In re</i>	1914	— v. Fitzgerald	637, 1437
Glenton to Haden, <i>In re</i>	1941	Goutard v. Carr	54, 530, 1428
Gliddon, <i>Ex parte</i> , Wakeham, <i>In re</i>	146	Gow v. Foster	2126
— v. Brodersen	481	Gowan v. Sprott.....	1650, 1727
Gloucestershire Banking Co. v. Edwards	5, 1642	— v. Wright	613, 1805
— Banking Co. v. Phillips ..	943, 1463	Gower v. Postmaster-General	1079
Glover v. Smith	2000	Grafton v. Watson.....	537, 1859
Goad v. Empire Printing Co.	630	Graham v. Edge.....	417
Goas, <i>Ex parte</i> , Clement, <i>In re</i>	179, 620	— v. Lewis	1202
Godfrey, <i>Ex parte</i> , Lazarus, <i>In re</i>	173	Grahame v. Grahame	80, 752, 1528
— <i>Ex parte</i> , Winslow, <i>In re</i>	136	Grand Junction Canal Co. v. Petty	1970, 1974
— v. Poole	828	— Junction Ry. of Canada v. Peter- borough (Corporation)	326
Godiva, The	1695	— Trunk Ry. of Canada v. Jennings ...	1302
Gold v. Brennan, Steele, <i>In re</i>	1903	Grange v. Sturdy, Haseldine, <i>In re</i> ...	796, 2025
Goldring v. Lancaster, Ormston, <i>In re</i>	525	Grant, <i>In re</i> , Whinney, <i>Ex parte</i>	136, 174
Golds and Norton, <i>In re</i>	1948	— v. Coverdale	1678
Goldsmid, <i>In re</i> , Taylor, <i>Ex parte</i> ..	163, 1887	— v. Easton	1038, 1421
— v. Great Eastern Ry.	1811	— v. Heysham, Milne, <i>In re</i>	2050
Goldstrom v. Tallerman	242, 245	Grattan v. Langdale	2064
Gooch v. London Banking Association	428	Graves v. Masters	1515
Good, <i>Ex parte</i> , Salkeld, <i>In re</i>	120	Gray, <i>In re</i> , Dresser v. Gray	2083, 2086
Goodall v. Harding	472	— <i>In goods of</i>	2007
Goodbody v. Gallaher	1428	— v. Commissioners of Customs	1063
Goodden v. Coles	668, 693, 1266	— v. Hopper.....	551
Goodenough, <i>Ex parte</i> , Walmsley v. Mundy ..	57	— v. Press Association	1417
Goodes v. Cluff	560	— v. Stait.....	1098
Goodfellow v. Prince	1830, 1856	Great Berlin Steamboat Co., <i>In re</i> ...	437, 823
Goodhart v. Hyett	520, 684	Great Eastern Ry. v. Goldsmid	1180, 1182, 1958
Gooding v. Ealing Local Board	857	— Steamship Co., <i>In re</i> , Wil- liams' Claim	1656
Goodland v. Ewing	787	Great Indian Peninsular Ry. v. Turnbull... 1671	
Goodman v. Blake	558, 1043	— Northern Ry. and Sanderson, <i>In re</i> ... 1941, 1944	
— v. Robinson	69	— v. Tahourdin	1548
Goodwin v. Goodwin.....	906	Great Western Forest of Dean Coal Con- sumers' Co., <i>In re</i> , Carter's case	421
Goold, <i>Ex parte</i> , Walker, <i>In re</i> ... 123, 192, 193, 1083, 1101, 1103		Great Western Forest of Dean Coal Con- sumers' Co., <i>In re</i> , Craw- shay's case	440
— <i>In re</i> , Goold v. Goold	1404		
— v. Birmingham, Dudley and District Bank	1943		
Gordon v. James	1283, 1514, 1736		

21.

Great Western Ry., <i>Ex parte</i> , Gough's Trusts, <i>In re</i>	1132	Grimmett's Trusts, <i>In re</i>	1163
— v. Bagge	291	Grimwade, <i>Ex parte</i> , Tennent, <i>In re</i> ...	109, 443
— v. Bunch	286	— v. Mutual Society	360
— v. Central Wales Ry. 1552		Grogan v. London and Manchester Indus- trial Assurance Co.	995
— v. McCarthy	295	Grosvenor v. Grosvenor	893
— v. Swindon and Chel- tenham Ry....	1114,	— Bank v. Boaler.....	354
1115, 1805		Grove, <i>In re</i> , Vaucher v. Solicitor to the Treasury.....	1026, 1031
— Steamship Co., <i>In re</i>	378	Grover v. Loomes.....	1937, 1952
— Wheal Polgooth, <i>In re</i>	355, 422	Groves v. Volkart	1665
Grébert-Borgnis v. Nugent	604	Grumbrecht v. Parry	666
Green, <i>In re</i> , Edmunds, <i>Ex parte</i>	200	Grundy v. Townsend	730, 1203, 1233
— <i>In re</i> , Green v. Green	1792	Guest, <i>Ex parte</i> , Russell, <i>In re</i>	109, 613
— v. Belfast Tramways Co.	685	Guilfoyle, <i>In re</i>	148, 177
— v. Bennett	1467	Guillemin, <i>Ex parte</i> , Oriental Bank Cor- poration, <i>In re</i>	436
— v. Biggs	1243	Guinness v. Fitzsimons.....	990
— v. Brand	827, 1007	Guterman's Registered Designs, <i>In re</i>	1859
— v. Burgess, Williams, <i>In re</i>	796	Gullischen v. Stewart	1665
— v. Green, Green, <i>In re</i>	1792	Gully v. Smith	1976
— v. Humphreys.....	1146	Gun v. M'Carthy	752, 1231
— v. Paterson	498, 817, 936, 962,	Gunn, <i>In goods of</i>	493, 940, 1576, 1993
	1823	Gunning's Estate, <i>In re</i>	2041
Greenbank v. Sanderson.....	525, 819	Guy, <i>In re</i> , Scantlebury, <i>Ex parte</i>	200
Greene's Estate, <i>In re</i>	1145	— v. Churchill	1789
Greene v. Flood	792, 2059	— v. Hancock	654
— v. Gordon, Jones, <i>In re</i>	2096	— v. McCarthy, Flynn, <i>In re</i>	809
— v. Thornton	1477	Gydon, <i>In re</i> , Allen v. Taylor.....	1450
Greenway v. Bachelor.....	507, 718	Gyll, <i>In re</i> , Board of Trade, <i>Ex parte</i>	118
— v. National Provincial Bank.....	79	Gyte v. Gyte.....	607, 895
Greenwood's Trusts, <i>In re</i>	1907		
Greenwood v. Hornsey	679, 681, 986		
Gregory v. Edmondson, Diggles, <i>In re</i>	2093		
Gregson, <i>In re</i> , Christison v. Bolam	1284		
Gregson's Trusts, <i>In re</i>	1916		
Grepe, <i>Ex parte</i> , Grepe, <i>In re</i>	205		
— v. Loam	1479		
Greville's Settlement, <i>In re</i>	1767		
Grey's Case.....	392		
— Brewery Co., <i>In re</i>	439, 1770		
— Settlements, <i>In re</i> , Acason v. Green- wood	923		
Grey (Earl) v. Durham (Earl), Durham (Earl), <i>In re</i>	622		
Gridley v. Swinborne	1858		
Griffith, <i>In re</i>	174		
— <i>In goods of</i>	505, 2015		
— v. Blake	988		
— v. Bourke	2087, 2088		
Griffith-Boscawen v. Scott	2104		
Griffith Jones & Co., <i>In re</i>	1276, 1758		
Griffiths, <i>In re</i>	969, 1077		
— <i>In re</i> , Griffiths v. Lewis	809		
— v. Lancashire J.J.	1050		
— v. Lewis, Griffiths, <i>In re</i>	809		
— v. London and St. Katharine Dock Co.	1189		
— v. Mortimer, Mortimer, <i>In re</i>	2027		

Hall v. Ewin	1088	Hardwick, The	755, 1725
— v. Hale	1800, 1902	— v. Sutton, Faithfull, <i>In re</i>	784
— v. Hall, Hall, <i>In re</i> ,	1453, 1911, 2114	Hardwicke v. Wilmot, De Ros' Trust, <i>In re</i>	945
— v. Heward	1280	Hardwidge, <i>In re</i>	42
— v. London, Brighton, and South Coast Ry.	26, 292, 1552, 1553	Hardy v. Fothergill	186
— v. Truman	662	— v. North Riding JJ.	7, 1063
— v. West End Advance Co.	740, 1254	Hargrave v. Kettlewell	1429
— & Co., <i>In re</i>	416, 449, 1310	Hargreave's Trust, <i>In re</i> , Bradford (Mayor), <i>Ex parte</i>	1128
Hallas v. Robinson	259	Hargreaves and Thompson, <i>In re</i>	1939
Hall-Dare v. Hall-Dare	624, 816	Harker v. Edwards	1524
Hallett v. Furze	1270	Harnett, <i>In re</i> , Leahy v. O'Grady	754, 805
— v. Hastings, Hastings (Lady), <i>In re</i> , 928, 1154, 2118		— v. Miles	832
Halliwell, <i>In goods of</i>	2011	Harper v. Aplin	1266
Hallows v. Lloyd	1899	— v. Davis	554
Hamill v. Lilley	20	Harrald, <i>In re</i> , Wilde v. Walford ...	1787, 1898
— v. Murphy	735	Harrington, The	1730
Hamilton, <i>In re</i>	974	Harris, <i>Ex parte</i>	1097
— <i>In goods of</i>	2008	— <i>Ex parte</i> , Gallard, <i>In re</i>	199, 1770
— v. Barr	1415	— <i>In re</i>	1772
— v. Bone	585	— <i>In re</i> , Harris v. Harris	807
— (Duke) v. Dunlop	620, 1224	— v. Briscoe	300
— v. Pandorf	1668	— v. Davies	321
Hamlet, <i>In re</i> , Stephen v. Cunningham ...	2047	— v. De Pinna	678
Hamling v. Elliott, Coulton, <i>In re</i>	1482	— v. Marcus Jacobs	1667, 1677
Hammond v. Bussey	605	— v. May	851
— v. Hocking	251	— v. Rothwell	1339
Hampden v. Wallis	67, 68, 1426	— v. Slater	549
Hampshire, JJ., <i>In re</i>	1594	— v. Tenpany	467
Hanbury, <i>Ex parte</i> , Finley, <i>In re</i>	122	Harris' Settled Estates, <i>In re</i>	937, 1627
— v. Cundy	1058, 1092	Harrison, <i>Ex parte</i> , Cannock and Rugeley Colliery Co., <i>In re</i>	387
Hance v. Harding	95, 160	— <i>Ex parte</i> , Peake, <i>In re</i>	159, 842
Hancock, <i>In re</i> , Hancock v. Berrey ...	1144, 1245	— <i>Ex parte</i> , Jordan, <i>In re</i>	139
— v. Hancock	947	— <i>In re</i>	1777, 1781
Hankey v. Martin	1237	— <i>In re</i> , Harrison v. Harrison 1615, 1824	
Hankinson v. Barningham	2014	— <i>In re</i> , Latimer v. Harrison	785
Hanmer v. King	558	— <i>In re</i> , Perry v. Spencer	493
Hann, <i>In re</i> , Foreman, <i>Ex parte</i>	206	— <i>In re</i> , Turner v. Hellard	2017
Hannay v. Graham	1436	— v. Abergavenny (Marquis)	1447
Hannington v. True, Smith, <i>In re</i>	2112	— v. Cornwall Minerals Ry.	1788
Hanrahan v. Limerick Steamship Co. 554,	1190	— v. Harrison	901, 903, 927, 1789
Hansa, The	1698	— v. Harrison, Harrison, <i>In re</i>	1615, 1824
Hanson, <i>In re</i> , Foster, <i>Ex parte</i>	101	— v. London and North Western Ry. 1302	
— v. Maddox	541, 1043	— v. McL'Meel	1056
Hanson's Trade-mark, <i>In re</i>	1839, 1841	— v. National Provincial Bank	1172
Harbord, <i>In re</i>	1842	Harrop's Trusts, <i>In re</i>	1639
Hardaker v. Moorhouse	1912	Harsant v. Blaine	1022, 1234, 1525
Harden Star Hand Grenade Co., <i>In re</i> ...	1839	Harston v. Harvey	480
Harding, <i>In goods of</i>	2012	Hart, <i>In re</i> , Caldicott, <i>Ex parte</i>	147, 153
— v. Barker	1199, 1215	— v. Hernandez	2068
— v. Board of Land and Works	321	— v. Manston, Spencer, <i>In re</i>	2016
— v. Harding	62, 889	Hartcup v. Bell	44, 734, 1084, 1093
— v. Lyons	1499	Harte v. Meredith	795
Hardman and Child, <i>In re</i>	1942	Hartley, <i>In re</i> , Stedman v. Dunster	2079
— v. Child	1942	— v. Wilkinson	1863
— v. Maffett	955	Harton, The	1692
Hardwick, <i>In re</i>	23, 1741	Hartopp v. Huskisson	1249
— <i>In re</i> , Hubbard, <i>Ex parte</i>	226	Harvest, The	1693

Harvey, <i>Ex parte</i> , Player, <i>In re</i>	167	Heap v. Day	1863
— <i>In re</i> , Harvey v. Lambert	780	Heathcote, <i>In re</i> , Gilbert v. Aviolet	494
— <i>In re</i> , Peek v. Savory	2081	— v. Livesley	156
— <i>In re</i> , Phillips, <i>Ex parte</i>	179	Heaton's Trade-mark, <i>In re</i> ,	1838
— <i>In re</i> , Wright v. Woods	809	Heawood v. Bone	1097
— v. Croydon Union Rural Sanitary Authority	1489	Hector, The	40, 1699, 1701
— v. Dougherty	1418	Hedgely, <i>In re</i> , Small v. Hedgely	793, 929
— v. Harvey	69, 1641	Hedges v. London and St. Katherine Docks Co.	1717
— v. Lambert, Harvey, <i>In re</i>	780	Heinrich Bjorn, The	1715
— v. Lovekin	656, 657, 663, 887	Heintz, <i>Ex parte</i> , Heintz, <i>In re</i>	177
— v. Municipal Permanent Investment Building Society	272	Helder, <i>Ex parte</i> , Lewis, <i>In re</i>	101, 168
— v. Olliver	1897	Hellard v. Moody, Ridge, <i>In re</i>	1632
Harvey's Estate	1785	Hellier v. Hellier	1995
Harwood, <i>In re</i>	1159, 1902	Helmores v. Smith	461, 766 1332, 1338
Haseldine, <i>In re</i> , Grange v. Sturdy	796, 2025	Hemsworth Free Grammar School, <i>In re</i> , ...	314
Hasker, <i>Ex parte</i>	1177, 1493	Henderson, <i>Ex parte</i> , Henderson, <i>In re</i> 109, 901	
— v. Wood	522	— <i>In re</i> , Nouvion v. Freeman ...	1039
Haslam Engineering Co. v. Hall	27, 1348	— v. Maxwell	1445
— Foundry and Engineering Co. v. Goodfellow	1343	— v. Preston	1173, 1536
Hassard v. Clark	833	— v. Rothschild	399, 1234, 1519, 1870
Hasson v. Chambers	707	Hendry, <i>In re</i> , Watson v. Blakeney	302
Hastie's Trusts, <i>In re</i>	2022	— v. Turner	1337
Hasties and Crawford, <i>In re</i>	1774	Henley, <i>In goods of</i>	2014
Hastings, <i>In re</i> , Dearle, <i>Ex parte</i>	103	Hennessy v. Wright	637, 647, 661, 1438
— (Lady), <i>In re</i> , Hallett v. Hastings	928,	Henry v. Armitage	508, 509
1154, 2118		— v. Strong, Coleman, <i>In re</i> 974, 1880, 2040	
Hatchard v. Mège	1400, 1834	Henty v. Wrey	616, 1619
Hatten v. Russell	1620, 1933	Hepburn, <i>In re</i> , Smith, <i>Ex parte</i>	145, 1138
Hatherley v. Dunning, Dunning, <i>In re</i>	783	— v. Leather	1795
Hawes, <i>Ex parte</i> , Byrne, <i>In re</i>	1156	Heppenstall v. Hose	1941
— v. Bauman	176	Herbert, <i>In re</i>	1755
— v. Curtis, Curtis, <i>In re</i>	917	Hercules, The	1726
— v. Hawes	900	Herman v. Jeuchner	484, 594, 1234
— v. South Eastern Ry.	289, 602	— v. Royal Exchange Shipping Co. 738, 1659	
Hawke, <i>In re</i> , Scott, <i>Ex parte</i>	84	— v. Zeuchner	484, 594, 1234
— v. Brear	53, 531	Hermann Loog, <i>In re</i> , Ramsay's case	419
Hawken v. Shearer	1295	— v. Bean	639, 991, 1135, 1390, 1526
Hawkesworth v. Chaffey	465	Hernando, <i>In re</i> , Hernando v. Sawtell ...	1036, 2105
Hawkins v. Hawkins	894	Hersant v. Halse	705
Hawksford v. Giffard	333, 1039	Heske v. Samuelson	1196
Haydon v. Brown	231	Hesketh v. Bray	1572
Haynes, <i>In re</i> , Kemp v. Haynes	1633, 2075	Heslin v. Fay	1335
Hayson, <i>In re</i> , Booth v. Trail	70	Hester v. Hester	1763, 1764
Hayward's Trade Mark, <i>In re</i> ... 1837, 1848, 1851,		Hetherington's Trusts, <i>In re</i>	1915
1855		— v. Groome	239, 249
Hayward v. East London Waterworks Co. 989, 1965		— v. Hetherington	905
— v. Lely	503, 504	Hettihewage v. Queen's Advocate	332
— v. Moss	53	Hewat's Divorce Bill	904
— & Co. v. Hayward & Sons	635, 1833	Hewett v. Murray	769, 1456
Haywood v. Silber	1076	Hewitson v. Fabre	1413
Hazeldine v. Heaton	1105	Hewitt, <i>Ex parte</i> , Hewitt, <i>In re</i>	137, 210
Hazle's Settled Estates, <i>In re</i>	1624	Hewitt's Estate, <i>In re</i> , Gateshead (Mayor)	
Hazlehurst, <i>Ex parte</i> , Beswick, <i>In re</i>	86	— v. Hudspeth	304
Headington Union v. St. Olave's Union ...	1381	— and Brett's case	445
Heap, <i>In re</i> , Board of Trade, <i>Ex parte</i>	180	Heyes v. Heyes	894, 897
— v. Burnley Union	862	Heywood, <i>In re</i>	563
		— v. Mallalieu	1934
		— v. Manchester (Bishop)	689

Heyworth, <i>Ex parte</i> , Rhodes, <i>In re</i>	114	Hogan v. Sterrett	705
— v. London (Mayor).....	1538	Hogg v. Brooks	1099
Hibernian Joint Stock Co. v. Fottrell	1402	Hohenzollern Actien Gesellschaft and the Contract Corporation, <i>In re</i>	46
Hickey, <i>In re</i> , Hickey v. Colmer	612	Holborn Union v. Chertsey Union	26, 1385
Hickley, <i>In re</i>	1766	— Viaduct Land Co. v. Reg. ...	597, 1573
— v. Strangways, Strangways, <i>In re</i>	1622	Holburne, <i>In re</i> , Coates v. Mackillop	303
Hickman, <i>In re</i> , Strawbridge, <i>Ex parte</i>	94, 175, 176	Holden, <i>In re</i> , Holden v. Smith	2059
— v. Williamson, Johnson, <i>In re</i> ...	2029	— <i>In re</i> , Official Receiver, <i>Ex parte</i>	160, 1896
Hicks v. Dunstable Overseers	1369	Holgate v. Brett	1368
Hiddings v. De Villiers	329, 775	— v. Shutt	277, 1451, 1452
— v. Denysen	339	Holland, <i>In re</i> , Warren, <i>Ex parte</i>	187
Higgins, <i>In re</i> , Day v. Turnell	1576, 1618	— v. Dickson, or Crystal Palace Co.	355
— and Percival, <i>In re</i>	1937	— v. Worley	680, 985
— v. Browne	1433	Holliday, <i>Ex parte</i> , Emperor Life Assu- rance Society, <i>In re</i>	440
— v. Hall	850	— and Godlee, <i>In re</i>	1756
— v. Hill	483	— and Wakefield (Mayor), <i>In re</i>	55, 1961
— v. Scott	1509	Hollingshead, <i>In re</i> , Hollingshead v. Webster	1147
Higgs v. Weaver, Weaver, <i>In re</i>	209	Hollingworth v. Willing, Weir, <i>In re</i>	628, 1309
Highworth and Swindon Union v. West- bury-on-Severn Union	1382	Hollins v. Verney	673
Hilbers v. Parkinson	951	Hollman v. Pullin	1520
Hill, <i>Ex parte</i> , Darbyshire, <i>In re</i>	204	Holloway, <i>In re</i> , Holloway v. Holloway ...	1884
— <i>Ex parte</i> , Easy, <i>In re</i>	84, 112	— <i>In re</i> , Young v. Holloway	649, 659, 2014
— <i>Ex parte</i> , Lane, <i>In re</i>	240	Holly v. Burke	706
— <i>In re</i>	1759, 1763, 1776	Hollyoak, <i>Ex parte</i> , Field, <i>In re</i>	139
— to Chapman, <i>In re</i>	2029	Holmes, <i>In re</i>	1257, 1495
— v. East and West India Dock Co.....	123	— v. Brierley	883, 967
— v. Edward	866, 1086	— v. Durkee	220, 468, 1527
— v. Grant, Dickson, <i>In re</i>	971	— v. Shaw	1506
— v. Hart-Davis	653, 762, 1504	Holt v. Beagle	1275
— v. Somerset	1977	Holton v. London and South-Western Ry.	282
— v. Spurgeon, Love, <i>In re</i>	813, 1896	Holy Trinity Church, Stroud Green, <i>In re</i>	693
— & Co. v. Hill	353, 488	Holyland v. Lewin	2101
Hilleary and Taylor, <i>In re</i>	532	Homan, <i>In goods of</i>	2009
Hillyard v. Smyth	1409	Home, <i>Ex parte</i> , Home, <i>In re</i>	144, 161, 827, 943
Hilton v. Tucker	226, 1357	— <i>In re</i> , Edwards, <i>Ex parte</i>	87
Hinks, <i>In re</i> , Verdi, <i>Ex parte</i>	142	Home Secretary and Fletcher, <i>In re</i>	1229
Hinshelwood, <i>Ex parte</i> , Ellis, <i>In re</i>	103	Homer v. Cadman	1976
Hintz, <i>Ex parte</i> , Hintz, <i>In re</i> ,	177	— District Consolidated Gold Mines, <i>In re</i> , Smith, <i>Ex parte</i>	382
Hipgrave v. Case	1503, 1798	Homfray, <i>In goods of</i>	1993
Hire Purchase Furnishing Co. v. Richens	408	Honeybone v. Hambridge	710
Hitchins v. Morrieson	906, 2032	Honygar, <i>Ex parte</i> , Mahler, <i>In re</i>	89
Hoare v. Hoare	306	Hood v. Randell, Randell, <i>In re</i>	40
— v. Stephens	1274	Hooper v. Exeter (Mayor)	1233
Hobbs, <i>In re</i> , Hobbs v. Wade.....	971, 1151	— v. Hawkins	1980
— v. Wayet	772, 1877, 2092	— v. Smith, Smith, <i>In re</i>	31
Hobson, <i>In re</i>	154	Hope, The	1787
— <i>In re</i> , Walker v. Appach ...	1819, 2125	— v. Croydon and Norwood Tramways Co.	374
— <i>In re</i> , Webster v. Rickards	924	— v. Evered	1171
Hockady, <i>In re</i> , Nelson, <i>Ex parte</i>	257	Hopkinson v. Caunt	1230
Hockey v. Evans	1041	Hopper's Trusts, <i>In re</i>	1910
Hodge v. Reg.	325	Horace, The	536, 1728
Hodges v. London Tramways Omnibus Co.	990, 1223		
Hodgson, <i>In re</i> , Beckett v. Ramsdale	728, 754, 805, 807, 1329		
Hodkinson v. London and North-Western Ry.	286		
Hodson and Howes, <i>In re</i>	1243		

Horan v. Macmahon	626, 1741	Hubbuck v. Helms	374, 1482
Hordern v. Commercial Union Assurance Co.	751, 1006	Hudson's Trade-marks, <i>In re</i>	1854
Hornby v. Silvester	341	Hudson, <i>In re</i> , Creed v. Henderson ..	474, 478
Horne, <i>In re</i> , Nassan, <i>Ex parte</i>	126	— v. Osgerby	537, 1858
— and Hellard, <i>In re</i>	371	Hugall v. McKean	1081
Horne's Settled Estate, <i>In re</i>	1623	Huggins, <i>Ex parte</i> , Woodward, <i>In re</i>	126
Horner, <i>In re</i> , Eagleton v. Horner ...	2023, 2032	Hughes' Trustees, <i>Ex parte</i> , Ruthin Ry., <i>In re</i>	1319
— v. Cadman	1976	Hughes, <i>Ex parte</i> , Hughes, <i>In re</i>	115, 116
— v. Whitechapel Board of Works	538, 1184, 1215	— <i>Ex parte</i> , Thackrah, <i>In re</i>	127
Horniblow, <i>In re</i> , Official Receiver, <i>Ex parte</i> ..	90	— <i>In re</i>	61, 1999, 2002
Horsburgh's Application, <i>In re</i>	1843, 1845	— In goods of	2001
Horsell v. Swindon Local Board	859	— <i>In re</i> , Hughes, <i>Ex parte</i>	115, 116
Horsley v. Price	1667	— v. Anderson, Butler's Trusts, <i>In re</i> ..	9, 883, 1820
Horton, <i>In re</i> , Horton v. Perks	735, 960	— v. Coles	1153
Horwood, <i>In re</i>	761, 1919	— v. Finney	553
Hosking v. Smith	272, 1247	— v. Little	30, 237, 242, 257, 1045
Hospital for Incurables, <i>In re</i>	312, 751	— v. Twisden	823, 1141, 1327, 1750
Hotchkin's Settled Estates, <i>In re</i>	1637	— v. West	798, 1402
Hotchkys, <i>In re</i> , Freke v. Calmady... 1894, 2111		Hugill v. Wilkinson	1152
Hough, <i>Ex parte</i> , Windus, <i>In re</i>	154, 155	Hulda, The	1722
— v. Head	1012	Hulkes, <i>In re</i> , Powell v. Hulkes	792
— v. Windus	154, 767, 1804	Hull, Barnsley, and West Riding Ry., <i>In re</i> ..	1541, 1549
Houghton, <i>In re</i> , Houghton v. Brown	2061	— Barnsley, and West Riding Junction Ry. v. Yorkshire and Derbyshire Coal Co.	299
— v. Sevenoaks Estate Co.	1268	Hulme's Trusts, <i>In re</i>	1908
Houghton's Estate, <i>In re</i>	1636	Humber, The	1729
Houlder v. Merchants' Marine Insurance Co.	1011	Hume, <i>In re</i>	1919
Hounsell v. Suttill	510	— <i>In re</i> , Trenchard's Will, <i>In re</i>	1919
House, <i>Ex parte</i> , May, <i>In re</i> ...	725, 731, 1286, 1395	Humphery v. Sumner	40
— Property and Investment Co. v. Horse Nail Co.	1405	Humphrey v. Earle	713
Household, <i>In re</i> , Household v. Household ..	1611	Humphreys v. Jones	1769
— v. Fairburn	1352, 1832	Humphries, <i>In re</i> , Smith v. Millidge	2024
Houstoun v. Sligo (Marquis) 726, 747, 1077, 1433		— v. Taylor Drug Co.	1439
Howard v. Clarke	1173, 1357	Hunnings v. Williamson	749, 1208
— v. Graves	557	Hunt's Trusts, <i>In re</i>	2098
— v. Harris	74	Hunt, <i>Ex parte</i> , Cann, <i>In re</i>	256
— v. Maitland	1946	— v. Fensham	767
— v. Patent Ivory Manufacturing Co.	366, 402	— v. Hunt	913, 928, 988
— v. Refuge Friendly Society ...	482, 837, 1001	— v. Parry, Alford, <i>In re</i>	2123
Howarth v. Brearley	1206	— v. Williams	837, 1157
— v. Howarth ...	619, 896, 897, 898, 1491	Hunter v. Johnson	1594
Howe, <i>In re</i>	88, 184	— v. Myatt	1271
— In goods of	2032	— v. Northern Marine Insurance Co.	1010
— v. Finch	1194	Huntingdon Election, <i>In re</i> , Clark, <i>Ex parte</i>	510
— v. Smith	1797, 1950	Hurlbatt and Chaytor, <i>In re</i>	1927
Howell v. Dawson	1042, 1455	Hurst v. Hurst	811
Howitt v. Nottingham and District Tramways Co.	1862	— v. Parry, Alford, <i>In re</i>	2123
Howlett v. Hodson, Coppard, <i>In re</i>	2038	— v. Taylor	1295
Howorth v. Minns	1047	Husband v. Martin, Clark, <i>In re</i>	305
Hoyland Silkstone Colliery, <i>In re</i>	419	Hutcheson v. Eaton	46, 1520
Hubback, <i>In re</i> , International Hydropathic Co. v. Hawes	443, 783	Hutchings to Burt, <i>In re</i>	924
Hubbard, <i>Ex parte</i> , Hardwick, <i>In re</i>	226	— v. Humphreys	1801
		Hutchinson, <i>Ex parte</i> , Hutchinson, <i>In re</i> ..	155, 772

James v. Parry	1842	Johnstone v. Browne	606, 930
— v. Ricknell	1736	— v. Marks	966
— v. Wywill	857	— v. Milling	490
— v. Young	1229	— v. Spencer (Earl)	496
James' Settled Estates, <i>In re</i>	1625, 2042	Jonas v. Long	557
James's Trade-Mark, <i>In re</i>	1842	Jones's Trade-mark, <i>In re</i>	1835
Jameson v. Midland Ry.	290, 491, 603	Jones, <i>Ex parte</i> , Stephens, <i>In re</i>	203
Japp v. Campbell	1657	— <i>In re</i>	1160, 1624, 1755, 1902
Jarrett v. Hunter	470	— <i>In re</i> , Calver v. Laxton	785
Jaynes, <i>Ex parte</i> , Dowson, <i>In re</i>	198	— <i>In re</i> , Greene v. Gordon	2096
Jeffery v. Cancer Hospital	1998	— <i>In re</i> , King, <i>Ex parte</i>	1750
Jeffreys, <i>Ex parte</i>	1069	— v. Andrews	31, 651
Jellard, <i>In re</i>	1487, 1900	— v. Ashwin	735, 1328
Jenkin's Case	141, 394	— v. Blake, Blake, <i>In re</i>	802, 811, 1381
Jenkins, <i>Ex parte</i> , Glanville, <i>In re</i> ..	90, 99, 164	— v. Cheverton	87
— v. Rees	1466	— v. Curling	521, 532, 541
Jenkinson, <i>In re</i> , Nottingham Bank, <i>Ex</i> <i>parte</i>	125	— v. Dorothea Co.	1101
— v. Brandley Mining Co.	369	— v. Harding	2004
Jenks v. Turpin	836	— v. Harris	1507
Jenner-Fust v. Needham	1274	— v. Hawkins, Stocken, <i>In re</i>	801
Jenney v. Mackintosh	1418	— v. Jaggar	613
Jennings' Estate, <i>In re</i>	1243	— v. Jones	1068
Jensen, <i>In re</i> , Callow, <i>Ex parte</i>	125, 198	— v. Liverpool Corporation	1296
Jersey (Earl) v. Neath Union	1226	— v. Mason, Muffett, <i>In re</i> ..	795, 2035, 2079
Jesus College, Cambridge, <i>Ex parte</i>	1128	— v. Parry	859
Jetley v. Hill	914	— v. Richards	661
Jewson v. Gatti	1295	— v. Scottish Accident Insurance Co.	1417
Jobling, <i>Ex parte</i> , Wheal Buller Consols, <i>In re</i>	444	— v. Slee	830
Johann Sverdrup, The	1679	— v. Thomas	635
John, <i>In goods of</i>	2008	— v. Whitaker	1531
John McIntyre, The	1685	— v. Williams, Williams, <i>In re</i> ..	82, 210, 1808
Johnson, <i>Ex parte</i> , Chapman, <i>In re</i> ..	100, 236, 255, 260, 762	Jones' Trustees v. Gittens	555, 1538
— <i>Ex parte</i> , Johnson, <i>In re</i>	102	Jonmenjoy Coondoo v. Watson	1391
— <i>In re</i>	460	Jordan, <i>In re</i> , Harrison, <i>Ex parte</i>	139
— <i>In re</i> , Johnson, <i>Ex parte</i>	102	— <i>In re</i> , Kino v. Picard	932, 933
— <i>In re</i> , Hickman v. Williamson ..	2029	Joseph v. Lyons	241, 259
— <i>In re</i> , Sly v. Blake	802, 1145	Josolyne v. Meeson	1211
— <i>In re</i> , Wagg v. Shand	805	Jowett v. Idle Local Board	852
— and Tustin, <i>In re</i>	1939	Joynt's Divorce Bill	904
— and Weatherall, <i>In re</i>	1756	Judge v. Bennett	567, 585
— v. Altrincham Permanent Benefit Building Society	276	Judkin's Trusts, <i>In re</i>	791, 971, 2123
— v. Croydon (Mayor)	513	Jupp, <i>In re</i> , Jupp v. Buckwell	916
— v. Hook	1866	— v. Powell	1146
— v. Johnson	936	Justice v. Fooks	1137
Johnston, <i>In re</i> , Cockerell v. Essex (Earl) ..	1578, 2055, 2070, 2072	Justitia, The	1656
— v. English	1403		
— v. Great Northern Ry.	1303		
— v. Hill, Dawson, <i>In re</i>	2080		
— v. Johnston	627, 824, 963		
— v. Salvage Association	1019, 1458, 1534		
Johnstone's Settlement, <i>In re</i>	1628		
Johnstone, <i>In re</i> , Abrams, <i>Ex parte</i>	138		
— <i>In re</i> , Angier, <i>Ex parte</i>	200		
— <i>In re</i> , Singleton, <i>Ex parte</i>	89		

Kearsley, <i>Ex parte</i> , Genese, <i>In re</i> ...	139, 170, 173, 197	Kimberley North Block Diamond Mining Co., <i>In re</i> , Wernher, <i>Ex parte</i>	391
Keay v. Boulton.....	2034	King's Estate, <i>In re</i>	1869, 2092
Keeley's Trusts, <i>In re</i>	1905	King, <i>Ex parte</i> , Ingham, <i>In re</i>	148
Keeling, <i>In re</i> , Blanchett, <i>Ex parte</i>	105	— <i>Ex parte</i> , Jones, <i>In re</i>	1750
Keep's Trade-mark, <i>In re</i>	1855	— <i>In re</i> , Mesham, <i>Ex parte</i>	150
Keeping and Gloag, <i>In re</i>	1766	— v. Chick, Talbott, <i>In re</i>	808
Kchoe, <i>In goods of</i>	1997	— v. King.....	2020, 2104, 2110
— v. Waterford and Limerick Ry.....	400	— v. Lucas	926
Keith v. Burke	221	— v. Oxford Co-operative Society	560
— v. Butcher	1407	Kingdon, <i>In re</i> , Wilkins v. Pryer ...	1995, 2098
— v. Day	1273	— v. Kirk	1799
Kelday, <i>In re</i> , Meston, <i>Ex parte</i>	107	Kingsbridge Union v. East Stonehouse Guardians	1383
Kellard v. Rooke	1192	Kingstown Commissioners, <i>Ex parte</i>	1539
Keller, <i>In re</i>	23	— Commissioners, <i>Ex parte</i> , Local Government Board, <i>In re</i> ...	530
Kellock, <i>In re</i>	1752, 1754	Kinnaird v. Trollope	1278
Kells Union, <i>In re</i> , Smith, <i>Ex parte</i>	1125	Kino v. Picard, Jordan, <i>In re</i>	932, 933
Kelly's Settlement, <i>In re</i> , West v. Turner	961	Kintore (Countess) v. Kintore (Earl)	1604
Kelly v. Browne	766, 1643	Kirby Hall, The.....	1685, 1724
— v. Kellond	617	Kirk, <i>Ex parte</i> , Dashwood, <i>In re</i>	138
— v. Kelly	810	— <i>In re</i> , Nicholson v. Kirk	2025
— v. London and Staffordshire Fire Insurance Co.	1005	— v. Coates	849
Kelson v. Ellis, Ellis' Trusts, <i>In re</i>	1486	Kirpatrick v. South Australian Insurance Co.	1005, 1360
Kemmis v. Kemmis	2124	Kirwan's Trusts, <i>In re</i>	2099, 2100
Kemp, <i>In re</i>	972	Kirwin v. Hines.....	666
— <i>In re</i> , Luck, <i>Ex parte</i>	101, 162	Klœbe, <i>In re</i> , Kannreuther v. Geiselbrecht	794, 1034
— v. Goldberg	1268, 1437	Knatchbull's Settled Estate, <i>In re</i>	1635
— v. Haynes, Haynes, <i>In re</i>	1633, 2075	Knebworth Settled Estates, <i>In re</i>	1636
Kenmare (Lord) v. Casey	675, 1498	Knight, <i>Ex parte</i> , Firkbank, <i>In re</i>	88
Kennard v. Simmons	1070, 1536	— <i>In re</i> , Cooper, <i>Ex parte</i>	143
Kennedy, <i>Ex parte</i> , Willis, <i>In re</i>	228	— <i>In re</i> , Knight v. Burgess	2067
— v. Lyell	1826	— <i>In re</i> , Knight v. Gardner	34, 764, 800, 812
— v. Purcell	338	— <i>In re</i> , Smith, <i>Ex parte</i>	152
Kensington (Lord), <i>In re</i> , Bacon v. Ford	1061	— v. Bowers	849
Kensit v. Great Eastern Ry.	681, 1971	— v. Clarke	702, 1497, 2138
Kent's case	434, 447	— v. Coales	56
Kenyon's Estate, <i>In re</i> , Mann v. Knapp ...	2089	— v. Cotesworth	1013
Kenyon v. Eastwood.....	549	— v. Gardner, Knight, <i>In re</i>	34, 764, 800, 812
Kerford v. Seacombe, Hoylake, and Dee- side Ry.	1116	— v. Whitmore	1860
Keroula, The	1651	Knight's Trusts or Will, <i>In re</i>	523, 541, 1898, 1913
Kerr v. Chambers	710	Knill v. Prowse	62
Kershaw, <i>In re</i> , Drake v. Kershaw	2112	Knott, <i>In re</i> , Bax v. Palmer	1897
— v. Kershaw	934	Knowles, <i>In re</i> , Rainford v. Knowles	2023
— v. Sheffield (Corporation)	868	— v. Booth	558, 830, 831
Keswick Old Brewery Co., <i>In re</i>	414	— v. Roberts	1505
Kettlewell v. Watson.....	629, 1950, 1959	Knowles' Settled Estates, <i>In re</i>	1620, 1629
Kewney v. Attrill	774	Knox v. Mackinnon	1874
Keyse v. Keyse	895	Koster, <i>Ex parte</i> , Park, <i>In re</i>	608
Kibble v. Payne, Payne's Settlement, <i>In</i> <i>re</i>	1921	— v. Park	608
Kiddle v. Lovett.....	490, 604	Krantzcke v. Robinson.....	954
— v. Kidston	1648	Kronprinz, The	1696
Kiff v. Roberts, Roberts, <i>In re</i>	28, 1398, 2065	Kuhn's Trade-marks, <i>In re</i>	1854, 1855
Kilford v. Blaney, Meere, <i>In re</i>	2117		
Killmister v. Fitton	1180		
Kimber v. Paravicini	693		

Kurtz v. Spence ... 750, 1135, 1353, 1354, 1355, 1504	Lane, <i>In re</i> , Lane v. Robin..... 1034
Kyle v. Barbor..... 865, 1365	— v. Collins 849
Kyshe v. Alturas Gold Co. 358	— v. Lane, Llewellyn, <i>In re</i> 802
	— v. Moeder 1100
	— v. Rhoades, Rhoades, <i>In re</i> 2073
	— v. Robin, Lane, <i>In re</i> 1034
	— v. Tyler 260, 1093
	Langen v. Tate 757
	Langworthy v. Langworthy 887
	Lanyon v. Martin 475
	Lapington v. Lapington 892
	Laphorn v. Harvey 1981
	Lapthorne v. St. Aubyn 265
	Larkin v. M'Inerney 1422, 1782
	Larking, <i>In re</i> , Larking v. Larking 2091
	Lascelles, <i>In re</i> , Genese, <i>Ex parte</i> , 27, 609
	Last v. London Assurance Corporation 1003, 1568
	Latimer v. Harrison, Harrison, <i>In re</i> 785
	— v. Official Co-operative Society ... 684
	Lauderdale Peerage, The 748, 882, 1026, 1599, 1600
	Lavery v. Pursell 472, 1794
	Law v. Philby 1420
	Lawes v. Maughan 1533
	Lawley v. Merricks 834
	Lawrence v. Lawrence..... 43
	— v. Norreys (Lord) 1436
	Laws v. Smith 1651, 1721
	Lawson v. Vacuum Brake Co..... 757
	Lawton v. Elwes, Corsellis, <i>In re</i> 981, 1779
	Lay, <i>In re</i> , Woodward, <i>Ex parte</i> 126
	Lazarus, <i>In re</i> , Godfrey, <i>Ex parte</i> 173
	Le Blond v. Curtis 1472
	Le May v. Welch 1858
	Le Phénix, <i>In re</i> 1004
	Lea, <i>In re</i> , Lea v. Cooke 306
	— v. Abergavenny Improvement Commis- sioners 1968
	— v. Cooke, Lea, <i>In re</i> 306
	— v. Facey 7, 878
	— v. Parker 552
	— Conservancy Board v. Hertford (Mayor) 1311, 1807
	Leader v. Duffey 959
	— v. Hayes 1101
	Leaf's Trade Mark, <i>In re</i> 528, 1839, 1842, 1849
	Leahy v. O'Grady, Harnett, <i>In re</i> 754, 805
	— v. Tobin 1403
	Leamington Priors Gas Co. v. Davis 839
	Learoyd v. Whiteley..... 1873
	Leathersellers' Co., <i>Ex parte</i> , Tickle, <i>In re</i> 142, 193, 1101
	Leaver, <i>Ex parte</i> , Metropolitan (Brush) Electric Light and Power Co., <i>In re</i> 438
	Ledbrook v. Passman 1246
	Ledgard v. Bull 1345
	Ledger, <i>Ex parte</i> , Postlethwaite, <i>In re</i> ... 169
	Leduc v. Ward 1406, 1661
	Lee v. Abdy 998, 1037
	— v. Barnes 254
L.	
La Trinidad v. Browne 764	
Lacey, <i>In re</i> , Taylor, <i>Ex parte</i> 106	
— v. Waghorne 1246	
— and Sons, <i>In re</i> 1758, 1766	
Lacon v. Tyrrell 1275	
Lacy v. Stone, Pitt, <i>In re</i> 306, 2121	
Ladds v. Walthew 646	
Ladywell Mining Co. v. Brookes or Huggons 356	
Laertes, Cargo ex 1662, 1705	
Laine, <i>In re</i> , Berner, <i>Ex parte</i> 147	
Lake v. Bell, Bell, <i>In re</i> 1139	
— v. Haseltine 1441	
Lamb, <i>In re</i> , Gibson, <i>Ex parte</i> 99, 168	
Lamb's Trusts, <i>In re</i> 1908	
Lambert, <i>In re</i> 745	
— <i>In re</i> , Stanton v. Lambert 913, 1577, 2120	
Lambert's Estate, <i>In re</i> 1254	
— Trade-Mark, <i>In re</i> 1848	
Lambeth Guardians v. Bradshaw... 1165, 1387, 2010	
Lambton v. Parkinson..... 525, 1447	
Lamond, <i>Ex parte</i> , Dod, Longstaffe & Co., <i>In re</i> 557, 1776	
Lamplugh v. Yalding Overseers 700, 1379	
Lancashire Cotton Spinning Co., <i>In re</i> , Carnelley, <i>Ex parte</i> 423	
— and Yorkshire Ry., <i>In re</i> 1124	
— v. Green- wood 292	
— v. Knowles 1970	
— Telephone Co. v. Manchester Overseers 1374	
Lancaster, <i>Ex parte</i> , Marsden, <i>In re</i> 162	
— The 1711	
— v. Allsup... 1334	
— v. Harlech Highway Board..... 1981	
— JJ. v. Newton Improvement Commissioners 1982	
— JJ. v. Rochdale (Mayor) ... 1982	
Land Development Association, <i>In re</i> , Kent's case 434, 447	
Land Loan Mortgage and General Trust Co. of South Africa, <i>In re</i> , Boyle's case 453	
Landau, <i>In re</i> , Brown, <i>Ex parte</i> 204	
Landergan v. Feast 1426	
Landowners' West of England Drainage Co. v. Ashford 540	
Landrock, <i>In re</i> , Fabian, <i>Ex parte</i> 131	
Lane, <i>In re</i> , Hill, <i>Ex parte</i> 240	

Lee v. Chapman, <i>Ex parte</i> , Asphaltic Paving Co., <i>In re</i>	427, 491	Lewis, <i>In re</i> , Lewis v. Williams.....	42
— v. Dunsford.....	1269	— v. Aberdare and Plymouth Co.	1271
— v. Neuchatel Asphalte Co.	400	— v. Driscoll	234
— v. Soames	1933	— v. Fermor	15
— v. Turner.....	235	— v. Graham	1202
— and Hemingway, <i>In re</i>	522	— v. Herbert	1411
Leeds v. Leeds	888	— v. James	763, 1225, 1425
— (Mayor) v. Robshaw	869	— v. Jones	18
— Estate Building Co. v. Shepherd... 361, 364		— v. Lewis	551
Leek Improvement Commissioners v. Staffordshire JJ.	1983	— v. Pritchard, Pugh, <i>In re</i>	543
Lees, <i>In re</i>	1164	— v. Ramsdale.....	1391, 1517
Leete v. Wallace	1001, 1522	— v. Weston Super Mare Local Board	865
Leggott v. Western	772	— v. Williams, Lewis, <i>In re</i>	42
Leicester Club and County Race Course Co., <i>In re</i>	433	Lhoneux v. Hong Kong and Shanghai Banking Corporation	1410
— Urban Sanitary Authority v. Holland	1065	Licensed Victuallers' Newspaper Co. v. Bingham.....	1828
Leicestershire Banking Co., <i>Ex parte</i> , Dale, <i>In re</i>	207	Liebig's Extract of Meat Co. v. Anderson	1832
Leigh v. Burnett	1248	Liffey, The	1706, 1730
— v. Dickeson	1076, 1235, 1821	Light v. Anticosti Co.	758
— v. Leigh	1876	Lightbody's Trusts, <i>In re</i>	1917
— v. Rumney, Revill, <i>In re</i>	806	Lightbound v. Bebington Local Board.....	867
Leighton v. Price, Price, <i>In re</i>	1627	Lightbown v. McMyn, McMyn, <i>In re</i> 784, 914, 1535	
Leitch v. Abbott.....	658, 1440	Lilley v. Rankin.....	216, 482, 838
Lemon v. Simmons	632, 941	Limehouse Board of Works, <i>Ex parte</i> , Val-lance, <i>In re</i>	748
Lemons, <i>In re</i>	976	Limpus v. Arnold	2127
Lenders v. Anderson.....	1417	Lindo, <i>In re</i> , Askin v. Ferguson.....	2106
Lenham v. Barber.....	512	Lindsell v. Phillips, Powers, <i>In re</i> ...	804, 1148, 1152
Lennox, <i>Ex parte</i> , Lennox, <i>In re</i>	111, 612	Lindsey, <i>Ex parte</i> , Bates, <i>In re</i>	106, 112
Leonard v. Wells	1837, 1843, 1847, 1850	Line v. Warren.....	27, 511, 512
Leonard's Trade Mark, <i>In re</i> ... 1837, 1843, 1847, 1850		Linen and Woollen Drapers' Institution, <i>In re</i>	1564
Leptir, The	1673	Linton, <i>Ex parte</i> , Linton, <i>In re</i> ...	143, 607, 902
Lesingham's Trusts, <i>In re</i>	907, 2035	— v. Linton.....	143, 607, 902
Leslie, <i>Ex parte</i> , Leslie, <i>In re</i>	116	Linwood v. Andrews	211, 462
— v. Cave	650	Lion Mutual Marine Insurance Association v. Tucker	456, 1019, 1803
— v. Clifford	1446	Lipscombe, <i>Ex parte</i> , Lipscombe, <i>In re</i> ...	111
Letterstedt v. Broers.....	1912	Lisbon-Berlyn Gold Fields v. Heddle	1414
Lever v. Goodwin	1830	Lishman v. Christie	1660
Leverington, The	1690	Litchfield v. Jones.....	68, 611, 666, 1742
— In goods of.....	2002	Little, <i>In re</i>	933
Levy's Trusts, <i>In re</i>	192	Littleton (Post-mistress), <i>Ex parte</i>	640
Levy v. Abercorris Slate Co.....	368, 369	Liverpool Guardians v. Portsea Overseers... 1382	
— v. Merchants' Marine Insurance Co. 1010, 1017		Liverpool Household Stores Association v. Smith	638
— v. Polack	241	Livesey, <i>In re</i>	156
— v. Sewill, Moss, <i>In re</i>	1023, 1282	Livietta, The.....	1655, 1710, 1791
Lewin, <i>In re</i>	1397	Llangennech Coal Co., <i>In re</i>	293, 1137
— v. Jones	1276	Llewellyn, <i>In re</i> , Llewellyn v. Williams ... 1633	
— v. Killey.....	2048	— <i>In re</i> , Lane v. Lane	802
— v. Trimming	522, 539	Lloyd, <i>In re</i> , Edwards v. Lloyd.....	1640
— v. Wilson	1149	— In goods of	2006
Lewis, <i>Ex parte</i>	1176, 1223, 1481	— v. Bottomley	1850
— <i>Ex parte</i> , Clagett, <i>In re</i>	1022, 1060	— v. Lloyd	833, 2067
— <i>In re</i> , Foxwell v. Lewis	495, 2109	— Generale Italiano, <i>In re</i>	409
— <i>In re</i> , Helder, <i>Ex parte</i>	101, 168	Lloyd's Banking Co. v. Jones	1236, 1251

Lloyd's Trade-mark, <i>In re</i>	1850	London and Lancashire Paper Mills Co., <i>In re</i>	439, 440, 1239, 1949
— Trustees, <i>In re</i>	1912	— and Provincial Electric Lighting Co., <i>In re</i> , Hale, <i>Ex parte</i>	349
Local Government Board, <i>In re</i> , Kings- town Commissioners, <i>Ex parte</i>	530	— and Provincial Fire Insurance Co., <i>In re</i>	378
Lock v. Willis, Bradbrook, <i>In re</i>	1818	— and Provincial Provident Associa- tion, <i>In re</i> , Mogridge's case	452
Locke v. Dunlop	2034	— and Southern Counties Freehold Land Co., <i>In re</i>	357
— v. White	1466, 1501	— and Staffordshire Fire Insurance Co., <i>In re</i> , Wallace's case	350
Lockhart v. St. Albans (Mayor)	1071	— and Westminster Supply Associa- tion v. Griffiths	385
— v. Webster	476	— and Yorkshire Bank v. Belton	1109
Lockwood v. Sikes	1616	— — — v. Cooper	651
— v. Tunbridge Wells Local Board	1359	— — — v. Pritt	487
Loder's Trusts, <i>In re</i>	939, 1285	Lord v. Hayward, Smith, <i>In re</i>	2025
Lofthouse, <i>In re</i>	973, 1882	Lord Advocate v. Young	1605
Lomax v. Ward	158	Loring v. Davis	1524
Long, <i>Ex parte</i> , Long, <i>In re</i>	106	Loughborough Highway Board v. Curzon	26, 1984
— v. Lane	2050	Lound v. Grimwade	484
Longfield v. Bantry	2089	Lovat Peerage, The	745, 1599
Longnewton, The	1692	Love, <i>In re</i> , Hill v. Spurgeon	813, 1896
Longstaffe, <i>In re</i> , Blenkarn v. Longstaffe	762	— v. Bell	1227
London (Mayor), <i>Ex parte</i>	1128, 1768	— v. Hills, Miller, <i>In re</i> , French, <i>In re</i>	1896, 1752
— — — <i>Ex parte</i> , Sion College, <i>In re</i>	1130	Lovell v. Wallis	625, 762
— — — v. Brooke	927	Lovely v. White	72
London Alliance Discount Co. v. Kerr	931	Loving, <i>Ex parte</i> , Ayshford, <i>In re</i>	166
London, Brighton, and South Coast Ry. v. Truman	1311, 1546, 1807	— — — <i>Ex parte</i> , Murrell, <i>In re</i>	124
London Celluloid Co., <i>In re</i>	383	Lowcock v. Broughton Overseers	712
— — — — — Bayley and Hanbury's case	449, 1200	Lowe v. Dixon	1324, 1531
London, Chatham and Dover Ry. v. South- Eastern Ry.	1465, 1551	— v. Fox	619, 940, 1169, 1825
London Financial Association v. Kelk	401	Lowenthal, <i>In re</i> , Beesty, <i>Ex parte</i>	84
— Founders' Association v. Clarke	381	Lowestoft (Manor of), <i>In re</i> , Reeve, <i>Ex</i> <i>parte</i>	596, 1126
— Land Company v. Harris	1445	Lowndes, <i>In re</i> , Trustee, <i>Ex parte</i>	159, 194, 983
— Road Car Company v. Kelly	1448	Lowry v. Lowry	2064
— School Board v. Duggan	1593	Lowther v. Curwen	1719
— — — v. St. Leonard's, Shoreditch	1373	— v. Heaver	1503
— — — v. Wood	1593	Lucas, <i>In re</i> , Parish v. Hudson	44
— — — v. Wright	1594	— v. Harris	59, 771, 1363, 1455
— Scottish Permanent Benefit Society v. Chorley	528, 1778	— v. Martin	173
— Steam Dyeing Company v. Digby	536, 1478	Luck, <i>Ex parte</i> , Kemp, <i>In re</i>	101, 162
— Street, Greenwich, and London, Chatham, and Dover Ry., <i>In re</i>	1131	Luddy, <i>In re</i> , Peard v. Morton	2044
— Tilbury, and Southend Ry. v. Kirk	664	Luddy's Trustee v. Peard	1740
— Wharfing Co., <i>In re</i>	540	Ludford, <i>In re</i>	158, 1644
— and Blackwall Ry. v. Cross	51, 1121, 1436	Ludmore, <i>In re</i>	158, 1644
— and County Banking Co. v. Firmin, Firmin, <i>In re</i>	612	Lulham, <i>In re</i> , Brinton v. Lulham	827, 952, 1867
— and County Banking Co. v. London and River Plate Bank	1304	Lumb v. Beaumont	1449, 1498, 1504
— and County Banking Co. v. Terry, Sherry, <i>In re</i>	80, 1360, 1528	Lumley v. Nicholson	1521
— and County Plate Glass Insurance Co., <i>In re</i>	379	— v. Simmons	239, 244, 245, 246, 252
— and Lancashire Fire Insurance Co. v. British American Association	56	Lund v. Campbell	54, 530
		Lush, <i>In goods of</i>	2007
		Lutton v. Doherty	862
		Lybbe v. Hart	121, 1090, 1808
		Lydia, The	1729

Lydney and Wigpool Iron Ore Company v. Bird.....	22, 356, 537, 1443, 1744
Lyell v. Kennedy	648, 650, 663, 664, 665, 748, 1149
Lynch v. Commissioners of Sewers.....	741, 1113
— v. Lynch.....	607, 894
— v. Macdonald	1471
— v. Wheatley	717
Lyndon's Trade-mark, <i>In re</i>	1845
Lyon v. Morris.....	252, 1044
Lyons, The	1652
Lyton (Earl) v. Devey	1135

M.

M. (falsely called D.) v. D.....	885, 887
Maberly, <i>In re</i> , Maberly v. Maberly	1876
Maberly's Settled Estate, <i>In re</i>	1629
McAllister v. McAllister	803
McAlpine, <i>Ex parte</i> , McAlpine, <i>In re</i>	176
MacArthur v. Hood	1406
Macauliffe and Balfour, <i>In re</i>	1884
McBean v. Deane	691
McCane, <i>In goods of</i>	2007
McCartan v. North-Eastern Ry.	284
McCarthy v. Cork Steam Packet Co.	36
McCaull v. Strauss	468, 1512
McClean v. Prichard	507, 706
McClellan, <i>In re</i> , McClellan v. McClellan ..	523, 542, 809
— v. Clark, Sayer, <i>In re</i>	2086
McConnell, <i>In re</i> , Saunders v. McConnell ..	39
McCormick v. Heyden	1168, 2013
McDermott, <i>Ex parte</i> , McHenry, <i>In re</i> ...	177
M'Devitt v. Connolly	1813
McDonald v. Cloghessy, Cloghessy, <i>In re</i> ..	809
Macdonald v. Lochrane	514
— v. Tacquah Gold Mines Co. ...	70
— v. Whitfield	220, 326
Macdonnell v. Marsden	1189
Macdougall v. Knight	634
MacDowall's Case	442, 1188
Macey v. Gilbert	252
M'Evoy v. Waterford Steamship Co.	554, 1196, 1290
McEwan v. Crombie	807, 812
Macfarlane, <i>In goods of</i>	1995
— v. Lister	1788, 1791
M'Garry v. White	769, 931, 1455
McGibbon v. Abbott	328, 2016
McGlone v. Smith	1971
McGough v. Lancaster Burial Board	697
McGowan, <i>In goods of</i>	2012
McGreevy v. Russell	323, 478
McGregor v. McGregor	473, 916
McHardy v. Liptrott	559
Macharg v. Stoke-upon-Trent Assessment Committee	1372
Machell v. Newman, Thompson, <i>In re</i>	2031

McHenry, <i>Ex parte</i> , McHenry, <i>In re</i>	118
— <i>In re</i>	35, 150, 205
— — Credit Co., <i>Ex parte</i> ...	91
— — McDermott, <i>Ex parte</i> ...	177
— — McHenry, <i>Ex parte</i>	118
M'Ilwraith v. Green	1428, 1446
Mackay, <i>Ex parte</i> , Page, <i>In re</i>	123
— — Shirley, <i>In re</i>	104, 444
— — Banister	550
— v. Merritt	156, 239
Mackellar v. Bond	331
M'Kendrick v. Buchanan.....	709
Mackenzie and Ascot Gas Co., <i>In re</i>	52, 874
Mackie v. Herbertson	953
Mackintosh, <i>Ex parte</i> , Mackintosh, <i>In re</i> ..	194
Macbreth v. Walmsley	1535
Maclaren v. Compagnie Française de Navigation à Vapeur	1689
McLean's Case	445
McLean v. Clydesdale Banking Co.	20, 218
Maclean v. Currie	1110
M'Lean v. Simpson	2048
McLean v. Smith, Pearce, <i>In re</i>	810
Macleod v. Jones	1022, 1260, 1281, 1738
MacMahon, <i>Ex parte</i>	1176
McMahon, <i>In re</i> , McMahon v. McMahon...	843, 1242
McManus v. Cooke	474, 676, 1794
McMurdo, <i>Ex parte</i> , Sedgwick, <i>In re</i>	108
M'Myn, <i>In re</i> , Lightbown v. M'Myn ...	784, 914, 1535
Macnamara's Estate	1244, 1361
M'Namara v. Malone	1777
Macnicoll v. Parnell	770
Macpherson's Estate, <i>In re</i> , Macpherson v. Macpherson	945
— v. Scottish Rights of Way and Recreation Society	673
McTear, <i>Ex parte</i> , McTear, <i>In re</i>	170
McRae, <i>In re</i> , Forster v. Davies ...	33, 803, 1329
— — Norden v. McRae ...	803, 809, 1329
Macreight, <i>In re</i> , Paxton v. Macreight ..	59, 1028
Maddever, <i>In re</i> , Three Towns Banking Co. v. Maddever	827, 1073
Maddock v. Wallasey Local Board	840
Madgwick, <i>In re</i>	1128
Magarill v. Whitehaven Overseers	710
Magee, <i>Ex parte</i> , Magee, <i>In re</i>	198
Magnus v. National Bank of Scotland ..	730, 1448
— v. Queensland National Bank ..	77, 1284
Magrath v. Reichel	691, 727
Mahler, <i>In re</i> , Honygar, <i>Ex parte</i>	89
Maidstone and Ashford Ry., <i>In re</i>	1129
Maidstone Union v. Holborn Union	1383
Main, The	1683
Malcomson v. Malcomson	973, 1880
Malden, <i>In re</i> , James, <i>Ex parte</i>	94, 95, 145
Malen, <i>In goods of</i>	2002
Maley, <i>In goods of</i>	2006

Mallam v. Bean	512	Marsh, <i>Ex parte</i> , Marsh, <i>In re</i>	199, 1762
Mallet v. Hanley	1318	— <i>In re</i> , Mason v. Thorne	2095
Malone v. Fitzgerald	638, 661	— and Granville (Earl), <i>In re</i>	1937
Mammatt v. Brett	409	Marshall v. Maclure	468, 1326
Mammoth, The	533, 535, 1728	Marshall v. Edelston, Owtram, <i>In re</i>	185
Manchester (Mayor) v. Hampson	870	— v. Jones	1499
— Overseers v. Headlam	1379	— v. Marshall	1415
— — v. Ormskirk Guar-		Marshfield, <i>In re</i> , Marshfield v. Hutchings	749,
dians	1385		1151, 1260
— Economic Building Society,		Marsland, <i>In re</i>	919, 1028, 1059
<i>In re</i>	32, 1395	— v. Hole	30
— Sheffield, and Lincolnshire Ry.		Marten v. Rocke	79, 1590, 1921
v. Brown	295	Martin's Estate, <i>In re</i>	1454
— Sheffield, and Lincolnshire Ry.		— Trusts, <i>In re</i>	1917
v. North Central Waggon Co.	232,	Martin, <i>Ex parte</i> , Strick, <i>In re</i>	114
	293	— <i>In re</i> , Board of Trade, <i>Ex parte</i> ..	91
— and Oldham Bank, <i>In re</i>	454	— <i>In re</i> , Smith v. Martin	2047
— — v. Cook ...	490,	— <i>In re</i> , Tuke v. Gilbert	2040
	601, 736	— In goods of	1783
Mander v. Harris, March, <i>In re</i>	916	— v. Beauchamp (Earl)	1433
Manisty v. Churchill, Churchill (Lord), <i>In</i>		— v. Connah's Quay Alkali Co.	1197
<i>re</i>	597, 1534	— v. Dale	957
Mann v. Brodie	673, 1606	— v. Freeman, Taylor, <i>In re</i> ...	309, 2082,
— v. Knapp, Kenyon's Estate, <i>In re</i> ...	2089		2113
Manners v. Mew	1250	— v. Fyfe	56
Manning, <i>In re</i>	609	— v. Hanrahan	708
— v. Adams	1189	— v. Lacon, Christmas, <i>In re</i>	302
— v. Moriarty	1423	— v. Martin	2053
Mansel, <i>In re</i> , Newitt, <i>Ex parte</i>	92	— v. Russell	1440
— <i>In re</i> , Rhodes v. Jenkins	1896	— v. Spicer	657, 1075
— <i>In re</i> , Sayer, <i>Ex parte</i>	92	— v. Treacher	656
— v. Clanricarde	764	— v. Tritton	1042, 1643
Mansell, <i>Ex parte</i> , Chillington Iron Co.,		— v. Wyatt	698
<i>In re</i>	407	Martineau, <i>In re</i>	1578
Manton v. Tabois	2071, 2089	Martinson v. Clowes	41, 1259, 1743
Maple v. Shrewsbury (Earl)	1427	Martyn, <i>In re</i> , Toutt's Will, <i>In re</i>	1908
March, <i>Ex parte</i> , Richards, <i>In re</i>	204	Mary Lohden, The	1691
— <i>In re</i> , Mander v. Harris	916	Marzetti v. Smith	753, 1670
Marcus, <i>In re</i> , Marcus v. Marcus ...	1578, 2003,	Mason v. Ashton Gas Co.	840
	2036, 2070	— v. Bishop	2002
Marcy v. Morris	342	— v. Rhodes	1246
Margary v. Robinson	2001, 2005	— v. Thorne, Marsh, <i>In re</i>	2095
Margetts, <i>In re</i> , Board of Trade, <i>Ex parte</i> ..	93	— v. Westoby	1265, 1454
Marine Insurance Co. v. China Transpacific		Masonic and General Life Assurance Co.,	
Steamship Co.	1016	<i>In re</i>	414, 799
Marion, The	1648	Massey and Carey, <i>In re</i>	1776
Marlborough's (Duke) Settlement, <i>In re</i> ,		— v. Heynes	1418
Marlborough (Duke) v.		Massy v. Rogers	2079
Majoribanks	1634	Masters v. Green	1109
— (Duke) v. Sartoris	1630	Matheson, <i>In re</i>	410
Marony v. Taylor, Wickham, <i>In re</i>	1434	Mathews v. Carpenter	1064
Marrett, <i>In re</i> , Chalmers v. Wingfield	1027	— v. London Street Tramways Co.	1287
Marriott v. Chamberlain	638, 662	— v. Ovey	559
Marsden, <i>In re</i> , Bowden v. Layland ..	789, 1140,	Matthew, <i>Ex parte</i> , Matthew, <i>In re</i> ..	108, 222,
	1955		1358
— <i>In re</i> , Gibbs v. Layland ...	1140, 1955	Matthews v. Munster	211
— <i>In re</i> , Lancaster, <i>Ex parte</i>	162	Maugham, <i>Ex parte</i> , Maugham, <i>In re</i> ...	86, 103
Massilles Extension Ry. and Land Co.,		Maughan, <i>In re</i> , Monkhouse, <i>Ex parte</i> ...	119
Smallpage and Brandon, <i>In re</i> ...	220, 421, 1037	Maullin v. Rogers	1482

May, <i>Ex parte</i> , Brightmore, <i>In re</i>	110	Metropolitan Board of Works v. Lathey ...	1212
— <i>Ex parte</i> , May, <i>In re</i>	117, 209	— — — v. Nathan ...	1213
— <i>In re</i> , House, <i>Ex parte</i> 725, 731, 1286, 1395		— (Brush) Electric Light and	
— <i>In re</i> , May, <i>Ex parte</i>	117, 209	Power Co., <i>In re</i> ,	
— v. Harcourt	52	Leaver, <i>Ex parte</i>	438
— v. Newton	804, 806	— — — Electric Light and	
Mayer v. Mindlevich.....	256	Power Co., <i>In re</i> ,	
Mcager, <i>Ex parte</i> , Pellew, <i>In re</i>	607, 944	Offor, <i>Ex parte</i> ...	761
— v. Pellew.....	606, 944	— — — Railway v. Wright.....	1475
Mcakin v. Morris	44, 966	Meyler v. Meyler	623
Medical Attendance Association, <i>In re</i> ,		Michael, <i>In re</i> , Dessau v. Lewin.....	762
Onslow's case	444	Michel v. Mutch	1489
Medlock, <i>In re</i> , Ruffle v. Medlock	2123	Micklethwait v. Newlay Bridge Co. 621, 1971,	
Medway Union v. Bedminster Union	1384	1986	
Meehan v. Meehan	1508	Middlesborough Building Society, <i>In re</i> 274, 280	
Meek v. Wendt	1519	— — — <i>In re</i> ,	
Meere, <i>In re</i> , Kilford v. Blaney	2117	Wythes,	
Megson v. Mapleson	1096	<i>Ex parte</i> 274	
Mein, <i>Ex parte</i> , Ridgway, <i>In re</i>	146	— — — Firebrick Co., <i>In re</i>	418
Melaugh v. Chambers	716	— — — Overseers v. Yorkshire	
Meldrum v. Scorer.....	1399	(N. R.) J.J.	545, 1980
Mellis v. Shirley Local Board 482, 516, 874, 875		Middlesex J.J. v. Reg.	1537
Mellor v. Daintree.....	2019	Midland Railway v. Freeman.....	17
— v. Porter.....	983, 1267	— — — v. Miles	1547
— v. Swire, Swire, <i>In re</i>	1481	— — — v. Robinson.....	1546
— v. Thompson	38, 1473	— — — v. Watton.....	852, 853, 868
Melly, <i>In re</i>	1160	Midleton (Lord) v. Power	596, 1181, 1182,
Melville v. Stringer.....	239, 245	1183	
Memnon, The.....	1688	Milan Tramways Co., <i>In re</i> , Theys, <i>Ex</i>	
Merchantile Mutual Marine Insurance Asso-		<i>parte</i>	63, 426, 1500
ciation, <i>In re</i> , Jenkins' case	141, 394	Mildred v. Maspons	1511
Mercer, <i>Ex parte</i> , Wise, <i>In re</i>	825	Miles, <i>Ex parte</i> , Isaacs, <i>In re</i>	206, 1586
Merchant Banking Co. v. London and Han-		— v. Jarvis.....	1321, 1488
seatic Bank.....	1267	— v. New Zealand Alford Estate Co. 385,	
— Prince, The	1684	456, 474, 479	
— Taylors' Co. <i>In re</i>	1765, 1770	— v. Scotting	1232
Merchants of Staple of England v. Bank of		— v. Tudway	2038
England	75, 389, 741	Milford Haven Ry. and Estate Co. v.	
Meredith, The	1649	Mowatt	1245
— <i>In re</i> , Meredith v. Facey	180	Millar v. Harper.....	657, 1440
Merivale v. Carson	634	— v. Toulmin.....	22, 1475
Merriman, <i>Ex parte</i> , Stenson, <i>In re</i>	151	Miller, <i>In re</i> , Love v. Hills.....	1396, 1752
Mersey Docks v. Henderson ... 1717, 1805, 1810		— v. Douglas	782
— Docks v. Llanellian Overseers	1371	— v. Gulson	959
— Docks v. Lucas.....	1567	Miller's case	394, 442
— Railway, <i>In re</i>	1548	— — — Dale and Ashwood Dale Lime Co.,	
— Steamship Co. v. Shuttleworth	1477	<i>In re</i>	407
— Steel and Iron Co. v. Naylor 426, 477,		Millichamp, Goodale and Bullock, <i>In re</i> ...	2126
1583		Millikin v. Snelling, Colyer, <i>In re</i> ... 1893, 2072,	
Mertens v. Walley, Serjeant, <i>In re</i>	2035	2127	
Merthyr v. N. Stepney Union	1384	Mills, <i>In re</i> , Mills v. Mills	2096
Mesham, <i>Ex parte</i> , King, <i>In re</i>	150	— <i>In re</i> , Official Receiver, <i>Ex parte</i> ...	163
Meston, <i>Ex parte</i> , Kelday, <i>In re</i>	107	— v. Armstrong	1287, 1647
Metcalfe, <i>In re</i> , Metcalfe v. Blencowe	1764	— v. Fox	969
Metropolitan Bank v. Pooley 188, 300, 408, 516,		— v. Mills, Mills, <i>In re</i>	2096
1170, 1464, 1465		Mills' Estate, <i>In re</i>	522, 1129
— — — Board of Works v. Anthony... 1211		— — — Trusts, <i>In re</i>	498, 1903
— — — v. Eaton.....	1218	Millward v. Midland Ry.....	1193
— — — v. Heaton ... 1218		— v. Millward	899

Milne, <i>In re</i> , Grant v. Heysham	2050	Moore v. Deakin	1468
Milner, <i>Ex parte</i> , Milner, <i>In re</i>	179	— v. Explosives Co.	347
— v. Great Northern Ry.	1199	— v. Ffolliot	2099, 2103
Milnes v. Huddersfield (Mayor).....	1963	— v. Johnson, Moore, <i>In re</i>	795, 1614
— v. Sherwin.....	11, 786	— v. Lambeth Waterworks Co.	1962
Mineral Water Bottle Exchange Society v.		— v. Moore.....	910
Booth	487, 1860	— v. Palmer	1189
Minifie v. Banger	715	— v. Roche, Moore, <i>In re</i>	2093
Mining Co. of Ireland v. Delany	66, 988	— v. Simkin	724
Minnett, <i>Ex parte</i>	1053	— v. Walton	1782
Minshull v. Brinsmead	478	Moore's Estate, <i>In re</i>	2077, 2114
Missouri Steamship Co., Monroe's claim,		Moorhouse v. Linney	509
<i>In re</i>	1037, 1666	Morley and Co., <i>In re</i>	380
Mitchell, <i>In re</i> , Cunningham, <i>Ex parte</i> ...	96,	Mordy and Cowman, <i>In re</i>	1946
	1026	Morgan, <i>In re</i>	1625
— <i>In re</i> , Mitchell v. Mitchell.....	1526	— <i>In re</i> , Owen v. Morgan ...	40, 659, 1505
— and Governor of Ceylon, <i>In re</i> ...	49	— v. Brisco	1801
— v. Cantrill	677	— v. Davey	1224
— v. Darley Main Colliery Co.	653	— v. Eyre	606, 944
— v. Mitchell, Mitchell, <i>In re</i>	1526	— v. Hardy	1080
Mitchell's Trade-mark, <i>In re</i>	1855	— v. London General Omnibus Co....	615,
Mitchelstown Inquisition, <i>In re</i>	505		1190
Mitchison v. Thompson	1104	Morgan's case.....	438
Mocatta, <i>In re</i> , Mocatta v. Mocatta	2067	— Estate, <i>In re</i>	2041
Mogg v. Clark	694, 1208	— Patent, <i>In re</i>	1351
Mogridge's case	452	Moritz v. Stephan	773, 1416
Mogul Steamship Co. v. Macgregor ...	459, 986,	Moroney, <i>In re</i>	826
	1834	Morrin v. Morrin.....	2060, 2094
Moir, <i>In re</i> , Warner v. Moir	2075	Morris, <i>In re</i> , Bucknill v. Morris	1877
Molony v. Molony.....	1449	— <i>In re</i> , Cooper, <i>Ex parte</i>	140, 1186
Molyneux and White, <i>In re</i>	779	— <i>In re</i> , Salter v. Att.-Gen.	2044
Monarch, The.....	1703, 1710, 1711	— v. Griffiths, Raw, <i>In re</i>	493
Monckton to Gilzean.....	1942	— c. Howell	1449
Monet, <i>Ex parte</i> , Dudley, <i>In re</i>	611, 1742	— v. London and Westminster Bank...	79
Monetary Advance Co. v. Cater.....	217, 255	— v. Lowe	559
Monk, <i>In re</i> , Wayman v. Monk	693	Morrison, <i>Ex parte</i> , Gillespie, <i>In re</i> ...	151, 204
Monkhouse, <i>Ex parte</i> , Maughan, <i>In re</i> ...	119	— v. Great Eastern Ry.	1123
Monroe's claim, Missouri Steamship Co.,		Morritt, <i>In re</i> , Official Receiver, <i>Ex parte</i>	
<i>In re</i>	1037, 1666		246, 248
Montagu's case	392	Mortgage Insurance Corporation v. Inland	
Montagu, <i>In re</i> , Montagu v. Festing.....	980	Revenue Commissioners	215, 1558, 1559
— v. Land Corporation of England	1509	Mortimer, <i>In re</i> , Griffiths v. Mortimer.....	2027
Montague v. Sandwich (Earl)	2090, 2113	— v. Wilson	1488
Montrose (Dowager Duchess) v. Stuart ...	1606	Morton, <i>In goods of</i>	2005
Moody and Yates, <i>In re</i>	1937, 1939	Moseley v. Victoria Rubber Co. ...	537, 649, 663,
Moon, <i>Ex parte</i> , Moon, <i>In re</i>	170		1341, 1346
— <i>In re</i>	208	Moser, <i>In re</i> , Painter, <i>Ex parte</i>	120
— <i>In re</i> , Dawes, <i>Ex parte</i>	26, 180, 192,	Moss, <i>Ex parte</i> , Toward, <i>In re</i>	165
	202	— <i>In re</i> , Levy v. Sewill	1023, 1282
— <i>In re</i> , Moon, <i>Ex parte</i>	170	— v. Bradburn.....	1469
Moorcock, The	1301, 1719, 1988	— v. Malings	1347
Moore, <i>Ex parte</i> , Faithfull, <i>In re</i>	108	Moss's Trusts, <i>In re</i>	1909, 1915
— <i>Ex parte</i> , Dickinson, <i>In re</i>	155	Mouflet v. Washburn	550
— <i>In re</i>	87	Mounsey v. Rankin	472
— <i>In re</i> , Moore v. Johnson.....	795, 1614	Mount Morgan (West) Gold Mine, <i>In re</i> ,	
— <i>In re</i> , Moore v. Roche.....	2093	West, <i>Ex parte</i>	349
— <i>In re</i> , Trafford v. Maconochie	2078	Mouson v. Boehm	1854
— <i>In goods of</i>	798, 2015	Mowatt v. Castle Steel and Ironworks Co.	
— v. Bemrose, Walters, <i>In re</i>	525		372, 733

Moxon v. London Tramways Co.	556		
Moyers v. Soady	47, 262	N.	
Muckalt v. Davis, Davis, <i>In re</i>	783		
Muffett, <i>In re</i> , Jones v. Mason... ..	795, 2035, 2079		
Mulcahy v. Kilmacthomas Guardians ...	17, 879		
Mulckern v. Doerks	1419		
Mulleneisen v. Coulson.....	553, 1397		
Multon, <i>Ex parte</i> , Multon, <i>In re</i>	182		
Munby v. Ross, Coulman, <i>In re</i>	2101		
Munch's Application, <i>In re</i>	1847		
Munday, <i>In re</i> , Allam, <i>Ex parte</i>	246, 257		
Mundy, <i>In re</i> , Shead, <i>Ex parte</i>	207		
Municipal Building Society v. Kent... ..	275, 1804		
— — — v. Richards ...	277		
— — — v. Smith 1079, 1263			
— Freehold Land Co. v. Metropo-			
litan and District Rys.....	1118		
— Trust Co., <i>In re</i>	379, 380		
Munns v. Burn, Crosby or Crosley, <i>In re</i>	33,		
187, 1143			
— and Longden, <i>In re</i>	42, 1483, 1757		
Munro v. Watson	513		
Munster v. Cox	1330		
— v. Lamb	633		
— Bank, <i>In re</i> , Dillon's Claim	455		
Munton v. Truro (Lord)	627		
Murfett v. Smith	1474, 1991, 2016		
Murphy v. Cheevers	2088		
— v. Coffin	1677		
— v. Davey	1234		
— v. Nolan	1423		
— v. Wilson.....	1194		
Murray, <i>In re</i> , Dickson v. Murray.....	823, 1920		
— v. Flavell, Flavell, <i>In re</i>	1334,		
1872			
— and Hegarty, <i>In re</i>	1939		
— v. Glasgow and South-Western			
Ry.	297		
— v. Scott	268, 279		
— v. Stephenson.....	1409		
Murrell, <i>In re</i> , Lovering, <i>Ex parte</i>	124		
— v. Fysh	490, 605, 1106		
Musgrave v. Brooke, Brooke, <i>In re</i>	2074		
— v. Stephens	259		
Mutrie v. Binney	1432		
Mutter v. Eastern and Midlands Ry.....	355		
Mutton, <i>In re</i> , Board of Trade, <i>Ex parte</i>	185,		
205			
— <i>In re</i> , Mutton, <i>Ex parte</i>	182		
Mutual Aid Permanent Benefit Building			
Society, <i>In re</i> , Anson, <i>Ex parte</i>	267		
— Life Assurance Society v. Langley	65,		
1256, 1257, 1271, 1430, 1495, 1921			
— and Permanent Benefit Building			
Society, <i>In re</i> , James, <i>Ex parte</i>	1526		
Myers v. Elliott.....	244		
Myles v. Burton.....	931		
Mysore Reefs Gold Mining Co., <i>In re</i>	420		
Mytton v. Mytton	890		
Nacupai Gold Mining Co., <i>In re</i>	416		
Nadin v. Bassett	758		
Nally v. Reg.	300		
Nanney v. Morgan	386		
Naples, The.....	1697		
Nares, <i>In goods of</i>	2008		
Nash v. Wooderson	1928		
Nasmyth, The	1707, 1722		
Nassan, <i>Ex parte</i> , Horne, <i>In re</i>	126		
Nathan, <i>In re</i>	1174, 1578		
— Newman & Co., <i>In re</i>	441		
Nation, <i>In re</i> , Nation v. Hamilton	41, 532		
National Arms and Ammunition Co., <i>In</i>			
<i>re</i>	425		
— Bank v. Canning	1448		
— Bank v. Gourley	970		
— Building and Land Investment			
Co., <i>In re</i> , Clitheroe, <i>Ex parte</i>	431		
— Coffee Palace Co., <i>In re</i> , Panmure,			
<i>Ex parte</i>	382, 1518		
— Provincial Bank of England v.			
Games	1277		
— Provincial Bank of England v.			
Jackson.....	618, 1245, 1250, 1253		
Natt, <i>In re</i> , Walker v. Gammage	795		
Navan and Kingscourt Ry., <i>In re</i> , Dyas,			
<i>Ex parte</i>	1634,		
1635			
— — — <i>In re</i> , Price,			
<i>Ex parte</i>	1550		
Naylor and Spendla's Contract, <i>In re</i>	496		
Neal, <i>In re</i> , Weston v. Neal	1434		
Neath Harbour Smelting and Rolling			
Works, <i>In re</i>	362		
— and Bristol Steamship Co., <i>In re</i>	415,		
667			
Neaves v. Spooner.....	538		
Neck, <i>In re</i> , Broad, <i>Ex parte</i>	127		
Needham, <i>In re</i>	1919		
— <i>In re</i> , Robinson v. Needham ..	2116		
— v. Bowers.....	1565		
Negus v. Jones	923		
Neilsen v. Neame	1674		
Neilson v. Mossend Iron Co.	1333		
Nelson, <i>Ex parte</i> , Hockaday, <i>In re</i>	257		
— <i>In re</i>	1761		
— v. Pastorino	1331, 1411, 1419		
— v. Robins, Robins, <i>In re</i>	1578		
Nesbitt's Trusts, <i>In re</i>	1915		
Nettlefold's Trusts, <i>In re</i>	1881		
Never Despair, The	1444, 1723		
Nevill, <i>In re</i>	1160		
New Chile Gold Mining Co., <i>In re</i>	384		
— City Constitutional Club Co., <i>In re</i> ,			
Purssell, <i>Ex parte</i>	424		
— University Club, <i>In re</i>	1563		

New Windsor (Mayor) v. Stovell	875	Nolloth v. Simplified Permanent Building Society.....	273
— York Exchange, <i>In re</i>	412	Norden v. McRae, McRae, <i>In re</i>	803, 809, 1329
Newbattle, The	1442, 1695	“Normal” Trade-mark, <i>In re</i>	1849
Newbegin, <i>In re</i> , Eggleton v. Newbegin ..	1165, 1387	Norman, <i>In re</i> , Bradwell, <i>Ex parte</i>	1760
Newbould v. Bailward	1773	— v. Bolt	102, 1531
— v. Smith	746, 1148	Normanton Gas Co. v. Pope	841
— v. Steade	1445	Norris, <i>Ex parte</i> , Sadler, <i>In re</i>	150
Newfoundland Government v. Newfoundland Ry.	65, 336	— <i>In re</i> , Allen v. Norris	1740, 1914, 1918
Newhaven Local Board v. Newhaven School Board	848, 855	— <i>In re</i> , Reynolds, <i>Ex parte</i>	96
Newitt, <i>Ex parte</i> , Mansel, <i>In re</i>	92	— v. Catmur	1295
Newlands v. National Employers' Accident Association	408, 1516	North Brazilian Sugar Factories, <i>In re</i> ...	416, 440
Newlove v. Shrewsbury	231	— British Ry. v. Perth, Provost of ...	1544
Newman v. Jones	1054	— Eastern Ry. v. Cairns	296
— v. Newman.....	999, 1247, 1255, 1885	— Eastern Ry. v. Sutton Overseers ...	514
— v. Pinto	1857	— London Freehold Land and House Co. v. Jacques	1104
Newport Slipway Dry Dock Co. v. Paynter	1439	— Molton Mining Co., <i>In re</i>	421
Newson v. Pender	680, 986	North-West Transportation Co. v. Beatty	359
Newton's Patents, <i>In re</i>	1351	North and South Western Junction Ry. v. Brentford Union	1373, 1381
Newton v. Chapman, Chapple, <i>In re</i>	1780	Northam Bridge Co. v. Reg.....	1390, 1805
— v. Monkcom.....	852	Northcote v. Heinrich Björn (Owners) ...	1652
— v. Newton	901	Northen's Estate, <i>In re</i> , Salt v. Pym	2018
— v. West Riding J.J.	1057	Northern Counties of England Fire Insurance Co. v. Whipp	1249, 1252
Newtownards Gas Co., <i>In re</i> , Stephenson, <i>Ex parte</i>	430	Northumberland (Duke) v. Bowman	987
Nicholl v. Wheeler	662	— Avenue Hotel Co., <i>In re</i>	Fox's claim 478
Nicholls v. Morgan	931	— — <i>In re</i> , Sully's case 403, 1798	
— v. North Eastern Ry.	288	Norton v. Compton, Compton, <i>In re</i> 30, 38,	785
— and Nixey's Contract, <i>In re</i>	135, 1614	— v. Fenwick	534
Nichols to Nixey.....	135, 1614	— v. Johnstone	2122
Nicholson, <i>Ex parte</i> , Nicholson, <i>In re</i>	196	Norwich Equitable Fire Insurance Co., <i>In re</i> , 439, 1008, 1009	
— <i>Ex parte</i> , Stone, <i>In re</i>	85, 608	— — <i>In re</i> , Brasnett's case	42, 427
— <i>In re</i>	1159, 1902	— — <i>In re</i> , Miller's case	394, 442
— <i>In re</i> , Nicholson, <i>Ex parte</i>	196	Norwich Town Close Estate, <i>In re</i>	311
— <i>In re</i> , Quinn, <i>Ex parte</i>	1784	Nottebohn v. Richter	1664
— v. Booth	583, 1064	Notting Hill, The	602, 1700
— v. Holborn Union	1372	Nottingham, <i>Ex parte</i> , Tuff, <i>In re</i>	144
— v. Kirk, Kirk, <i>In re</i>	2025	— Bank, <i>Ex parte</i> , Jenkinson, <i>In re</i>	125
— v. Wood	1441	— Patent Brick and Tile Co. v. Butler	1931
Nickoll, <i>Ex parte</i> , Walker, <i>In re</i>	98, 206	Nouvion v. Freeman, Henderson, <i>In re</i> ...	1039
Nicol's case	391	Noyce, <i>In re</i> , Brown v. Rigg	2051
Nicol v. Beaumont	674, 1777	Noyes v. Pollock	1265, 1281, 1283
— v. Nicol.....	910	Nugent's Trusts, <i>In re</i>	1152
Nicoll v. Beere	486	Nugent v. Nugent	2030
Nicols v. Pitman	502, 991	Numida, The	1728
Nielsen v. Wait	1676	Nutter v. Messageries Maritimes de France	1410
Niobe, The	1713, 1714		
Nisbet v. M'Innes	1565		
Nixon v. Cameron, Cameron, <i>In re</i> ..	777, 2114		
— v. Sheldon, Sheldon, <i>In re</i>	34, 1817		
— v. Tynemouth Rural Sanitary Authority	1313		
— v. Verry	192		
Noble v. Ahier	687		
Noel v. Noel	907, 909		

O.

O. D. <i>In re</i> , Robinson, <i>Ex parte</i>	150	Olathe Silver Mining Co., <i>In re</i>	414, 419
O'Brien, <i>Ex parte</i> , Dublin and Wicklow Manure Co., <i>In re</i>	447	Old Mill Co. v. Dukinfield Local Board...	1470
— v. Gillman	808	Old Swan, &c. Benefit Building Society, <i>In re</i> , Evatt, <i>Ex parte</i>	278
— v. Tyssen	302, 1465	Old's Trusts, <i>In re</i> , Pengelley v. Herbert...	2097
O'Byrne's Estate, <i>In re</i>	628, 1257	Oldenberg (Prince), <i>In goods of</i>	2011
O'Connor, <i>In goods of</i>	1995	Oldham v. Stringer	1243
O'Donnell v. O'Donnell	32, 2020	Oliphant v. Gerard, Gerard (Lord), <i>In re</i> ...	948
O'Donoghue v. Vowles, Vowles, <i>In re</i>	812	Olive, <i>In re</i> , Olive v. Westerman	791, 1874
O'Dwyer, <i>In re</i>	238	Olley v. Fisher	624, 1796
O'Grady v. Mercers' Hospital	515	Olpherts, <i>Ex parte</i> , Bann Navigation Act, <i>In re</i>	1770
O'Hagan, <i>Ex parte</i>	1775	Onslow, <i>In re</i> , Plowden v. Gayford	923
O'Halloran v. King, Bown, <i>In re</i>	937	Onslow's case	444
O'Kelly v. Harvey	1066	Openshaw v. Evans	1081
O'Loughlin v. Dwyer	1106, 1137	Oppenheim v. Oppenheim	909
O'Malley v. Kilmallock Union	535	Oppert v. Beaumont	35, 1492
O'Neil v. City and County Finance Co. ...	260	Oram, <i>Ex parte</i> , Watson, <i>In re</i>	110
O'Neill (Lord), <i>In re</i>	1576	Orange to Wright	1930
O'Rorke v. O'Rorke	919	Orient Steam Navigation Co. v. Ocean Marine Insurance Co.	55, 533, 1426
Oakey v. Dalton	1401	Oriental Bank Corporation, <i>In re</i> ...	28, 410, 428, 1494
— v. Stretton	591	— — — <i>In re</i> , The Crown, <i>Ex parte</i> ...	321, 430, 595
Oakfield, The	1681	— — — <i>In re</i> , Guillemin, <i>Ex parte</i> ...	436
Oastler, <i>Ex parte</i> , Friedlander, <i>In re</i> ...	98, 201	— — — <i>In re</i> , MacDow- all's Case...	442, 1188
Obert v. Barrow, Douglas, <i>In re</i>	305	— — — v. Richer	335
Ocean Iron Steamship Insurance Associa- tion v. Leslie	1020	Orme, <i>In re</i> , Evans v. Maxwell	12, 785
— Steamship Co. v. Anderson ..	1445, 1724	Ormerod v. Bleasdale	38
Octavia Stella, The	1296, 1681	Ormston, <i>In re</i> , Goldring v. Lancaster.....	525
Oddy v. Hallett	1535	Orsmond, <i>In re</i> , Drury v. Orsmond	792
Odell v. Cormack	217, 1512	Orwell, The	1725
Odevaine v. Odevaine	901	Osborne v. London and North Western Ry.	1294
Official Receiver, <i>Ex parte</i> , Bear, <i>In re</i> ...	164	— v. Milman	1536, 1793
— <i>Ex parte</i> , Bond, <i>In re</i> ...	104	— v. Morgan	320
— <i>Ex parte</i> , Emery, <i>In re</i>	234	Otto v. Steel	1339
— <i>Ex parte</i> , Gould, <i>In re</i> ...	210	Otway, <i>Ex parte</i> , Otway, <i>In re</i>	105, 607, 902
— <i>Ex parte</i> , Holden, <i>In re</i>	160, 1896	— v. Otway	893, 899
— <i>Ex parte</i> , Horniblow, <i>In</i> <i>re</i>	90	Outlay Assurance Society, <i>In re</i>	353
— <i>Ex parte</i> , Mills, <i>In re</i> ...	163	Over-Darwen (Mayor) v. Lancashire JJ.	1862, 1933
— <i>Ex parte</i> , Morritt, <i>In re</i>	246, 248	Ovey, <i>In re</i> , Broadbent v. Barrow	304, 309, 2115
— <i>Ex parte</i> , Parker, <i>In re</i>	194	Owen, <i>Ex parte</i> , Owen, <i>In re</i>	105, 1327
— <i>Ex parte</i> , Reed, <i>In re</i> ...	202	— <i>In re</i> , Payton, <i>Ex parte</i>	201, 1753
— <i>Ex parte</i> , Richards, <i>In re</i>	136	— v. Edwards, Edwards, <i>In re</i>	619, 1491
— <i>Ex parte</i> , Ryley, <i>In re</i>	609	— v. Morgan, Morgan, <i>In re</i>	40, 1505
— <i>Ex parte</i> , Stephenson, <i>In</i> <i>re</i>	143	— v. Roberts	270
— <i>Ex parte</i> , Taylor, <i>In re</i> ...	89	Owens v. Shield	70
— <i>Ex parte</i> , White, <i>In re</i>	136, 196	— College v. Chorlton-upon-Medlock Overseers	1376
— <i>Ex parte</i> , Wilkinson, <i>In re</i> ..	162	Owtram, <i>In re</i> , Marshall v. Edgelston	185
— <i>Ex parte</i> , Williams, <i>In re</i> ..	197	Oxford Benefit Building Society, <i>In re</i> ...	362
Offor, <i>Ex parte</i> , Metropolitan (Brush) Electric Light and Power Co., <i>In re</i>	761	Oxley v. Scarth, Pearson, <i>In re</i>	1873
Ogle v. Sherborne (Lord), Whorwood, <i>In</i> <i>re</i>	2036		

P.

Pacific, The	1683, 1689	Parrott, <i>In re</i> , Walter v. Parrott.....	1613, 2069
Packard v. Collings	720, 722	Parry and Daggs, <i>In re</i>	2048, 2074
Paddington Burial Board v. Inland Revenue Commissioners.....	698, 1567	Parsons, <i>Ex parte</i> , Townsend, <i>In re</i> ...	225, 237
Page, <i>In re</i> , Mackay, <i>Ex parte</i>	123	— v. Cotterell	486
— v. Eastern and Midlands Ry.	364	— v. Hargreaves	249, 252
— v. Morgan	472, 1580	Partington, <i>In re</i> , Partington v. Allen.....	1748, 1874, 1876, 1878
— v. Slade	1337	— v. Hawthorne	727, 1513
Paget v. Marshall	624, 1231	Partridge, <i>Ex parte</i>	1206
Paget's Settled Estates, <i>In re</i>	1622, 2075	— v. Mallandaine	1567
Paine v. Matthews	225	Pascoe v. Puleston.....	721
Paine's Trusts, <i>In re</i>	1915, 1917	Pass, <i>In re</i>	1744
Painter, <i>Ex parte</i> , Moser, <i>In re</i>	120	Patent Invert Sugar Company, <i>In re</i>	375
Palatine Estate Charity, <i>In re</i>	310	Paterson, <i>Ex parte</i> , Rathbone, <i>In re</i>	119
Palermo, The.....	647, 1702, 1724	Patience, <i>In re</i> , Patience v. Main	1028
Paley v. Garnett	1196	Paton v. Carter	1098
Palinurus, The	1683	Patroclus, The	1683
Palliser v. Gurney	926	Patten v. Wood	1187
Palmer, <i>Ex parte</i> , Palmer, <i>In re</i>	190	Patton v. Employers' Liability Assurance Co.	997
— <i>In re</i> , Skipper v. Skipper	1472	Paull, <i>In re</i>	1762
— v. Hummerston	635	Paxton v. Macreight, Macreight, <i>In re</i> ...	59, 1028
— v. Johnson	615, 617, 1927	Payne, <i>Ex parte</i> , Coton, <i>In re</i>	239
— v. Mallet.....	487, 1336	— <i>Ex parte</i> , Sinclair, <i>In re</i>	168
— v. Palmer.....	745, 2064	— <i>In re</i> , Castle Mail Packets Co., <i>Ex parte</i>	183, 188, 201
Palmer's Trade Mark, <i>In re</i>	1837, 1847	— v. Esdaile	701, 1153
Palomares, The	546, 1727	— v. Tanner	790
Pandorf v. Hamilton	615	Payne's Settlement, <i>In re</i> , Kibble v. Payne 1921	
Pannure, <i>Ex parte</i> , National Coffee Palace Co., <i>In re</i>	382, 1518	Payton, <i>Ex parte</i> , Owen, <i>In re</i>	201, 1753
Pape v. Pape	934	Peace, <i>Ex parte</i> , Williams, <i>In re</i>	247
Paris and New York Telegraph Co. v. Penzance Union.....	1375	— and Ellis, <i>In re</i>	1773
Parish v. Hudson, Lucas, <i>In re</i>	44	— and Waller, <i>In re</i>	770, 931
— v. Poole	533, 1242	Peacock v. Colling	1898, 1899, 1911
Parisian, The	1725	Peake, <i>In re</i> , Harrison, <i>Ex parte</i>	159, 842
Park, <i>In re</i> , Koster, <i>Ex parte</i>	608	— v. Finchley Local Board.....	874
Parkdale Corporation v. West	326	Pearce, <i>In re</i> , Board of Trade, <i>Ex parte</i>	92, 194
Parke, <i>In re</i>	234, 256, 1825	— <i>In re</i> , Crosthwaite, <i>Ex parte</i> ...157, 1641	
Parker, <i>Ex parte</i> , Chapman, <i>In re</i>	143	— <i>In re</i> , McLean v. Smith	810
— <i>In re</i>	1769	— v. Foster	648, 1188
— <i>In re</i> , Dearing v. Brooks.....	1454, 2015	Peard v. Morton, Luddy, <i>In re</i>	2044
— <i>In re</i> , Official Receiver, <i>Ex parte</i> 194		Pearson, <i>In re</i> , Oxley v. Scarth	1873
— and Beech, <i>In re</i>	1947	— <i>In re</i> , West Cannock Colliery Co., <i>Ex parte</i>	156
— v. Blenkhorn	1773	— v. Atk-Gen., Perton, <i>In re</i>	744
— v. Inge	862	— v. Pearson	555, 615, 752, 801, 845
— v. Winder, Wilson, <i>In re</i>	2027	— v. Ripley	54, 531
Parker's Will, <i>In re</i>	1900	Pease v. Pattinson.....	308
Parkers, <i>In re</i> , Sheppard, <i>Ex parte</i> ...	147	Peat v. Broughton, Broughton, <i>In re</i> ... 191, 2077	
— <i>In re</i> , Turquand, <i>Ex parte</i> ...	122, 126, 232	— v. Fowler.....	351, 830
Parkin v. Cresswell, Cresswell, <i>In re</i>	2045	— v. Nicholson	1274
Parkinson, <i>In re</i>	593, 1749	Peckham Tramways Co., <i>In re</i>	417
— v. Potter.....	1024, 1085, 1370	Pedder v. Hunt	1151, 2059
Parnacott v. Passmore	818	Peek v. Derry	344, 345, 350, 824
Parnell v. Mort.	526, 562, 1348	— v. Savory, Harvey, <i>In re</i>	2081
— v. Stedman	826	Peel, <i>In re</i>	1160, 1902
Parrott, <i>In re</i> , Parrott v. Parrott ...	2069, 2071	Pegram v. Dixon	1194

Pellaw, <i>In re</i> , Meager, <i>Ex parte</i>	607, 944	Pickering, <i>In re</i> , Pickering v. Pickering ...	651, 1331
Pelly, <i>Ex parte</i> , Anglo-French Co-operative Society, <i>In re</i>	431	Pidler v. Berry	818
Pengelley v. Herbert, Old's Trusts, <i>In re</i> ...	2097	Pierson v. Knutsford Estates Co.	1789
Pennington, <i>In re</i> , Cooper, <i>Ex parte</i>	826	Pietermaritzburg (Mayor) v. Natal Land Co.	330, 1803, 1811
— v. Payne, Wilson, <i>In re</i>	781	Pike v. Ongley	753, 1520
Penny v. Hanson	1925	Pilley v. Robinson.....	1406
People's Café Co., <i>In re</i>	378	Pilling's Trusts, <i>In re</i>	1402, 1904
Pepper's Trusts, <i>In re</i>	954	Pilot v. Craze	1513
Pepper, <i>In re</i> , Pepper v. Pepper ...	1167, 1484	Pine v. Barnes	1055
Percival, <i>In re</i> , Boote v. Dutton	1996	Pinnas, The	1706
— v. Dunn	61, 1465	Pitman v. Francis	1747
— v. Pedley	551	Pitt's Estate, <i>In re</i> , Lacy v. Stone.....	306, 2121
Percy v. Percy, Percy, <i>In re</i>	2055	Pitt v. White	1322
Perkins v. Dangerfield	1474	Planet, The	1726
— v. Gingell.....	1648, 1972	Plater v. Burnley (Mayor)	1233
Perratt v. London Scottish Permanent Benefit Building Society.....	274	Platt, <i>In re</i>	1158
Perriam, <i>In re</i> , Perriam v. Perriam	1936	— v. Mendel.....	1267, 1272
Perry, <i>Ex parte</i>	510	Player, <i>In re</i> , Harvey, <i>Ex parte</i>	167
— v. Barnett	1523	Plimmer v. Wellington (Mayor)	336
— v. Spencer, Harrison, <i>In re</i>	493	Plowden, <i>Ex parte</i> , Hutchinson, <i>In re</i>	155, 772
Perton, <i>In re</i> , Pearson v. Att.-Gen.	744	— v. Gayford, Onslow, <i>In re</i>	923
Pescod v. Pescod	52	Plowright v. Lambert	1886
Peshawur, The	1431, 1723	Plumb v. Craker	556
Peter v. Thomas-Peter	1404	Plumstead Board of Works v. Spackman...	1803
Peterborough Corporation v. Wiltshorpe Overseers.....	26, 29	Pochin v. Smith.....	834
Peters v. Tilly	731, 1434	Pocock v. Gilham	1092
Pethybridge v. Burrow, Shield, <i>In re</i>	1869	Pointin v. Porrier	289
Petty v. Daniel	68, 1482	Pointon v. Hill	1924
Pfeiffer v. Midland Ry.	1474	Pollard, <i>In re</i>	1752
Phelan v. Slattery	2021	Pollen Trustees, <i>Ex parte</i> , Davis, <i>In re</i>	159, 1094
— v. Tedcastle	469	Pollexfen v. Sibson	1330
Phelips v. Hadham District Board.....	7, 1466, 1979	Pollock, <i>In re</i> , Pollock v. Worrall ...	2087, 2088
Phelps v. Comber	129, 1587	— v. Lands Improvement Co. ...	669, 1809
— v. Upton Snodsbury Highway Board	516	Pomero v. Pomero	895
Phelps' Settlement Trusts, <i>In re</i>	1916	Pommery v. Aphorpe	1570
Philips v. Beale	1467	Ponsford v. Abbott	186, 1081
Phillips, <i>Ex parte</i> , Harvey, <i>In re</i>	179	Ponsonby v. Ponsonby	908
— <i>Ex parte</i> , Phillips, <i>In re</i>	106, 205	Pontida, The	1715
— <i>Ex parte</i> , Rodway, <i>In re</i>	199, 200	Pontifex v. Foord	1459
— <i>Ex parte</i> , Watson, <i>In re</i>	30, 786	Pool's case	445
— <i>In re</i>	967	Pool v. Tunnel Mining Co.	446
— <i>In re</i> , Bath, <i>Ex parte</i>	141, 272	Poole, <i>In re</i> , Poole v. Poole.....	1445
— <i>In re</i> , Phillips, <i>Ex parte</i>	106, 205	Poole's Settled Estate, <i>In re</i>	1626
— v. Andrews	1322	Pooley, <i>In re</i>	1780, 2003
— v. Goff	1592	Pooley's Trustee v. Whetham, 34, 93, 614, 1442, 1737	
— v. Highland Ry.....	1721	Pope, <i>In re</i>	771, 1453
— v. Homfray	19	Poppleton, <i>Ex parte</i> , Thomas, <i>In re</i>	353
— v. Phillips	925, 1820, 1867, 2054	Porrett v. White	1426
Phillipson v. Emanuel	1409	Portal and Lamb, <i>In re</i>	2087
Philp, <i>Ex parte</i> , United Stock Exchange, <i>In re</i>	416	Porteous v. Reynar	328
Phipps v. Jackson	990, 1089	Porter v. Grant	807, 812
Pickard, <i>In re</i> , Turner v. Nicholson	1162, 1323	— v. Porter	1167, 1322
— v. Wheeler, Robinson, <i>In re</i>	1487, 1488	Portman v. Home Hospitals Association ...	1087
Picker v. London and County Banking Co.	1304	Portsmouth (Mayor) v. Smith	869
		Postlethwaite, <i>In re</i> , Ledger, <i>Ex parte</i> ...	169
		— <i>In re</i> , Postlethwaite v. Rickman	649, 1886

Proctor v. Webster	634
Progressive Investment and Building So- ciety, <i>In re</i> , Corbold, <i>Ex parte</i>	279, 433
Provincial Bank v. Cussen	1532
Prynne, <i>In re</i>	942, 988
Pryor, <i>In re</i> , Board of Trade, <i>Ex parte</i> ...	199
— v. Pryor	884, 908
Pugh, <i>In re</i> , Lewis v. Pritchard	543
Pulbrook v. Ashby.....	229
Pullan v. Roughfort Bleaching Co.	681
Punch v. Boyd	639
Purcell, <i>In re</i>	1641, 1644
— v. Henderson	1359
— v. Sheehy	952
Purser v. Worthing Local Board	871
Pursell, <i>Ex parte</i> , New City Constitu- tional Club Co., <i>In re</i>	424
Purvis, <i>In re</i> , Rooke, <i>Ex parte</i>	137
Pyatt, <i>In re</i> , Rogers, <i>Ex parte</i> ...	135, 629, 935
Pybus, <i>In re</i>	1760
Pyman v. Burt	1659, 1668

Quartz Hill Consolidated Gold Mining Co.

<i>v. Eyre</i>	1170
Queade's Trusts, <i>In re</i>	703, 947
Queale's Estate, <i>In re</i>	781
Queensland Mercantile Agency Co., <i>In re</i> .	418
Quillan <i>v. Limerick Market Trustees</i>	1184
Quinlan <i>v. Murnane</i>	1475
Quinn, <i>Ex parte</i> , Nicholson, <i>In re</i>	1784

Rackstraw's Trusts, <i>In re</i>	1904
Railway Sleepers Supply Co., <i>In re</i> ...	407, 1825
— and Electric Appliances Co., <i>In re</i>	465, 620
Rainbow, The	1654, 1655
Rainford v. Knowles, Knowles, <i>In re</i>	2032
Raisby, The	538, 1708, 1728
Ralph Creyke, The	1690
Ralph's Trade-mark, <i>In re</i>	1847, 1853
Ramsay's case	419
Ramskill v. Edwards	186, 1401, 1530, 1879
Randall v. Lithgow	73
Randell, <i>In re</i> , Hood v. Randell	40
— <i>In re</i> , Randell v. Dixon	308
Ranelagh's (Lord) Will, <i>In re</i>	1868
Rankart, <i>Ex parte</i> , Blakeway, <i>In re</i> ...	132, 201
Rankin, <i>Ex parte</i> , Rankin, <i>In re</i>	183, 203
Raphael v. Burt	1585
Rapley v. Taylor	1095

Rasbotham v. Shropshire Union Rys. and Canal Co.....	665	Reg. v. Burnup	852
Rathbone, <i>In re</i> , Paterson, <i>Ex parte</i>	119	— v. Burton	572
Rathmines Drainage Act, <i>In re</i>	1638	— v. Bushell	593, 1365
Ravenscroft v. Workman, Arnold, <i>In re</i> 307, 2121		— v. Butt	573
Raw, <i>In re</i> , Morris v. Griffiths	493	— v. Carroll	1540
Rawlings, <i>Ex parte</i> , Cleaver, <i>In re</i> 239, 249, 251		— v. Carter	576
— <i>Ex parte</i> , Davis, <i>In re</i>	127, 232	— v. Cattley	830
— <i>Ex parte</i> , Forster, <i>In re</i>	166	— v. Central Criminal Court (Justices) 23,	
— v. Emmerson, Emmerson, <i>In re</i> 462,		577, 587, 1174	
543, 2014		— v. Charnwood Forest Ry. ...	390, 737, 1175
Rawnsley v. Lancashire and Yorkshire Ry. 560		— v. Cheshire Justices.....	1984
Rawstone v. Preston Corporation	647	— v. Chittenden	1976
Ray's Settled Estates, <i>In re</i>	1162, 1630	— v. Christopherson.....	696, 1373
Ray v. Wallis	1192	— v. Cinque Ports Justice	1924
Rayner's Trustees and Greenaway, <i>In re</i> ... 1884		— v. City of London Court Judge 554, 556.	
Read, <i>Ex parte</i>	687	1648, 1721	
— v. Anderson	834, 1522	— v. Clarence	582
— v. Brown	5, 1203	— v. Clark	1925
Readdy v. Pendergast	1737	— v. Coles	584
Reading v. London School Board	1040	— v. Coley	567
Real and Personal Advance Co. v. Clears... 243		— v. Cooban.....	847, 848
Reay v. Gateshead (Mayor)	858	— v. Cook	835
Redfield v. Wickham (Corporation)	327	— v. Copping Syke Overseers.....	1381
Redhead v. Westwood	232	— v. Cork Justices	1068
Reece v. Strousberg.....	1095, 1263	— v. Cox	756, 1049, 1178, 1734
Reed, <i>Ex parte</i> , Reed, <i>In re</i> ... 169, 170, 187, 207		— v. Crawford	1924
— <i>In re</i>	2039	— v. Crewkerne Justices.....	1051
— <i>In re</i> , Official Receiver, <i>Ex parte</i> ... 202		— v. Cronmire	568
— <i>In re</i> , Reed, <i>Ex parte</i> ... 169, 170, 187, 207		— v. Croydon County Court Judge... 138, 548	
— v. O'Meara	1829	— v. Croydon and Norwood Tramways	
— v. Winn, Winn, <i>In re</i>	920, 1002	Co.	1862
Rees, <i>In re</i> , Rees v. Rees	1775	— v. Cumberland Justices	1062
Reeve, <i>Ex parte</i> , Lowestoft (Manor of),		— v. Cuming, Hall, <i>Ex parte</i>	58
<i>In re</i>	596, 1126	— v. Curtis	579
— v. Berridge.....	1930	— v. De Portugal	814
Reeves v. Barlow	225, 264	— v. De Winton	212
Regalia, The	1651	— v. Deasy	586
Reg. v. Adams	581	— v. Dee	580
— v. Andover Justices	1057	— v. D'Eyncourt	1065
— v. Ashwell	575	— v. Denbighshire Justices.....	1381
— v. Ayley	566	— v. Dibbin	1367
— v. Bangor (Mayor)	507	— v. Dobbins	1056
— v. Banks	576	— v. Doherty	579, 592
— v. Barnet Union	977	— v. Doutre.....	211, 323
— v. Beckley	1063	— v. Dover (Recorder)	1975
— v. Beddington Overseers	1378	— v. Downing	515
— v. Berwick Assessment Committee ... 1371		— v. Dublin (Recorder)	1048
— v. Biron	1175	— v. Dudley	579
— v. Bishop	1048	— v. Dykes	565, 941
— v. Bloomsbury County Court Judge... 719		— v. Eardley	583, 732, 1064, 1177
— v. Brackenridge.....	587, 732, 1062, 1066	— v. East and West India Dock Co.....	1222
— v. Bredin	569	— v. Edwards.....	616, 1063, 1122
— v. Brindley	840	— v. Essex	266, 1119
— v. Brittleton	590	— v. Essex County Court Judge ... 556, 1022	
— v. Brompton County Court Judge 549, 608		— v. Essex Justices	1979
— v. Buckmaster	575	— v. Farrant	1062
— v. Burgess	573	— v. Felbermann	641
— v. Burns	585, 592	— v. Finkelstein.....	574, 815
		— v. Flannagan	580, 588

Reg. v. Flavell	213	Reg. v. Latimer	532
— v. Fletcher	213, 1063	— v. Lavaudier	814
— v. Flowers	575	— v. Lee	212
— v. Foote	24	— v. Leeds County Court Registrar	555
— v. Fox	723	— v. Leresche	934
— v. Garrett	1052	— v. Lincolnshire County Court Judge... ..	771, 1456
— v. Garstang Union	1386	— v. Liverpool Justices	1051
— v. Garvey	723	— v. Liverpool (Mayor)	561
— v. General Assessment Sessions	1222	— v. Llewellyn	863
— v. General Medical Council	1206	— v. Lloyd	584
— v. Gibson	591	— v. Local Government Board	1975
— v. Gilham	1989	— v. London (Mayor) ... 641, 941, 1068, 1071, ..	1176
— v. Great Western Ry.	1551	— v. London School Board	1373
— v. Great Western Ry. Directors	506	— v. London and North Western Ry. ...	593
— v. Greenwich Board of Works	1218	— v. Long	854
— v. Greenwich County Court Judge ...	556	— v. Lordsmere Inhabitants	1985
— v. Greenwich County Court Registrar ..	193, 555, 557	— v. McDonald	576
— v. Griffiths	1068	— v. Mace	581
— v. Gunnell	590	— v. Mallory	591
— v. Hadfield	584	— v. Mann	589
— v. Hagbourne (Vicar)	694	— v. Manning	566
— v. Hall	214	— v. Market Bosworth Justices	1051
— v. Hands	574	— v. Marsham	1176, 1221
— v. Hanley (Recorder)	840	— v. Marylebone County Court Judge ...	551
— v. Hannam	872	— v. Marylebone Guardians	1381
— v. Haslehurst	1367, 1368	— v. Masters	592
— v. Hatts	588	— v. Midland Ry.	1551
— v. Hazlewood	571	— v. Millhouse	592
— v. Headlam	1379	— v. Miskin Higher Justices	1052
— v. Henkers	581	— v. Merthyr Tydvil Justices	1050
— v. Hollis	575	— v. Metropolitan Ry.	1816
— v. Holmes	572	— v. Montagu	1050
— v. Holroyd	552	— v. Moore	1595
— v. Income Tax Commissioners... 1174, 1477, ..	1573	— v. Newcastle-upon-Tyne Justices	1053
— v. Ingham	1561	— v. Nillins	814
— v. Inland Revenue Commissioners ...	1174, 1378	— v. Northampton County Court Judge ..	830
— v. Inland Revenue Commissioners, Empire Theatre, <i>In re</i>	1046	— v. Norton	588, 722
— v. Jefferson	1379	— v. O'Connell	1049
— v. Jessop	578	— v. Oldham Justices	934
— v. Johnson	580	— v. Owen	582
— v. Johnston	1656	— v. Packer	581
— v. Jones	571, 588	— v. Peters	187, 592
— v. Jordan	460, 550, 559	— v. Phillimore	1175
— v. Judy	187	— v. Pierce	572
— v. Judd	640	— v. Pilling	1175
— v. Kain	592	— v. Pirehill Justices	1178
— v. Kay	566	— v. — North Justices	1177, 1810
— v. Kent Inhabitants	863	— v. Poole (Mayor)	587, 878, 1984
— v. Kettle	559	— v. Poplar Union	1222
— v. King	1048, 1177	— v. Portugal	569
— v. Kirkdale Justices	1049	— v. Poulter	1118, 1119
— v. Labouchere	640	— v. Powell	513, 571
— v. Lambeth County Court Judge	462, 550, 719	— v. Preston Guardians	1386
— v. Langrville Overseers	1381	— v. Price	505, 564, 578
		— v. Prunteny	589
		— v. Ramsay	640, 641
		— v. Randell	570

Reg. v. Rawlins	1367	Reg. v. West Bromwich School Board	1374
— v. Redditch Justices	1051	— v. West Riding Justices	1053, 1057
— v. Regan	591	— v. Westmoreland County Court Judge	547, 1538
— v. Registrar of Joint-Stock Companies	446, 1174, 1177	— v. Wheatley	528, 862
— v. Riel	323	v. Whelan	1540
— v. Riley	580, 591	— v. White	1317, 1369
— v. Ritson	577	— v. Whitfield	1168
— v. Robinson	506	— v. Wigan Corporation	512
— v. Robson	567	— v. Williams	337, 1300
— v. Rogers	548	— v. Wilton (Mayor)	509
— v. Rose	578	— v. Wolverhampton (Recorder)	1072
— v. Rudge	24	— v. Woodfield	590, 834
— v. St. George's Vestry	695, 1208	— v. Wynn	576
— v. St. Mary, Bermondsey	1223	— v. Tonbridge Overseers	697, 1804
— v. — Islington	1222, 1382	— v. Tooke	1062
— v. St. Marylebone Vestry	60	— v. Townshend	225, 569
— v. St. Matthew's, Bethnal Green	695	— v. Trinity House Corporation	1681
— v. St. Olave's Union	1381	— v. Truro (Lord)	627
— v. Sampson	570	— v. Turnbull	1076, 1536
— v. Sandoval	1959	— v. Tynemouth Justices	1070, 1536
— v. Serné	579	— v. York (Archbishop)	687
— v. Sheffield (Recorder)	870	— v. Yorkshire Justices, Gill, <i>Ex parte</i>	1176
— v. Sheil	1176, 1213	Reichel v. Oxford (Bishop)	690
— v. Shepley	1369	Reid, <i>Ex parte</i>	1176
— v. Shingler	214	— <i>Ex parte</i> , Gillespie, <i>In re</i>	152, 200
— v. Shropshire County Court Judge	548, 1061	— <i>In goods of</i>	2012
— v. Shurmer	588	— v. Explosives Company	441, 1188
— v. Sibly	1317, 1369	— v. Hoare	956
— v. Simpson	566	— v. London and Staffordshire Fire Insurance Company	349
— v. Slade	18	— v. Reid	918, 924, 1807
— v. Smith	589, 1123, 1370	Renpor, The	1704, 1707
— v. South Staffordshire Waterworks Co.	1377	Republic of Peru v. Dreyfus	1024, 1412
— v. Southampton County	1985, 1986	— v. Peruvian Guano Company	1464
— v. Southend County Court Judge	1721	Revell, <i>Ex parte</i> , Tollemache, <i>In re</i>	149, 746
— v. Sparks	1051	Revill, <i>In re</i> , Leigh v. Rumney	806
— v. Staffordshire County Court Judge	550	Rew v. Payne	1582
— v. — (Justices)	1177, 1810	Reynolds, <i>Ex parte</i> , Barnett, <i>In re</i>	86, 193, 196
— v. Staines Local Board	593	— <i>Ex parte</i> , Norris, <i>In re</i>	96
— v. Stephens	568	— v. Coleman	1413, 1416
— v. Stephenson	505, 564, 578	Rhoades, <i>In re</i> , Lane v. Rhoades	2073
— v. Stepney Union	1384	Rhodes, <i>In re</i> , Heyworth, <i>Ex parte</i>	114
— v. Stonor	528, 549, 608	— <i>In re</i> , Rhodes v. Rhodes	742
— v. Stroulger	587, 722	— Will, <i>In re</i>	1430
— v. Stubbs	593	— v. Dawson	189, 1042, 1443
— v. Sullivan	590	— v. Jenkins, Mansel, <i>In re</i>	1896
— v. Surrey Justices	299, 1047	— v. Pateley Bridge Union	1378
— v. Sussex County Court Judge	110	— v. Rhodes, Rhodes, <i>In re</i>	742
— v. Wakefield	1051	— v. Sugden, Wadsworth, <i>In re</i>	1788, 1789, 1790
— v. Wakefield Guardians	1386	Rhondda, The	1689
— v. Wakefield (Mayor)	878, 1985	Rhosina, The	517, 1297, 1301, 1517, 1718
— v. Wandsworth Board of Works	1217	Rice, <i>In re</i>	750
— v. Ward	586	— v. Howard	755
— v. Warr	1989	Richards, <i>Ex parte</i> , Wallace, <i>In re</i>	112, 1391
— v. Wealand	581	— <i>In re</i> , March, <i>Ex parte</i>	204
— v. Webster	582	— <i>In re</i> , Official Receiver, <i>Ex parte</i>	136
— v. Weil	23, 814		
— v. Wellard	583		
— v. Wells Water Company	1962		

Richards, <i>In re</i> , Shenstone v. Brock	1870	Robinson v. Barton Local Board.....	852, 858
— <i>In re</i> , Williams v. Gorvin	2055	— v. Dand.....	691
— v. Banks	1046, 1561	— v. Gandy, Garnett, <i>In re</i>	949
— v. Jenkins	735, 774, 1041	— v. Milne	265, 1078, 1225
— v. Kessick	853	— v. Needham, Needham, <i>In re</i> ...	2116
— v. West Middlesex Waterworks Co.....	1199, 1968	— v. Robinson	904
Richardson, <i>In re</i> , Gould, <i>Ex parte</i>	88, 141	— v. Trevor	270, 1247
— <i>In re</i> , Shillito v. Hobson	1243	— v. Tucker.....	25, 224, 1045, 1474
— <i>In re</i> , Shuldham v. Royal National Lifeboat Institu- tion	306, 1868	Robinsons, The	1720
— v. Brown	856	Robson, <i>Ex parte</i>	511
— v. Feary	1321	— v. Owner of the Kate.....	1720
— v. Harrison	2026, 2055, 2103	— v. Worswick, Worswick, <i>In re</i>	647
— v. Pratt.....	97	Rochdale Building Society v. Rochdale (Mayor)	872, 1070
— v. Webb	767	Rodocanachi v. Milburn.....	1666, 1672
Richardson's Will, <i>In re</i>	308	Rodway, <i>In re</i> , Phillips, <i>Ex parte</i>	199, 200
Riddell, <i>In re</i> , Strathmore (Earl), <i>Ex parte</i> ..	109	Roe v. Birch, Birch, <i>In re</i>	788, 1073
— v. Errington	936, 1627	— v. Mutual Loan Fund ...	188, 244, 260, 736
Riddeough, <i>In re</i> , Vaughan, <i>Ex parte</i>	136, 165	Rogers, <i>Ex parte</i> , Pyatt, <i>In re</i> ...	135, 629, 935
Ridge, <i>In re</i> , Hellard v. Moody	1632	— <i>Ex parte</i> , Rogers, <i>In re</i>	170, 172
Ridgway, <i>Ex parte</i> , Ridgway, <i>In re</i>	167	— <i>In re</i> , Board of Trade, <i>Ex parte</i> ...	92
— <i>In re</i> , Mein, <i>Ex parte</i>	146	— v. Drury	488
— v. Ward	74, 1987	Rolland v. Cassidy.....	322
Riel v. Reg.....	323	Rollason, <i>In re</i> , Rollason v. Rollason... 766, 1358	
Rigborgs Minde, The	1679, 1680	Rolls v. London School Board.....	1592
Rigg v. Hughes, Smith, <i>In re</i>	43, 2015, 2016	— v. Miller	1086
Riley to Streatfield, <i>In re</i>	1948	Rona, The	1652
Ringdove, The	1653	Ronan v. Midland Ry.	296
Rio Tinto, The.....	1651, 1721	Rooke, <i>Ex parte</i> , Purvis, <i>In re</i>	137
Ripley v. Paper Bottle Co.	398	Rooney, <i>Ex parte</i> , Tallerman, <i>In re</i>	151
— v. Sawyer	982, 1507	Roots v. Beaumont	864
Ripon, The	1680, 1691	— v. Williamson	386
Risoluto, The	1699	Roper, <i>In re</i> , Roper v. Doncaster	929
River Lagan, The	1698	Rose of England, The	1692
River Plate Fresh Meat Co., <i>In re</i>	380	Roselle v. Buchanan.....	636, 1438
Rivett-Carnac's Will, <i>In re</i>	1631, 1825	Rosetta, The.....	1685, 1686
Rivière's Trade-mark, <i>In re</i> ...	1835, 1852, 1853	Rosher, <i>In re</i> , Rosher v. Rosher.....	616, 2073
Robarts, <i>Ex parte</i> , Gillespie, <i>In re</i>	143, 223	Rosing's Application, <i>In re</i>	1844, 1848
Robert Dickinson, The.....	1651	Ross, <i>Ex parte</i> , British Empire Match Co., <i>In re</i>	382
Roberts, <i>Ex parte</i>	300	— <i>Ex parte</i> , Cripps, <i>In re</i>	113, 158
— <i>In re</i> , Daniel, <i>Ex parte</i>	164	— v. Army and Navy Hotel Co.	370
— <i>In re</i> , Evans v. Roberts	229, 472, 1588	Rothbury, The	1668
— <i>In re</i> , Kiff v. Roberts... 28, 1398, 2065		Rotherham (Mayor) v. Fullerton	854
— <i>In re</i> , Tarleton v. Bruton	2049	— v. Rotherham	2061
— v. Barnard	1522	— Alum and Chemical Co., <i>In re</i>	403, 475
— v. Falmouth Sanitary Authority... 1594		Rous v. Jackson.....	2102
— v. Oppenheim	650, 652	Routh, <i>Ex parte</i> , Whitehead, <i>In re</i>	474
— v. Roberts	228, 237, 240, 241, 255	Rowe, <i>In re</i> , Rowe v. Smith	978
Robertson, <i>In re</i>	205, 1774	— v. Kelly	1426
— v. Broadbent	2084, 2086	— v. London School Board	1799
— v. Richardson.....	191	— v. Smith, Rowe, <i>In re</i>	978
Robey v. Snafell Mining Co.	1416	Rowlands, <i>In re</i> , Board of Trade, <i>Ex parte</i> ..	94
Robins, <i>In re</i> , Nelson v. Robins.....	1578	— v. De Vecchi	745, 1135
Robinson, <i>Ex parte</i> , O. D., <i>In re</i>	150	— v. Williams	1789
— <i>In re</i>	65, 903, 1164	Rownson, <i>In re</i> , Field v. White	783, 788
— <i>In re</i> , Pickard v. Wheeler... 1487, 1488		Royal Bristol Permanent Building Society v. Bomash	1799

Royal Exchange Shipping Co. v. Dixon ...	1670	St. Mary, Newington, v. South London Fish	
— Liver Friendly Society, <i>In re</i>	831	Market Co.	1214
— Mail Steam Packet Co. v. English		St. Matthew's, Bethnal Green, v. Perkins...	695
Bank of Rio de Janeiro	1715	St. Pancras Guardians v. Norwich Guar-	
Rudland v. Sunderland (Mayor)	857	dians	1382
Ruffle v. Medlock, Medlock, <i>In re</i>	2123	St. Saviour's Rectory (Trustees) and Oyler,	
Rushbrooke v. Farley	1424	<i>In re</i>	700
Russell, <i>Ex parte</i> , Elderton, <i>In re</i>	208	St. Stephen's, Coleman Street, <i>In re</i>	313
— <i>In re</i>	1751, 1753, 2034	Salaman, <i>Ex parte</i> , Salaman, <i>In re</i>	181, 207
— <i>In re</i> , Guest, <i>Ex parte</i>	109, 613	Salisbury (Bishop) v. Ottery	688
— <i>In re</i> , Russell v. Shoolbred... ..	1106, 1530	— (Lord) v. Nugent	2014
— v. Town and County Bank	1571	Salkeld, <i>In re</i> , Good; <i>Ex parte</i>	120
— v. Waterford and Limerick Ry. ...	729	Salm Kyrburg v. Posnanski	66, 1492
— v. Watts	675, 1955	Salmon, <i>In re</i> , Gould, <i>Ex parte</i>	1658
Rust v. Victoria Graving Dock Co.	601	— v. Duncombe	332, 1803
Ruthin Ry., <i>In re</i> , Hughes' Trustees, <i>Ex</i>		Salt v. Edgar	1273
<i>parte</i>	1319	— v. Pym, Northen's Estate, <i>In re</i>	2018
Ryan, <i>In re</i>	192, 961	Salter v. Att.-Gen., Morris, <i>In re</i>	2044
— v. Fraser	532	Salting, <i>Ex parte</i> , Stratton, <i>In re</i>	146
— and Cavanagh, <i>In re</i>	779, 1945	Sampson and Wall, <i>In re</i>	968
Ryder, <i>In re</i>	1132, 1162	Sanders, <i>In re</i> , Serjeant, <i>Ex parte</i> 86, 206, 1109	
Rye v. Hawkes	1422	Sandeman v. Scottish Property Society ..	1606
Ryley, <i>In re</i> , Official Receiver, <i>Ex parte</i> ...	609	Sanders, <i>In re</i> , Serjeant, <i>Ex parte</i> 86, 206, 1109	
— <i>In re</i> , Stewart, <i>Ex parte</i>	168	— <i>In re</i> , Whinney, <i>Ex parte</i>	109, 443
Rymer v. De Rosaz, De Rosaz, <i>In re</i>	535	— v. Anderson	1417
— v. Harpley, Bourne, <i>In re</i>	2046	— v. Bromley, Bromley, <i>In re</i>	398
Rymill v. Wandsworth District Board	72	— v. Davis	1238
		— v. Maclean	1581
		— v. Peek	1407
		— v. Teape	18, 1300, 1864
		Sanderson, <i>In re</i> , Wright v. Sanderson 39, 2001	
		— v. Berwick-upon-Tweed (Mayor) 1084	
		Sandford v. Clarke	1076, 1090, 1101, 1295
		Sandgate Local Board v. Leney	684
		— — v. Pledge	873, 1071
		Sandwell, <i>In re</i> , Zeffass, <i>Ex parte</i>	121
		Sangster v. Cochrane	271
		"Sanitas" Trade-mark, <i>In re</i>	1839, 1849
		Sanitas Co. v. Condy	1856
		Sara, The	1653
		Sarum (Bishop of), <i>In re</i>	1905
		Satellite, The	1720
		Saul v. Pattinson	1267, 1881
		— v. Wigton Sanitary Authority	872
		Saunders v. Brading Harbour Improvement	
		Co.	1796
		— v. Dence	1588
		— v. McConnell, McConnell, <i>In re</i> ..	39
		— v. Pawley	1471, 1496
		— v. Pitfield	833
		Saunders-Davies, <i>In re</i> , Saunders-Davies	
		v. Saunders-Davies	2119
		Savage v. Payne, Stamford (Earl), <i>In re</i> ..	1427
		Savile v. Couper	1915
		— v. Yeatman, Drax, <i>In re</i>	2036
		Saville, <i>Ex parte</i> , Saville, <i>In re</i>	111
		— <i>In re</i> , Beyfus or Saville, <i>Ex parte</i> ..	111
		Sawyer v. Sawyer	1459, 1887
		— and Baring's Contract, <i>In re</i>	1944
S., <i>In re</i> , Bank of Ireland, <i>Ex parte</i>	142, 1001		
S. (falsely called B.) v. B.	887		
Sachs v. Spielman	1439		
Sadler, <i>In re</i> , Norris, <i>Ex parte</i>	150		
St. Agnes, <i>In re</i>	693		
St. Alphege (Parson), <i>In re</i>	1127		
— London Wall, <i>In re</i>	313		
St. Andrews Election	718		
St. Andrew's Hospital v. Shearsmith....	1566		
St. Andries, The	1687		
St. Botolph Estates, <i>In re</i>	312		
St. Croix v. Morris	482, 838		
St. Gabriel, Fenchurch v. Williams	1375		
St. George's Estate, <i>In re</i>	1457		
St. George v. St. George	659, 799		
St. Giles, Camberwell v. Greenwich Board			
of Works	1219		
— — v. Hunt	1220		
St. Helen's (Mayor) v. Kirkham	866		
— Corporation v. St. Helen's			
Colliery Co.	871		
St. John the Evangelist, <i>In re</i>	313		
St. John's, Hampstead, v. Cotton	1220		
— — v. Hoopel	1217		
St. Lawrence (Overseers) v. Kent JJ... ..	545, 1072,		
St. Leonard, Shoreditch, Schools, <i>In re</i> ...	314		
St. Leonard's Vestry v. Holmes	1217		
St. Mary's, Aldermanbury, <i>In re</i>	313		

Sayer, <i>Ex parte</i> , Mansel, <i>In re</i>	92	Selous v. Croydon Rural Sanitary Au-	
— <i>In re</i> , McClellan v. Clark	2086	thority	768, 1482
— v. Hutton	1288	Selwyn v. Garfit	1258, 1955, 1956
Sayers, <i>Ex parte</i> , Belfast Town Council,		Senhouse v. Mawson	209
<i>In re</i>	2029	Sephton v. Sephton	934
— v. Collyer	985, 987, 1953	Seraglio, The	1727
Saywood v. Cross	539	Serff v. Acton Local Board	670, 1408, 1483
Scanlan, <i>In re</i>	980	Sergeant, <i>Ex parte</i> , Sandars, <i>In re</i> ...	86, 206
Scantlebury, <i>Ex parte</i> , Guy, <i>In re</i>	200	—	1109
Scaramanga v. Marquand	1672, 1708	— <i>In re</i> , Mertens v. Walley	2035
Scarborough v. Scarborough	2044	Seroka v. Kattenburg	914, 941
Scarlett v. Hanson	1642	Serrao v. Noel	732
Scatchard v. Johnson	1054	Seton v. Lafone	740, 1988
Scharrer, <i>In re</i> , Tilly, <i>Ex parte</i>	137, 202	Seventh East Central Building Society, <i>In</i>	
Scheyer, <i>Ex parte</i> , Wontner, <i>In re</i>	1786	<i>re</i>	421
Schmidt's Trade-mark, <i>In re</i>	1848	Seward v. The Vera Cruz	1301, 1720, 1808
Schmitz, <i>Ex parte</i> , Cohen, <i>In re</i>	108	Sewell v. Burdick	1583, 1662
Schneider v. Duncan	722	Seymour v. Bridge	1523
Schofield v. Hincks	123, 1090, 1107	Seyton, <i>In re</i> , Seyton v. Satterthwaite	920, 1002
— v. Solomon	1156	Shafto v. Bolckow, Vaughan & Co. ...	500, 1407,
Scholes, <i>In re</i>	1754	—	1471
Scholfield v. Spooner	951	Shafto's Trusts, <i>In re</i>	1913
Schove v. Schmincké	501, 1829	Shakespeare, <i>In re</i> , Deakin v. Lakin	926
Schreiber v. Dinkel	829	Shannon (Earl) v. Good	2061
Schultze v. Schultze	920, 1002	Shapcott v. Chappell	559
Schulze v. Great Eastern Ry.	291, 603	Sharp, <i>Ex parte</i> , Walker, <i>In re</i>	84
Schumann, <i>Ex parte</i> , Forster & Co., <i>In re</i>	441,	— v. Fowle	1096
1188		— v. McHenry ...	175, 196, 235, 236, 255, 256
Scicluna v. Stevenson	1689	Sharpe v. Wakefield	1051
Score, <i>In re</i> , Tolman v. Score	2057, 2064	Shaw v. Aitken	1646, 1663
Scotch Whiskey Distillers, <i>Ex parte</i> ,		— v. Benson	351
Flatau, <i>In re</i>	111, 113	— v. Kirby	1641, 1643
Scotney v. Lomer	1888, 2042, 2058, 2101	— v. Lomas	1095
Scott, <i>Ex parte</i> , Hawke, <i>In re</i>	84	— v. Port Phillip Gold Mining Co. ...	394, 1516
— <i>In re</i>	1166	— v. Simmons	352
— v. Attorney-General	330, 1030	— v. Smith	644, 655, 1449
— v. Brown	1104, 1864	— and the Birmingham Corporation, <i>In</i>	
— v. Great Clifton School Board	1593	<i>re</i>	60
— v. Morley	606, 930, 943, 1803	Shead, <i>Ex parte</i> , Mundy, <i>In re</i>	207
— v. Murphy	808	Sheffield (Earl) v. London Joint Stock	
— v. Pape	678	Bank	76
— v. Sebright	886	— Building Society, <i>In re</i> , Watson,	
— v. Taylor	1826	<i>Ex parte</i>	269, 734
Scovell v. Bevan	1720	— Waterworks Co. v. Bingham	872,
Sea Insurance Co. v. Hadden or Hodden ...	1018	—	1964
Seaar v. Webb	1483	— and South Yorkshire Permanent	
Seager v. White	590, 1056	Building Society v. Harrison ...	228,
Seagrave's Trust, <i>In re</i>	932	—	1238
Searle v. Choat	772, 1467	Sheldon, <i>In re</i> , Nixon v. Sheldon	1817
Seath v. Moore	133, 1604	— and Kemble, <i>In re</i>	2060
Seaton, The	1687	Shelley v. Bethell	666, 1823
— v. Seaton	968	Shenstone v. Brock, Richards, <i>In re</i>	1870
Sebright's Settled Estates, <i>In re</i>	1631	Sheolin v. M'Grane	1788
Secretary of State for War and Denne, <i>In re</i>	1767	Shepherd, <i>In re</i> , Whitehaven Mutual In-	
Sedgwick, <i>In re</i> , McMurdo, <i>Ex parte</i>	108	surance Society, <i>Ex parte</i> ...	149,
— v. Yedras Mining Co.	1408	—	150
Self-Acting Sewing Machine Co., <i>In re</i> ...	445	— v. Folland	525, 1184
Sellors v. Matlock Bath Local Board ...	7, 878,	— v. Norwich (Mayor)	1112, 1122
1313		— v. Pulbrook	231

Sheppard, <i>Ex parte</i> , Parkers, <i>In re</i>	147	Sitwell, <i>Ex parte</i> , Drury Lowe's Marriage Settlement, <i>In re</i>	1574
— v. Gilmore	266, 1470, 1952	Skinner v. City of London Marine Insurance Corporation	390, 603
— v. Scinde, Punjaub, and Delhi Ry.	480	— v. Skinner	980
Sheppy Union v. Elmley Overseers	1984	— v. Weguelin.....	1526
Sherbro, The	1657	Skipper v. Skipper, Palmer, <i>In re</i>	1472
Sheridan, <i>In re</i>	2067	Skipwith v. Great Western Ry.	287
Sherrington's case.....	452	Slack v. Parker	1328
Sherry, <i>In re</i> , London and County Banking Co. v. Terry	80, 1360, 1528	Slater v. Burnley (Mayor)	1969
Shield, <i>In re</i> , Pethybridge v. Burrow	1869	!— v. Slater	1429, 1745
Shiers v. Ashworth, Jackson, <i>In re</i>	2037	Slattery v. Ball, Ball, <i>In re</i>	2047
Shillito v. Hobson, Richardson, <i>In re</i>	1243	— v. Naylor	281, 319
Shilson, <i>Ex parte</i> , Cock, <i>In re</i>	121	Sly v. Blake, Johnson, <i>In re</i>	802, 1145
Shingler v. Smith	214	Small, <i>Ex parte</i> , Small, <i>In re</i>	182
Shirley, <i>In re</i> , Mackay, <i>Ex parte</i>	104, 444	— v. Hedgely, Hedgely, <i>In re</i>	793, 929
Shoolbred, <i>Ex parte</i> , Angell, <i>In re</i>	199	— v. Smith	278
Shoreditch (Hoxton Division) Election, <i>In re</i> , Walker, <i>Ex parte</i>	719	Smalley, <i>In re</i> , Smalley v. Smalley	2065
Shrapnel v. Laing	520	Smallpage and Brandon's Case	220, 421, 1037
Shroder v. Myers	1466	Smallpage v. Tonge	1412
Shrubb v. Lee.....	1108	Smart, <i>In goods of</i>	1994
Shuldham v. Royal National Lifeboat Institution, Richardson, <i>In re</i>	306, 1868	Smeed, <i>In re</i> , Archer v. Prall.....	972
Shumm v. Dixon	529	Smethurst v. Hastings	1875, 1958
Shurly, <i>Ex parte</i> , Shurly, <i>In re</i>	115	Smiles v. Crooke	1565
Shurmur v. Sedgwick	828	Smith, <i>Ex parte</i> , Hepburn, <i>In re</i>	145, 1138
Shurrock v. Lillie	67	— <i>Ex parte</i> , Homer District Consolidated Gold Mines, <i>In re</i>	382
Shute v. Hogge	949	— <i>Ex parte</i> , Kells Union, <i>In re</i>	1125
Sibeth, <i>Ex parte</i> , Sibeth, <i>In re</i>	131, 923	— <i>Ex parte</i> , Knight, <i>In re</i>	152
Sibley v. Higgs	240	— <i>Ex parte</i> , Staniar, <i>In re</i>	171
Siddall, <i>In re</i>	352	— <i>In re</i>	1761
Siddell v. Vickers	1340	— <i>In re</i> , Brown, <i>Ex parte</i>	71, 94, 152, 613
Siegenberg v. Metropolitan District Ry. ...	1116	— <i>In re</i> , Chapman v. Wood.....	938
Silva's Trusts, <i>In re</i>	1163	— <i>In re</i> , Day v. Bonaini	1949
Silverton v. Marriott	1296	— <i>In re</i> , Edwards, <i>Ex parte</i>	49, 142, 193
Simes v. Simes, Allen, <i>In re</i>	1487, 1918	— <i>In re</i> , Fox, <i>Ex parte</i>	95, 140
Simkin v. London and North Western Ry. ...	1292	— <i>In re</i> , Hannington v. True	2112
Simmonds, <i>Ex parte</i> , Carnac, <i>In re</i> ...	95, 1232	— <i>In re</i> , Hooper v. Smith	31
Simmons, <i>In re</i>	57, 1793	— <i>In re</i> , Lord v. Hayward	2025
— v. Henchy	1642	— <i>In re</i> , Rigg v. Hughes	43, 2015, 2016
Simonds v. Blackheath JJ.	1053	— <i>In re</i> , Smith v. Went	654
Simpson's Claim, Cunningham & Co., <i>In re</i> ..	1513	— and Stott, <i>In re</i>	1944
Simpson v. Beard, Beard, <i>In re</i>	2070	— v. Acock	1108
— v. Charing Cross Bank	254	— v. Barham	1377
— v. Shaw	300, 1204	— v. Buchan	1508
Sinclair, <i>In re</i> , Chaplin, <i>Ex parte</i> ...	100, 144, 166, 826	— v. Butler.....	1071, 1863
— <i>In re</i> , Payne, <i>Ex parte</i>	168	— v. Carter	769, 1456
Sinclair's Settlement, <i>In re</i> , Crump v. Leicester.....	492	— v. Chadwick	348, 821
Sinclair's Trust, <i>In re</i>	304	— v. Critchfield.....	1039, 1042
Singer v. Hasson	1341, 1808	— v. Cropper	734, 1346, 1351
Singleton, <i>Ex parte</i> , Johnstone, <i>In re</i>	89	— v. Cuninghame	2082
— v. Knight.....	325, 1328	— v. Darlow.....	25, 1043, 1044
Sinidino v. Kitchen	46, 1584	— v. Dart	1475, 1665
Sion College, <i>In re</i> , London (Mayor), <i>Ex parte</i>	1130	— v. Davies	30, 1268, 1451
Sissling, <i>In re</i> , Fenton, <i>Ex parte</i>	151	— v. Drummond	1664
		— v. Edwards.....	1422, 1782
		— v. Gill, Gill, <i>In re</i>	1487, 1910, 1918
		— v. Gordon	3
		— v. Hargrove	1473

Smith v. Hunt	833	South Shropshire Election, <i>In re</i>	720
— v. Jobson	2023	— Staffordshire Waterworks Co. v. Mason	1961
— v. Land and House Property Cor- poration	39, 824, 1934	— Staffordshire Waterworks Co. v. Stone	1070
— v. Maclure	1238	Southend Waterworks Co. v. Howard	1967
— v. Manchester (Duke)	357	Southampton Guardians v. Bell.....	1368, 1754
— v. Martin, Martin, <i>In re</i>	2047	Southport Banking Co., <i>In re</i> , Fisher's case, Sherrington's case	452
— v. Midland Railway	290	— Banking Co. v. Thompson.....	1239
— v. Millidge, Humphries, <i>In re</i>	2024	Spackman v. Plumstead Board of Works ...	1210
— v. Olding	1271	Spamer, <i>Ex parte</i> , Voght, <i>In re</i>	151
— v. Pearman	1273	Spearman, The	1690
— v. Sibthorpe, Jackson, <i>In re</i> ..	1236, 1821	Spedding v. Fitzpatrick	1438
— v. Smith	891, 908, 1207	Speer, <i>In re</i>	1844
— v. Spence, Wheatley, <i>In re</i>	703, 923	Speers v. Daggers	561, 1040
— v. Tregarthen	602, 1671	Speight, <i>In re</i> , Brooks, <i>Ex parte</i>	208
— v. Went, Smith, <i>In re</i>	654	— v. Gaunt	1889
— v. Whitlock	927	Speller v. Bristol Steam Navigation Co. ...	1460, 1461
— v. Wills	533	Spencer, <i>In re</i> , Hart v. Manston	2016
Smith's Estate, <i>In re</i> , Clements v. Ward... 303, 940, 1808, 1992		— <i>In re</i> , Thomas v. Spencer.....	988
Smithwick v. Hayden	2082	— v. Ancots Vale Rubber Co.	38
Smyth, <i>In re</i>	1903	— v. Brighthouse, Williams, <i>In re</i> ...	2046, 2122
Smythe v. Smythe	457, 900, 1491	Spencer's Trade-mark, <i>In re</i>	1843
Snell v. Heighton	230, 1883	— Will, <i>In re</i>	2020, 2092
Snelling v. Pulling	523, 544	Spencer-Bell to the London and South Western Ry.	1023, 1124
Sneyd, <i>In re</i> , Fewings, <i>Ex parte</i>	188, 1023, 1061, 1279	Spero Expecto, The	1723
Snow v. Hill	835	Spettigue's Trusts, <i>In re</i>	536
— v. Whitehead	1953, 1973	Spittall v. Brook.....	709
Soanes, <i>Ex parte</i> , Walker, <i>In re</i>	197, 203	Squire v. Arnison	800
Société Anonyme des Manufactures de Glaces v. Tilghman's Patent Sand Blast Co.	1352, 1832	Stafford v. Stafford, Price, <i>In re</i>	939, 1992
— Française des Asphaltes v. Farrell	631	Stafford's Charity, <i>In re</i>	1131
— Générale de Paris v. Dreyfus	1411	Staines, <i>In re</i> , Staines v. Staines	1488
— v. Geen	176	Stainton, <i>In re</i> , Board of Trade, <i>Ex parte</i> ..	202
— v. Tramways Union Co.	1308	Stamford (Earl), <i>In re</i> , Savage v. Payne ..	1427
— v. Walker	397	Stamford's (Lord) Estate, <i>In re</i>	1637
Solicitor, <i>In re</i>	1492, 1783	Standing v. Bowring.....	13, 388
— <i>In re</i> , Dudley, <i>Ex parte</i>	1493	Stanford, <i>Ex parte</i> , Barber, <i>In re</i> 237, 238, 240	
— to the Treasury v. White	759	— v. Roberts	1748, 1765
Solis, The	1722	— v. Stanford	2045
Solomon v. Davis	221	Stanger, <i>In re</i> , Geisel, <i>Ex parte</i>	98, 118
Solway, The	743, 1725	Stanhope v. Stanhope	1, 896
Somerset (Duke), <i>In re</i> , Thynne v. St. Maur 941, 981, 2116		Staniar, <i>In re</i> , Smith, <i>Ex parte</i>	171
— v. Hart	1054	— v. Evans	1490, 1744, 1781, 1897
Somerville, <i>In re</i> , Downes v. Somerville ...	42	Stanmore, The	1688
— v. Schembri	335, 1831	Stanton v. Lambert, Lambert, <i>In re</i>	913, 1577, 2120
Sonnenschein v. Barnard.....	540	Star of Persia, The	1711
Soper v. Arnold.....	1951	Stedman, <i>In re</i> , Coombe v. Vincent	1322
Souch v. Cowley, Cowley, <i>In re</i>	2108, 2128	— v. Dunster, Hartley, <i>In re</i>	2079
Soutar's Policy Trust, <i>In re</i>	920, 1001	Steed, <i>Ex parte</i> , Day, <i>In re</i>	208
South City Market Co., <i>In re</i> , Bergin, <i>Ex</i> <i>parte</i>	1126	Steedman v. Hakin	41, 1494
— Dublin Union v. Jones.....	526, 1071	Steele, <i>In re</i> , Gold v. Brennan	1903
— Durham Brewery Co., <i>In re</i>	383	— v. Sutton Gas Co.....	364
— London Fish Market Co., <i>In re</i>	411	Stein v. Cope	1515
		Stenning's Trusts, <i>In re</i>	1901

Stenson, <i>In re</i> , Merriman, <i>Ex parte</i>	151	Streatham Estates Co. v. Public Works Commissioners	1123
Stephen v. Cunningham, Hamlet, <i>In re</i> ...	2047	Street v. Crump.....	1509
Stephens, <i>In re</i> , Jones, <i>Ex parte</i>	203	— v. Union Bank of Spain and Eng-land	6, 991, 1829
— v. Harris	1678	Stribling v. Halse	706
— v. London and South Western Ry.....	294	Strick, <i>In re</i> , Martin, <i>Ex parte</i>	114
— v. Stephens	952	— v. Swansea Tin Plate Co.	1860
Stephenson, <i>Ex parte</i> , Newtownards Gas Co., <i>In re</i>	430	Strickland v. Symons	1892
— <i>In re</i> , Official Receiver, <i>Ex parte</i>	143	— v. Weldon	4, 316, 476, 1398
— v. Stephenson	1997	Strike v. Collins.....	1184
Stevens, <i>Ex parte</i> , Whicher, <i>In re</i>	137	Strong, <i>In re</i>	34, 610, 1741, 1742
— <i>In re</i>	1820	Stroud v. Austin	601
— v. Barnet Gas and Water Co.	1966	Strugnell v. Strugnell	983, 1322
— v. Biller	1526	Stuart, <i>In goods of</i>	1998
— v. Bishop.....	701, 1571	— v. Balkis Co.....	760, 761
— v. Great Western Ry.	290	— v. Wrey, Wrey, <i>In re</i>	2044
— v. Metropolitan District Ry. 544,	1544	Stubbs v. Hilditch.....	1972
— v. Thompson, Thompson, <i>In re</i> ...	942,	Stuchbery v. Spencer	1046, 1560
	1443	Studdert v. Grosvenor	357
Steward v. North Metropolitan Tramways Co.	1502	Studds v. Watson	471
Stewart, <i>Ex parte</i> , Ryley, <i>In re</i>	168	Stumore v. Breen	1652, 1659
— v. Fletcher	937	Sturgis (British) Motor Power Syndicate, <i>In re</i>	415
— v. Merchant Marine Insurance Co. 1015		Styles v. New York Life Insurance Co. ...	1004,
— v. West Derby Burial Board	698		1568
Stewartstown Loan Co. v. Daly	1423	Suckling v. Gabb	1447
Stimpson v. Wood	1302	Sudeley's (Lord) Settled Estates, <i>In re</i> ...	1635
Stock v. Inglis	1009, 1581	Suffield and Watts, <i>In re</i> , Brown, <i>Ex parte</i>	85, 1396, 1790
Stocken, <i>In re</i> , Jones v. Hawkins	801	Suffolk v. Lawrence	1486, 1900
Stockton, <i>In re</i> , Gibson, <i>Ex parte</i>	203	Sugg v. Bray	751
Stoer, <i>In re</i>	760, 884	Sullivan v. O'Connor	1298
Stogdon, <i>In re</i> , Baker, <i>Ex parte</i>	1757	Sully, <i>Ex parte</i> , Wallis, <i>In re</i>	124
Stokes v. Stokes	551	Sully's case	403, 1798
Stolworthy v. Powell	548	Sultzberger, <i>Ex parte</i> , Sultzberger, <i>In re</i> 183	
Stone, <i>In re</i> , Nicholson, <i>Ex parte</i>	85, 608	Summers v. Moorhouse.....	509
— v. Att.-Gen., Sutton, <i>In re</i>	303, 2068	Summersville, <i>In re</i>	1161
— v. Smith	1473, 1800	Sunderland 32nd Universal Building Society, <i>In re</i> , Jackson. <i>Ex parte</i>	278
Stone's Trusts, <i>In re</i>	1325	Sunnyside, The	1709
Stoneham v. Ocean, Railway, and General Accident Insurance Co.	996	Suse, <i>In re</i> , Dever, <i>Ex parte</i>	128, 130, 135,
Stonor v. Fowle	608		467, 921, 995, 1003, 1035
Stonor's Trusts, <i>In re</i>	946	Sutcliffe v. Wood	1424
Storer, <i>In re</i>	1777	Sutherland, The.....	1679
Storey v. Storey.....	893	Sutton, <i>In re</i> , Stone v. Att.-Gen.	303, 2068
Stormcock, The	1694, 1714	— (Parish of) to Church	314, 341
Stotesbury v. St. Giles, Camberwell	1220	Svensden v. Wallace.....	534, 1016, 1716
Stott v. Fairlamb	216	Swabey v. Dovey	657
— v. Milne	1895	Swain v. Ayres	1103
Strand, <i>In re</i> , Board of Trade, <i>Ex parte</i> ...	200	— v. Follows	560
Strangways, <i>In re</i> , Hickley v. Strangways 1622		Swansea Co-operative Building Society v. Davies	553
Strathmore (Earl), <i>Ex parte</i> , Riddell, <i>In re</i>	109	Sweet v. Combley	1271
— v. Vane, Bowes, <i>In re</i> 78,	787	Swift v. Pannell.....	125, 258
Stratton, <i>In re</i> , Salting, <i>Ex parte</i>	146	Swinburn v. Ainslie, Ainslie, <i>In re</i> ...	790, 1824
Strauss v. County Hotel and Wine Co. 993,	1294	— v. Milburn	1089
Strawbridge, <i>Ex parte</i> , Hickman, <i>In re</i> ...	94,	Swinburne, <i>In re</i> , Swinburne v. Pitt 2099,	2110
	175, 176	Swindell v. Bulkeley.....	800

Swire, <i>In re</i> , Mellor v. Swire	1481	Taylor v. Mostyn	1226, 1264, 1269, 1270
Syer v. Gladstone	2110	— v. Neate	1337
Sykes, <i>In re</i> , Sykes v. Sykes	1772	— v. Pendleton Overseers	1369
— v. Sacerdoti	1442	— v. Pilsen Joel and General Electric Light Co.	406
Symes v. Appelbe	1997	— v. Poncia	1627
Symington v. Footman	1831	— v. Smetten	837, 1157
Symonds v. City Bank	1503	— v. Taylor, Taylor, <i>In re</i>	1999
— v. Hallett	941	— v. Timson	694
— v. Incorporated Law Society	1793	Teale, <i>In re</i> , Teale v. Teale	2043
Symons, <i>In re</i> , Betts v. Betts	1400	Tearle v. Edols	317
— v. Leaker	672	Tempest v. Camoys (Lord)	1917
T.		Temple v. Thring	808, 880, 1820
T. v. T.	1029	— Bar, The	1468, 1724
Tabor v. Prentice	1997	Tench's Trusts, <i>In re</i>	925
Tacon v. National Standard Investment Co.	1507	Tench v. Eykyn	1460
Tagart v. Marcus	1500, 1514	Tennant v. Cross	2016
Tailby v. Official Receiver	242	— v. Howatson	337
Tait v. Mitchell	1643	Tennent, <i>In re</i> , Grimwade, <i>Ex parte</i> ...	109, 443
Talbott, <i>In re</i> , King v. Chick	808	— v. Welch	935
Tallerman, <i>In re</i> , Rooney, <i>Ex parte</i>	151	Terry and White, <i>In re</i>	1929
Tambracherry Estates Co., <i>In re</i>	379	— v. Dubois	1457
Tamvaco v. Timothy	287	Tetley v. Griffith	930, 1507
Tandy, <i>In re</i> , Tandy v. Tandy	2027	Teuliere v. St. Mary Abbott's Vestry	1214
Tanner, <i>In re</i>	12, 970	Tew v. Newbold-on-Avon District School Board	265
— v. Carter	709, 1923	Thackrah, <i>In re</i> , Hughes, <i>Ex parte</i>	127
— v. Scrivener	688	Thackwray and Young, <i>In re</i>	1134, 1938
Taplin v. Taplin	897, 1474	Thames Conservators v. Inland Revenue Commissioners	1559
Tapling v. Weston	1097	— and Mersey Marine Insurance Co. v. Hamilton	1012
Tarleton v. Bruton, Roberts, <i>In re</i>	2049	Thanemore Steamship v. Thompson	1418
Tarn v. Commercial Banking Co. of Sydney	798,	Tharel's Trusts, <i>In re</i>	2122
— v. Turner	1436	Thatcher's Trusts, <i>In re</i>	972
Tarratt, <i>In re</i>	1279	Theodore H. Rand, The	1682
Tarrt, <i>Ex parte</i>	1163	Thetford, The	1693
Tasmania, The	894	Theys, <i>Ex parte</i> , Milan Tramways Co., <i>In re</i>	63, 426, 1500
Tate v. Hyslop	1694, 1713, 1714	Thomas, <i>Ex parte</i> , Trotter, <i>In re</i>	119, 596
Tattersall v. National Steamship Co.	1013, 1310	— <i>In re</i> , Commissioners of Woods and Forests, <i>Ex parte</i>	119, 596
Tatum v. Evans	288, 1662	— <i>In re</i> , Comptroller, <i>Ex parte</i>	93
Taurine Company, <i>In re</i>	1534	— <i>In re</i> , Poppleton, <i>Ex parte</i>	353
Tay v. Bignell	454	— <i>In re</i> , Thomas v. Howell ..	493, 919,
Taylor, <i>Ex parte</i> , Goldsmid, <i>In re</i> ..	666	—	1927
— <i>Ex parte</i> , Lacey, <i>In re</i>	163, 1887	— <i>In re</i> , Ystradfordwg Local Board, <i>Ex parte</i>	140, 873
— <i>In re</i> , Board of Trade, <i>Ex parte</i> ..	106	— v. Exeter Flying Post Co.	1474
— <i>In re</i> , Cloak v. Hammond ..	89	— v. Hamilton (Duchess Dowager)	1413
— <i>In re</i> , Dyer, <i>Ex parte</i>	2020, 2033	— v. Howell, Thomas, <i>In re</i> ..	493, 919,
— <i>In re</i> , Dyer, <i>Ex parte</i>	126	—	1927
— <i>In re</i> , Illsley v. Randall	2127	— v. Kelly	26, 241, 1043
— <i>In re</i> , Martin v. Freeman ..	309, 2082,	— v. Mirehouse	1093
—	2113	— v. Owen	672
— <i>In re</i> , Official Receiver, <i>Ex parte</i> ...	89	— v. Peek	546
— <i>In re</i> , Taylor v. Ley	2037	— v. Quartermaine	1197
— <i>In re</i> , Taylor v. Taylor	1999	— v. Sherwood	322
— <i>In re</i> , Whitby v. Highton	1992	— v. Spencer, Spencer, <i>In re</i>	938
— v. Bank of New South Wales	1533		
— v. Blakelock	1888, 1920		
— v. Ley, Taylor, <i>In re</i>	2037		

Thomas v. Turner	504	Tonsley v. Heffer	1468
Thomas Allen, The	1711	Toogood's Trusts, <i>In re</i>	1430, 1495
Thompson, <i>In re</i>	1751, 1755	Topham v. Booth	1151
— <i>In re</i> , Machell v. Newman	2031	— v. Greenside Glazed Fire Brick Co.	227, 369
— <i>In re</i> , Stevens v. Thompson	942, 1448	Topley v. Corsbie	253
— In goods of	744, 2015	Toppin v. Buckerfield	546
— and Curzon, <i>In re</i>	925	Torish v. Clark	704, 709
— to Curzon, <i>In re</i>	1932, 2054	Torquay Market Co. v. Burrigge	1183
— v. Royal Mail Steam Packet Co.	287	Tosh v. North British Building Society ...	279
— v. Thompson	899	Totness Union v. Cardiff Union	1385
— v. Wright	1040	Tottenham v. Swansea Zinc Ore Co.	423, 820, 1239
Thompson's Will, <i>In re</i>	1633, 2075	Toulmin v. Millar	22, 1476, 1521
Thomson v. Weems	995	Toutt's Will, <i>In re</i> , Martyn, <i>In re</i>	1908
Thorman v. Burt	1659, 1660	Toward, <i>In re</i> , Moss, <i>Ex parte</i>	165
Thorner, <i>Ex parte</i> , Barlow, <i>In re</i>	173	Tower Ward Schools Trustees, <i>Ex parte</i> , Finnis to Forbes	314
Thorniley, <i>In re</i> , Woolley v. Thorniley	1466	Towgood v. Pirie	1840
Thornton v. Thornton	1431	Townley, <i>In re</i> , Townley v. Townley	2068
Thorp v. Dakin	178, 737	Townsend, <i>In re</i> , Clark or Parsons, <i>Ex</i> <i>parte</i>	225, 237
Thorpe v. Cregeen	245	— <i>In re</i> , Townsend v. Townsend	2004, 2052
Three Towns Banking Co. v. Maddever, Maddever, <i>In re</i>	827, 1073	Towse v. Loveridge	1461
Throssel v. Marsh	235	Tozier v. Hawkins	1413, 1415
Thruswell v. Handyside	1294	Trafford v. Blanc, Trufort, <i>In re</i>	1026, 1034, 1039, 1502
Thurston, <i>In re</i> , Thurston v. Evans	2103	— v. Maconochie, Moore, <i>In re</i>	2078
Thwaites v. Wilding	1096	Tranter v. Lancashire Justices	1050
Thyatira, The	729, 1699, 1727, 1728	Treadwell v. London and South-Western Ry.	1112
Thynne v. St. Maur, Somerset (Duke), <i>In re</i> ..	941, 981, 2116	Tredegar Iron and Coal Co. v. Gielgud	601
Tickle, <i>In re</i> , Leathersellers' Co., <i>Ex parte</i> ..	142, 193, 1101	Treherne v. Dale	67
Tidswell, <i>Ex parte</i> , Tidswell, <i>In re</i>	144	Trench, <i>In re</i> , Brandon, <i>Ex parte</i>	97
Tighe v. Featherstonhaugh	2065	Trenchard's Will, <i>In re</i> , Hume, <i>In re</i>	1919
Tillet, <i>In re</i> , Field v. Lydall	806, 1493	Tress v. Tress	889
Tillett v. Nixon	1268, 1454	Trevelyan v. Trevelyan	1945
Tilly, <i>Ex parte</i> , Scharrer, <i>In re</i>	137, 202	Trevor v. Whitworth	384
Timson v. Wilson	1468	Tricks, <i>In re</i> , Charles, <i>Ex parte</i>	205
Tinnuchi v. Smart	611	Trinder v. Raynor	234
Tippett, <i>Ex parte</i> , Tippet, <i>In re</i>	32	Tritton v. Bankart	1087, 1459, 1462
— and Newbould, <i>In re</i>	937, 1940	Trott v. Buchanan	794, 2117
Tischler v. Apthorpe	1569	Trotter, <i>In re</i> , Thomas, <i>Ex parte</i>	119, 596
Tisdall v. Richardson	533	Troward v. Troward	896
Titian Steamship Co., <i>In re</i>	417	Trower v. Law Life Assurance Society	1467
Tiverton and North Devon Ry. v. Loosemore	1116	Trufort, <i>In re</i> , Trafford v. Blanc ...	1026, 1034, 1039, 1502
Tod-Heatley v. Benham	1087	Trustee, <i>Ex parte</i> , Cox, <i>In re</i>	139
Todd, <i>Ex parte</i> , Ashcroft, <i>In re</i>	160, 1807, 1808	— <i>Ex parte</i> , Lowndes, <i>In re</i>	159, 194, 983
— v. Robinson	876, 877, 1362	— <i>Ex parte</i> , Walsh, <i>In re</i>	99
Tolhausen v. Davies	1298	— <i>Ex parte</i> , Whitaker, <i>In re</i> ...	119, 194
Tolman v. Score, Score, <i>In re</i>	2057, 2064	— <i>Ex parte</i> , Yapp, <i>In re</i>	196
Tollemache, <i>In re</i> , Anderson, <i>Ex parte</i>	149, 747	Trustees and Agency Co. v. Short	1149
— <i>In re</i> , Bonham, <i>Ex parte</i>	149	Trye v. Sullivan, Young, <i>In re</i>	939, 1992, 2085
— <i>In re</i> , Edwards, <i>Ex parte</i>	149, 745	Tryon v. National Provident Institution ...	1404
— <i>In re</i> , Revell, <i>Ex parte</i>	149, 746	Tuck v. Priester	501
Tomkinson v. South-Eastern Ry.	406, 1506	Tucker, <i>In re</i> , Bowchier v. Gordon	2042
Tomlin Patent Horse Shoe Co., <i>In re</i>	412	— <i>In re</i> , Emanuel v. Parfitt	925
Tomlinson v. Ashworth	1187		
— v. Gilby	393, 2010		
— v. Land and Finance Corporation	1042		
Tompson v. Dashwood	633		
Tone v. Preston	685		

Tucker v. Bennett	624, 963
— v. Cotterell	528, 1398
— v. Collinson	528, 1398
— v. Linger	1078
Tuckett's Trusts, <i>In re</i>	1876
Tudball v. Medlicott.....	1891, 2055
Tuer's Will, <i>In re</i>	1163
Tufdrell v. Nicholls	1272
Tuff, <i>In re</i> , Nottingham, <i>Ex parte</i>	144
Tufnell & Ponsonby's case	391
Tugwell, <i>In re</i>	492, 1125, 1158
Tuke v. Gilbert, Martin, <i>In re</i>	2040
Tunbridge Highway Board v. Sevenoaks Highway Board.....	1981
Tunnel Mining Co., <i>In re</i> , Pool's case	446
Tunncliffe v. Birkdale Overseers	1373
Turcan, <i>In re</i>	947, 998
Turgot, The.....	1654, 1655
Turnbull v. Forman	926
Turner, <i>In re</i> , Glenister v. Harding ...	744, 748
— <i>In re</i> , Turner v. Turner.....	11, 813
— In goods of	134, 2011
— v. Culpan	236, 253
— v. Hellard, Harrison, <i>In re</i>	2017
— v. Hockey	1589
— v. Nicholson, Pickard, <i>In re</i>	1162, 1323
— v. Thompson	1029
— v. Turner, Turner, <i>In re</i>	11, 813
Turner's Settled Estates, <i>In re</i>	2100
Turnour, In goods of	2004
Turquand, <i>Ex parte</i> , Parkers, <i>In re</i> ...	121, 126, 232
— v. Board of Trade	89
Tuther v. Caralampi	630, 1422
Tweedie and Miles, <i>In re</i>	1882
Tweedy, <i>In re</i>	1910
Tyars v. Alsop	1739
Tyler v. London and South Western Ry. ...	594, 1365, 1865
Tyne Boiler Works Co. v. Longbenton Over- seers.....	1371
— — v. Tynemouth Union	1371
Tynemouth Union v. Backworth Overseers	1379
 U.	
Ullee, <i>In re</i>	979
Ulysses, Cargo, Ex	1706
Undaunted, The.....	1713
Underbank Mills Cotton Spinning and Manufacturing Co., <i>In re</i>	367
Underhay v. Read.....	1262
Underhill, <i>In re</i> , Budden, <i>Ex parte</i>	198
Ulster Land Co., <i>In re</i>	442
— Permanent Building Society v. Glenton	272, 1085, 1244
 V.	
Valdez' Trusts, <i>In re</i>	2030
Vallance, <i>In re</i> , Limehouse Board of Works, <i>Ex parte</i>	748
— <i>In re</i> , Vallance v. Blagden.....	483
— v. Falle.....	5, 1361, 1657, 1811
Van Duzer's Trade-mark, <i>In re</i>	1839, 1842
Vanderhaege, <i>In re</i> , Izard, <i>Ex parte</i> ...	152, 206
Vardon's Trusts, <i>In re</i>	30, 703, 961, 1901
Vaucher v. Solicitor to the Treasury, Grove, <i>In re</i>	1026, 1031
Vaughan, <i>Ex parte</i> , Biddeough, <i>In re</i> ...	136, 165
— <i>In re</i> , Vaughan v. Thomas.....	303
Vavasour, <i>In re</i>	1158
Veale v. Automatic Boiler Feeder Co.	1408
Venkata Narasimha Row v. Court of Wards	340
Vera Cruz, The.....	39, 617, 1288, 1703, 1730
Verdi, <i>Ex parte</i> , Hinks, <i>In re</i>	142
Verney v. Thomas	1421
Vernon v. Croft	1429
— v. Hallam	486, 844
— Ewens, & Co., <i>In re</i>	746, 1250, 1872
Vibert v. Eastern Telegraph Co.....	1187

Vicat, <i>In re</i>	1907
Vickers, <i>Ex parte</i> , British Burmah Lead Co., <i>In re</i>	344
— <i>In re</i> , Vickers v. Vickers	2090
Victor Covacevich, The	1449, 1724
Victoria, The	1702, 1720
Victorian Railway Commissioners v. Coultas	600, 1303
Vincent v. Vincent	473
Vindobala, The	1649
Viney v. Bignold	50, 1006
— v. Norwich Union	50, 1006
Vint v. Hudspeth	27, 142, 188, 915, 1476
Vivian & Co., <i>In re</i> , West African Telegraph Co., <i>In re</i>	379
Vivienne, The	1651
Voght, <i>In re</i> , Spamer, <i>Ex parte</i>	151
Voinet v. Barrett	1039
Vollum v. Revett, Youngs, <i>In re</i>	29, 804, 1480
Von Brockdorff v. Malcolm	2095, 2102
Vowles, <i>In re</i> , O'Donoghue v. Vowles	812
Vyse v. Brown	69

W.

W. A. Scholten, The	1410, 1721
Wade v. Keefe	982, 1743
— v. Wilson, Bentley, <i>In re</i>	1621, 2062
Wadham v. North-Eastern Ry.	1119
Wadsworth, <i>In re</i> , Rhodes v. Sugden ...	1788, 1789, 1790
Wagg v. Shand, Johnson, <i>In re</i> ..	805
Wagstaff v. Clinton	1089
— v. Shorthorn Dairy Co.	601
Wait, <i>In re</i> , Workman v. Petgrave	2096
Waite v. Morland	906, 921
Wake v. Sheffield (Mayor)	870
Wakefield v. Maffet	958
Wakeham, <i>In re</i> , Gliddon, <i>Ex parte</i>	146
Wakelin v. London and South-Western Ry.	1289
Walcott v. Lyons	1405, 1875
Wales v. Thomas	1229
Walford, <i>In re</i> , Walford v. Walford ..	1261, 1590
Walhampton Estate, <i>In re</i>	1248, 1613
Walkden's Aerated Waters Co.'s Application, <i>In re</i>	1846
Walker, <i>Ex parte</i> , Hoxton Election, <i>In re</i> ..	719
— <i>In re</i> , Barter, <i>Ex parte</i>	134, 263
— <i>In re</i> , Gould or Goold, <i>Ex parte</i> ...	123, 192, 193, 1083, 1101, 1103
— <i>In re</i> , Jackson, <i>In re</i>	754, 883
— <i>In re</i> , Nickoll, <i>Ex parte</i>	98, 206
— <i>In re</i> , Sharp, <i>Ex parte</i>	84
— <i>In re</i> , Soanes, <i>Ex parte</i>	197, 203
— <i>In re</i> , Walker v. Walker	2084
— and Beckenham Local Board, <i>In re</i> ..	874

Walker and Hacking, <i>In re</i>	385
— and Hughes' Contract, <i>In re</i>	1912
— v. Appach, Hobson, <i>In re</i> ...	1819, 2125
— v. Bradford Old Bank	62
— v. Clarke	1356
— v. Dodds	562
— v. Gammage, Natt, <i>In re</i>	795
— v. General Mutual Investment Building Society	276
— v. Hirsch	1324
— v. James	1473
— v. London and Provincial Insurance Co.	1007
— v. Midland Ry.	993, 1293
— v. Southall	1237
— v. Walker, Walker, <i>In re</i>	2084
Wall, <i>In re</i>	968
— v. Stanwick	970
Wallace's case	350
Wallace, <i>Ex parte</i> , Wallace, <i>In re</i> ...	112, 1391
— <i>In re</i> , Campbell, <i>Ex parte</i> ...	169, 173
— <i>In re</i> , Richards or Wallace, <i>Ex parte</i>	112, 1391
Wallasey Local Board v. Gracey	864
Wallis, <i>In re</i> , Sully, <i>Ex parte</i>	124
— v. Wallis	982, 2029
Walls v. Thomas	1229
Walmsley v. Mundy, Goodenough, <i>Ex parte</i>	57
Walrond v. Goldmann	258
Walsh, <i>In re</i>	976
— <i>In re</i> , Trustee, <i>Ex parte</i>	99
— v. Blayney	2038
— v. Whiteley	1195
Walter v. Emmott	614, 1828
— v. James	1473
— v. Parrott, Parrott, <i>In re</i>	1613, 2069
Walters, <i>In re</i> , Moore v. Bemrose	525
Walton v. Edge	280
Wandsworth Board of Works v. United Telephone Co.	1215, 1804, 1816
— District Local Board v. Postmaster-General	1816
Wanklyn v. Wilson	1425
Warburg, <i>Ex parte</i> , Whalley, <i>In re</i> ...	102, 204
Ward's Estate, <i>In re</i>	1126
Ward, <i>Ex parte</i> , Gamlen, <i>In re</i>	117
— <i>In re</i>	1754, 1756
— v. Dudley (Countess)	1228
— v. Holmes, Dean, <i>In re</i>	1769
— v. Huckle	2013
— v. Royal Exchange Shipping Co. ...	365
— v. Sharp	1452, 1504, 1739
— v. Sheffield (Mayor)	514, 866
— v. Wood, Wood, <i>In re</i>	2020
Waring v. Pearman	54, 531
— v. Scotland	1795
Warkworth, The	1701, 1804
Warne v. Lawrence	504

Warne v. Seeböhm	503	Weir, <i>In re</i> , Hollingworth v. Willing	628, 1309
Warner v. Moir, Moir, <i>In re</i>	2075	Welch v. Channell, Evans, <i>In re</i>	975, 1893
Warren, <i>Ex parte</i> , Holland, <i>In re</i>	157	— v. Gardner	2006
— <i>In re</i> , Weedon v. Warren	780	— v. London and North Western Ry.	287
Warren's Settlement, <i>In re</i>	932	— v. National Cycle Works Co.	1274
— Trusts, <i>In re</i>	959, 1617, 2101	— v. Peterborough (Bishop)	689
Washburn and Moen Manufacturing Co. v. Patterson	35	Weld, <i>In re</i>	1159
Waterhouse v. Gilbert	25, 1044	Weldon v. De Bathe	631, 941
— v. Worsnop	1167	— v. Gounod	769, 1483
Waterman v. Ayres	1831, 1838, 1839	— v. Maples	34
Waterman's Trade-mark, <i>In re</i> ...	1831, 1838, 1839	— v. Neal	594, 846, 940, 1502
Watkin v. Newcomen	799	— v. Riviere	940
Watkins, <i>Ex parte</i> , Watkins, <i>In re</i>	202	— v. Weldon	889, 607
— <i>Ex parte</i> , Wilson, <i>In re</i>	198	— v. Winslow	940
— <i>In re</i> , Watkins, <i>Ex parte</i>	202	Wellcome's Trade-mark, <i>In re</i>	1835
— v. Evans	238, 248	Weller v. Stone	499
Watkinson, <i>Ex parte</i> , Wilson, <i>In re</i>	198	Wellfield (Owners) v. Adamson	1712
Watson, <i>Ex parte</i> , Argle Coal and Cannell Co., <i>In re</i>	450	Wells v. Masons' Company of London	515
— <i>Ex parte</i> , Sheffield Building Society, <i>In re</i>	269, 734	— v. Stanforth	714
— <i>In re</i>	790, 1158, 1785, 1902	Wemyss, <i>Ex parte</i> , Wemyss, <i>In re</i>	114
— <i>In re</i> , Carlton v. Carlton	1993	Wenlock (Baroness) v. River Dee Co. 57, 342, 365, 366, 669	
— <i>In re</i> , Oram, <i>Ex parte</i>	110	Wenmoth's Estate, <i>In re</i> , Wenmoth v. Wenmoth	2039
— <i>In re</i> , Phillips, <i>Ex parte</i>	30, 786	Wennhak v. Morgan	636, 1189
— v. Black	711	Wentworth v. Humphrey	318
— v. Blakeney, Hendry, <i>In re</i>	302	Werle v. Colquhoun	1570
— v. Strickland	238, 253	Wernher, <i>Ex parte</i> , Kimberley North Block Diamond Mining Co., <i>In re</i>	391
— v. Young	2039, 2081	Werra, The	1709
Watson's Trusts, <i>In re</i>	2035	West, <i>Ex parte</i> , Mount Morgan (West) Gold Mine, <i>In re</i>	340
Watts, <i>In re</i> , Cornford v. Elliott ...	301, 302, 616	West v. Turner, Kelly's Settlement, <i>In re</i>	961
Waye v. Thompson	851	West African Telegraph Co., <i>In re</i> , Vivian & Co., <i>In re</i>	379
Wayman v. Monk, Monk, <i>In re</i>	693	— Bromwich School Board v. West Bromwich Overseers	1374
Weaver, <i>In re</i> , Higgs v. Weaver	209	— Cannock Colliery Co., <i>Ex parte</i> , Pearson, <i>In re</i>	156
Webb, <i>Ex parte</i> , Webb, <i>In re</i>	175, 202	— Cumberland Iron and Steel Co., <i>In re</i>	380
— In goods of	2008	— Devon Great Consols Mine, <i>In re</i>	38, 211, 440, 563
— v. Jonas	1872	— Lancashire Ry. v. Iddon	1545
— v. Kerr	1509	— London Commercial Bank, <i>In re</i>	595
— v. Shaw	43, 1044	— — — v. Kitson	218, 358, 1519
— v. Smith	62, 1589	— — — v. Reliance Permanent Building Society	1260
Webber, <i>Ex parte</i> , Webber, <i>In re</i>	133	— Middlesex Waterworks Co. v. Coleman	1966
Weblin v. Ballard	1197, 1198	— Norfolk Farmers' Manure Co. v. Archdale	1608
Webster, <i>In re</i> , Derby Union v. Sharatt	1165, 1387	— Riding JJ. v. Reg.	1982
— <i>In re</i> , Foster, <i>Ex parte</i>	87, 174	Westcott v. Smalley	220
— v. Armstrong	732		
— v. Bond	289		
— v. Friedeberg	1475		
— v. Myer	1496		
— v. Patteson	1275		
— v. Rickards, Hobson, <i>In re</i>	924		
— v. Southey	310, 1389		
Webster's Estate, <i>In re</i> , Wigden v. Mello	2049		
Weedon v. Warren, Warren, <i>In re</i>	780		
Weekes's Case	401		
Weekes v. King	861		
Weguelin v. Wyaut	1565		

Westbrook v. Field	16	Whitehaven Mutual Insurance Society, <i>Ex parte</i> , Shepherd, <i>In re</i> ...	149, 150
Westbury-on-Severn Sanitary Authority v. Meredith	6, 1397	—— Joint Stock Banking Co. v. Reed.....	373
Western Suburban, &c., Permanent Benefit Society v. Martin	276	Whitehead, <i>Ex parte</i> , Whitehead, <i>In re</i> ...	132, 474, 917
Westfield and Metropolitan Ry. Cos., <i>In re</i>	1123	—— <i>In re</i>	21, 1741
—— v. Metropolitan District Ry. ...	1123	—— <i>In re</i> , Whitehead, <i>Ex parte</i> 132, 474,	917
Westhead v. Riley	770	Whitehouse, <i>In re</i> , Whitehouse v. Edwards	12
Westminster Fire Office v. Glasgow Provident Investment Society	1007	Whitehouse's Claim, General Horticultural Co., <i>In re</i>	70, 368
Weston v. Neal, Neal, <i>In re</i>	1434	Whiteley, <i>In re</i> , Whiteley v. Learoyd	770, 1454
Westropp's Divorce Bill	905	—— v. Barley.....	645, 876
Westropp v. Elligott	1059	—— v. Learoyd, Whiteley, <i>In re</i> ...	770, 1454
Wexford, The	1726	Whitham v. Kershaw	1082
Whaley v. Busfield, Busfield, <i>In re</i> ...	1484, 1809	Whiting v. East London Waterworks Co...	1964
Whalley, <i>In re</i> , Warburg, <i>Ex parte</i> ...	102, 204	Whitley & Co., <i>In re</i> , Callan, <i>Ex parte</i> ...	350, 451, 1512
—— v. Lancashire and Yorkshire Ry. 1546,	1973	Whittaker, <i>In re</i>	90
Wheal Buller Consols, <i>In re</i> , Jobling, <i>Ex parte</i>	444	Whitten v. Hanlon	2094
Wheatcroft v. Matlock Local Board	859	Whittick v. Mozley	474
Wheatley, <i>In re</i> , Smith v. Spence	703, 923	Whittingstall v. Grover	793, 1330
—— v. Silkstone and Haigh Moor Coal Co.	372	Whitton v. Hanlon	1501
Wheeler v. Webb	850	Whitwell's Estate, <i>In re</i>	1321
Wheeler v. United Telephone Co.	1428	Whorwood, <i>In re</i> , Ogle v. Sherborne (Lord)	2036
Whelan v. Palmer	2100	Whyte v. Ahrens	646, 1452
Whetham v. Davey	1236, 1326	—— v. Tyndall	1079
Whicher, <i>In re</i> , Stevens, <i>Ex parte</i>	137	Wickham, <i>In re</i> , Marony v. Taylor	1434
Whickham, The	654	Wicksteed v. Biggs.....	535, 665
Whinney, <i>Ex parte</i> , Grant, <i>In re</i>	136, 174	Wigden v. Mello, Webster's Estate, <i>In re</i> ...	2049
—— <i>Ex parte</i> , Sanders, <i>In re</i> ...	109, 443	Wiggeston Hospital and Stephenson, <i>In re</i>	53, 1482
Whistler and Richardson, <i>In re</i>	779	Wight v. Shaw	521
Whitaker, <i>In re</i> , Trustee, <i>Ex parte</i> ...	119, 194	Wigram v. Fryer.....	1121, 1810
—— <i>In re</i> , Christian v. Whitaker ...	946	Wilcock, <i>In re</i>	1629
—— v. Derby Urban Sanitary Authority	863	Wilcoxon, <i>In re</i> , Andrews, <i>Ex parte</i>	145
Whitby v. Highton, Taylor, <i>In re</i>	1992	Wilde, <i>In goods of</i>	2009, 2010
White, <i>Ex parte</i> , White, <i>In re</i>	181, 207	—— v. Walford, Harrauld, <i>In re</i>	1787, 1898
—— <i>In re</i>	1788	Wildy v. Stephenson.....	1521
—— <i>In re</i> , Official Receiver, <i>Ex parte</i>	136, 196	Wilkins, <i>In re</i> , Wilkins v. Rotherham...	809, 1579, 2128
—— <i>In re</i> , White, <i>Ex parte</i>	181, 207	—— v. Birmingham (Mayor)	60
—— v. Baxter	1521	—— v. Day	1976
—— v. Bywater.....	849	—— v. Pryer, Kingdon, <i>In re</i>	1995, 2098
—— v. City of London Brewery Co. ...	1057, 1263	—— v. Rotherham, Wilkins, <i>In re</i>	809, 1579, 2128
—— v. Ditchfield	1649	Wilkinson, <i>In re</i> , Official Receiver, <i>Ex parte</i> ...	162
—— v. Haymen.....	348	—— v. Collyer	1086
—— v. McMahon	470	—— v. Jagger	558, 831
—— v. Milne.....	558, 1044	Wilkinson's Trusts, <i>In re</i>	2083
—— v. Neaylon.....	320	Wilks, <i>Ex parte</i>	510
—— v. Norwood Burial Board	699	—— v. Bannister.....	2033, 2049
—— v. Peto	1212, 1299	Willet, <i>In goods of</i>	2009
—— v. Randolph, Gibbes' Settlement, <i>In re</i>	2098	William Symington, The	1712
White's Trusts, <i>In re</i>	309	Williames, <i>In re</i> , Andrew v. Williames, 787, 1894	
"White Rose" Trade-mark, <i>In re</i>	1844	Williams. <i>Ex parte</i> , Williams, <i>In re</i>	203
Whitehall Court, <i>In re</i>	361		

Williams, <i>In re</i> , Davies v. Williams	1154	Wilson v. Knox	2041
— <i>In re</i> , Green v. Burgess	796	— v. M'Mains	521
— <i>In re</i> , Jones v. Williams 82, 210, 1808		— v. Noble	1508
— <i>In re</i> , Official Receiver, <i>Ex parte</i> 197		— v. Owens	1297
— <i>In re</i> , Pearce, <i>Ex parte</i>	247	— v. Wilson	758
— <i>In re</i> , Spencer v. Brighthouse 2046, 2122		— v. The Xantho	1661
— <i>In re</i> , Williams, <i>Ex parte</i>	203	Wilton v. Leeds Forge Valley Co.	557
— v. British Marine Mutual Insurance Association	1021	Wimbledon Local Board v. Croydon Sanitary Authority	861, 987
— v. Colonial Bank ...76, 395, 1038, 1305		Winby, <i>Ex parte</i> , Winby, <i>In re</i>	113
— v. De Boinville	1482	Winchelsea (Earl) Policy Trusts, <i>In re</i> 1000, 1877	
— v. Gorvin, Richards, <i>In re</i>	2055	Winder v. Kingston-upon-Hull 1166, 1388, 1861	
— v. Great Western Ry.	17, 288	Windham v. Bainton	535
— v. Jenkins, Price, <i>In re</i>	811	Windsor and Annapolis Ry. v. Reg.	597
— v. Jones	542, 751, 1794	Winfield v. Boothroyd	548, 642, 1809, 1865
— v. Mercier	950	Wingrove v. Wingrove	1991
— v. Morgan	320	Winn, <i>In re</i> , Reed v. Winn	920
— v. Peel River Land Co.	642	Winslow, <i>In re</i> , Godfrey, <i>Ex parte</i>	136
— v. Pounder, Pounder, <i>In re</i>	2059	Winstanley's Settled Estates, <i>In re</i>	1640
— v. Ramsdale	1438	Winston, The	1679
— v. Shadbolt	221	Winterbottom, <i>Ex parte</i> , Winterbottom, <i>In re</i>	103, 111
— v. Smith	632	Wise, <i>In re</i> , Brown, <i>Ex parte</i>	88, 208, 209
— v. Wallasey Local Board	855	— <i>In re</i> , Croydon County Court Registrar, <i>Ex parte</i>	88, 208, 209
— v. Wandsworth Board of Works 1219		— <i>In re</i> , Mercer, <i>Ex parte</i>	825
— v. Ward	521	Withall v. Nixon	1274
— v. Ware	1429	Witham v. Vane	618, 1224, 1463
— v. Williams	2062	Witt v. Banner	240
— v. Wynne	1069	Witten, <i>In re</i>	980
Williams' Claim, Great Eastern Steamship Co., <i>In re</i>	1656	Wittmann v. Oppenheim	519, 1860
— Trusts, <i>In re</i>	1904	Witton, <i>In re</i> , Arnal, <i>Ex parte</i>	120, 121
Williamson v. Burrage	1273	Woburn Union v. Newport Pagnell Union 863	
— v. Farnell or Farwell	1619	Wolstenholme, <i>Ex parte</i> , Wolstenholme, <i>In re</i> 99	
— v. North Staffordshire Ry.	537	— v. Sheffield Union Banking Co.	78
Willis, <i>In re</i> , Kennedy, <i>Ex parte</i>	228	Wolverhampton Banking Co., <i>Ex parte</i> , Campbell, <i>In re</i> ..	167, 168, 206, 484
— v. Beauchamp (Earl)	1435, 1464	— Tramways Co. v. Great Western Ry.	1861
— v. Combe	1642	Womersley, <i>In re</i> , Etheridge v. Womersley 806	
Willoughby, <i>In re</i>	976	Wontner, <i>In re</i> , Scheyer, <i>Ex parte</i>	1786
Wills v. Luff	1268	Wood, <i>Ex parte</i> , Burden, <i>In re</i>	85
Willyams v. Scottish Widows Fund	742	— <i>In re</i> , Ward v. Wood	2020
Wilmott v. Freehold House Property Co. 1424, 1442		— v. Anderston Foundry Co.	1410
— v. London Celluloid Co.	374, 435	— v. Aylward	469
Wilson, <i>In re</i>	1771, 1919	— v. Calvert	1763, 1771
— <i>In re</i> , Alexander v. Calder	763, 802	— v. Chandler	713
— <i>In re</i> , Parker v. Winder	2027	— v. Douglas, Douglas, <i>In re</i>	724, 1207
— <i>In re</i> , Pennington v. Payne	781	— v. Durham (Earl)	638, 1498, 1500
— <i>In re</i> , Watkins or Watkinson, <i>Ex parte</i>	198	— v. Lambert	1841, 1857
— <i>In re</i> , Wilson v. Alltree	526, 667	— v. Silcock	265, 1795
— and Green, <i>In re</i>	52	— v. West Ham Gas Co.	842
— v. Alltree, Wilson, <i>In re</i>	527, 667	— v. Wood	892, 901
— v. Barnes	311	Wood's Estate, <i>In re</i> , Commissioners of Works and Public Buildings, <i>Ex parte</i>	596, 1130, 1802
— v. Condé D'Eu Ry.	51	— Trade-mark, <i>In re</i>	1841, 1857
— v. Joulon	758		
— v. Duguid	2026, 2103		
— v. Fasson	1565		
— v. Glossop	914		
— v. Kenrick	1619		

Woodall, <i>In re</i>	23, 814		
Woodgate v. Great Western Ry.	285	X.	
Woodhall, <i>Ex parte</i>	23	X., <i>In re</i>	1776
— <i>Ex parte</i> , Woodhall, <i>In re</i>	107		
Woodham, <i>In re</i> , Conder, <i>Ex parte</i> ...	158, 1644		
Woodhill v. Sunderland (Mayor)	856	Y.	
Woodhouse v. Balfour	2000		
— v. Spurgeon	2058	Yan-Yean, The	1707
Woodruff v. Brecon and Merthyr Tydvil Ry.	1543	Yapp, <i>In re</i> , Trustee, <i>Ex parte</i>	196
Woods v. Woods	905	Yarmouth v. France	1190, 1195, 1198, 1200
Woodward, <i>Ex parte</i> , Lay, <i>In re</i>	126	— Exchange Bank v. Blethen ...	618, 738
— <i>In re</i> , Huggins, <i>Ex parte</i>	126	Yates, <i>In re</i> , Batcheldor or Batchelor v.	
— v. Goulstone	1999	Yates	227, 1258
— v. Sansum	1341	— and Kellett's Patent, <i>In re</i>	1351
Woolhouse, <i>In re</i>	1159	— v. Reg.	639
Woolley v. Thorniley, Thorniley, <i>In re</i>	1466	Yeilding and Westbrook, <i>In re</i>	1939
Woolstenholme, <i>In re</i> , Foster, <i>Ex parte</i> ...	98	Yelland v. Winter	1562
Workman v. Petgrave, Wait, <i>In re</i>	2096	Yeo v. Dawe	216, 1558
Worthington v. Dublin, Wicklow and Wex-		Yeoland Consols, <i>In re</i>	414, 454
ford Ry.	650	York, <i>In re</i> , Atkinson v. Powell	21
— v. Gill	1979	Yorkshire Banking Co. v. Mullan	126
Worswick, <i>In re</i> , Robson v. Worswick	647	— Tannery v. Eglington Chemical	
Wortley v. St. Mary, Islington	1219	Co.	1412, 14
Wraggs' Trade-mark, <i>In re</i>	1846, 1850	Young, <i>Ex parte</i> , Young, <i>In re</i>	1
Wray, <i>In re</i>	113, 1743	— <i>In re</i> , Trye v. Sullivan ...	939, 1992, 20
— v. Kemp	1735	— <i>In re</i> , Young, <i>Ex parte</i>	1
Wrey, <i>In re</i> , Stuart v. Wrey	2044	— and Harston, <i>In re</i>	1940, 19
Wright's Trusts, <i>In re</i>	932, 1639	— v. Beattie	149
Wright and Marshall, <i>In re</i>	1611, 1883	— v. Holloway, Holloway, <i>In re</i>	649, 65
— v. Harris	1047	—	201
— v. Hetton, Downs Co-operative Society	1864	— v. Schuler	752
— v. Horton	367	Younge v. Cocker	983, 1267
— v. Ingle	697, 1218	Youngs, <i>In re</i> , Doggett v. Revett ..	29, 804, 1434,
— v. Midland Ry.	1288, 1290	—	1480
— v. Robotham	630	— <i>In re</i> , Vollum v. Revett... ..	29, 804, 1480
— v. Sanderson, Sanderson, <i>In re</i>	39,	Yourri, The	1690
—	2001	Ystradfordwg Local Board, <i>Ex parte</i> ,	
— v. Wallasey Local Board	697	Thomas, <i>In re</i>	140, 873
— v. Watson	153		
— v. Woods, Harvey, <i>In re</i>	809		
Wybrants v. Maffett	2113	Z.	
Wycombe Union v. Marylebone Guardians	1381	Zadok, The	1685, 1686
Wygeston Hospital and Stephenson, <i>In re</i> ..	53,	Zappert, <i>In re</i>	120
—	1482	Zerfass, <i>Ex parte</i> , Sandwell, <i>In re</i>	121
Wylson v. Dunn	470, 1799	Zeus, The	1720
Wyman v. Knight	2137	Zoe, The	1701
Wythes, <i>Ex parte</i> , Middlesborough Building		Zoedone Co., <i>In re</i>	418
Society, <i>In re</i>	274		

THE END.

